

(2013) 03 CAL CK 0006**Calcutta High Court****Case No:** Criminal Revision No. 1868 of 2012

Anjan Ganguly and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: March 12, 2013**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 162, 162(1), 313, 397
- Evidence Act, 1872 - Section 145, 27, 32
- Penal Code, 1860 (IPC) - Section 306, 326, 498A

Citation: (2013) 3 CALLT 193 : (2013) 3 DMC 760 : (2014) 2 RCR(Criminal) 970**Hon'ble Judges:** Kanwaljit Singh Ahluwalia, J**Bench:** Single Bench**Advocate:** Sudipto Moitra, Mr. Sandip Bhattacharjee, Mr. Ayan Bhattacharya, Mr. Pawan Kumar Gupta and Mr. Joydeep Bhatterjee, for the Appellant; Shiladitya Sanyal, Sandip Chakraborty and Mr. Sabyasachi Banerjee as Amicus Curiae, for the Respondent**Judgement**

Kanwaljit Singh Ahluwalia, J.

This revision petition has been filed u/s 397/401 of the Code of Criminal Procedure praying that the impugned order dated 11th of April, 2012 passed by 3rd Additional Sessions Judge, Fast Track Court, Barrackpore, whereby he refused to recall P.W. 10 Swadhin Ranjan Guha, a police officer who recorded the statement of the witnesses u/s 161 Cr.P.C., to prove contradictions, be set aside. It will be necessary to recapitulate brief facts to appreciate the issues raised and decide them.

2. A case being Baranagar Police Station case No. 75 dated 3rd April, 2006 u/s 498A/326 IPC was registered against the petitioners at the instance of Swapan Kumar Bhattacharya. Later due to the death of deceased section 306 IPC was added. In the FIR, it was stated by the de facto complainant that his daughter Soumi Ganguly was married with petitioner No. 1 Anjan Ganguly. She suffered serious burn injuries in her matrimonial home and was admitted in R.G. Kar Medical College &

Hospital. Husband Anjan Ganguly, mother-in-law Smt. Bela Ganguly, sister-in-law Smt. Ruma Chatterjee and her son Papai Chatterjee were named as accused.

3. The case was investigated and a charge-sheet was submitted which was committed to Court of Sessions and entrusted to the Court of 3rd Additional Sessions Judge, Fast Track Court, Barrackpore, North 24 Parganas for trial and disposal. Prosecution in all cited and examined thirteen witnesses.

4. Mother of the deceased Smt. Mitra Bhattacharya had stepped into witness box as P.W. 2. In her deposition she stated that Soumi Ganguly was her daughter. On 22nd January, 2003 she was married with Anjan Ganguly as per Hindu rites and customs. At the time of marriage they have given Rs. 1 lakh by way of two cheques. Utensils and other articles were also given as per demand, to the accused. She further stated in the FIR that on 3rd April, 2006 in the house of in-laws her daughter was burnt to death. Allegations of mal-treatment were leveled against the accused. It was stated that Soumi Ganguly had suffered 80 per cent of burn injuries. She remained admitted in the Apollo Hospital for 13 days, thereafter she was shifted to NRI Hospital, where on the next day she expired. Deposition of this witness was recorded on 2nd day of September, 2008, on that day she was cross-examined. It will be apposite to reproduce certain portions of the testimony of the witness, upon which controversy raised revolves:-

I did not state to the police that at the time of marriage of my daughter we gave Rs. one lakh in all by two cheques and in hand, utensils another articles to the accd. persons as per the demand of the accd. persons. I did not state to the police that on 3.4.06 in the house of her in laws my daughter was burnt to death.

Not a fact that I did not state to the police that on 3.4.06 after hearing the incident over phone I informed the same to my husband in his office and thereafter myself along with my youngest daughter Moumi went to the R.G. Kar hospital and in that hospital I could not find any of the in laws of my daughter and the doctors of the R.G. Kar Hospital advised us to take my daughter to the Apollo hospital so that my daughter might survive and on 2.4.06 my daughter told me in my house that the accd. persons demanded Rs. 40,000 from her and share from her father's property and during her life time in her in laws house the accd. persons used to assault my daughter and insatiate her to commit suicide.

I do not know the educational qualification of Anjan Ganguly at the time of marriage.

I do not know the educational qualification of Anjan Ganguly. Anjan Ganguly is an employee under Central Govt. Police took my handwriting and signature after the incident. Police did not take the handwriting and signature of my husband. We did not accompany my daughter at the time of treatment by her husband after the

marriage.

Not a fact that my husband and his friends did not admit my daughter in the Apollo hospital and her husband admitted my daughter in that hospital and he paid all the cost for proper treatment of my daughter. I do not know whether from 5.2.02 to 10.3.05 my daughter was treated at Indian Institute of Psychometry of 117 B.T. Road Calcutta.

Not a fact that from 2003 to 2005 my daughter was treated by many doctors for her different types of diseases. Not a fact that since before her marriage my daughter had been suffering from many diseases and we concealed the same.

5. Moumi Bhattacharya, younger sister of the deceased Soumi Ganguly, appeared as P.W. 3. She also reiterated as what was stated by her mother Mitra Bhattacharya. Statement of this witness was recorded on 3rd December, 2008, on the same day she was cross-examined.

6. Following portion of her deposition in cross-examination is reproduced below:

Not a fact that I did not state to the police that during her life time my sister used to talk with me over phone and sometimes she used to come to our house and talked with me.

Not a fact that I did not state to the police that the deceased used to come to our house and demand money otherwise she would be assaulted by her husband.

Not a fact that I did not state to the police that the husband of my sister used to pour boiling milk on her body and did not provide her food.

Not a fact that I did not state to the police that accd. Anjan demanded Rs. 40,000 from the deceased and asked her to take share from her father's property and whenever I used to visit the house of the accd. person I saw the accd. person to abuse my sister. Not a fact that I did not state to the police that myself along with my mother and father took my sister to the Apollo hospital and someone from the patbari lane informed us over phone about the incident and myself along with my mother went to the R.G. Kar hospital after hearing the incident over phone and my father went to that hospital at about 14.00 hrs. on that date and at that time we did not find any other person in the hospital. Not a fact that I did not state to the police that the accd. persons have murdered my sister by burning in their house.

Not a fact that all my statements in my examination in chief are false. Not a fact that as per the instruction of my father I have deposed falsely in Court today and all the accd. persons have been falsely implicated in this case.

7. Swadhin Ranjan Guha, at the relevant time on 3rd April, 2006 was posted as Sub-Inspector at Baranagar Police Station, he had investigated the case. He

appeared as P.W. 10. His deposition was recorded on 17th day of June, 2009. This witness deposed regarding various facets of investigation and he further stated that on 24th July, 2006 he was transferred and he had handed over the case diary to the I.C. concerned for further investigation.

8. This witness in examination chief stated "Then I recorded the statement of the available witnesses." This witness further stated in examination chief "I cannot remember the name of the police officer who recorded the statement of the witnesses u/s 161 of the Cr.P.C. as per my dictation." In cross-examination this witness denied the factum of not recording statements of the witnesses and stated as under:

Not a fact that I did not record any statement of any witness.

9. Upon conclusion of prosecution evidence, statement of accused was recorded u/s 313 Cr.P.C., opportunity to lead defence evidence was also afforded to the accused. When the case was fixed for arguments, an application was submitted on 5th March, 2012 on behalf of the accused. In the application, it was stated as under:

2. On or about 17.06.2009 the Prosecution Witness No. 10, above named was examined in chief and subsequently was cross-examined by the defence. While cross-examining the said witness due to inadvertence the contradiction/omission in respect of the evidence of PW-2, Smt. Mitral Bhattacharya and PW-3, Smt. Moumi Bhattacharya were not taken.

4. The accused persons most humbly submit that all these omissions/contradictions were put to the P.W. 2 and P.W. 3 respectively. However, due to inadvertence, while cross-examining P.W. 10 these questions were not put to him as contradictions/omissions, though from the alleged statement of P.W. 2 and P.W. 3, allegedly recorded u/s 161 of the Code of Criminal Procedure, it is apparent that such omissions/contradictions were never there.

10. It was pleaded in the application that since due to inadvertence contradictions or omissions with the previous statements recorded u/s 161 Cr.P.C. were not put to the Investigation Officer who recorded statement of the witnesses u/s 161 Cr.P.C. it was necessary to recall P.W. 10 Shri Swadhin Ranjan Guha, Investigating Officer, so that contradictions in evidence in the testimony of P.W. 2 and P.W. 3 with their previous statement recorded u/s 161 Cr.P.C. are put to the Investigating Officer. The prayer made by the petitioner was rejected by the Trial Court vide the impugned order dated 11th April, 2012 by observing as under:

After a lapse of about 3 years when the case is fixed for argument, such a petition has been filed with a prayer for further cross-examination of P.W. 10 who retired prior to 17.6.2009 with a view to drag the disposal of this case with an oblique motive. This Court finds no merit in the petition filed on behalf of the accused

persons and the same is liable to be rejected.

11. Counsel for the petitioners have contended that even if there is a delay on the part of the accused to recall P.W. 10 he is a material witness who has recorded the statement of the witnesses. Therefore, it was necessary for the prosecution to prove the statement of the witnesses recorded by him. It is further contended if the contradictions in the evidence of the witnesses have not been put to the Investigating Officer inadvertently or due to oversight such an opportunity cannot be denied to the accused. It was urged that as contradictions in the evidence of the witnesses with their statements recorded by Investigating Officer u/s 161 Cr.P.C. go to the root of the matter, they are necessary to be brought on record to advance interest of justice.

12. This case was taken up for hearing on 16th of July, 2012 and on 2nd of August, 2012. Arguments advanced by the counsel for the parties were heard. Mr. Sabyasachi Banerjee, who was present in the Court, was appointed as amicus curiae to assist this Court. The date when the case was adjourned following three questions were put the counsel for the parties.

(a) Whether defence during course of cross-examination of the witnesses, have drawn attention of the witnesses, to their previous statements made u/s 161 Cr.P.C.? If not, what is effect?

(b) What is effect of harmonious reading of section 161, 162 Cr.P.C. and section 145 of Indian Evidence Act?

(c) If the defence has failed to prove the contradiction in the deposition of witnesses is it necessary to recall the Investigating Officer for proving the same?

13. Shri Sudipto Moitra, assisted by battery of lawyers on behalf of the petitioners, has placed reliance upon [Pedda Narayana and Others Vs. State of Andhra Pradesh](#), wherein it was held "A statement recorded by the police during the investigation is not at all admissible and the proper procedure is to confront the witnesses with the contradictions when they are examined and then ask the Investigating Officer regarding those contradictions."

14. Naturally, a question will arise whether the witnesses in the present case were confronted with the contradictions and whether their attention was drawn to the statement recorded by the Investigating Officer. Calling of the Investigating Officer will be only necessary if statement recorded by him is shown to the witness who has made such statement as per the mandate of section 145 of the Indian Evidence Act.

15. In the case of [State \(Delhi Administration\) Vs. Laxman Kumar and Others](#), it was held as under:

This Court pointed out in Pedda Narayana v. State of A.P., that a statement recorded by the police officer during investigation is inadmissible in evidence and the proper

recording is to confront the witness with the contradictions when they are examined and then ask the investigating officer regarding the contradictions. This Court reiterated the position in *Sat Paul v. Delhi Administration*, by again pointing out that the statement made to a police officer during the investigation can be used only for the purpose of contradicting the prosecution witnesses u/s 145 of the Evidence Act. It cannot be used for the purpose of cross-examination. The mandate of the law of procedure and the law laid down by this Court have obviously been overlooked by the trial Court as also the High Court, although the High Court was cognizant of the legal position and had found fault with the Trial Court. We would like to point out that the trial Court has marked large portions of the statements recorded by the police without confining to the actual contradiction. If attention had been bestowed at the appropriate stage, this situation would not have arisen.

16. Counsel for the petitioner has further canvassed that in certain cases omissions can be construed as contradictions and to impress this Court has placed reliance upon Bishna alias [Bishna @ Bhiswadeb Mahato and Others Vs. State of West Bengal](#), wherein it was held as under:

29. section 145 of the Evidence Act is attracted when a specific contradiction is required to be taken; but we may point out that in certain cases omissions are also considered to be contradictions. (See *Shri Gopal v. Subhash, Sekar v. State and State of Maharashtra v. Bharat Chaganlal Raghani*, SCC para 51.)

17. Shri Moitra has further cited [Sudevanand Vs. State](#), to urge that power of the Court is not limited to recall witness for further cross-examination with reference to his previous statement, but to take any additional evidence into consideration to arrive at just decision of the case. It has been said that in the judgment relied, a duty has been cast upon the Court to arrive at truth by lawful means.

18. Shri Sabyasachi Banerjee, appearing as amicus curiae, has also placed reliance upon judgment cited by counsel for the accused to contend that the Court has unfettered powers to recall any witness at any stage, and delay on the part of the accused to file an application should not hamper the journey of the Court to arrive at the truth.

19. Counsel for the State has not cited any judgment but has supported the impugned order by stating that accused have adopted tactics to delay the culmination of the trial and an application filed by the accused before the Court below and the prayer made is not at all worth consideration by this Court.

20. I have given my thoughtful consideration to the rival submissions advanced by counsel for the parties.

21. It was held in [State of Karnataka Vs. Bhaskar Kushali Kotharkar and Others](#), that if any statement of witness is contrary to the previous statement recorded u/s 161 Cr.P.C. or suffers from omission of certain material particulars, then the previous

statement can be proved by examining the Investigating Officer who had recorded the same. Thus, there is no doubt that for proving the previous statement Investigating Officer ought to be examined, and statement of the witness recorded by him, can only be proved by him and he has to depose to the extent that he had correctly recorded the statement, without adding or omitting, as to what was stated by the witness.

It would be apposite here to reproduce sections 161 and 162 Cr.P.C.:-

Section 161. (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if the (sic he) does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Section 162. (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of Clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

Explanation - An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such

omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

22. Proviso to section 162(1) Cr.P.C. state in clear terms that the statement of the witness ought to be duly proved. The words if duly proved, cast a duty upon the accused who want to highlight the contradictions by confronting the witness to prove the previous statement of a witness through the police officer who has recorded the same in the ordinary way. If the witness in the cross-examination admits contradictions then there is no need to prove the statement. But if the witness denies a contradiction and the police officer who had recorded the statement is called by the prosecution, the previous statement of the witness on this point may be proved by the police officer. In case prosecution fail to call the police officer in a given situation Court can call this witness or the accused can call the police officer to give evidence in defence. There is no doubt that unless the statement as per proviso to Sub-section (1) of section 162 Cr.P.C. is duly proved, contradiction in terms of section 145 of the Indian Evidence Act cannot be taken into consideration by the Court.

23. To elaborate this further, it will be necessary to reproduce section 145 of the Indian Evidence Act.

Section 145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

24. Therefore, it is appropriate that before the previous statement or statement u/s 161 Cr.P.C. is proved, attention of the witness must be drawn to the portion in the statement recorded by the Investigating Officer to bring in light the contradiction, a process called confrontation.

25. Let us first understand what is proper procedure. A witness may have stated in statement u/s 161 Cr.P.C. that "X murdered Y". In Court witness state "Z murdered Y". This is a contradiction. Defence counsel or Court and even prosecution if witness is declared hostile having resiled from previous statement, is to be confronted to bring contradiction on record. Attention of the witness must be drawn to the previous statement or statement u/s 161 Cr.P.C. where it was stated that "X murdered Y". Since section 145 of the Indian Evidence Act use the word being proved, therefore, in the course of examination of the witness, previous statement or statement u/s 161 Cr.P.C. will not be exhibited but shall be assigned mark, and the portion contradicted will be specified. The Trial Court in the event of contradiction has to record as under.

26. Attention of the witness has been drawn to portion A to A of statement marked as 1, and confronted with the portion where it is recorded that "X murdered Y". In

this manner by way of confrontation contradiction is brought on record. Later, when Investigating Officer is examined, prosecution or defence may prove statement, after Investigating Officer testify that statement assigned mark was correctly recorded by him at that stage statement will be exhibited by the Court. Then contradiction will be proved by the Investigating Officer by stating that witness had informed or told him that "X murdered Y" and he had correctly recorded this fact.

27. Now a reference to the explanation to section 162 Cr.P.C. which say that an omission to state a fact or circumstance may amount to contradiction. Say for instance if a witness omit to state in Court that "X murdered Y", what he had stated in a statement u/s 161 Cr.P.C. will be material contradiction, for Public Prosecutor, as witness has resiled from previous statement, or if "W" has been sent for trial for charge of murder, omission to state "X murdered Y" will be a material omission, and amount to contradiction so far defence of "W" is concerned. At that stage also attention of the witness will be drawn to significant portion of the statement recorded u/s 161 Cr.P.C. which witness had omitted to state and note shall be given that attention of the witness was drawn to portion A to A wherein it is recorded that "X murdered Y". In this way omission is brought on record. Rest of the procedure stated earlier qua confrontation shall be followed to prove the statement of the witness and the fact stated by the witness.

28. Therefore, to prove the statement for the purpose of contradiction it is necessary that the contradiction or omission must be brought to the notice of the witness. His or her attention must be drawn to the portion of the previous statement (in present case statement u/s 161 Cr.P.C.).

29. Thus, a humble attempt has been made to answer three questions raised and noted by this Court.

30. Now coming to the facts of present case, a perusal of the statement of P.W. 2 Smt. Mitra Bhattacharya and P.W. 3 Moumi Bhattacharya reveals that the attention of the witness was not drawn to the contradiction or omission made by her with the statements recorded by the Investigating Officer. Since the proper contradiction by way of confrontation i.e. by not drawing the attention of the witnesses to portion of the statements has not been adhered to, the question of proving the contradiction by examining Investigating Officer P.W. 10 Shri Swadhin Ranjan Guha who had recorded these statements do not arise.

31. Therefore, before the contradictions are to be proved by the Investigating Officer the contradictions must have been brought to the notice of the witnesses by confronting. Since this procedures was not followed by the defence counsel, those contradictions cannot be taken into consideration by the Court below. Hence recalling of the Investigating Officer to prove contradictions will be an exercise in the futility. On this score alone the present petition is liable to be dismissed along with the sound reasoning given by the Trial Judge (which this Court shall adopt) that

the accused were not diligent and have only filed the application after a period of three years when the case was fixed for arguments to delay the proceedings.

Consequently the present petition being devoid of any merit is dismissed.