

Avinash Kumar Vs. State

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Court : Allahabad

Decided On : Dec-18-1962

Reported in : 1963CriLJ706

Judge : D.S. Mathur, J.

Appellant : Avinash Kumar

Respondent : State

Judgement :

ORDER

D.S. Mathur, J.

1. This is a Criminal Reference by the Additional Sessions Judge of Muzaffarnagar with the recommendation that the order dated 26-6-1962 of the Magistrate be set aside and he be directed to furnish copies of the statements of witnesses recorded under Section 161 Cr. P. C. to the accused person.

2. Chamanlal Nagpal made a report with the police of district Saharanpur alleging that the applicant, Srimati Avinash Kaur had committed offences punishable under Sections 406 and 409, I.P.C. The offences were investigated by the police but no chargesheet was submitted. Thereafter Chamanlal Nagpal moved a criminal complaint before the Magistrate at Saharanpur which has since been transferred to Muzaffarnagar. The complaint is at present pending for hearing before Sri P. C. Misra, Magistrate, 1st Class, Muzaffarnagar.

3. Srimati Avinash Kaur wanted to utilise the statement recorded by the police under S. 161, Cr. P. C. for cross-examining the complainant and his witnesses and with that aim. in view moved an application for the summoning of the case diary pertaining to this case. The case diary was not received on the date the criminal case was taken up. She naturally wanted adjournment of the cross-examination of witnesses till the case diary was received. There was an implied requirement that copies of statements recorded under Section 161, Cr. P. C. be furnished to her to enable her to cross-examine the complainant and his witnesses. An objection was raised by the complainant that no such copies could be furnished to the accused and the trial was to proceed without summoning the case diary. The Magistrate has under the impugned order dated 26-6-1962 disallowed the request for adjournment on the ground that there was no provision under which copies of statements recorded under S. 161, Cr. P. C. were to be furnished to the accused

4. Under Section 161, Cr. P. C. a police officer Investigating an offence can examine orally any person supposed to be acquainted with the facts and circumstances of the case and it is necessary for him to reduce into writing the statement so made though he cannot in view of Section 162 (1), Cr. P. C. obtain the signature or thumb mark of that person below his statement. The record of such statement is maintained in the diary of proceedings as contemplated by Section 172, Cr. P. C. which is in the State of Uttar Pradesh called case diary. The case diary of the case under inquiry or trial before a criminal Court can, as laid down in Sub-section (2) of Section 172, be sent for by such Court and can be used not as evidence in the case but as aid to such inquiry

or trial. The accused or his agent is, however, not entitled to call for such diary nor is he entitled to see it merely because it was referred to by the Court; but the provisions of Sections 145 and 161 of the Evidence Act are applicable, i.e. the accused can use the contents of the case diary for purposes of contradicting the police officer if he had used the case diary to refresh his memory, or the Court used it for the purposes of contradicting such police officer. Section 172 (2), Cr. P. C. thus places a bar on the summoning of the case-diary by the accused or his agent, but it does not debar the Court from sending for the case-diary, suo moto or on the request of the accused or his agent.

5. As the statement of witnesses made before the investigating officer is recorded in the case diary, contents thereof amount to an earlier statement of the witness which can be used for contradicting that witness unless under some valid provision of law, such use is not permissible. Prohibition shall not be presumed and if no provision exists to the contrary, the statement recorded under Section 161, Cr. P. C shall be treated at par with any other earlier statement of the witness.

6. The bar with regard to the use of the statement recorded under Section 161, Cr. P. C. is contained in Section 162 (1), Cr. P. C. It provides that no statement made by any person to a police officer in the course of investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor 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 enquiry or trial in respect of any offence under investigation at the time when such statement was made. Section 162 (i), Cr. P. C. thus places a bar on the use of the statement recorded under Section 161, Cr. P. C. in an inquiry or trial in respect of the offence under investigation at the time when such statement was made. The words 'offence under investigation at the time when such statement was made' are of importance making it clear that the bar placed by Section 162 (i) is against the use of statement recorded under Section 161, Cr. P. C. during the enquiry or trial in respect of such offence. Such statements can easily be used at any other inquiry or trial of course for purposes of corroboration or contradiction.

7. The statement recorded under Section 161, Cr. P. C. can, however, be used at any inquiry or trial in respect of the offence under investigation in the manner laid down in the proviso to Sub-section (1) of Section 162. Before making comments on the proviso, it may here be noted that the main part of Sub-section (1) of Section 162, Cr. P. C. does not make any differentiation between a case started on a police report or on a complaint. The subsection has been worded generally to include any inquiry or trial in respect of the offence under investigation and the bar imposed by Section 162 shall be applicable even if that offence is being inquired into or tried on a complaint other than a police report.

8. The proviso to Section 162 (i), Cr. P. C. makes it permissible for the accused, and also the prosecution with the permission of the Court, to use the statement recorded under Section 161, Cr. P. C. to contradict a witness called for the prosecution in such inquiry or trial the witness can be so contradicted in the manner provided by S. 145 of the Evidence Act. The statement recorded under Section 161, Cr. P. C. can also be used in the re-examination of such witness to explain any matter referred to in his cross-examination. The use of the word prosecution will not debar the accused from cross-examining the complainant and witnesses with reference to statement recorded under Section 161, Cr. P. C. in view of the fact that the word prosecution as used in the Code covers complaint cases also.

9. Section 251-A, Cr. P. C. lays down the procedure for the trial of warrant cases instituted on a police report and naturally, therefore the State has throughout been referred to as the prosecution.

10. Section 252, Cr. P. C. onwards governs the trial of warrant cases instituted otherwise than on a police report. Sub-section (1) of Section 252 makes it clear that the evidence adduced by the complainant to prove the allegation made by him is an evidence produced in support of the prosecution. In private cases, the complainant becomes the prosecutor and a witness examined by him is a witness called for the prosecution.

11. The only other point which remains for consideration is whether it is the duty of the Magistrate or of the

complainant to furnish to the accused copies of documents referred to in Section 173 (4), in the present case, copies of statements of witnesses recorded under Section 161, Cr. P. C, before the commencement of the trial. The duty of furnishing copies of the documents to the accused is laid upon an officer-in-charge of the police station under Sub-section (4) of Section 173, and it is under Section 251-A that the Magistrate has to satisfy himself before the commencement of the trial that copies of documents referred to in Section 173 have been furnished to the accused. Consequently, if the police does not submit a report for the prosecution of the accused, it is not necessary for the police to furnish copies of documents referred to in Section 173 to the accused, nor is it necessary for the Magistrate to satisfy himself that such copies have been furnished. In other cases, the trial shall proceed even if copies of the above documents have not been supplied to the accused.

On reading Sections 173 and 251-A, and also other sections of Chapter XXI, Cr. P. C, it must be held that in cases started otherwise than on a police report it is not the duty of the Magistrate to satisfy himself before the commencement of the trial that copies of the statements of witnesses recorded under Section 161, Cr. P. C. have been furnished to the accused nor can the holding of such trial be postponed till copies have been supplied to or received by the accused persons. Further, no responsibility has been placed upon the complainant to supply such copies. It shall be for the accused to himself apply for and obtain copies of statements recorded under S. 161, Cr. P. C. to enable him to cross-examine the complainant and his witnesses with reference to earlier statements contained therein. As it is the primary duty of the Courts of law to administer justice in a manner as not to prejudice the interest of the accused, the Magistrate shall have to fix a date for the cross-examination of the complainant and his witnesses such that the accused is able to obtain before-hand copies of the statements recorded under S. 161, Cr. P. C.

12. If copies of statements recorded under Section 161, Cr. P. C. are issued by the Superintendent of Police, it shall be necessary for the accused to apply to the Superintendent of police for such copies. But if under the rules or otherwise, the Superintendent of Police cannot supply certified copies of such statements, it shall be necessary for the Magistrate to take other steps to ensure that the accused receives such copies. In suitable cases the Magistrate may himself supply the copies after summoning the case diary. The Magistrate can of course, in each and every case, use the case diary for the proper inquiry or trial of the case.

13. To sum up, the accused cannot insist that copies of documents referred to in S. 173, in the present case, copies of statements of witnesses recorded under S. 161, Cr. P. C, be furnished to her before she is called upon to cross-examine the complainant and his witnesses, or that on her request the case diary be summoned for being used during the cross-examination of witnesses; but in the interest of justice, the accused can apply for and obtain certified copies of statements recorded under Section 161, Cr. P. C. and use them during the trial for cross-examination of witnesses. At the same time, the Magistrate can suo motu or on the present request of the accused summon the case diary for his perusal and for issuing copies of statements recorded therein if necessary to enable him to decide the case expeditiously without causing prejudice to any of the parties.

14. The Sessions Judge has made the recommendation that the Magistrate be directed to furnish copies of the statements of witnesses recorded under Section 161, Cr. P. C. to the accused before the commencement of the trial but the recommendation as made cannot be accepted.

15. The Criminal Reference is in substance allowed and the Magistrate is directed to proceed with the trial after the accused has obtained or is supplied with copies of statements recorded under Section 161, Cr. P. C. of the complainant and such witnesses as he desires to examine in the case.

16. The record be sent back to the Magistrate concerned at a very early date to enable him to take steps in accordance with the law.