

Bhaskar Behera Vs. State of Orissa

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Court : Orissa

Decided On : Aug-12-1999

Reported in : 88(1999)CLT361; 1999(II)OLR291

Judge : R.K. Dash, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 164

Appeal No. : Criminal Misc. Case No. 1623 of 1999

Appellant : Bhaskar Behera

Respondent : State of Orissa

Advocate for Def. : S.K. Nayak, Addl. Standing Counsel

Advocate for Pet/Ap. : B. Bhuyan, A. Sahu, A.K. Rout and A.K. Tripathy; Sanjit Mohanty

Judgement :

R.K. Dash, J.

1. The petitioner, accused of having committed rape on a minor girl aged 15 years, has filed this application for bail, his prayer having been rejected by the learned Sessions Judge, Balasore.

2. The prosecution allegation as borne out from the FIR is that on 28.6.1998, the victim girl (name withheld), aged 15 years, had been to Sajanagarh with her two minor sisters to witness car festival. On that day, it is alleged, the petitioner forcibly took her behind a cabin and sexually molested her. On return to village she narrated the incident to her mother, whereafter a written report was lodged at Nilagiri Police Station on the basis of which a case Under Section 376, IPC was registered. During investigation the petitioner was apprehended and forwarded to the Court of the S.D.J.M., Nilagiri. He moved that Court for bail and the same having been rejected, he approached the learned Sessions Judge, Balasore. which also met with the same fate. Hence, the present application.

3. Learned counsel appearing for the petitioner in course of argument submitted that the victim girl in her statement recorded Under Section 164 of the Code of Criminal Procedure (for short 'the Code') has not supported what she is alleged to have stated in the FIR and therefore, in absence of any material that she was subjected to rape and more particularly by the petitioner, his prayer for bail should be allowed.

4. Learned Addl. Standing Counsel opposing the bail contended that the learned Magistrate acted illegally and without jurisdiction in recording the statement of the victim at the instance of the petitioner. He urged that since Section 164 of the Code for recording statement of a witness is embodied in Chapter XII under the caption 'information to the police and their powers to investigate', it is for the Investigating Officer and none else to move the Court to get such statement recorded if he considered it necessary in the facts and circumstances of the case.

5. Question, therefore, arises whether it is exclusively within the domain of the investigating agency to move the Court to get the statement of a witness recorded Under Section 164 of the Code, or the informant, accused or a witness can move the Court to get such statement recorded. For answering the said question I sought assistance of the members of the Bar. Shri Sanjit Mohanty, a learned member of the Bar in usual fairness submitted that though in view of three decisions of this Court reported in 47 (1979) CLT 298 : (State of Orissa v. Amitabh Prasad Das), 78 (1994) CLT 621 : (Bhima Mallick v. State of Orissa) and 87

(1999) CLT 247 : (Smt. Champarani Swain v. State of Orissa), recording of statement of the victim girl by the learned Magistrate Under Section 164 of the Code cannot be faulted with, however, a fresh look is necessary to the propositions of law laid down in those decisions. He contended that taking advantage of the law as decided by this Court, an accused in order to create evidence in support of his defence plea gets the statements of some persons recorded by the Magistrate. A similar situation arose in a matter which ultimately came to this Court in; a writ petition for determination as to whether statements of some persons in support of the defence plea of 'alibi' could be recorded by the Magistrate with the aid of the said section. A Division Bench of this Court (consisting of Hon'ble S. N. Phukan, C.J., as then Lordship was then, and Hon'ble P.K. Tripathy, J.) answered the issue in negative and dismissed the writ application with costs. {See (1999) 16 OCR 213 : Jogendra Nahak and Ors. v. State of Orissa and Ors.).

6. Section 164 of the Code, relevant for the purpose, reads as under:

'164. Recording of confessions and statements - (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial :

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.xx xx xx xx

(5) Any statement (other than a confession) made under Sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate. best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the persons whose statement is so recorded.

xx xx xx'

The aforesaid provision in Chapter XII of the Code under caption 'Information to the police and their powers to investigate' is primarily intended to be resorted to by the police in course of investigation into a cognizable offence. Ordinarily the Investigating Officer moves in the matter and produces a witness before the Magistrate for recording his statement. Such a course is adopted when he entertains doubt that the witness may resile or tamper with the statement which he made during investigation. But as the section did not specifically provide that recourse to the said provision can be had only by the police and none else, it came for judicial interpretation whether statement could be recorded at the instance of the informant, accused or at the request of a witness. Lahore High Court in Muhammad Sarfraz Khan v. The Crown : 52 Cri.L.J. 1425, reliance on which was placed by this Court in Amitabh (supra), approved the action of the Magistrate recording the statements of two eye-witnesses Under Section 164 at their instance. To appreciate the view taken by the High Court a few facts may be stated in brief. On 27.12.1949 at about 11.30 p.m. Muhammad Sarfraz Khan, a wealthy Zamindar, accompanied by his chauffeur Muhammad Ramzan and his servant Muhammad Sharif came to the house of Khair Din's daughter Gulzar Begum who carried on the profession of dancing and singing. In course of some altercation Md. Sarfraz fired with a revolver injuring one Yusuf and Saeed Ahmad. An information was lodged to the police whereupon investigation commenced in course of which statements of two injured who were undergoing treatment in the hospital were recorded. In their statements they had stated that it was Sarfraz who fired at them with his revolver. On 19th January injured Yusuf died. Subsequently a new theory was evolved at the instance of the Investigating Officer and some other police personnel that the revolver shots were fired by Ramzan and not Sarfraz. The material witnesses, namely, Khair Din and his daughter Gulzar Begum in their first statement had supported the prosecution case that Md. Sarfraz was the real culprit. They on being re-examined went back upon their earlier statements. Resultantly the Officer-in-charge submitted challan showing Ramzan to be the real culprit. About a week after filing of the challan the aforesaid two material eye-witnesses appeared before a Magistrate, First Class, Lahore, and alleged that the Police was screening the real offender, namely, Md. Sarfraz. Their statements were got recorded by the Magistrate under Sec. 164. As Saeed

Ahmad, the other injured, was not satisfied with the progress of the case in the hands of the Police, he filed a complaint accusing the police of dishonesty and praying that Md. Sarfraz Khan should be punished after due inquiry. Accordingly, an inquiry was held by the Additional District Magistrate, and two sets of witnesses were examined - one, accusing Md. Sarfraz and the other, accusing Ramzan. The Magistrate, therefore, committed Md. Ramzan, Md. Sarfraz and another to the Court of Session on the charge of committing murder of Yusuf and attempting to murder the injured Saeed Ahmed. On the above factual backdrop objection was taken to the admissibility of statement of Gulzar Begum recorded by the Additional District Magistrate, Lahore on the ground that the same was not made in course of police investigation and that if so made, it was recorded by the Magistrate who had no jurisdiction to record it. Repelling such contention the Court observed :

'xxxxxx In our view the words 'in the course of an investigation' in Section 164, Criminal P.C., as would appear from the succeeding words, 'or at any time afterwards before the commencement of the inquiry' mean 'while the investigation is in progress', and a statement under that section may be recorded not only at the instance of the police but also at the instance of the accused or the aggrieved person or at the request of the witness himself. The authority to record statements in the course of police investigation does not exclusively vest in the Magistrate competent to take cognizance of the offence. The section itself expressly states that it is not necessary that the Magistrate expressly states that it is not necessary that the Magistrate recording such statement should have jurisdiction in the case.....'

(Underlining is mine)

From the above, it appears that the question for consideration before the Court was not whether statement under Section 164 of the Code can be recorded at the instance of the accused or the aggrieved person or at the request of the witness himself. No argument was also advanced by either side in that regard. So the observation of the Court underlined above cannot be said to be the answer to the question raised in that case.

7. In another decision of Madras High Court in re C.W. Casse : AIR 1948 Madras 489 on which reliance was placed by this Court in Amitabh (supra), a similar question arose whether it was obligatory of a Magistrate to record the statement of a person if such a prayer was made by him. In that case one C.W. Casse appeared before the Chief Presidency Magistrate, Madras and filed an application praying that his statement should be recorded Under Section 164 of the Code in order that it may be useful for the purpose of inquiry or trial of the case investigated by the Special Police Establishment, New Delhi. Learned Magistrate rejected the application on various grounds, one of the grounds being that Section 164 of the Code was not intended to enable the accused to secure in advance evidence which he might lead in defence, in case he should be tried later on. The Court observed :

'.....I am inclined to hold that it is not obligatory upon the Magistrate to record the statement of an individual simply because an application is made to him that such a statement may be necessary in an enquiry or trial that may develop as a result of the investigation.....Therefore, any person who feels that he has useful information to give in connection with the investigation will first of all have to contract the investigating police officers and impart that information to such investigating staff.'

8. Now I will advert to the three judgments of this Court reference of which was made at the Bar in course of argument. In Amitabh (supra) the accused who was prosecuted Under Section 366, IPC moved the S.D.J.M. to get the statement of the victim girl recorded Under Section 164 of the Code alleging that during the period of her detention at the police station she was tortured by the police to make false statement. The prayer having been rejected he moved the Sessions Judge in a Criminal Revision and the revisional Court upon hearing set aside the order of the Court below and directed to get the statement of the girl recorded. The said order came to be challenged before this Court by the State. The Court relying upon the decision of the Lahore High Court and Madras High Court referred to supra, held that under exceptional circumstances, the accused may move the Magistrate for recording the statement of a witness and the same can be allowed when he is satisfied that the circumstances are exceptional and refusal to record

the statement would defeat the ends of justice. Similar view has been reiterated in subsequent two decisions in Bhima Mallik (supra) and Champarani Swain (supra).

9. Under the Code, Police have the unfettered power to investigate into all cases where they suspect that a cognizable offence has been committed. Law does not permit interference with their power of investigation by the Judiciary. Functions of both investigating agency and the Judiciary are well demarcated by the Code. The police officer in course of investigation into cognizable offence proceeds to the spot, examines the persons acquainted with the facts and circumstances of the case, takes measure for discovery and arrest of the offender. He also takes recourse to Section 164 of the Code to get the statement of any witness recorded by the Magistrate when he entertains doubt that the witness may resile from his previous statement. Though ordinarily it is the Investigating Officer who moves in the matter, it cannot be said on a plain reading of the section that except him no other can approach the Magistrate for recording the statement of a witness. Many affluent and influential persons are involved in serious crimes. Investigating agency in our country has not yet been made independent. The Executive has over- all control over it. Many a time it is complained that investigation is not conducted fairly and with promptitude in the cases where influential and affluent persons are involved. Sometimes material witnesses acquainted with the facts of the case are not examined during investigation and instead, some interested witnesses are examined who in course of trial turn hostile and support the defence. In such a situation if the informant or the person aggrieved approaches the Magistrate and requests to record the statements of some material witnesses who have not been examined by the Investigating Officer, in that case the Magistrate if satisfied that their statements may be necessary in the enquiry or trial then he may record their statements and send the same to the Court by which the case is to be inquired into or tried.

10. The next question that arises for consideration is whether the statement Under Section 164 of the Code can be recorded at the instance of the accused or a witness himself. An accused has no right to have any say as regards the method of investigation. He has no participation as a matter of right during the course of investigation of a case till it terminates on filing of final report Under Section 173 of

the Code. The same principle applies to a proceeding instituted otherwise than on a police report till process is issued. Therefore, so long as the investigation is in progress, an accused in order to create defence evidence in advance cannot approach the Magistrate to have the statement of a witness recorded Under Section 164 of the Code.

Coming to the role of a witness during investigation, ordinarily he does not show any interest in the case unless he is the informant or person aggrieved. He when examined by the police, gives statement as to the facts and circumstances of the case. So whenever such a witness (being not the informant or person aggrieved) approaches the Magistrate to have his statement recorded, the man behind the screen is the accused who brings him to the Court to get statement recorded in support of his defence plea. In exceptional cases however, the Magistrate may record the statement of a witness who is capable of giving useful information relating to the offence. For example in a case where the informant being not the person aggrieved is gained over during investigation and likewise the Investigating Officer on being influenced by the accused weakens or demolishes the prosecution case and does not examine and record the statement of a material witness at the earliest opportunity, in such a situation in order to see that the truth comes to light and the person committing the offence is punished, the Magistrate on being moved by the witness acquainted with the facts and circumstances of the case, may record his statement. But while doing so, it should be borne in mind that the provision of Section 164 of the Code is not misutilised by unscrupulous persons. Therefore, whenever a prayer is made by a witness to have his statement recorded, the Magistrate should call upon him to file an affidavit as to what statement he intends to make and only thereafter if he is satisfied that the statement sought to be made is not to create evidence for the defence in advance, then he may record such statement on prior notice to the Investigating Officer.

11. In *Jogendra Nahak (supra)* the petitioners who claimed to be the witnesses filed the writ petition for issuance of necessary direction to the Magistrate to record their statements Under Section 164 of the Code. In support of their prayer reliance was placed on *Bhima Mallik (supra)*. It was contended that the investigation was not conducted in fair and impartial manner and the petitioners being material

witnesses, were not examined and their statements were not recorded during investigation: In order to find the correctness of such contention, the case diary was called for and on scrutiny the allegations were found to be untrue. The Court, therefore, observed that the petitioners were set up by the accused to have their statements recorded to build up his plea of 'alibi' and consequently rejected their prayer with costs. In view of such observation of the Division Bench in the aforesaid case, view expressed by this Court in the three decisions referred to above cannot be said to be laying down the law of general application that whenever in a case a witness makes prayer for recording his statement Under Section 164 of the Code, it is obligatory of the Magistrate to record the same.

12. In the present case, it is stated that the victim girl voluntarily appeared and gave her statement which was accordingly recorded by the learned S.D.J.M. From the said statement it appears that she did not state anything implicating the petitioner in the alleged sexual assault to her. In that view of the matter, I am inclined to admit the petitioner to bail. Accordingly it is ordered that the petitioner be released on furnishing a bond of Rs. 10,000/- (rupees ten thousand) with one surety for the like amount to the satisfaction of the S.D.J.M., Nilgiri, in G.R. Case No. 171 of 1998.

Cri. Misc. Case disposed of.

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