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MCRC-27914-2024

IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE PRAMOD KUMAR AGRAWAL

MISC. CRIMINAL CASE No. 27914 of 2024*RAHUL BADGAIYA**Versus**THE STATE OF MADHYA PRADESH AND OTHERS*

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Appearance:

*Shri Anil Khare - Senior Advocate with Shri Madhur Shukla - Advocate for applicant.*

*Shri C.M. Tiwari - Government Advocate for State/respondent No.1.*

*Shri Rakesh Kumar Shukla - Advocate for respondent No.2 and 3.*

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*Reserved on : 20.11.2024*

*Pronounced on : 22.01.2025*

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ORDER

The present application under Section 482 of Cr.P.C. is being preferred against registration of the offences under Sections 363, 366, 376(2) (n), 376, 376(3) of the Indian Penal Code, 1860 read with Sections 3,4,5,6 of Protection of Children from Sexual offences Act, 2012 against the present applicant.

2. Learned Senior Advocate for the applicant submits that in the aforesaid offences, charge-sheet in respect of the main accused person namely Jai Dubey has already been filed, however against the present applicant, the investigation under 173(8) of the Criminal Procedure Code is still pending. The respondent No.3, who happens to be the father of victim presented an application before the concerning Superintendent of Police for



recording the statement of prosecutrix again under Section 164 of the Cr.P.C. and thereafter, he appeared before the Special Judge (POCSO Act), Jabalpur and preferred an application that the statement of the victim under Section 164 may be recorded again, so that the present applicant should not be falsely implicated in the case. The aforesaid application was dismissed by the Special Judge on the ground that the arrest, investigation & other proceedings are yet to take place in respect of the present applicant. The applicant has nothing to do with the offence alleged, continuation of the criminal proceedings against the present applicant would be sheer abuse of process of law. It is further submitted that there is no bar in law to prevent the victim from moving an application for recording the statement of the prosecutrix under Section 164 of the Cr.P.C. for the second time or so on and in support this, reliance has been placed in the judgment dated 14.07.2022 passed in Writ Appeal No.602/2022 (Halke Bhai Gond Vs. The State of M.P.). Learned Senior Advocate has not pressed the application regarding quashment of FIR but the only prayer made by the applicant is to direct the Special Judge (POCSO), Jabalpur (M.P.) for permitting the respondent No.2/prosecutrix to record her statement again under Section 164 of the Criminal Procedure Code as the same is her legal right.

3. Learned counsel for the respondent No.2 and 3 has supported the contentions made by the learned Senior Advocate for the applicant.

4. On the other hand, learned counsel for the State vehemently opposed the prayer on the ground that at the time of incident, prosecutrix was minor aged about 13 years. It is submitted that her statement under Section



161 of Cr.P.C. has been recorded by the police and statement under Section 164 of the Cr.P.C. has been recorded before the Judicial Magistrate in which she has stated that present applicant and other co-accused person have committed rape upon her. No cogent reason has been mentioned in the application that why prosecutrix wants to record her statement under Section 164 of the Cr.P.C. second time in this case. It is further submitted that learned Trial Court has rightly dismissed the application filed on behalf of the respondent No.2/prosecutrix for again recording her statement under Section 164 of the Cr.P.C.

5. I have heard learned counsel for the parties and perused the record.

6. It is found that at the time of incident, prosecutrix was aged about 13 years and she was recovered by the police on 11.12.2023 and just after her recovery, her statement was recorded on 13.12.2023 under Section 161 of the Cr.P.C. by the police and on 14.12.2023 her statement under Section 164 of the Cr.P.C. was recorded by the Judicial Magistrate in which she has deposed that present applicant and another co-accused have committed rape upon her. Thereafter, on 14.03.2024, application for recording her second statement under Section 164 of the Cr.P.C. was presented by the father of the prosecutrix before the concerning Superintendent of Police and thereafter he has filed an application before the trial Court which reveals that approximately after three months from the date of her first statement, this application has been filed, although, it is true that law does not bar recording of statement under Section 164 of Cr.P.C. twice or more on as held in the case of Halke Bai (**Supra**) but at the same time second statement should not



be recorded to negate or defeat the earlier statement of the victim/prosecutrix whether it is in favour or against the accused otherwise the sanctity of the statement under Section 164 of the Cr.P.C. will lose its value.

7. It is pertinent to mention here that application for recording of second statement of the prosecutrix under Section 164 of the Cr.P.C. was not sponsored by the investigating agency. In this regard, the Hon'ble Apex Court in the case of **Jogendra Nahak and Ors Vs. State of Orissa and Ors** reported in 2000(1) SCC 272, has observed as below :-

*“2. A strange motion has been made before the High Court of Orissa by four persons who are strangers to a criminal case for direction to a Magistrate to record their statements under section 164 of the CrPC (for short ‘the Code’).*

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*20. In re C.W. Cases (supra) Govinda Menon, J. of the Madras High Court (as he then was) expressed the view that:*

*It is not necessary that the Magistrate should be moved by the police in order that he might record a statement. There may be instances where the police may not desire to have recorded, the statement of a witness for some reason or other. In such a case, there is nothing preventing the witness to go to the Magistrate and request him to record the statement and if a Magistrate records his statement and transmits the same to the Court where the enquiry or the trial is to go on, there is nothing wrong in his action.*

*21. Nevertheless learned Single Judge sounded a note of caution like this:*

*But such a thing will be very exceptional, as there is always a discretion in the Magistrate to refuse to record the statement. Ordinarily, when a Police Officer requests the Magistrate to record the statement, of a witness on oath under section 161 Cr. P.C., such a request will not be refused by the Magistrate. But when a private party seeks to invoke the powers of a Magistrate under section 164, Cr. P.C. the Magistrate has got a very wide discretion in acting or refusing to act.*

*22. The same approach was made by Single Judges in State of Orissa v. A.P. Das (supra) and in Kunjukutty v. State of Kerala (supra).*

*23. If a Magistrate has power to record statement of any person under*



*section 164 of the Code, even without the Investigating Officer moving for it, then there is no good reason to limit the power to exceptional cases. We are unable to draw up a dividing line between witnesses whose statements are liable to be recorded by the Magistrate on being approached for that purpose and those not to be recorded. The contention that there may be instances, when the Investigating Officer would be disinclined to record statements of willing witnesses and therefore such witnesses must have a remedy to have their version regarding a case put on record, is no answer to the question whether any intending witness can straightaway approach a Magistrate for recording his statement under section 164 of the Code. Even for such witnesses provisions are available in law, e.g. the accused can cite them as defence witnesses, during trial or the Court can be requested to summon them under section 311 of the Code. When such, remedies are available to witnesses (who may be sidelined by the Investigating Officers) we do not find any special reason why the Magistrate should be burdened with the additional task of recording the statements of all and sundry who may knock at the door of the Court with a request to record their statements under section 164 of the Code.*

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*25. Thus, on a consideration of various aspects, we are disinclined to interpret section 164(1) of the Code as empowering a Magistrate to record the statement of a person unsponsored by the Investigating Agency. The High Court has rightly disallowed me statements of the four appellants to remain on record in this case. Of course, the said course will be without prejudice to their evidence being adduced during trial, if any of the parties requires it.”*

**8. In the case of Ajay Kumar Parmar Vs. State of Rajasthan reported in (2012) 12 SCC 406, it has been observed as below :-**

*"5. We have considered the rival submissions made by the learned counsel for the parties and perused the records. A three Judge bench of this Court in Jogendra Nahak & Ors. v. State of Orissa & Ors., AIR 1999 SC 2565, held that Sub-Section 5 of Section 164, deals with the statement of a person, other than the statement of an accused i.e. a confession. Such a statement can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. This Court held that, in case such a course of action, wherein such person is allowed to appear before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their*



*statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate courts, for the purpose of creating record in advance to aid the said culprits. Such statements would be very helpful to the accused to get bail and discharge orders.*

*6. The said judgment was distinguished by this Court in Mahabir Singh v. State of Haryana, AIR 2001 SC 2503, on facts, but the Court expressed its anguish at the fact that the statement of a person in the said case was recorded under Section 164 Cr.P.C. by the Magistrate, without knowing him personally or without any attempt of identification of the said person, by any other person.*

*7. In view of the above, it is evident that this case is squarely covered by the aforesaid judgment of the three Judge bench in Jogendra Nahak & Ors. (Supra), which held that a person should be produced before a Magistrate, by the police for recording his statement under Section 164 Cr.P.C. The Chief Judicial Magistrate, Sirohi, who entertained the application and further directed the Judicial Magistrate, Sheoganj, to record the statement of the prosecutrix, was not known to the prosecutrix in the case and the latter also recorded her statement, without any attempt at identification, by any court officer/lawyer/police or anybody else."*

**9. In the case of Nafeesa Vs. State of U.P. Thru Secy. Home Lucknow and Others reported in 2015 SCC Online ALL 8731, the High Court of Allahabad has observed as below :-**

*"1. The question raised by way of this petition is as to whether a witness, of his own has the right to approach a Magistrate to record his statement under Section 164 Cr.P.C. and whether such Magistrate is under a legal obligation to record the statement of such witness under Section 164 Cr.P.C., when investigation in a criminal offence is going on?*

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*9. By virtue of this petition, the petitioner seeks a writ in the nature of Mandamus, directing the Magistrate and the investigating agency to record statement of the petitioner under Section 164 Cr.P.C.*

*10. Law in regard to recording of statement under Section 164, Cr.P.C., has been clarified by the Hon'ble Supreme Court of India in the case of Jogendra Nahak v. State of Orissa, (2000) 1 SCC 272 : (AIR 1999 SC 2565). The following has been held:—*

*"19. In the scheme of the above provisions there is no set or stage at which a magistrate can take note of a stranger individual approaching him directly with a prayer that his statement may be recorded in*



*connection with some occurrence involving a criminal offence. If a Magistrate is obliged to record the statements of all such persons who approach him the situation would become anomalous and every Magistrate's court will be further crowded with a number of such intending witness brought up at the behest of accused persons.*

*22. If a Magistrate has power to record statement of any person under Section 164 of the Code, even without the investigating officer moving for it, then there is no good reason to limit the power to exceptional cases. We are unable to draw up a dividing line between witnesses whose statements are liable to be recorded by the Magistrate on being approached for that purpose and those not to be recorded. The contention that there may be instances when the investigating officer would be disinclined to record statements of willing witnesses and therefore such witnesses must have a remedy to have their version regarding a case put on record, is no answer to the question whether any intending witness can straightaway approach a Magistrate for recording his statement under Section 164 of the Code. Even for such witnesses provisions are available in law, e.g. the accused can cite them as defence witnesses during trial or the court can be requested to summon them under Section 311 of the Code. When such remedies are available to witnesses (who may be sidelined by the investigating officers) we do not find any special reason why the Magistrate should be burdened with the additional task of recording the statements of all and sundry who may knock at the door of the court with a request to record their statements under Section 164 of the Code.*

*23. On the other hand, if the door is opened to such persons to get in and if the Magistrates are put under the obligation to record their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrates courts for the purpose of creating record in advance for the purpose of helping the culprits. In the present case, one of the arguments advanced by accused for grant of bail to them was based on the statements of the four appellants recorded by the Magistrate under Section 164, of the Code. It is not part of the investigation to open up such a vista nor can such step be deemed necessary for the administration of justice.*

*24. Thus, on a consideration of various aspects, we are disinclined to interpret Section 164(1) of the Code as empowering a Magistrate to record the statement of a person unsponsored by the investigating agency. The High Court has rigidly disallowed the statements of the four appellants to remain on record in this case. Of course, the said course will be without prejudice to their evidence being adduced during trial, if any of the parties requires it.”*

*11. Considering the law laid down by the Hon'ble Supreme Court of India, and extracted hereinabove, it becomes clear that a Magistrate cannot take note of*



*an individual approaching him directly with a prayer that his/her statement may be recorded in connection with some occurrence involving a criminal offence. If liberty is given to anybody, and everybody, to approach a Magistrate for recording of statement under Section 164, Cr.P.C., in connection with an occurrence involving criminal offence, and if Magistrates are put under an obligation to record their statement, there is every likelihood that persons sponsored by accused/culprits might be asked to approach court of the Magistrate for creating record/evidence in defence with the purpose to help an accused/benefactor. If such a provision is made by way of giving liberty to a person unsponsored by the investigating agency to give statement under Section 164, Cr.P.C., entire investigation process would be derailed.*

*12. In the opinion of this Court, investigation is a searching enquiry for ascertaining facts; detailed or careful examination. Such Investigation is to be conducted by an investigating agency. In case persons individually are permitted to create, "evidence in the process of investigation", the process of investigation would be interfered.*

*13. It is the duty of the investigating agency to conduct investigation. When it is felt relevant and necessary, the investigating officer makes an application to the magistrate to record statement of a witness under Section 164, Cr.P.C. Such statement becomes a part of investigation record under Chapter XII of the Code of Criminal Procedure. This process would surely be interfered, if persons on thenown claim a right to give statement under Section 164, Cr.P.C. Surely such a statement cannot be construed in pursuance of investigation by the concerned investigating agency. Investigation has been defined under Section 2(h) as follows:*

*"2(h) "investigatibn" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf".*

*14. Considering the above it becomes illusory and apparent that only a police officer or an investigator can sponsor a witness to a Magistrate for recording of statement under Section 164, Cr.P.C.*

*15. Considering the averments made in the petition, we are of the considered opinion that while exercising extraordinary writ jurisdiction, such direction, as sought in the petition, cannot be given. The investigating agency is required to proceed as per law. Ordinarily, a direction is not required to be given to the investigating agency to investigate a case in a particular manner. As witness can be produced before the Magistrate for recording his/her statement under Section 164, Cr.P.C., only by the investigating officer. Apparently, the petitioner has already given her statement once under Section 164, Cr.P.C., on the asking of the investigating agency.*

*16. From the pleadings in the petition, it has become evident that the petitioner concedes that she knowingly gave a false statement. Clearly, the petitioner can be proceeded against for giving a statement that is false to her knowledge and*





*belief.*

*17. At this stage, in these proceedings, it cannot even be deduced whether the earlier version given by the petitioner was truthful or the case set up in this petition is truthful.*

*18. The petitioner would have the option to give statement in court when she is produced as a prosecution witness. It would be for the Trial Court to consider the statement (s) of the prosecutrix and conclude whether offence has been committed or not.*

*19. The question posed to the Court is answered in the negative, for the reasons recorded above.*

*20. Considering the law as noticed above, as also the peculiar facts and circumstances of the case, this Court would not like to interfere in the process of investigation by way of issuing direction to the magistrate to record statement of the petitioner under Section 164, Cr.P.C. Petition is dismissed."*

10. In view of the aforesaid, this Court is of the view that application for recording of second statement of prosecutrix under Section 164 of the Cr.P.C. was not sponsored by the investigating agency and the trial Court did not commit any error and has given cogent reason in rejecting the aforesaid prayer. Accordingly, this Court is not inclined to entertain this petition filed under Section 482 of Cr.P.C to direct the trial Court for recording of second statement of the prosecutrix under Section 164 of the Cr.P.C.

11. Resultantly, this M.Cr.C. stands dismissed.

(PRAMOD KUMAR AGRAWAL)  
JUDGE