

Criminal Revision

Present: **The Hon'ble Justice Ashim Kumar Roy**

C.R.R. No. 541 of 2010

Judgment On: 07-04-2010.

Sk. Khelafat Mojhi

versus

The State of West Bengal

POINTS:

EXAMINATION-Offence punishable under Section 376 of the Indian Penal Code - Statement recorded under Section 164 of the Code of Criminal Procedure, whether can be admitted into evidence and be marked as exhibit, without the concerned Magistrate who recorded such statement being examined during the trial-Code of Criminal Procedure, 1973, S164- Evidence Act, 1872, S.80- Indian Penal Code, S. 376

FACTS:

The present petitioner is facing his trial of an offence punishable under Section 376 of the Indian Penal Code. In course of such trial, the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure was tendered by the Investigating Officer of the case and was marked as Exhibit – 9. However, defence raised an objection to that on the ground no statement under Section 164 of the Code can be marked exhibit and be admitted into evidence without the Learned Magistrate concerned who recorded such statement being examined in Court. The Learned Trial Court rejected such objection.

HELD:

Indisputably a statement of witness recorded under Section 164 of the Code can very well be admitted into evidence and be marked as exhibit without the Learned Magistrate who recorded the statement being examined in Court. But, such statement not being a substantive piece of evidence can only be used either to contradict or to corroborate the

maker thereof. So non-examination of the Learned Magistrate who recorded such statement will not in any way prejudice the petitioner. Para-6

CASES CITED:

1. Madi Ganga Vs. State of Orissa, AIR 1981 SC 1165.
2. Guruvindapalli Anna Rao & Ors. Vs. The State of A.P., 2003 Cri. L.J. 3253
3. Padam Prashad Upadhyaya Vs. Emperor, AIR 1929 Calcutta 617
4. Sadulla Vs. Emperor, AIR 1938 Lahore 477.

For Petitioner: Mr. Rabindra Nath Pal

For State: Mr. Debabrata Roy

As Amicus Curiae: Mr. Manjit Singh

THE COURT:

1. The present petitioner is facing his trial of an offence punishable under Section 376 of the Indian Penal Code before the Learned Additional District & Sessions Judge, Fast Track 2nd Court, Uluberia, Howrah. In course of such trial, the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure was tendered by the Investigating Officer of the case and was marked as Exhibit – 9. However, defence raised an objection to that on the ground no statement under Section 164 of the Code can be marked exhibit and be admitted into evidence without the Learned Magistrate concerned who recorded such statement being examined in Court. The Learned Trial Court rejected such objection. Hence this Criminal Revision.

2. Heard Mr. Rabindra Nath Pal, Learned Counsel appearing for the petitioner, Mr. Debabrata Roy, Learned Counsel appearing for the State as well as Mr. Manjit Singh, appearing as Amicus Curiae.

3. In this case, the short question that arises for decision, as to whether a statement recorded under Section 164 of the Code of Criminal Procedure can be admitted into

evidence and be marked as exhibit, without the concerned Magistrate recorded such statement being examined during the trial.

4. According to the Learned Advocate of the petitioner, although the Learned Magistrate was very much available but in spite of repeated summons were issued, he did not turn up. He further submitted that it transpired from the 164 statement of the victim that the Learned Magistrate has recorded something incriminating against the petitioner, which has not been stated by the victim girl in her evidence during the trial. Thus, he submitted if the Learned Magistrate is not examined, then in that case the accused shall lost the opportunity to take such contradiction with reference to the evidence of the victim girl. On the other had, Mr. Debabrata Roy, Learned Counsel appearing for the State, submitted before this Court that there is no bar to exhibit a statement recorded under Section 164 of the Code of Criminal Procedure without the examination of the concerned Magistrate recorded the same and such statement may be taken into consideration by the Trial Court.

5. Whereas, according to Mr. Manjit Singh, Advocate appearing as Amicus Curiae, there is no bar in exhibiting a statement recorded by a Learned Magistrate, be that be a confession of an accused or a statement of a witness without examining the Learned Magistrate during the course of trial. According to him, such statement can very well be tendered into evidence by the Investigating Officer of this case. In support of his submissions, Mr. Singh relied on a decision of the Hon'ble Supreme Court in the case of Madi Ganga Vs. State of Orissa, reported in AIR 1981 SC 1165. In paragraph 5 of the said decision, the Hon'ble Supreme Court held as follows;

“5.The Learned Magistrate has put to the accused all the necessary questions to satisfy himself that the confession was voluntary. He has also appended the necessary certificate. We do not accept Shri Jain's submission that the Learned Magistrate should have been examined as a witness. Section 80 of the Evidence Act makes the examination of the Magistrate unnecessary. It authorizes the Court to presume that the document is genuine, that any statements as to the circumstances under which it was taken are true and that such confession was truly take in accordance with law.”

Mr. Singh further relied on a decision in the case of Guruvindapalli Anna Rao & Ors. Vs. The State of A.P., reported in 2003 Cri. L.J. 3253, where the Hon'ble Division Bench of the Andhra Pradesh High Court in paragraph 7 held as follows;

“7. We could like to put one more discrepancy on record, viz., that while recording evidence, the learned II Additional Sessions Judge had summoned the I Additional Munsif Magistrate, Tenali (P.W. 10) to prove the statement of P.W. 1 recorded by him under Section 164, Cr.P.C. This Court has already ruled if any Magistrate records the statement of a witness under Section 164, Cr.P.C., it is not necessary for the Sessions Judges to summon that Magistrate to prove the contents of the statement recorded by him. This Court has already ruled that when a Magistrate, discharging his official functions as such, records the statement of any witness under Section 164, Cr.P.C., such statement is a ‘public document’ and it does not require any formal proof.”

Mr. Singh relied on a Special Bench decision of our High Court in the case of Padam Prashad Upadhyaya Vs. Emperor, reported in AIR 1929 Calcutta 617, Special Bench. The relevant portion of page 626 is quoted below; “S. 80, Evidence Act does not deal with the question of admissibility of the documents referred to therein but simply dispenses with the necessity of their formal proof by raising the presumption that everything in connection with them had been legally and correctly done i.e., (i) that the documents purporting to be record of evidences or statements or confessions are genuine (ii) that the statements as to the circumstances under which they were taken made by the officer who affixed his signature are true and (iii) that the evidence, statement or confession was duly taken.”

Lastly, Mr. Singh relied on another decision in the case of Sadulla Vs. Emperor, reported in AIR 1938 Lahore 477. The Lahore High Court held as follows; “The fact that the person who made the statement under S.164 is the person in Court can be proved by the police officer who had the statement recorded and the trying Magistrate need not be examined.”

6. Now, having regards to the case laws relied upon by Mr. Singh, indisputably a statement of witness recorded under Section 164 of the Code can very well be admitted

into evidence and be marked as exhibit without the Learned Magistrate who recorded the statement being examined in Court. But, such statement not being a substantive piece of evidence can only be used either to contradict or to corroborate the maker thereof.

According to the learned advocate of the petitioner some incriminating statement although was made by the victim in her statement recorded under Section 164 of the Code, but such statement was not found place in her substantive evidence in Court, if that be so non-examination of the Learned Magistrate recorded such statement will not in any way prejudice the petitioner.

7. This criminal revision has no merit and accordingly stands dismissed. Interim order, if any, stands vacated.

8. At the end this court records its deep appreciation for the assistance rendered by Mr. Manjit Singh, advocate appearing as Amicus Curiae. Criminal Section is directed to deliver urgent Photostat certified copy of this Judgment to the parties, if applied for, as early as possible.

(**Ashim Kumar Roy, J.**)