



**HIGH COURT OF JUDICATURE FOR RAJASTHAN  
BENCH AT JAIPUR**

S.B. Criminal Miscellaneous (Petition) No.3545/2020

Ramswaroop S/o Shri Bherulal, Present Sewa Sahakari Samit  
Nagal Bairasi Tehsil Dausa District Dausa (Raj.)

----Petitioner

Versus

State Of Rajasthan through P.P.

----Respondent



For Petitioner(s) : Mr. M.K. Kaushik  
For Respondent(s) : Mr. Ramesh Choudhary, PP

**HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA**

**Judgment**

**Reportable:**

**06/11/2020**

1. The present petition has been filed by the petitioner-victim, who had lodged the complaint against the accused, which was registered as an FIR under Section 156(3) Cr.P.C. and sent for investigation to the Investigating Officer. An FIR was registered under Sections 406, 420, 167, 467, 468, 471 & 120-B IPC wherein an allegation has been levelled of the accused having committed an embezzlement of a huge sum of Rs.6,07,29,306/-.

2. The grievance of the petitioner-victim is that when he appeared before the Investigating Officer, his statement was wrongfully recorded under Section 161 Cr.P.C. by the Investigating Officer and he, therefore, moved an application to the concerned Magistrate seeking liberty to give his statement under Section 164 Cr.P.C. on oath so that the correct facts may come out before the court. It is his submission that the Investigating Officer was trying



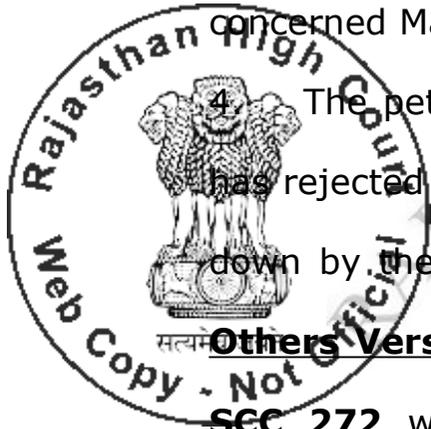
to help the accused and was therefore not recording the statement of the petitioner correctly.

3. Learned counsel points out that the statement was recorded by the Investigating Officer on 9.7.2020 and when the petitioner learnt that the statement has been wrongfully recorded, he immediately moved an application on the next date before the concerned Magistrate.

4. The petitioner's counsel submits that the learned Magistrate has rejected application of the petitioner relying on the law as laid down by the Supreme Court in the case of **Jogendra Nahak & Others Versus State of Orissa & Others** reported in **2000(1)**

**SCC 272** wherein the Supreme Court has observed that the statement of witnesses cannot be directly recorded by the Magistrate as it would open a pandora's box and it should be only when an application is moved by the concerned Investigating Officer that the statement can be recorded of a witness under Section 164 Cr.P.C. Learned counsel for the petitioner also submits that the facts of the case in **Jogendra Nahak & Others** (supra) were totally different from the facts of the present case. In the said case, the witness had come up claiming their statements to be recorded under Section 164 Cr.P.C. in support of the accused.

5. It was stated that the said witnesses who wanted to bring the correct facts on record before the Investigating Officer, were not allowed to make their statements and therefore they approached the High Court and the matter traveled to the Supreme Court and the Supreme Court has observed that such witnesses can always be examined by calling them in defence by the accused or by moving application under Section 311 Cr.P.C.





6. However, the facts of the present case are totally different and learned counsel submits that in the present case, it is the victim i.e. complainant, who is seeking his correct statement to be recorded and has alleged that the Investigating Officer has wrongfully recorded his statement.

7. Learned counsel also submits that the provisions of Section 163(2) Cr.P.C. allow a person to make his submission on his freewill independent of the statement made before the Investigating Officer and such provision is only subject to the conditions for recording confessional statement as under Section 164(4) Cr.P.C. Learned counsel submits that the said aspect has not been considered in the judgment of the **Jogendra Nahak & Others** (supra) and therefore, the facts of the present case are distinguishable from that before the Hon'ble Apex Court.

8. He therefore prays that in the present case the directions ought to be issued to the learned Magistrate to record the statement of the petitioner so that the facts which have been mentioned in the FIR are supported by the petitioner through his statement made on oath under Section 164 Cr.P.C. It would also be in the interest of justice that the correct facts are therefore come before the court to bring home conviction to the concerned accused.

9. I have considered the submissions.

10. Chapter XII of Cr.P.C. lays down the provisions relating to information to the Police and their powers to investigate. Once, an FIR has been registered either under Section 154 Cr.P.C. or after directions issued under Section 126(3) Cr.P.C., powers have been provided to the Police Officer to conduct investigation in preliminary inquiry and also examined the witnesses under



Section 161 Cr.P.C. Section 162 Cr.P.C. lays down provisions and their statements to the Police are not required to be signed and the relevance to such statement for the purpose of evidence in terms of Section 145 of the Evidence Act also have been noticed under Section 162 Cr.P.C.

11. Section 163 and 164 Cr.P.C. which are relevant for the present case, reads as under:-

**163. No inducement to be offered.**—(1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Indian Evidence Act, 1872 (1 of 1872).

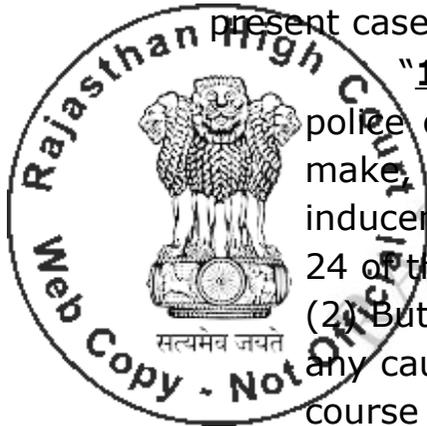
(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will: Provided that nothing in this sub-section shall affect the provisions of sub-section (4) of section 164.

**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 any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence: Provided further 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.]

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall





not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B. Magistrate.”



(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 person whose statement is so recorded.

[(5A) (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, subsection (1) or sub-section (2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of



examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1 of 1872) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.]

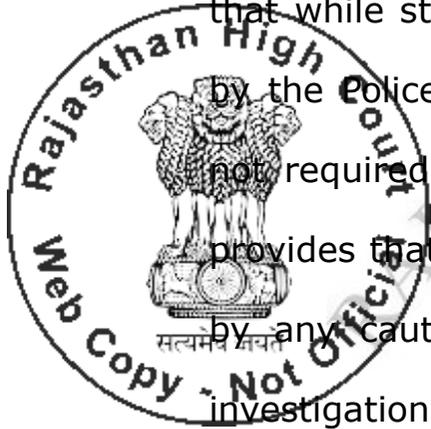
(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

12. From the perusal of the aforesaid provisions, it is apparent that while statement of witnesses can be examined and recorded by the Police under Section 161 Cr.P.C. and such statements are not required to be signed in terms of Section 162. Section 163 provides that no Police Officer or any other authority shall prevent by any caution or otherwise any person in the course of any investigation under this Chapter any statement which he may be deposed to make on his own freewill.

13. The question before this court is that if such is the case as alleged by the petitioner who has been prevented to give his statement of his own freewill and his statement under Section 161 Cr.P.C. has been recorded against his will, can he move an application before the Magistrate for getting his statement recorded in support of the complaint made by him.

14. A close look at the judgment passed by the Supreme Court in the case of **Jogendra Nahak & Others** (supra) shows that the Apex Court had dealt with the provisions of the aforesaid Chapter and has observed as under:-

"7. The argument addressed is that if the Magistrate has power to record a statement under Section 164 of the Code at the instance of a witness, this is not the stage to consider whether witness has approached the Magistrate with bonafides or not as that aspect should have been left to the trial court to decide while considering the reliability of his testimony. At present we may decide the question whether a witness can, on his own motion, approach a Magistrate





with a request that his statement may be recorded under Section 164 of the Code.

15. Section 160 of the Code deals with the powers and duties of the police regarding examination (including interrogation) of persons who are acquainted with the facts and circumstances of the case and also regarding the use of such statements in the trial. It is in the above context that Section 164 is incorporated in this Chapter for 'recording of confessions and statements.

16. By Sections 165 to 173, the Code prescribes provisions which the police have to adopt as follow up steps in the matter of investigation and also the requirements to be complied with on conclusion of such investigation.

17. Section 173 says that on completion of investigation the officer-in-charge of police station shall forward a report to the Magistrate, stating, inter alia, the names of the persons who appear to be acquainted with the circumstances of the case. Sub-section (5) of Section 173 requires that the police officer shall forward to the Magistrate along with the said report (a) all documents or relevant extracts thereof on which the prosecution proposes to rely and (b) the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

18. Even when a further investigation, as indicated under Sub-section (8) is conducted by the police, they have to comply with all the requirements contained in the preceding sub-sections.

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 court will be further crowded with a number of such intending witness brought up at the behest of accused persons."

15. And after considering the law it has reached to the following conclusion, which reads as under:-

"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 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 Magistrate 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 rightly 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.”

16. Thus, in clear terms, the Supreme Court has held that Magistrate does not have the power to record the statement of a person unsponsored by the Investigating Agency. In other words, it has empowered only the Investigating Agency to move an appropriate application for recording the statement of any

witnesses. The submission of the learned counsel for the petitioner is that the Apex Court was not considering the aspect regarding the statement being wished to be recorded of complainant/ victim being not considered is an argument noticed to be rejected. A presumption has to be drawn that the Apex Court while laying down the law would apply in all the circumstances and therefore in view of the aforesaid judgment, I am disinclined to accept the present petition and reject the same.

17. With the aforesaid observations, the criminal misc. petition is accordingly dismissed.

18. All pending applications shall also stand disposed of.

(SANJEEV PRAKASH SHARMA),J

Karan Bhutani /531/25

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