

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

S.B. Criminal Writ Petition No. 832/2020

Satyaprakash Vaishnav

----Petitioner

Versus

1. State Of Rajasthan, Through Principal Secretary Home Department Government Of Raj. Secretariat Jaipur
2. The Superintendent Of Police, Office Of Superintendent Of Police Baran Dist. Baran Raj.

----Respondents

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For Petitioner(s) : Mr. Anurag Kalavatiya, Adv.

For Respondent(s) : Mr. Arvind Bhadu, PP

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

**Order**

**19/11/2020**

1. The Investigating Officer moved an application before the Learned Magistrate for getting statements under section 164 Cr.PC recorded of the minor prosecutrix in terms of section 26 of the POCSO Act in the presence of the parents. However, Learned Judicial Magistrate has refused to accept the application against which revision was filed before the learned District & Sessions Judge, Baran who has also rejected the revision vide order dated 20.10.2020.

2. Learned counsel for the petitioner submits that the earlier statement recorded under Section 164 Cr.P.C. was not in accordance with the provisions of Section 26 of the POCSO Act, 2012 and therefore, the Investigating Officer was having right to

get the statements of the prosecutrix recorded again before the learned Judicial Magistrate.

3. Learned counsel for the complainant submits that mere apprehension that there might be lot number of such applications being moved by the concerned IO and there is a possibility of the concerned prosecutrix being tutored, cannot be a ground for rejecting such an application.

4. Learned Public Prosecutor supports the application and also submits that once an Investigating Officer has moved an application, it should be allowed.

5. I have considered the submissions.

6. Section 164 Cr. PC reads as under:-

(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 authorize 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, sub-section (1) or sub-section (2) of section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code, 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 video graphed.

(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 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.

7. The Supreme Court in **Jogendra Nahak & ors. vs. State of Orissa & Ors. (2000) 1 SCC 272** has held as under:-

"15. Section 160 of the Code deal 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.

20. In re C.W. Casse (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."

a. 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."

8. Thus it is exclusive domain of the IO alone to move an application for getting statement recorded of any witness u/s 164 Cr.P.C. On moving such an application, the Magistrate will have to get the statement recorded.

9. In **SBCRLMP No. 3681/2020 Smt. Lada Devi vs. State of Rajasthan**, taking into consideration the overall circumstances, this Court directed the concerned IO to get the statement of the girl-prosecutrix again recorded by moving an application under Section 164 Cr.P.C. before the concerned Judicial Magistrate.

10. In the present case also, the circumstances show that the prosecutrix, who are minor in age, have not given their statements in terms of Section 26 of the POCSO Act. Provisions of POCSO Act are mandatory in nature.

In view, thereof, the application moved by the Investigating officer could not have been rejected on the grounds which do not emanate from the facts. Merely because there may be a number of applications in other cases, the Judicial Magistrate cannot be allowed to shirk from his responsibilities.

Learned District & Sessions Judge ought to have allowed the revision in this regard filed by the Dy. S.P., Baran.

13. Accordingly, the orders dated 20.10.2020 and 01.10.2020 are set aside and the application moved by the Investigating Officer is allowed.

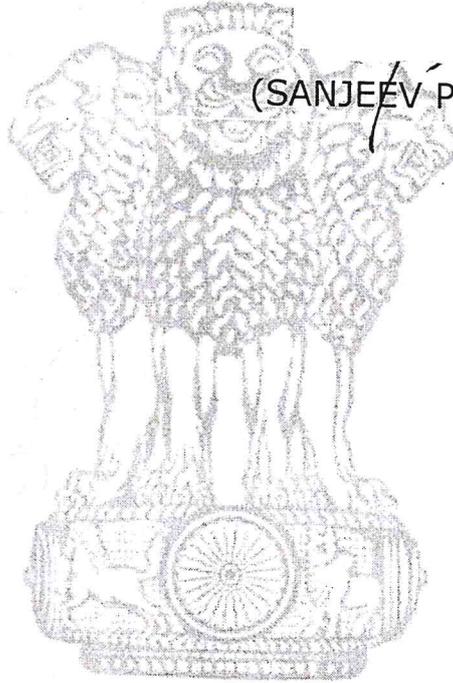
14. Learned Judicial Magistrate shall now immediately proceed to record the statements of the prosecutrix, however, the procedure as laid down under Section 26 of the POCSO Act shall be strictly followed.

15. It is further directed that in future, as and when a case relating to POCSO Act comes up before any Magistrate, they are bound to follow the provisions of Section 26 of the POCSO Act while recording the statements under Section 164 Cr.P.C. at the first instance.

16. With the aforesaid directions, the writ petition is allowed.

(SANJEEV PRAKASH SHARMA),J

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