

Court No. - 52 WWW.LIVELAW.IN

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 31695 of 2021

Applicant :- Dharmendra @ Patra

Opposite Party :- State of U.P.

Counsel for Applicant :- Sanjay Pathak, Arvind Kumar Tewari

Counsel for Opposite Party :- G.A.

With

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 20006 of 2021

Applicant :- Prem Narayan Vishwakarma And Another

Opposite Party :- State of U.P.

Counsel for Applicant :- Surendra Mohan Mishra, Akhilesh Singh,
Saroj Kumar Dubey

Counsel for Opposite Party :- G.A.

With

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 30288 of 2021

Applicant :- Nandlal

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Shesh Narain Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Samit Gopal, J.

1. Heard Sri Sanjay Pathak learned counsel for the applicant Dharmendra @ Patra, Sri Saroj Kumar Dubey learned counsel for the applicants Prem Narayan Vishwakarma and Vijay Kumar Vishwakarma, Sri Shesh Narayan Mishra learned counsel for the applicant Nandlal, Sri Sanjay Kumar Singh, learned Additional Government Advocate and Sri Akhilesh Kumar Tripathi, learned Brief Holder for the State and perused the material on record.

2. These three bail applications have been connected together and have been argued on a particular issue which is common in all of them. Even in other matters, the same is being encountered by this Court.

3. As of now the merits of the cases are not being gone into. The only specific question which is being dealt with is as follows:

"Whether the Investigating Officer of a case can after recording the statement of a prosecutrix/victim once under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') who has supported the prosecution case and then in her statement recorded under Section 164 of the Code recorded before a Magistrate has given a different version and more particularly does not state about any wrongful act being

committed on her as has been recorded in her statement under Section 161 of the Code earlier, can again interrogate the prosecutrix/victim under Section 161 of the Code and put specific questions to her pertaining to the two different versions given by her in the said two statements and then record the statements and proceed with the Investigation further ?"

4. These three cases in hand are examples of the same activity as done in the matter during investigation.

5. The powers of Police to investigate a matter is not under dispute. Reiterating the same, Investigation usually starts on information regarding to the commission of an offence given to the Police Officer, In-charge of a Police Station and recorded under Section 154 of the Code. If from information so received or otherwise the Officer In-charge of the Police Station has reason to suspect the commission of an offence, he or some other officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case, and if necessary, to take measures for the discovery and arrest of offenders. Investigation thus primarily consists of the ascertainment of the facts and circumstances of the case. As per the definition of the word "investigation" as per Section 2(h) of the Code, it includes the proceedings under the Code for collection of evidence conducted by a Police Officer. The Investigating Officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has the authority to examine the said person orally either by himself or by a duly authorized person on his behalf. The Officer may reproduce his statement into writing and such writing is available in the trial that may follow for use in the manner provided in this behalf in Section 162 of the Code. Section 155 of the Code empowers the Officer In-charge of a Police Station to make a search at any place for seizure of anything which is believed to be necessary for the purpose of investigation. He also has the power to arrest person or persons suspected of the commission of the offence under Section 41 of the Code.

6. He has to enter the proceedings in a diary on day to day basis, copy of which has to be sent to the Magistrate concerned. Upon completion of investigation he may decide to release the suspected accused if he is in custody on his executing a bond. If further it appears to him that there is sufficient evidence or reasonable ground to put the accused to trail, he may take necessary steps therefor under Section 170 of the Code. In either case he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed Form.

7. Thus as per the Code, the investigation consists of the following steps:-

- (i) proceeding to the spot;
- (ii) ascertainment of the facts and circumstances of the case;
- (iii) discovery and arrest of a suspect;

(iv) collection of evidence regarding to the commission of offence which may consists of examination of various persons including the accused and reducing their statements into writing, if he needs so fit, search of places for seizure of things necessary for investigation to be produced at the trial, and lastly;

(v) formation of an opinion as to whether the material collected is sufficient to be placed before the Magistrate for putting the accused to trial.

8. Section 164 of the Code also gives power to the investigating agency to forward any person for recording of his confession and the statements before a Magistrate. In the case of **Raju Vs. State of U.P. and others : 2012 (78) ACC 111**, a Division Bench of this Court in paragraph 9 has observed as follows:

"9. We are of the opinion that the statement of an accused or victim or a witness which is to be recorded under Section 164 Cr.P.C., might be a statement recorded during the course of investigation of a case but that is quite different from the statement of witnesses recorded under Section 161 Cr.P.C. The reason is that there is a full fledged provision under Section 164 Cr.P.C. authorizing the recording of such a statement by a judicial Magistrate. The practise and the procedure which is followed in recording such a statement is that the police has to file an application before the head of Magistracy, who is presently the Chief Judicial Magistrate, requesting for the statement of such a person to be recorded. On receipt of such an application, the Chief Judicial Magistrate gets the relevant record before him and thereafter passes an order in token of receipt of such an application and further passes an order upon the same and thereafter direct by the same order for deputation of a Magistrate to record the statement. He may also record the statement himself. In case of other judicial Magistrate being deputed for recording the statement under Section 164 Cr.P.C., the witness along with the judicial record is transmitted to the deputed judicial Magistrate, who records the receipt of the record for the purpose and proceeds to record the statement and as soon as it is recorded, he again records the recording of such a statement in the order-sheet of the same record and transmits the record along with the recorded statement under Section 164 Cr.P.C. to the Chief Judicial Magistrate. Thus, the whole exercise appears judicial in nature. Not only that, it further indicates that the orders drawn in the above behalf as also the statement recorded are the records of the judicial acts performed by him in discharge of official and judicial functions by a Judge. The recording of the statements is enjoined by the law of the country and the record in the form the recorded statement under Section 164 Cr.P.C. is the record of the act of a public servant discharging his official and

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judicial functions. In addition to that the statement recorded under Section 164 Cr.P.C. is never taken out of the judicial record nor it is handed over to the Investigating Officer or any other police officer. The copy of the statement is allowed to be copied in the relevant part of the case dairy. Thus, the recorded statement under Section 164 Cr.P.C. assumes the part of the judicial record of that particular case and, as such, it is the part of the case. This is the reason that we have pointed out that in spite of being a statement of a witness or any other interested person during the course of investigation, the recorded statement under Section 164 Cr.P.C. could not, strictu sensu, be said to be a mere statement during investigation which could be treated as part of the case dairy. It could never be put at par with a statement under Section 161 Cr.P.C. and as such it could never be said to be a part of case dairy."

9. In the matters in hand the prosecutrix/victim after giving her statement under Section 161 of the Code levelling allegations of rape against the accused, has given up the same in her statement recorded under Section 164 of the Code. The Investigating Officer then records the statement of the prosecutrix/victim again under Section 161 of the Code and puts specific questions to her with regards to the said variations in her statements and records her answers to the said questions.

10. The said action of the Investigating Officer is not appreciable. Putting questions to the prosecutrix/victim with regards to the change in version by her in the statements under Section 161 of the Code and in the statement under Section 164 of the Code, clearly shows disrespect to the courts who have recorded the statements under Section 164 of the Code. The said statements under Section 164 of the Code recorded by Judicial Magistrates is in discharge of their judicial functions and the act of recording of the said statements was a judicial act which was performed by a public servant while discharging his judicial functions. The said document is relevant under Section 35 of Indian Evidence Act and also under Section 72 of Indian Evidence Act and, as such, assumes the character of being a public document.

11. The statement made by the prosecutrix/victim under section 164 of the Code before the Magistrate stands on a high pedestal and sanctity during the course of investigation than that of her statement recorded under section 161 of the Code by the Investigating Officer.

12. Though the Investigating Agency has unfettered powers to investigate a matter, but they cannot on their whims and fancy adopt a procedure which would clearly be challenging the sanctity of an act done by a court of law while discharge of a judicial function. By putting questions to the prosecutrix/victim in her second statement under Section 161 of the Code after recording of the statement under Section 164 of the Code relating to the different versions in the said two statements, the Investigating Officer cannot

frustrate the same and also make an attempt to make the purpose of the said exercise look a farce.

13. The act of putting specific questions pertaining to the variations in the said two statements by the Investigating Officer is viewed with an impression of clearly challenging the authority of a judicial act. The Investigating Officers have clearly exceeded their jurisdiction by proceedings to investigate in such a manner. The same appears to be with a sole purpose to frustrate the statements recorded by a Magistrate.

14. Even the Uttar Pradesh Police Regulations while dealing with the particular duties of Police Officers for "Investigations" in its Chapter XI do not in any manner authorize Investigating Officers to act as such. Although Paragraph-107 of the same states that the Investigating Officer would not act as a mere clerk while recordings of statements but has to observe and infer. Paragraph-109 empowers for recording of supplementary statements. But the manner in which supplementary statements in the present matters have been recorded clearly show that they are for the sole purpose to put the variations to the witnesses and record the same.

15. This court thus finds that the manner in which the supplementary statements are recorded and the purpose for recording of the same is only and solely for frustrating the purpose of statements recorded under Section 164 of the Code and to negate and defeat the earlier statement of the prosecutrix/victim given under section 164 of the Code whether it is in favour or against the accused otherwise the sanctity of the statement under section 164 of the Code will lose its value. The same is neither the intent of Investigation nor is the purpose of it.

16. The Director General of Police, Uttar Pradesh Lucknow is directed to look into the said new trend of Investigation as adopted and issue suitable guidelines for such matter so that the sanctity and authority of judicial proceedings are maintained and they should not be frustrated by any act done during Investigation.

17. The Registrar (Compliance) of this Court and the learned counsels for the State are directed to communicate this order to the Director General of Police, Uttar Pradesh Lucknow for its compliance and necessary action within a period of one month from today and submit a compliance report within one week thereafter.

18. In so far as the matter relating to the prayer made under Section 439 of the Code of Criminal Procedure is concerned, let the matters be detagged with each other and be listed on 25-10-2021, as fresh before the appropriate Bench for consideration of the same.

19. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

20. The computer generated copy of such order shall be self-attested by the counsel of the party concerned.

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21. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(Samit Gopal, J.)

Order Date: - 1.10.2021

Naresh