

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on : 11th September, 2014*
Pronounced on : 24th September, 2014

+ CRL.M.C. 232/2005

RAM PHOOL SINGH Petitioner
Through : Mr. S.S. Gandhi, Sr. Advocate
with Mr. Abhishek Kishore &
Ms. Sakshi Kaul, Advocates

versus

STATE & ANR. Respondents
Through: Mr. Neeraj Kumar Singh, APP for
the State/R-1
Mr. Aditya V. Singh, Amicus
Curiae for R-2

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J

1. The Petitioner before this Court is a serving officer in Delhi Police, who was posted at PS Civil Lines in March, 1995. DD NO.3A dated 19.03.1995 registered at Police Station Civil Lines was assigned to him for necessary action in the matter. The said DD was recorded on the basis of information sent by Head Constable Virender Singh through PCO informing that two ladies have been spotted at 'Ghariwala Park' in suspicious condition.

2. The Petitioner along with Constable Satpal left for the spot. Since the incident disclosed by the Complainant had allegedly taken place within the jurisdiction of PS Nand Nagri, both the females i.e. the Complainant 'L' and her companion 'SK' were handed over to duty officer PS Nand Nagri on the same day and it was so recorded vide DD No. 10A at 2.50 p.m.

3. The case FIR No. 130/1995 dated 19th March, 1995 was registered at PS Nand Nagri and further investigation was in progress at that police Station. However, on the basis of written complaint dated 25th March, 1995 by the Complainant addressed to the Commissioner of Police against the present Petitioner leveling allegations of rape, an enquiry was conducted. Though, the allegations were found to be false but in the circumstances, the investigation was transferred to Crime Branch.

4. After conducting thorough investigation in the matter, the Crime Branch submitted the cancellation report with a prayer to seek direction for initiating action against the Complainant under Section 182 IPC. In the cancellation report the factum of the Complainant having got her statement recorded under Section 164 Cr. P.C. dated 1st August, 1995 before learned M.M. of her own accompanied by an Advocate was also incorporated. It was also mentioned that the Complainant had made complaints against the police officer in which detailed enquiry in the matter had been conducted at the level of superior officers but the complaints were found to be false. It was also mentioned that the Complainant, who was in the habit of filing false and frivolous complaint, is a chronic litigant having property dispute with her opponents.

5. Despite the fact that cancellation report in this case was submitted before the learned M.M. on 22nd August, 1995, the learned M.M. did not pass any order in the matter till Gurcharan Singh filed an application on 7th June, 2001 to ascertain the status of the case. It appears that thereafter the matter was taken up by learned M.M. who vide order dated 24th September, 2001, without recording reasons for not accepting the cancellation report summoned the accused persons for committing the offence punishable under Section 342/376 IPC. No justification was given in the said order as to why no action was required to be taken against the Complainant under Section 182 IPC.

6. Being aggrieved by the said order, the present Petitioner sought redressal of his grievance before the learned ASJ by filing Criminal Revision No. 7/2003. Learned ASJ, though referred the case law on the aspect as to when the power vested in the Court in revisional jurisdiction has to be exercised, vide order dated 24th November, 2004, dismissed the Revision Petition in a mechanical manner.

7. It is in the above circumstances that the Petitioner has invoked inherent powers of this Court with a prayer to quash the order dated 24th September, 2001 passed by the learned M.M. as well as the order dated 24th November, 2004 passed by the learned ASJ in Criminal Revision No. 7/2003.

8. The grounds on which the Petitioner has invoked the power of this Court under Section 482 Cr.P.C. are as follows:-

(i) In the FIR No. 130/1995 registered on 19th March, 1995 at PS Nand Nagri, the Complainant has leveled allegations of rape only against Bhavi Chand.

(ii) The MLC of the Complainant dated 19th March, 1995 prepared at GTB Hospital, Shahdara wherein also the alleged history given by 'L' was of being sexually assaulted once on the previous day, which can only be 18.03.1995. DD No.3A was assigned to the writ Petitioner on 19.03.1995. The details of the history recorded on the MLC is as under:-

“history of being hit followed by sexual assault yesterday. Patient was forcibly made to drink alcohol and was hit following which she became (?) unconscious. Patient does not recall sexual assault during unconsciousness. **Patient gives history of being sexually assaulted once, yesterday when she was fully conscious. Patient is married for eight years**”.

(iii) In the complaint dated 25th March, 1995 the Complainant for the first time leveled allegations of rape against the Petitioner. A detailed enquiry was conducted by Superior Officer and allegations were found not substantiated. Further investigation in the matter was conducted by the Crime Branch which submitted the cancellation report in the matter.

(iv) Statement under Section 164 Cr.P.C. recorded by learned M.M. on 1st August, 1995 unsponsored by investigating agency is inadmissible and cannot form basis to summon the Petitioner-accused.

(v) For 6 long years the learned M.M. did not pass any order on the cancellation report. The summoning order has been passed without giving any reasons for disagreeing with the cancellation report or recording satisfaction referring material on the basis of which the accused has been summoned. The learned M.M. has just vaguely

mentioned that there was enough material without referring to the details of said material in the summoning order.

(vi) Learned M.M. has also not dealt with the prayer of the Investigating Agency to initiate action against the Complainant under Section 182 IPC.

9. I have heard learned counsel for the Petitioner, learned APP for the State and Mr. Aditya V. Singh, learned Amicus Curiae for Respondent no. 2 appointed by this Court who has also filed brief written synopsis. The grievance of the present Petitioner is that there was no material before learned MM to summon the present Petitioner as an accused for committing the offence punishable under Section 342/376 IPC. Another ground on which the impugned orders have been assailed is that the statement of the Complainant under Section 164 Cr.P.C. being not at the behest of investigating agency, could not have been taken into account by the learned trial Court to summon the Petitioner on that basis by passing a non-speaking order. Learned counsel for the Petitioner has referred to *Atma Ram Singhal & Ors. Vs. State & Anr.*, 2007 V AD (DELHI) 717; *Kapil Garg Vs. State and Hari Singh Shekhawat Vs. State*, 2003 VI AD (DELHI) 599 and *Jogendra Nahak and others Vs. State of Orissa and others*, AIR 1999 SC 2565 in support of his submissions.

10. Learned Amicus Curaie for Respondent No.2 submitted that law laid down by Hon'ble Supreme Court in *Jogendra Nahak's* case (supra) is no longer an authoritative pronouncement as far as it relates to rape victims due to insertion of new provision 5A in Section 164 Cr.P.C. vide the Criminal Law Amendment Act, 2013. I do not find any force in the

contentions raised by learned Amicus Curaie for Respondent No.2 for the reason that the amendment in Section 164 CrPC nowhere nullifies the legal preposition laid down in **Jogendra Nahak's** case (Supra). Otherwise also, the said amendment does not have any retrospective effect.

11. The first question that arises for consideration is whether the learned MM was required to pass a speaking order while summoning the accused persons in a case where, while submitting cancellation report, action under Section 182 IPC has been recommended by the Investigating Agency. This issue has been considered in the case of **Atma Ram Singhal Vs. State** (supra) wherein the learned Magistrate without recording reasons summoned the Petitioners who were placed in column no. 2 in the charge-sheet. This Court while observing that the Petitioners were at least entitled to know as to why the learned Magistrate wanted to proceed against them, remanded the matter back to the learned Magistrate to consider the same afresh and pass appropriate orders. The relevant discussion in this regard appears in para nos. 8 to 10 which are extracted as under:-

“8. Thus, there is no doubt that even if the report discloses that no offence appears to have been committed, the Magistrate may disagree with the report and take a view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process. However, the question to be determined is as to when the MM decides to issue the process, notwithstanding the observations of the Investigating Officer; is he to indicate some reasons and reflect his thought process in the order as to why he is taking such a course.

9. *When the cancellation report is filed, the Complainant is given an opportunity to submit his objections to the said report. On receipt of the objections and hearing the Complainant, the Magistrate is required to apply his mind and to consider as to whether the report is to be accepted or not. However, in case the Magistrate decides to proceed further and orders summoning the accused, it is incumbent upon him to deal with the conclusion of the report instead of dismissing the same brusquely. This is so held by this Court in the case of Ajay Khandelwal v. State and Anr., 2003 (6) AD (Del) 485.*

10. *In the present case, the impugned order does not show any such consideration bestowed by the learned Magistrate. He has simply stated that he was not satisfied with the explanation given by the Investigating Officer in respect of "this specific allegation made in the complaint itself". What is the 'specific' allegation contained in the complaint to which the learned Magistrate was referring to and what was the 'explanation' which the Investigating Officer had tendered, which was not to the satisfaction of the learned MM, is not spelled out in the impugned order. No doubt, at this stage, while issuing the process, the learned MM is not required to give detailed reasons. However, when the report under Section 173 Cr.P.C. states that it appears that no case is made out, it is the duty of the Magistrate to at least indicate his mind as to why he still wanted to proceed in the matter and summon the accused persons."*

12. In the case of ***Kapil Garg (Dr.) Vs. State & Hari Singh Shekhawat Vs. State*** (supra) emphasis was laid on the need of recording the reasons while passing an order summoning the accused persons though investigating agency recommended closure of the case. The relevant para is reproduced below:-

"15. There is no gain saying that the provisions of Section 173 Cr.P.C. enjoin upon the Magistrate to satisfy himself

not only about the sufficiency of evidence but also the existence of ingredients of the offence on the basis of the material appearing in the final report submitted by the investigating agency while summoning the accused. However where the Investigating Agency/Officer-in-charge of Police Station recommends for closure of case on account of either insufficiency of evidence or the offences having not been made out, the Magistrate is required to not only give reasons for not agreeing with the report but also refer to the evidence and material on which he proposes to take cognizance of the offences by spelling out the ingredients of the offences. Similarly when a Magistrate decides not to take cognizance and to drop the proceedings on receiving the report forwarded u/s 173 Cr.P.C. concluding that an offence appears to have been committed, it is incumbent upon the Magistrate to give notice to the informant i.e. Complainant and provide him an opportunity to be heard at the time of consideration of the report. Here is a case where converse proposition of law was involved before the Supreme Court. Proposition was whether the Complainant/Informant/or Injured is required to be heard before the Magistrate decides not to act upon the final report u/s 173 Cr.P.C. and decides to drop the proceedings inspite of the report that an offence appears to have been committed. Supreme Court provided the following answer:-

"There can, therefore, be no doubt that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2) (i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2) (i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding against some of the persons mentioned in

the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

13. In the case of ***Jogendra Nahak Vs State of Orissa*** (Supra), the Supreme Court has dealt with the circumstances when the power under Section 164 Cr.P.C. can be exercised by a Magistrate. The relevant paras are reproduced below:-

"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.”

14. The order passed by the learned M.M. on 24th September, 2001 whereby the present Petitioner was summoned, reads as under:-

“I have heard the learned counsel and have perused the cancellation report, I have seen the cancellation report and the statement of Prosecutrix record under Section 164 Cr.P.C. There is sufficient evidence for summoning accused Bhan Chand, Gurcharan, Triloki, Billu, Ram Singh for offence under Section 342/366/376 IPC. There is also sufficient evidence for summoning accused SI Ram Bhool for offence under Section 342/376 IPC. All the accused be summoned on filing of P.F. for 19.12.01.”

It is not in dispute that except the statement under Section 164 Cr.P.C. made by the Complainant before learned M.M. of her own, there is absolutely no material against the present Petitioner justifying his summoning for committing the offence punishable under Section 342/376 IPC.

15. When this issue was agitated before the learned ASJ by filing Revision Petition being Crl. R. No. 7/2003, after referring to the statement of the Prosecutrix under Section 164 Cr.P.C. which formed basis for summoning of the present Petitioner as an accused, learned ASJ preferred not to give any reason as to how a non-speaking summoning order was legally sustainable and how this case could not be termed to be one calling for interference in exercise of revisional jurisdiction. Learned ASJ also failed to discuss how the manifest error in law by learned M.M. which has resulted in summoning of the present Petitioner on the basis of a statement under Section 164 Cr. P.C. which could not have been looked into by the learned M.M., and has resulted in miscarriage of justice, was not required to be interfered with. The reasons recorded by learned ASJ while dismissing the Revision Petition are as under:-

“4. From the perusal of the case record, it is clearly reflected that no doubt the statement of Prosecutrix Laxmi was recorded by learned M.M. on dated 1.8.95 in pursuance of an application as moved on behalf of Prosecutrix in this regard. The perusal of said statement of Prosecutrix as recorded by Ld. M.M. U/s 164 Cr.P.C. on dated 1.8.95 clearly found reflected about commission of rape by SI Rambhool (Petitioner herein) as against the Prosecutrix on the night of 18.3.95 inside the police both. The judgment as referred and relied by Learned Counsel for the Petitioner can be of no help for the Petitioner at this stage.

6. By taking the due from the aforesaid judgments and applying the same to the facts and circumstances of the present case as I do not find any glaring legal infirmity or perversity in the aforesaid impugned order dated 24.9.2001 as rendered by Ld. M.M. whereby summoning the accused persons including the Petitioner which warrant my interference by exercise of revisional jurisdiction. I am of

the considered view that this revision deserve dismissal and is hereby dismissed.”

16. Once the controversy is limited to the extent that except the statement of the Complainant recorded under Section 164 Cr.P.C. there is not an iota of evidence against the present Petitioner, this petition has to be disposed of only on this issue. Whether the statement made by the Prosecutrix under Section 164 CrPC of her own can be looked into by the Court has been discussed in detail by Hon'ble Supreme Court in the case of **Ajay Kumar Parmar Vs. State of Rajasthan**, AIR 2013 Delhi 633. In that case FIR under Section 342/376 IPC was registered on the statement of the Prosecutrix that she had been raped by the appellant Ajay Kumar Parmar. She appeared before the C.J.M., Sirohi with an application stating that the police was not investigating the case in a correct manner and expressed her wish to make her statement under Section 164 Cr.P.C. The C.J.M., Sirohi had disposed of the application on the same date directing the Judicial Magistrate, Sheoganj to record her statement under Section 164 Cr.P.C. The Prosecutrix appeared before the Judicial Magistrate, Sheoganj on the same day and the learned Judicial Magistrate directed the Public Prosecutor to produce the case diary by 4 p.m. on that very day. When the Public Prosecutor was not able to produce the case diary by 4 p.m., time was given for doing the needful by 10 a.m. next day and the order was complied with by producing the case diary. Thereafter, the statement of the Prosecutrix under Section 164 Cr.P.C. was recorded after she was identified by the lawyer.

In the above noted case, one of the contentions raised was whether the statement of the Prosecutrix recorded under Section 164 Cr.P.C. who had appeared before the Magistrate independently without any assistance of police, is acceptable. The legal position in that regard was summarized as under:-

“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.”

17. The inherent powers vested in High Court under Section 482 Cr.P.C. are wide and can be judiciously and cautiously exercised to prevent abuse of process of law and to advance the cause of justice. The scope and ambit of powers of High Court under Section 482 CrPC has been considered and explained in catena of judgments. In the case of ***P.Ramachandra Rao v. State of Karnataka 2002 (4) SCC 578***, it has been held :

“.....In appropriate cases, inherent power of the High Court under Section 482 can be invoked to make such orders, as may be necessary, to give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any Court, or otherwise, to secure the ends of justice. The power is wide and, if judiciously and consciously exercised, can take care of almost all the situations where interference by the High Court becomes necessary on account of delay in proceedings or for any other reason amounting to oppression or harassment in any trial, enquiry or proceedings...”

18. Reverting to the facts of the present case, undisputedly there is no material against the present Petitioner except the statement made by the Prosecutrix of her own under Section 164 Cr.P.C. before the learned M.M. on 1st August, 1995 wherein she made allegations against the present Petitioner of committing rape on her. Prior to that neither in FIR No. 130/1995 nor at the time of preparation of her MLC, any such

statement was made against the present Petitioner. The present Petitioner had gone to Ghariwala Park when DD No. 3A dated 19.03.1995 registered at PS Civil Lines was assigned to him and after questioning the Complainant, he handed over the Complainant to the duty officer of the PS Nand Nagri as the offence was allegedly committed within the jurisdiction of PS Nand Nagri.

19. The impugned order by the learned M.M. has been passed without recording any reason as to why the cancellation report needs to be rejected especially when it was emerging on record that it was the Complainant who made a false complaint warranting action against her under Section 182 IPC. It was necessary for learned M.M. to pass a speaking order by recording reasons and referring to the supporting material for differing with the cancellation report to justify the summoning of the Petitioner for committing the offence punishable under Sections 342/376 IPC. He should have referred to the contents of the statements and documents on the basis of which he formed an opinion that the material was enough to summon the accused persons which included the Petitioner. Since the summoning order against the Petitioner is based only on statement under Section 164 Cr.P.C. which is unsponsored by the Investigating Agency, in view of the legal position discussed above, learned M.M. could not have taken cognizance on the basis of that statement under Section 164 Cr.P.C.

20. Since the impugned orders dated 24th September, 2001 passed by learned MM and dated 24th November, 2004 passed by learned Addl. Session Judge in Crl.Rev.P. No.7/2013 have caused grave miscarriage of

justice it is a fit case for exercise of inherent power to quash the said impugned orders.

21. In view of above discussion, the writ petition is allowed and the impugned order dated 24th September, 2001 passed by learned MM and dated 24th November, 2004 passed by learned Addl. Session Judge in Crl.Rev.P. No.7/2013 are hereby quashed.

22. TCR be sent back alongwith copy of this order for information and compliance.

Dasti, as well.

(PRATIBHA RANI)
JUDGE

SEPTEMBER 24, 2014
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