

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31-07-2015

CORAM

THE HON'BLE MR.JUSTICE P.DEVADASS

Crl.A.No.131 of 2014

and

M.P.No. 2 of 2014

Sivakumar

...Appellant/Accused

Vs.

State by  
The Inspector of Police,  
W-18, M.K.B. Nagar,  
All Women Police Station,  
Chennai.

...Respondent/Complainant

This Criminal Appeal is filed under Section 374 of Cr.P.C., to set aside the judgment passed in S.C.No.371 of 2012 on 17.1.2014 by the Additional Sessions Judge, Mahila Court, Chennai.

For Appellant : Mr.R.C. Paul Kanagaraj for  
Mr.S.V.D.Rajendra Prasad &  
Mr.C.P.Naresh Kumar

For Respondent : Mr.P.Govindarajan,  
Additional Public Prosecutor.

JUDGMENT

The sole accused in the sessions case in S.C.No.371 of 2012 on the file of the learned Additional Sessions Judge, Mahila Court, Chennai is the appellant.

2 He has been tried for charges under section 376, 506(i), 354 I.P.C. and Sec.4 of Tamilnadu Prohibition of Harassment of Women Act, 1998.

3. Upon appreciating the evidence, the trial Court found him not guilty under section 506(i) of I.P.C., however, found him guilty on the other charges and sentenced him as detailed below:

| Conviction                                                   | Sentence                                             |
|--------------------------------------------------------------|------------------------------------------------------|
| (i) 376 I.P.C.                                               | 10 years R.I. and fine Rs.10,000/- i/d 3 months R.I. |
| (ii) 356 I.P.C.                                              | 3 years R.I. and fine Rs.5,000/- i/d 6 months S.I.   |
| (iii) Sec.4 of T.N.Prohibition of Women Harassment Act, 1998 | 3 years R.I. And fine Rs.10,000/- i/d 6 months S.I.  |

4. The prosecution case runs as under:

(1) The accused and P.W.2 are spouses. Their daughters are P.Ws.1 and 4. P.W.7's daughters are P.Ws.2 and 4 and sons are P.Ws.3 and 14. P.W.5's son is P.W.6.

(2) The accused was running a Sports shop in Chennai. He lived along with his wife and children at door No.35, 4<sup>th</sup> street, Thendral Nagar, Vyasarpadi, Chennai 39. P.W.1 was studying B.Com. course in a Womens College in Chennai.

(3) P.W.8 Dr.Suresh, Managing Director, Pavithra Hospital, a private clinic, on 10.6.2010 treated P.W.1 for she having consumed certain sleeping tablets (Ex.P4 Medical certificate).

(4) On 2.2.2011, P.W.16 Jamuna Rani, Inspector of Police, W-18, All Women Police station, M.K.B.Nagar, Chennai received Ex.P15 complaint of P.W.1 from the Deputy Commissioner of Police, Puliyanthope. In her complaint, P.W.1 alleged that the accused gave her continuous sexual torture and also raped her. P.W.16 registered this case (Ex.P16 F.I.R.).

(5) P.W.16 took up her investigation. She examined P.Ws.1 and 2 and recorded their statement. Through Court P.W.16 sent P.W.1 for medical examination. P.W.10 Dr.Vijayalakshmi, Assistant Professor, R.S.R.M. Hospital, Chennai examined P.W.1. She did not see any external injury on her private part. Her vagina admitted finger. She opined that she had been subjected to sexual intercourse (Ex.P8 Certificate).

(6) P.W.16 also examined P.Ws.3 to 7 and 14 and recorded their statement. She visited the scene house. Prepared Ex.P17 Observation Mahazar in the presence of Sankar and Mari. She drew Ex.P8 Rough sketch.

(7) On the requisition of P.W.16, P.W.11 XVIII Metropolitan Magistrate, Egmore, Chennai recorded Ex.P9 statement of P.W.4 under section 164 Cr.P.C. and P.W.12 VII Metropolitan Magistrate, Egmore, Chennai recorded Ex.P10 statement of P.W.1 under section 164 Cr.P.C.

(8) On 19.2.2011, P.W.16 seized Samsung touch screen Cellphone, LG. Cellphone with sim cards etc. in the presence of Iyappan and Suresh. P.W.16 examined Abirami theatre owner. She also examined P.W.1's Professor in W.C.C. College and seized Ex.P21 Attendance Register. P.W.16 produced the said items under Form 95 to the Court with Ex.P22 requisition to send them to forensic Lab for analysis and report.

(9) P.W.13 Hemavathy, Assistant Director, Computer Section, Forensic Lab, Chennai found Cellphone No.9840349553 is in the name of Charles (P.W.14). There is conversation of a man and woman recorded in M.O.1 C.D. (Ex.P13 Analysis report). P.W.13 sent them to P.W.15 Thirunavukarasu of Physics Department in the Forensic Lab, Chennai. PW.15 examined them. On comparison, the male voice and the female voice in the conversation tallied with that of the accused and P.W.1 respectively (Ex.P14 report).

(10) On 3.10.2011, at about 2 p.m. in his Win Sports shop at No.11, Walajah Road, Chennai, P.W.16 arrested the accused and send him to judicial custody. On her requisition Ex.P5, P.W.9 Dr.Sathyamoorthy examined him and found him capable of performing sexual act. (Ex.P6 report).

(11) Concluding her investigation, on 25.1.2000, P.W.16 filed the final report against the accused before the concerned Court for offences under section 376, 506(i), 354 of I.P.C. and Sec.4 of Tamilnadu Prohibition of Women Harassment Act.

5. Upon hearing both and on consideration of the final report and the documents attached thereto, the trial Court framed charges under Sections 376, 506(i), 354 of I.P.C. and Sec.4 of Tamilnadu Prohibition of Women Harassment Act as against the accused. The accused pleaded not guilty to the charges.

6. To substantiate the charges, prosecution examined PWs-1 to 16, marked Exs.P-1 to P-22 and exhibited MOs-1 to 4.

7. The trial Court examined the accused under Section 313 Cr.P.C. on the incriminating aspects in the prosecution evidence. He denied the offence. He did not let in defence evidence.

8. Appreciating the said evidence and the arguments of both sides, the trial Court convicted and sentenced him as already stated.

9. Mr.R.C.Paul Kanagaraj, learned counsel for the appellant contended that suspicion, however, strong may not take the place of legal proof. The charges framed against the appellant must be proved beyond all reasonable doubts by legal evidence. In this case, it was not done so. In this connection, the learned counsel cited JAHARLAL DAS VS. STATE OF ORISSA (1991 A.I.R. 1388).

10 The learned counsel for the appellant also contended that all the main prosecution witnesses have turned hostile. They did not adduce evidence as against the accused. In such circumstances, the evidence of such witnesses cannot be used against the accused to record a finding of guilty.

11 The learned counsel for the appellant also submitted that statement given under section 164 Cr.P.C. cannot be used against the accused. In this connection, the learned counsel cited R.PALANISAMY VS. INSPECTOR OF POLICE, b-7 RAMANATHAPURAM POLICE STATION, COIMBATORE (2013-2 L.W.(CrI.) 169). However, in this case, the trial Court has used the statement given by P.W.1 under section 164 Cr.P.C. to convict the accused especially when P.W.1 herself had turned hostile.

12 The learned counsel for the appellant also contended that using of electronic evidence also must be let in in accordance with Indian Evidence Act. However, in this case, it was not done so. In this connection, the learned counsel for the appellant cited ANVAR P.V. VS. P.K.BASHEER AND OTHERS (2014)10 SCC 473) and SANJAYSINH RAMRAO CHAVAN VS. DATTATRAY GULABRAO PHALKE AND OTHERS (2015)3 SCC 123).

13 The learned counsel for the appellant referring to Ex.P13 Forensic Scientist report, oral conversation stated to have been taken place between the accused and P.W.1, submitted that in the report 3.2.2011 is mentioned. However, Ex.P15 F.I.R. itself was on 12.1.2011. Thus, there is weakness and incongruity in the voice recording evidence pressed into service in this case.

14 The learned counsel for the appellant contended that the conviction recorded by the trial Court was not on the basis of legal evidence.

15 On the other hand, the learned Additional Public Prosecutor submitted that there is positive medical evidence of P.W.10. P.W.1 had confirmed that her giving of Ex.P10 statement under section 164 Cr.P.C. to P.W.12, a Judicial Officer. There is clinching electronic evidence which was analysed by experts P.Ws.13 and 15. Thus, conviction has been rightly recorded and the appellant has been punished accordingly.

16 I have anxiously considered the rival submissions, perused the entire materials on record, the impugned judgment and the decisions cited by the learned counsel for the appellant.

17 Out of the charges framed, appellant has been acquitted from the charge under section 506(i) of I.P.C. There is no appeal as against that by the State nor by the victim or by somebody on her behalf. In the circumstances, acquittal of the accused from the charge of criminal intimidation under section 506(i) of I.P.C. has become final.

18 Now, the question before us is whether the prosecution has established the charges under section 376, 354 I.P.C. and Sec.4 of Tamilnadu Prohibition of Women Harassment Act beyond all reasonable doubts.

19 The charges against the accused are very serious and grave in nature. The accused is accused of having raped his own daughter and continuously subjected her to sexual torture. In such circumstances, the Court must be very serious of prosecution proving those charges.

20 In this connection, JAHARLAL DAS VS. STATE OF ORISSA (1991 A.I.R. 1388) the Hon'ble Apex Court observed as under:

'No doubt the offence is a shocking one but the gravity of the offence cannot by itself overweigh as far as legal proof is concerned. Invariably in such cases a person last seen with the victim, unless otherwise there are circumstances prima facie exonerating him, would be the prime suspect but in the ultimate judicial adjudication suspicion, howsoever strong, cannot be allowed to take the place of proof.'

21 One's right of presumption itself is his basic human

right. It is his birth right. It is one facet of human (individual) right. The guilt or allegation or charges made against a person must be proved beyond all reasonable doubts. (See WOOLMINGTON VS. DIRECTOR OF PUBLIC PROSECUTION (1935) A.C 462). Thus, suspicion, however, strong may not take the place of legal proof. A conviction of a criminal Court must be based on legal evidence after a fair trial and that cannot be exchanged for conjectures and surmises.

22 Now, in this case, the accused is accused of having committed sexual violence on his minor daughter P.W.1. It is also alleged that he has misbehaved with his other daughter P.W.4. P.W.1 gave Ex.P10 statement under section 164 Cr.P.C. to P.W.12 the learned VII Metropolitan Magistrate, Egmore, Chennai. In its impugned judgment, the trial Court freely used P.W.1's said statement to record conviction as against the accused.

23 In R.PALANISAMY VS. INSPECTOR OF POLICE, b-7 RAMANATHAPURAM POLICE STATION, COIMBATORE (2013-2 L.W.(Cr1.) 169), a Division Bench of this Court to which I am also a party had occasion to go elaborately as to use, value and objective behind statements recorded under section 164 Cr.P.C. from witnesses, what is their nature, whether it can be used against the accused, whether it can be used by the accused in his favour have all been elaborately considered.

24 It is profitable here to note the following from R.PALANISAMY (supra):

'132. It is relevant here to note the aspects relating to the recording of statement of witnesses contained in Section 164 Cr.P.C., they runs as under :

"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 further x x x x x x x x

(2) x x x x x

(3) x x x x x

(4) x x x x x

(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.

(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."

33. The objective behind recording of statement of a witness under Section 164 Cr.P.C. is that it is for an assurance that the investigation is going on in right direction, it is going against a right person and, a belief that it will instill a sense of feeling in the mind of the deponent that later he should not resile from it. A feeling that he has been tied down to his such earlier statement.

34. In practice, resort being made to Section 164 Cr.P.C. by the Investigating Officers mainly when the case is in the investigation stage. Section 164 Cr.P.C. enables recording of statement of witnesses by the Magistrate and confession from the accused. The statement of witness has to be recorded like a statement recorded from a witness in the court. Before recording the statement, oath has to be administered to the witness. But, such recording of statement is not like recording of confession

from the accused. Only before and after recording a confession, various precautionary measures including giving of reflection time to the accused has been prescribed. This rigorous exercise need not be followed for recording the statement of a witness under Section 164 Cr.P.C.

35. However, in many cases, as in the present case, we have seen that even while recording the statement of a witness under Section 164 Cr.P.C., the learned Magistrates are following the procedure that they have to follow before recording a confession from the accused, although such recording of the statement will not make the statement invalid or unreliable, but, it is a needless exercise, not even prescribed in Section 164 Cr.P.C.

36. A statement given by a witness u/s.164 Cr.P.C., is like a 'previous statement' given

during investigation u/s.161 Cr.P.C. It is not 'substantive evidence' adduced before the Trial Judge, because it was not recorded in the presence of the accused. Because it was recorded - 'res inter alia acta' - recorded behind the back of the accused. Because it was recorded from a witness during investigation. Besides giving it to a police officer, it was also given to a Magistrate.

37. With regard to the value to be given to a statement recorded under Section 164 Cr.P.C., in RAM KISHAN SINGH VS. HARMIT KAUR [AIR 1972 SC 468], the Hon'ble Apex Court held as under :

"8. A statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness....."

38. Under Section 161 Cr.P.C., during investigation, the Investigating Officer can orally examine any person acquainted with the facts of the case. When he reduces the true account of it, then it becomes a statement under Section 161 Cr.P.C. and gist of it must find a place in his Case Diary (C.D.) (See Section 172 Cr.P.C). This is the 'previous statement' recorded by the Investigating Officer during investigation stage. It cannot be used as 'substantive evidence' as against the accused. There is total embargo in Section 162 Cr.P.C. for such usage with an exception in Section 162(2) Cr.P.C., that is, when the author of the statement dies it becomes his dying declaration under Section 32(1) of the Evidence Act. The section 161 statement can be used by the accused to contradict and impeach the credibility of the witness by the accused. It can be used by the accused in his favour. It cannot be used by the prosecution as against him. [See Sections 145, 155, 157 Evidence Act].

39. Although the statement of a witness recorded under Section 164 Cr.P.C. during investigation is also a previous statement like a statement recorded under Section 161 Cr.P.C., but, it has some higher value than the statement recorded under Section 161 Cr.P.C. by the police

since it was recorded by a Magistrate.

40. With regard to the statement of a witness recorded by a Magistrate u/s.164 Cr.P.C., in RAMPRASAD VS. STATE OF MAHARASHTRA [1999 CRI.L.J. 2889 (SC)], the Hon'ble Apex Court observed as under :

"15. Be that as it may, the question is whether the Court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before any authority legally competent to investigate the fact but its use is limited to corroboration of the testimony of such a witness. Though a police officer is legally competent to investigate, any statement made to him during such an investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a Magistrate is not affected by the prohibition contained in the said section. A Magistrate can record the statement of a person as provided in Section 164 of the Code and such a statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a Magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof."

41. In GURUVINDAPALLI ANNA RAO VS. STATE OF A.P. [2003 CRI.L.J. 3253], a Division Bench of the Andhra Pradesh High Court held that since the previous statement of a witness under Section 164 Cr.P.C., has been recorded by a Magistrate, it is a public document, the Magistrate need not be summoned and examined as a witness. The Division Bench observed as under :

"7. We would 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 (PW.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. Moreover, it is seen that the learned II Additional Sessions Judge, Guntur, while recording the evidence of the I Additional Munsif Magistrate, Tenali (PW.10), has exhibited the statement of P.W.1 recorded by the Magistrate as Ex.P.10. As a matter of fact, such statement cannot be treated as a substantive piece of evidence. Such statement can be made use of by the prosecution for the purpose of corroboration, or by the defence for contradiction, under Section 145 of the Evidence Act. Therefore, the II Additional Sessions Judge, Guntur, is directed to note the provisions contained in Section 145 of the Evidence Act. Even if a statement is recorded by a Magistrate, it is not a substantive piece of evidence, but it is only a previous statement."

42. We agree with the above view of the Division Bench of the Andhra Pradesh High Court. But, in many cases, we have seen that the learned Sessions Judges are simply summoning the learned Magistrates, who have recorded the statement of witnesses under Section 164 Cr.P.C., resulting in loss of their valuable services to the litigant public and others. Further, such exercise is also being done by the learned Sessions Judges even when a witness, who gave those statement turned hostile in the trial court, as it was done in the case before us.

43. Further, through the learned Magistrates, the learned Sessions Judges are marking the very statement of witnesses recorded under Section 164 Cr.P.C., even when the witness either turned hostile or has been dispensed with by the prosecution or not examined in the trial court due to various reasons.

44. When it was so marked the entire statement u/s.164 Cr.P.C., which has not been recorded before the learned Sessions judge, but recorded before the

Magistrate, at a time when the accused was not in the picture, goes into the deposition of the witness, becomes part of the record of evidence, as it was done in the case before us. Then there is the danger of the trial court using them as substantive evidence, as it was done in the case before us.

45. This practice / procedure does not have the sanction of law. It has to be avoided by the learned Sessions Judges. It will be for the benefit of the prosecution, the accused and also prevent loss of precious court hours. A copy of those public records, namely, statement u/s.164 Cr.P.C., can be supplied / obtained by the prosecution as well as by the accused like the statement of witnesses recorded under Section 161 Cr.P.C. During the trial of the case before the learned Sessions Judge, like the statement of a witness under Section 161 Cr.P.C., these statements recorded under Section 164 Cr.P.C. can be referred to within the parameters of law.

46. In RAM LAKHAN SHEO CHARAN AND OTHERS VS. STATE OF U.P. [1991 CRI.L.J. 2790], when the witness, whose statement has been recorded by the learned Magistrate under Section 164 Cr.P.C., during the Sessions' trial, turned hostile, did not support his statement to the Magistrate, a Division Bench of the Allahabad High Court observed as under :

"12. The trial was held when the new Code of Criminal Procedure had come into force. The wordings of Section 164 in the new and old Code of Criminal Procedure with little changes are the same. As early as in Manik Gazi v. Emperor, AIR 1942 Cal 36 : (1942) 43 Cri LJ 277 a Division Bench of the Calcutta High Court had held that the statements Under Section 164 of the Code can be used only to corroborate or contradict the statements made Under Sections 145 and 157 of the Indian Evidence Act. In Brij Bhushan Singh Vs. Emperor, AIR 1946 PC 38 and in Mamand v. Emperor, AIR 1946 PC 45 : (1946) 47 Cri LJ 344 the Privy Council had observed that the statement Under Section 164 of the Code cannot be used as a substantive evidence and which can only be used to contradict and corroborate the statement of a

witness given in the Court. Similar observations, as made in the two cases below, were made by the Privy Council, in Bhuboni Sahu v. King, AIR 1949 PC 257 : (1949) 50 Cri LJ 872) and in Bhagi v. Crown, 1950 Cri LJ 1004 : (AIR (37) 1950 HP 35). It was also held by a single Bench of the Himachal Pradesh Judicial Commissioner's court that statement Under Section 164 of Code cannot be used as a substantive piece of evidence. In State v. Hotey Khan, 1960 ALJ 642 : (1960 Cri LJ 1167). A Division Bench of this Court had also observed that statements Under Section 164 of the Code cannot be used as a substantive evidence.

13. The above catena of cases go to show that where the witnesses do not support the prosecution story in the Court, then their statements Under Section 164 of the Code cannot be used as substantive piece of evidence. In this case, the learned Judge had erred in using Exts. Ka-15 and Ka-16 as substantive piece of evidence."

47. Again in PHOOL CHAND VS. STATE OF U.P. [2004 CRI.L.J. 1904 ], when similar situation as in Ram Lakhan Sheo Charan (supra) arose, a Division Bench of the Allahabad High Court held as under :

"18. Learned Additional Public Prosecutor Sri Amarjeet Singh has tried to emphasise that Karan (P.W. 1) and his wife Smt. Makkhan (P.W.2) were produced before the Magistrate for recording their statements under Section 164 Cr.P.C. in which they fully supported the facts/circumstances leading to the commission of multiple murders in this case. The learned counsel has contended that these statements should be given due weight and should be considered for proving the offences with which the appellants were charged. On thoughtful consideration on this legal aspect of the matter, we find that the aforesaid submission has no substance in it. The statement of a witness under Section 164 Cr. P. C. is one where the accused have hardly any occasion to cross examine him and if it is to be treated as substantive piece of evidence, it should be duly tendered before trial Court and then a witness should be produced by the prosecution for his cross examination. In this context the learned Senior Advocate appearing for the appellants has cited the case law of Brij

Bhushan Singh v. Emperor, AIR 1946 PC 38 (1946 (47) Cri LJ 336) and Ram Kishan Singh v. Harmit Kaur, 1972 Cri. LJ 267 : (AIR 1972 SC 468). In these cases the Privy Council and the Hon'ble Supreme Court have categorically held that the statements recorded under Section 164 Cr. P. C. are not substantive evidence. It can be used only to corroborate the statements of the witness or to contradict them. In the present case, when the witnesses (P.W.1 and P.W.2) have themselves did not support their version, their statements earlier recorded under Section 164 Cr.P.C. could not be available to the prosecution for their corroboration. It could, to the maximum, be used by the prosecution for their contradiction, but that too has not been done in the present case. It is obvious that it would be a fallacy of a legal approach to have reliance upon the statement of a witness recorded under Section 164 Cr.P.C. and thereby to record conviction of the accused persons on that basis."

48. In T. DIWAKARA VS. STATE OF KARNATAKA [2006 CRI.L.J. 4813], during investigation, P.W.10 gave statement before a Magistrate under Section 164 Cr.P.C., but, later during the Sessions trial, he turned hostile. In such circumstances, the Karnataka High Court held as under :

"1....The statement of PW10 was recorded before the Magistrate. After the lodging of the complaint, PW10 has turned hostile. But the trial court convicted the accused on the strength of statement of PW10 recorded under Section 164 of Criminal Procedure Code. The trial court grossly erred in placing reliance on the statement recorded under Section 164 of Criminal Procedure Code as substantive evidence. While convicting the accused the statement recorded under Section 164 of Criminal Procedure Code does not have any better legal status than the one recorded under Section 161(3) of Criminal Procedure Code. At the most, if the deponent whose statement is recorded under Section 164 of Criminal Procedure Code turns hostile, he/she could be prosecuted for perjury but on the strength of such statement no conviction can be placed. "

49. When a witness gave statement to the

Magistrate under Section 164 Cr.P.C., later during the trial before the learned Sessions Judge disowned it, gave different version, either the statement given by him before the learned Magistrate may be true or his deposition before the learned Sessions Judge may be true, but both may not be true.

50. In this connection, long ago, in IN RE MADIGA NARASIGADU [AIR (36) 1949 MADRAS 502], this Court observed as under :

"2. It is no doubt true that either the statement made before the Taluk Magistrate under Section 164, Criminal P.C., or the evidence given in P.R.C. No. 1 of 1946 on the file of the Stationary Sub-Magistrate, Dharmavaram, is false and false to the knowledge of the petitioners. If according to the case of the respondent the statements made under Section 164, Criminal P.C., were true the evidence given before the Sub-Magistrate in P.R.C. No.1 of 1946 was false. But the petitioners say that they were forced to make false statements under Section 164, Criminal P.C., and that later on they spoke the truth before the Magistrate. In similar circumstances, the observations made by Beaumont, C.J., in Emperor v. Ningappa Ramappa I.L.R. (1942) Bom. 26 : (A.I.R. (28) 1941 Bom.408 : 43 Cr.L.J. 167) are very instructive and may be cited in extenso. The learned Judge says:

"No doubt, a man making a statement on oath before a Magistrate under Section 164, Criminal P.C., should speak the truth but if he does not, the least he can do is to tell the truth when subsequently he goes in the witness box. To prosecute a man who has resiled from a false statement, made under Section 164 is to encourage him in the belief that it pays to tell a lie and stick to it. It is far better that a man should escape punishment for having made a false statement under Section 164 than that he should be induced to believe that it is to his interest, however false the statement may have been to adhere to it, and thereby save himself from prosecution. The danger of such a course leading to the conviction of innocent person is too great to be risked." With great respect I agree with his observations.

Applying those observations I must say that the prosecution of the petitioners would not be in the interests of justice. Further these petitioners are illiterate Madigas and it is impossible to rule out the possibility that they were forced to make the statements which they did under Section 164, Criminal P.C., and later on they spoke the truth before the Court."

51. Thus, from the survey of the decisions relating to Section 164 Cr.P.C., as to its nature, scope, evidentiary value, consequences of the author of the statement resiling from his such statement before the learned Sessions Judge, his statement under Section 164 Cr.P.C., which is not a substantive piece of evidence loses its value. It cannot be used to record a finding of guilty. When the position of law is such that, in the case before us, inspite of the fact that the prosecutrix (P.W.1) has turned hostile, disowned her statement, the learned Additional Sessions Judge relied on it since it was recorded by a Judicial Officer. The trial court has completely went wrong."

25 From the above, the ambit, scope and utility of statement recorded from witnesses under section 164 Cr.P.C. is very clear. One need not be confused with such a statement recorded from a witness under section 164 Cr.P.C. with a statement (confession) recorded from an accused under section 164 Cr.P.C. Both are not one and the same except they are appearing in the same section.

26 In its impugned judgment the trial Court had referred to the electronic evidence based vide the reports of Forensic Scientists P.Ws.13 and 15. It is alleged that the accused was bent upon sexually abusing his daughter/P.W.1. There was secret arrangement as between P.Ws.1 and 2 and P.W.2's brother P.W.14 Charles to record the Cellphone conversation between the accused and P.W.1 which would expose the sexual advances made by the accused towards P.W.1.

27 To establish the said aspect, P.Ws.13, 15, M.Os.1 to 4 C.Ds., Cellphone and analysis reports Ex.P11 to P13 have been marked. The trial Court in its judgment referred to them electronic evidence and also reproduced the transcription of the Cellphone conversation stated to have been transpired between P.W.1 and the accused and used them as incriminating evidence to convict the accused.

28 In this case, P.W.1 the alleged victim girl was examined before the trial Court on 19.3.2013. She turned hostile. She had disowned her complaint. P.W.14 Charles was examined on 19.9.2013. He also turned hostile. Only thereafter on 30.9.2013, P.W.15 Forensic Scientist who compared and analysed the Cellphone conversation stated to have taken place between P.W.1 and the accused containing incriminating information has been examined. Thus, there was no occasion to confront P.Ws.1 and P.W.14 with the said electronic evidence. That part, accused have to be furnished with the said Forensic report, cassettes and the transcription of the conversation stated to have taken place between the accused and P.W.1 through Cellphones.

29 It is pertinent to note that neither P.W.1 nor P.W.14 were confronted with the said electronic evidence. Only after confronting them viz., P.W.1 and 14 with the said electronic evidence especially when they have turned hostile such evidence can be appreciated and analysed. This is an import aspect to be observed. However, it was overlooked by the trial Court. Thus, there is no fair trial. In such circumstances, the conclusion arrived at by the trial Court becomes faulty and vitiated.

30 In view of the foregoing, ordered as under:

- (i) This criminal appeal is allowed.
- (ii) Conviction recorded by the Additional Sessions Judge, Mahila Court, Chennai in S.C.No.371 of 2012 under section 376, 354 of I.P.C. and Sec.4 of Tamilnadu Prohibition of Woman Harassment Act and the sentences imposed on the accused are set aside.
- (iii) Exoneration of the accused from the charge under section 506(i) I.P.C. is maintained.
- (iv) The case is remanded back to the trial Court.
- (v) The trial Court will furnish copies of forensic analysis reports and C.Ds. and the transcription of conversation took place between certain persons in the Cellphone, if not already given.
- (vi) The trial Court will recall P.Ws.1 and 14 and confront them with the said electronic evidence.
- (vii) If there is any further incriminating evidence, the trial Court will examine the accused under section 313 Cr.P.C.

(viii) If the accused wishes, the trial Court will give him an opportunity under section 314 Cr.P.C.

(ix) If the accused wishes, the trial Court will permit him to let in defence evidence.

(x) Thereafter, the trial Court will hear both sides and dispose of the case according to law at an early date.

(xi) Now that Sec.439 Cr.P.C. becomes applicable to the accused, he can move a regular bail petition before the Sessions Court dealing with bail petitions and if such a bail petition is filed, the said Court will dispose of it on merits.

31 Accordingly, this Criminal appeal is disposed of. M.P.No.2 of 2014 is closed.

Sd/-  
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Judge,  
City Civil & Sessions Court,  
Chennai

2. The Additional Sessions Judge,  
Mahila Court, Chennai

3.The Superintendent,  
Central Prison, Puzhal

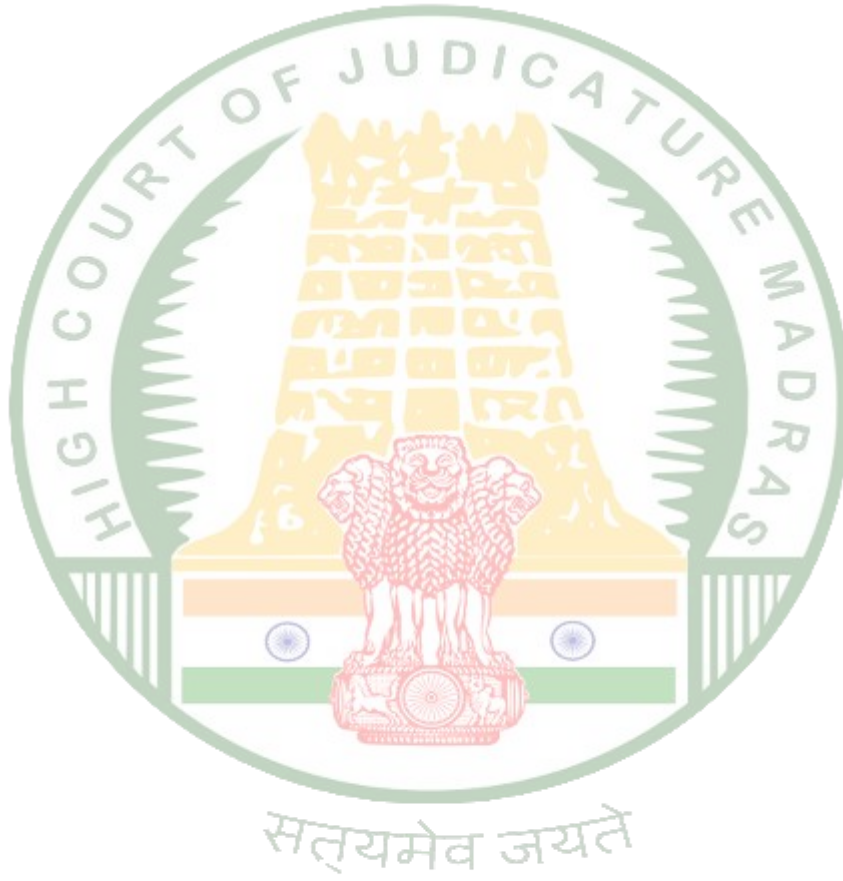
4.The Public Prosecutor,  
High Court, Madras.

5.The Inspector of Police,  
W-18, M.K.B. Nagar,  
All Women Police Station, Chennai.

6.The Section Officer,  
Criminal Section,  
High Court, Madras.

Crl.A.No.131 of 2014

PSI (31.07.2015)



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