

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 4380 OF 2015
WITH
CRIMINAL APPLICATION NO.4776 OF 2015
IN CRIMINAL APPLICATION NO. 4380 OF 2015

KRISHNA SAHEBRAO PATIL
VERSUS
THE STATE OF MAHARASHTRA

.....
Advocate for Applicant in Cri. Application No. 4380/2015 : Mr. S. C. Arora
Advocate for Applicant in Cri. Application No. 4776/2015 : Mr. V. D. Sapkal
APP for respondent/State : Mr. S. N. Kendre
.....

CORAM : V. K. JADHAV, J.

Date for reserving the order : 11.01.2016
Date of pronouncing the order : 19.01.2016

ORDER :-

1. By consent of learned counsel for respective parties, heard finally.
2. The applicant in Criminal Application No. 4380 of 2015 is the original accused No. 1 in Criminal Case No. 201 of 1998. The prosecution, after examining some witnesses, filed an application Exh.271, praying therein for issuance of summons to the Magistrate, who recorded the statements of four witnesses under Section 164 of the Cr.P.C. Learned Judicial Magistrate First Class, Gangapur, by the impugned order dated 07.07.2015 passed below Exh.271 in R.C.C. No. 201 of 1998, allowed the said application. The applicant/original accused No. 1 has, thus, preferred the present application challenging the said order passed below Exh.271 as aforesaid.

3. Learned counsel for the applicant/accused No. 1 submits that on earlier occasion, the prosecution had filed a similar application below Exh.245, however, the learned Judicial Magistrate First Class rejected the said application vide order dated 14.01.2014. Learned counsel submits that the same prayer again, ought not to have been considered by the court below. Learned counsel further submits that the exercise of calling the Magistrate, who has recorded statements of witnesses under Section 164 of Cr.P.C., is a futile exercise as the statement under Section 164 of Cr.P.C. can be used only for the purpose of corroboration or contradiction and it cannot be used as a substantive piece of evidence.

4. Learned counsel for the petitioner, to substantiate his submissions, places reliance on the following two cases :

1. ***State of Delhi v. Shri Ram Lohia***, reported in ***AIR 1960 Supreme court 490(1)*** and
2. ***Guruvindapalli Anna Rao and others v. The State of A.P.***, reported in ***2003 Cri. L. J. 3253***.

5. Learned APP submits that the initial application Exh.245 filed by the prosecution before the trial court for similar prayer came to be rejected on the ground that out of the said four witnesses, evidence of only two witnesses was recorded before the court and remaining two witnesses were yet to be examined. Thus, after examination of all the four witnesses before the court, whose statements came to be recorded by some other Magistrate under Section 164 of Cr.P.C., the prosecution has filed application Exh.271, which is rightly considered by the trial court. Learned

APP further submits that the original statements are not traceable and therefore, carbon copies of statements of the said four witnesses have been treated as primary evidence. Learned APP further submits that this is not a matter simplicitor to prove contradictions and omissions in the evidence of those four witnesses, but in the light of special circumstances of not having original statements on record, prosecution is intending to examine the Magistrate, who has recorded statements of those four witnesses under Section 164 of Cr.P.C.

6. The application Exh. 245 filed by the prosecution, initially before the trial court, came to be rejected only on the ground that all the witnesses are not examined before the court. In view of this, there is no bar as such, to entertain the application Exh. 271 at subsequent stage, when all the said four witnesses were examined before the trial court.

7. It is not the case of prosecution that the said four witnesses have turned hostile, and therefore, for the purpose of proving contradictions, presence of the Magistrate, who has recorded their statements, is required before the court. On the other hand, it appears that the said four witnesses have supported case of the prosecution. It is well settled that the statements of witnesses recorded under Section 164 of Cr.P.C. cannot be treated as a substantive evidence and no conviction can be passed on the strength of such statements alone. At the most, witness can be prosecuted for perjury, if he turns hostile. It is also not disputed that the statements of those four witnesses came to be recorded under Section 164 of Cr.P.C. by the Magistrate. In these circumstances, it would be a futile exercise to call

the Magistrate, who has recorded statements of witnesses under Section 164 of Cr.P.C. His presence is unwarranted and uncalled for.

8. The application Exh. 271 is filed solely for the reason that the original statements are not traceable, and since carbon copies of the statements are treated as primary evidence, it is necessary to record evidence of the Magistrate, who has recorded statements of witnesses under Section 164 of Cr.P.C. It would not be out of place to mention here that when the trial court held that the carbon copies of statements of those witnesses recorded under Section 164 of Cr.P.C., mechanically prepared while preparing the original, shall be treated as primary evidence, the present applicant has challenged the said order by filing criminal application No. 1018 of 2014 before this court. This Court, by order dated 5th March, 2014, upheld the said order passed by the trial court with the observations that the carbon copies of the statements have been rightly treated as primary evidence as they were made by one uniform process. In view of this, the apprehension in the mind of the prosecution is unwarranted. Thus, examination of the Magistrate, who has recorded statements of witnesses under Section 164 of Cr.P.C., on the ground alone that the original statements are not traceable, is not necessary.

9. In the case of ***Guruvindapalli*** (*supra*), in paragraph No. 7 of the judgment, the Andhra Pradesh High Court has made following observations :

“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 (P.W. 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....”

10. In the case of **State of Delhi v. Shri Ram Lohia** (*supra*), the Apex Court has observed that the statements recorded under Section 164 of Cr.P.C. are not a substantive evidence in a case and cannot be made use of, except to corroborate or contradict the witnesses.

11. In light of the above, the impugned order passed below Exh.271 calls for an interference. The Magistrate has not considered the above legal position and allowed the application Exh. 271 erroneously. Hence the following order:

ORDER

- I. The Criminal Application No. 4380 of 2015 is hereby allowed.
- II. The order dated 07.07.2015 below Exh.271 in R.C.C. No. 201 of 1998 passed by the Judicial Magistrate First Class, Gangapur, is hereby quashed and set aside.

- III. The application Exh.271 is hereby rejected.
- IV. The Criminal Application is accordingly disposed of.
- V. In view of disposal of Criminal Application No. 4380 of 2015, nothing survives in Criminal Application No. 4776 of 2015, and the same stands disposed of.

(V. K. JADHAV, J.)

...

vre/-