

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Orders Reserved on : 13.07.2016)

Date of verdict on : 25.10.2016

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

Crl.R.C.No.815 of 2016

and

Crl.M.P.No.6119 of 2016

N.Sakthivel

... Petitioner/Accused

Vs.

State by

The Inspector of Police,
Nettapakkam Circle,
Puducherry.

(Crime No.105/2013)

... Respondent/complainant

Prayer: Criminal Revision Case filed under Section 397 r/w. 401 of the Code of Criminal Procedure to call for the records and set aside the order dated 28.04.2016 passed in Crl. M.P.No.367 of 2016 in Spl.S.C.No.5 of 2015 on the file of the learned Special Judge, Puducherry.

For Petitioner : Mr.R.Shanmugasundaram SC for
Mr.G.Ganesh Rajan

For Respondent : J.Kumaran, GA Pondicherry

ORDER

This criminal revision case is directed against the order dated 28.04.2016 passed in Crl. M.P.No.367 of 2016 in Spl.S.C.No.5 of 2015 on the file of the learned Special Judge, Puducherry.

2. The brief facts, which led to the criminal revision case, are as follows:

In this case, a complaint was given by the de facto complainant on 26.10.2013. On the said complaint, a case was registered by the Sub Inspector of Police, Nettapakkam Circle, Puducherry under Section 7 of the Protection of Children from Sexual Offences Act, 2012 and the same was taken on file in Special S.C.No.5 of 2015 by the learned Special Judge, Puducherry. In the said case, the trial has also commenced.

During the trial, on the side of the prosecution, P.Ws.1 to 7 were examined, Exs.P.1 to P.16 were marked and M.Os.1 to 4 were marked. Cross examination of P.Ws.1 to 7 was also done on the side of the revision petitioner/accused. At that stage, the revision petitioner/accused filed a petition in CrI.M.P.No.367 of 2016 before the trial Court to record his objection and reject the admission of document Ex.P.16 on the ground that the said document is not admissible under law and it shall not be looked into as evidence. The trial Court after considering the submissions made by the learned counsel on either side and perusing the documents available on record, allowed the application in part by recording the objection, but reserved the finding relating to the proof, relevancy and admissibility of Ex.P.16 to be decided at the course of main judgment. Aggrieved against the order passed by the learned Special Judge, Puducherry, the revision petitioner has filed the present criminal revision petition.

3. The learned counsel for the petitioner contended that the trial Court without considering the facts and circumstances of the case, erroneously allowed the application by permitting the prosecution to mark the statement under Section 161(3) of Cr.P.C as Ex.P.16, which is an inadmissible evidence and reserved the finding regarding the relevancy and proof, which has to be considered only at the time of judgment. Hence, the learned counsel prayed that the order passed by the Court below may be set aside and the criminal revision case has to be allowed.

4. The learned Government Advocate (CrI.Side) mainly contended that the trial Court only after considering the facts and circumstances of the case marked the documents subject to the proof and relevancy and there is no infirmity or illegality in the order passed by the trial Court. Hence, the criminal revision case has to be dismissed.

5. Heard the submissions made by the learned counsel on either side and perused the records.

6. In this case, it is admitted by both sides that the statement under Section 161(3) of Cr.P.C. was recorded by the Investigating Officer and the same was marked as Ex.P.16 on the side of the prosecution. Now, it is submitted by the learned counsel for the petitioner that Ex.P.16 is only the statement recorded by the Investigating Officer under Section 161 (3) of the Code of Criminal Procedure and the same cannot be termed as evidence in the criminal revision case. The statements, which are recorded by the Police under Section 161 (3) of the Code of Criminal Procedure, cannot be marked as evidence as per law and reliance cannot be placed upon it to prove the case on the

side of prosecution. The trial Court, without applying its mind and ignoring the settled principles of law, allowed the prosecution to mark the statement under Section 161(3) of Cr.P.C. recorded by the Investigating Officer.

7. At this juncture, it is useful to refer the decision reported in RAJDENDRA SINGH VS. STATE OF U.P AND ANOTHER (2007 [7] SCC 378), wherein it has been held thus:

"7. The High Court has basically relied upon the statements of six witnesses which had been recorded by the investigating officer under Section 161 Cr.P.C. to record a positive finding that the respondent could not have been present at the scene of commission of the crime as he was present in a meeting of Nagar Nigam at Allahabad. A statement under Section 161 Cr.P.C is not a substantive piece of evidence. In view of the proviso to sub-section (1) of Section 162 Cr.P.C., the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Therefore, the High Court committed a manifest error of law in relying upon wholly inadmissible evidence in recording a finding that Kapil Dev Singh could not have been present at the scene of commission of the crime.

11. Having considered the submissions made by learned counsel for the parties, we are of the opinion that the statements of the witnesses under Section 161 Cr.P.C. being wholly inadmissible in evidence could not at all be taken into consideration. The High Court relied upon wholly inadmissible evidence to set aside the order passed by the learned Sessions Judge. That apart, no finding on a plea of alibi can be recorded by the High Court for the first time in a petition under Section 482 Cr.P.C. As mentioned above, the burden to prove the plea of alibi lay upon the accused which he could do by leading evidence in the trial and not by filing some affidavits or statement purported to have been recorded under Section 161 Cr.P.C. The whole procedure adopted by the High Court is clearly illegal and cannot be sustained. The other arguments based upon the acquittal of co-accused Daya Singh has also no merits."

8. It is also useful to refer another decision reported in PARAMREET SINGH @ PAMMA VS. STATE OF UTTARKHAND (CRIMINAL APPEAL No. 1699 of 2007) (cited supra), wherein it has been held thus:

"8. Shri S.R. Bajwa, learned senior counsel appearing for the appellant has submitted that out of 8 witnesses examined by the prosecution, 7 turned hostile and none of them deposed that the appellant had committed any offence. The Investigating Officer remained the only witness in the trial who had not turned hostile. The gun was allegedly recovered at the disclosure of the appellant as required but, it was not in consonance with Section 27 of the Indian Evidence Act, 1872, on the basis of which the recovery of the Gun could be proved. The trial Court as well as the High Court erred in convicting the appellant as none of the alleged pieces of circumstantial evidence could be proved by the prosecution. The courts below committed an error in accepting the inadmissible evidence e.g., confession before Police official; contents of statement recorded under Section 161 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C. '); using the FIR as a substantial piece of evidence; and recovery of 12 Bore Gun from an Arms Dealer at Rampur on the disclosure of the appellant and held the appellant guilty. No witness was examined to prove that the material collected by the Investigating Officer had been placed in safe custody in the Malkhana; the Register maintained by the arms dealer at Rampur had not been produced before the Court nor had the arms dealer been examined. None of the relevant incriminating pieces of circumstantial evidence had been put to the appellant by the Court while examining him under Section 313 Cr.P.C. The circumstances of the absconding of the appellant for 6 days had been taken to show him as guilty person. In spite of the fact that a compromise by Panchayat was not proved before the trial Court, it had been used against the appellant. More so, no motive or genesis of occurrence could be established on the record

of the case. The conviction is totally based on conjectures and surmises, thus liable to be set aside."

9. It is also useful to refer yet another decision reported in *PARAMJEET SINGH @ PAMMA VS. STATE OF UTTARAKHAND* (CRIMINAL APPEAL No. 1699 of 2007) , wherein it has been held thus:

"15.Contention No.2:- According to the learned counsel for the appellants, the markings in Ex.A.6, the rough sketch of the scene made by P.W.3, the Investigating Officer are based on statements recorded by him under S.161, O.1, C.P.C., which are inadmissible in evidence and as such those markings in Ex.P.6 are to be eschewed from consideration. The findings of the Tribunal, as well as of the learned Judge, based on those markings are therefore, unsustainable. Reliance was placed upon a decision of the Supreme Court in *Tori Singh v. State of U.P.* The bar under S.161 Cr.P.C., is applicable only to criminal trials. The statements recorded by the Investigating Officer under S.161 Cr.P.C., could be looked into in other proceedings, provided of course, they are properly proved, either by examining the Investigating Officer, who recorded the statements or by examining the witnesses themselves. Once proved, those statements could be relied on in proceedings like the present one. If, however those statements are not proved, they would come within the category of hearsay evidence and would not be admissible. In the instant case, P.W.3 has stated that he visited the scene of accident and that the driver of the motor cycle and one Kupparaj were available there and that they pointed out the scene and on the basis of that he had drawn Ex.P.6. Ex.P.6, therefore, could be relied on."

10. As per the decision of the Apex Court, the order of the trial Court has to be set aside since the statement under Section 161(3) of the Code of Criminal Procedure is only the statement recorded by the Investigating Officer and the same cannot be marked as document and has to be eschewed from the list of documents.

11. Under the facts and circumstances of the case and also in the light of the judgment cited supra, this Court is of the considered view that Ex.P.16, 161(3) statement is inadmissible in evidence and the same cannot be marked as witness on the side of the prosecution and hence, Ex.P.16 has to be eschewed from the documents list.

12. In the result, the Criminal Revision Case is allowed and the order dated 28.04.2016 passed in Cr1. M.P.No.367 of 2016 by the learned Special Judge, Puducherry is set aside. The trial Court is directed to eschew Ex.P.16 from the list of documents. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

cla

To

1. The Special Judge/
Principal Sessions Judge,
Puducherry.
2. The Public Prosecutor,
High Court, Madras.

+2cc to M/S.Ganesh Rajan, Advocate Sr.60746
+1cc to the Government Pleader Sr.61115

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