

## Rahul Badgaiya Vs The State Of Madhya Pradesh And Others

**Court:** Madhya Pradesh High Court (Jabalpur Bench)

**Date of Decision:** Jan. 22, 2025

**Acts Referred:** Code of Criminal Procedure, 1973 â€” Section 161, 164, 311, 482

Indian Penal Code 1860 â€” Section 363, 366, 376(2) (n), 376, 376(3)

Protection of Children from Sexual Offences Act, 2012 â€” Section 3, 4, 5, 6

**Hon'ble Judges:** Pramod Kumar Agrawal, J

**Bench:** Single Bench

**Advocate:** Anil Khare, Madhur Shukla, C.M. Tiwari, Rakesh Kumar Shukla

**Final Decision:** Dismissed

### Judgement

#### JUDGMENTTAG-JUDGMENT

Pramod Kumar Agrawal, J

The present application under Section 482 of Cr.P.C. is being preferred against registration of the offences under Sections 363, 366, 376(2) (n), 376,

376(3) of the Indian Penal Code, 1860 read with Sections 3,4,5,6 of Protection of Children from Sexual offences Act, 2012 against the present

applicant.

2. Learned Senior Advocate for the applicant submits that in the aforesaid offences, charge-sheet in respect of the main accused person namely Jai

Dubey has already been filed, however against the present applicant, the investigation under 173(8) of the Criminal Procedure Code is still pending.

The respondent No.3, who happens to be the father of victim presented an application before the concerning Superintendent of Police for recording

the statement of prosecutrix again under Section 164 of the Cr.P.C. and thereafter, he appeared before the Special Judge (POCSO Act), Jabalpur and

preferred an application that the statement of the victim under Section 164 may be recorded again, so that the present applicant should not be falsely

implicated in the case. The aforesaid application was dismissed by the Special Judge on the ground that the arrest, investigation & other proceedings

are yet to take place in respect of the present applicant. The applicant has nothing to do with the offence alleged, continuation of the criminal

proceedings against the present applicant would be sheer abuse of process of law. It is further submitted that there is no bar in law to prevent the

victim from moving an application for recording the statement of the prosecutrix under Section 164 of the Cr.P.C. for the second time or so on and in

support this, reliance has been placed in the judgment dated 14.07.2022 passed in Writ Appeal No.602/2022 (Halke Bhai Gond Vs. The State of

M.P.). Learned Senior Advocate has not pressed the application regarding quashment of FIR but the only prayer made by the applicant is to direct

the Special Judge (POCSO), Jabalpur (M.P.) for permitting the respondent No.2/prosecutrix to record her statement again under Section 164 of the

Criminal Procedure Code as the same is her legal right.

3. Learned counsel for the respondent No.2 and 3 has supported the contentions made by the learned Senior Advocate for the applicant.

4. On the other hand, learned counsel for the State vehemently opposed the prayer on the ground that at the time of incident, prosecutrix was minor

aged about 13 years. It is submitted that her statement under Section 161 of Cr.P.C. has been recorded by the police and statement under Section 164

of the Cr.P.C. has been recorded before the Judicial Magistrate in which she has stated that present applicant and other co-accused person have

committed rape upon her. No cogent reason has been mentioned in the application that why prosecutrix wants to record her statement under Section

164 of the Cr.P.C. second time in this case. It is further submitted that learned Trial Court has rightly dismissed the application filed on behalf of the

respondent No.2/prosecutrix for again recording her statement under Section 164 of the Cr.P.C.

5. I have heard learned counsel for the parties and perused the record.

6. It is found that at the time of incident, prosecutrix was aged about 13 years and she was recovered by the police on 11.12.2023 and just after her

recovery, her statement was recorded on 13.12.2023 under Section 161 of the Cr.P.C. by the police and on 14.12.2023 her statement under Section

164 of the Cr.P.C. was recorded by the Judicial Magistrate in which she has deposed that present applicant and another co-accused have committed

rape upon her. Thereafter, on 14.03.2024, application for recording her second statement under Section 164 of the Cr.P.C. was presented by the

father of the prosecutrix before the concerning Superintendent of Police and thereafter he has filed an application before the trial Court which reveals

that approximately after three months from the date of her first statement, this application has been filed, although, it is true that law does not bar

recording of statement under Section 164 of Cr.P.C. twice or more on as held in the case of Halke Bai (Supra) but at the same time second

statement should not be recorded to negate or defeat the earlier statement of the victim/ prosecutrix whether it is in favour or against the accused

otherwise the sanctity of the statement under Section 164 of the Cr.P.C. will lose its value.

7. It is pertinent to mention here that application for recording of second statement of the prosecutrix under Section 164 of the Cr.P.C. was not

sponsored by the investigating agency. In this regard, the Hon'ble Apex Court in the case of Jogendra Nahak and Ors Vs. State of Orissa and

Ors reported in 2000(1) SCC 272, has observed as below :-

“2. A strange motion has been made before the High Court of Orissa by four persons who are strangers to a criminal case for direction

to a Magistrate to record their statements under section 164 of the CrPC (for short “the Code”).

“3. The Magistrate has refused to record the statements of the four persons on the ground that they are strangers to the case and that they have no interest in the case.

“4. The Magistrate has also refused to record the statements of the four persons on the ground that they are strangers to the case and that they have no interest in the case.

20. In re C.W. Cases (supra) Govinda Menon, J. of the Madras High Court (as he then was) expressed the view that:

It is not necessary that the Magistrate should be moved by the police in order that he might record a statement. There may be instances

where the police may not desire to have recorded, the statement of a witness for some reason or other. In such a case, there is nothing

preventing the witness to go to the Magistrate and request him to record the statement and if a Magistrate records his statement and

transmits the same to the Court where the enquiry or the trial is to go on, there is nothing wrong in his action.

21. Nevertheless learned Single Judge sounded a note of caution like this:

But such a thing will be very exceptional, as there is always a discretion in the Magistrate to refuse to record the statement. Ordinarily,

when a Police Officer requests the Magistrate to record the statement, of a witness on oath under section 161 Cr. P.C., such a request will

not be refused by the Magistrate. But when a private party seeks to invoke the powers of a Magistrate under section 164, Cr. P.C. the

Magistrate has got a very wide discretion in acting or refusing to act.

22. The same approach was made by Single Judges in State of Orissa v. A.P. Das (supra) and in Kunjukutty v. State of Kerala (supra).

23. 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



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.

9. In the case of Nafeesa Vs. State of U.P. Thru Secy. Home Lucknow and Others reported in 2015 SCC Online ALL 873, 1st High

Court of Allahabad has observed as below :-

1. The question raised by way of this petition is as to whether a witness, of his own has the right to approach a Magistrate to record his

statement under Section 164 Cr.P.C. and whether such Magistrate is under a legal obligation to record the statement of such witness under

Section 164 Cr.P.C., when investigation in a criminal offence is going on?

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9. By virtue of this petition, the petitioner seeks a writ in the nature of Mandamus, directing the Magistrate and the investigating agency to

record statement of the petitioner under Section 164 Cr.P.C.

10. Law in regard to recording of statement under Section 164, Cr.P.C., has been clarified by the Hon'ble Supreme Court of India in the

case of Jogendra Nahak v. State of Orissa, (2000) 1 SCC 272 : (AIR 1999 SC 2565). The following has been held:—

“19. In the scheme of the above provisions there is no set or stage at which a magistrate can take note of a stranger individual

approaching him directly with a prayer that his statement may be recorded in connection with some occurrence involving a criminal offence.

If a Magistrate is obliged to record the statements of all such persons who approach him the situation would become anomalous and every

Magistrate's court will be further crowded with a number of such intending witness brought up at the behest of accused persons.

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 the 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 Magistrates 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 rigidly 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.

11. Considering the law laid down by the Hon'ble Supreme Court of India, and extracted hereinabove, it becomes clear that a Magistrate

cannot take note of an individual approaching him directly with a prayer that his/her statement may be recorded in connection with some

occurrence involving a criminal offence. If liberty is given to anybody, and everybody, to approach a Magistrate for recording of statement

under Section 164, Cr.P.C., in connection with an occurrence involving criminal offence, and if Magistrates are put under an obligation to

record their statement, there is every likelihood that persons sponsored by accused/culprits might be asked to approach court of the

Magistrate for creating record/evidence in defence with the purpose to help an accused/benefactor. If such a provision is made by way of

giving liberty to a person unsponsored by the investigating agency to give statement under Section 164, Cr.P.C., entire investigation process

would be derailed.

12. In the opinion of this Court, investigation is a searching enquiry for ascertaining facts; detailed or careful examination. Such

Investigation is to be conducted by an investigating agency. In case persons individually are permitted to create, "evidence in the

process of investigation", the process of investigation would be interfered.

13. It is the duty of the investigating agency to conduct investigation. When it is felt relevant and necessary, the investigating officer makes

an application to the magistrate to record statement of a witness under Section 164, Cr.P.C. Such statement becomes a part of investigation

record under Chapter XII of the Code of Criminal Procedure. This process would surely be interfered, if persons on their own claim a right

to give statement under Section 164, Cr.P.C. Surely such a statement cannot be construed in pursuance of investigation by the concerned

investigating agency. Investigation has been defined under Section 2(h) as follows:

"2(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by

any person (other than a Magistrate) who is authorised by a Magistrate in this behalf".

14. Considering the above it becomes illusory and apparent that only a police officer or an investigator can sponsor a witness to a

Magistrate for recording of statement under Section 164, Cr.P.C.

15. Considering the averments made in the petition, we are of the considered opinion that while exercising extraordinary writ jurisdiction,

such direction, as sought in the petition, cannot be given. The investigating agency is required to proceed as per law. Ordinarily, a

direction is not required to be given to the investigating agency to investigate a case in a particular manner. As witness can be produced

before the Magistrate for recording his/her statement under Section 164, Cr.P.C., only by the investigating officer. Apparently, the

petitioner has already given her statement once under Section 164, Cr.P.C., on the asking of the investigating agency.

16. From the pleadings in the petition, it has become evident that the petitioner concedes that she knowingly gave a false statement. Clearly,

the petitioner can be proceeded against for giving a statement that is false to her knowledge and belief.

17. At this stage, in these proceedings, it cannot even be deduced whether the earlier version given by the petitioner was truthful or the case

set up in this petition is truthful.

18. The petitioner would have the option to give statement in court when she is produced as a prosecution witness. It would be for the Trial

Court to consider the statement (s) of the prosecutrix and conclude whether offence has been committed or not.

19. The question posed to the Court is answered in the negative, for the reasons recorded above.

20. Considering the law as noticed above, as also the peculiar facts and circumstances of the case, this Court would not like to interfere in

the process of investigation by way of issuing direction to the magistrate to record statement of the petitioner under Section 164, Cr.P.C.

Petition is dismissed.

10. In view of the aforesaid, this Court is of the view that application for recording of second statement of prosecutrix under Section 164 of the

Cr.P.C. was not sponsored by the investigating agency and the trial Court did not commit any error and has given cogent reason in rejecting the

aforesaid prayer. Accordingly, this Court is not inclined to entertain this petition filed under Section 482 of Cr.P.C to direct the trial Court for recording

of second statement of the prosecutrix under Section 164 of the Cr.P.C.

11. Resultantly, this M.Cr.C. stands dismissed.