(2002) 02 KL CK 0058

High Court Of Kerala

Case No: Criminal R.P. No. 174 of 2002

Dharmarajan		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Feb. 21, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 162
- Evidence Act, 1872 - Section 145, 161(3), 165

Citation: (2002) CriLJ 2571 : (2002) 2 ILR (Ker) 235 : (2002) 3 RCR(Criminal) 199 : (2003) 2 RCR(Criminal) 149

Hon'ble Judges: T.M. Hassan Pillai, J

Bench: Single Bench

Advocate: S. Gopakumaran Nair, for the Appellant; Sujith Mathew Jose, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

T.M. Hassan Pillai, J.
Admitted. Public Prosecutor takes notice. Heard.

2. Challenge is made in this revision against the order passed by the learned Additional Sessions Judge, Kottayam in M.P. 95 of 2002 in S.C. 241 of 2000 on the file of that court. Crl.M.P. has been filed seeking permission of the Court to use the statement of PW1 alleged to be recorded by A.S.I, of Police one P.K. Balakrishnan "on 27.2.1996 u/s 161 Cr.P.C. for contradicting PW1 u/s 162 Cr.P.C. in the manner provided by Section 145 of the Indian Evidence Act, 1972".

3. The learned Additional Sessions Judge held that "the purported statement, the copy of which is produced by the defence along with the petition in question, is not produced along with the records contained u/s 173 Cr.P.C. and supplied to the defence". Learned Sessions Judge further held that it is not a statement relied on by

the prosecution and declined to allow the prayer made in the Crl. M.P. on the ground that no evidence is forthcoming to prove that that statement (statement purported to be that of the prosecutrix recorded by the Investigating Officer on 27.2.1996 in the course of investigation), is truly recorded. To fortify his conclusion learned Sessions Judge held that his predecessor found that the purported statement is "ingenuine". Holding that the alleged statement is not genuine, learned Sessions Judge dismissed the Crl.M.P.

4. Before dealing with the contentions raised by the revision petitioner (endeavour is made to persuade me to hold that prosecutrix''s statement is recorded by the Investigating Officer on 27.2.1996 as asserted by the revision petitioner) it is to be pointed out that Section 162 Cr.P.C., is conceived to protect an accused creating an absolute bar against the previous statement made before the police officer being used for any purpose whatsoever.

5. In any case, where proceeding has been initiated on a police report, the Magistrate shall, without any delay, furnish to the accused free of cost copy of the police report; First Information Report recorded u/s 154 Cr.P.C. and statement recorded under Sub-section (3) of Section 161 Cr.P.C. of all persons whom the prosecution proposes to examine as witnesses (S. 207 Cr.P.C.). Accused has a statutory right to get copies of the statements recorded under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses and that right is a most valuable right. It is a right, the exercise of which alone could give an accused an effective opportunity to test the veracity of the evidence led by the prosecution (see State of U.P. v. Kapil Deo Shukla 1972 SCC 597 . The well settled proposition of law is that statement made by a person to a police officer in the course of investigation and reduced to writing shall be used only by the accused to contradict such witness in the manner provided by Section 145 of the Evidence Act or with the permission of the court the prosecution could use it for re-examination only to explain the matter referred to in his cross-examination. Statement recorded u/s 161 Cr.P.C. enables the accused to rely thereon only to contradict the witnesses in the manner provided by Section 145 drawing attention of the witness to that part of the statement intended to be used for contradiction and that statement cannot be used for corroboration of a prosecution or defence witness or even a court witness, nor can it be used for contradicting a defence or a court witness. (See Malkiat Singh v. State of Punjab 1991 SCC 976 .

6. The object of Ss. 162, 173 and 207 is to enable the accused to obtain a clear picture of the case against him before the commencement of the trial. The Section 207 imposes an obligation upon the Magistrate before the commencement of the trial (Section 209 imposes on the Magistrate such an obligation before commitment of the case to the Court of Session) to supply copies of the statements of witnesses who are intended to be examined at the trial so that the accused may utilise those statements for cross-examining the witnesses to establish such defence as he

desires to put up, and also to shake their testim6ny. Section 161(3) does not require a police officer to record in writing the statements of witnesses examined by him in the course of the investigation, but if he does record in writing any such statement, Magistrate is obliged to make copies of those statements available to the accused before the commencement of trial or before committing the accused to the Court of Session, so that the accused may know the details and particulars of the case against him and how the case is intended to be proved. Needless to state that the object of the provision is manifestly to give the accused the fullest information in the possession of the prosecution, on which the case of the State is based, and the statements made against him. The provision relating to the making available to the accused copies of statements recorded in the course of investigation is undoubtedly of great importance.

7. I am fully aware of the law laid down by the Supreme Court in Noor Khan Vs. State of Rajasthan, that the failure to furnish statements of witnesses recorded in the course of investigation may not vitiate the trial. It does not affect the jurisdiction of the court to try a case, nor is the failure by itself a ground which affects the power of the court to record a conviction, if the evidence warrants such a course. The Supreme Court also held that the breach thereof must be considered in the light of the prejudice caused to the accused by reason of its breach, for Section 537 Cr.P.C provides, amongst other things that subject to the provisions contained in the Code no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice. By the explanation to Section 537 it is provided that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at the earlier stage in the proceeding. At this stage, I am not concerned with the question whether any prejudice is cause a to the accused on account of non-furnishing of copies of the statements of witnesses recorded in the course of investigation, nor is it necessary . for me to dilate on the question whether the failure to furnish copies in any way vitiates the trial.

8. The Supreme Court has held in Rameshwar Singh Vs. State of Jammu and Kashmir, that though the contents of the statements made by a witness in the course of investigation cannot be used for any purpose other than that laid down by Section 162 the fact of that statement having been made can certainly be relied upon to show how untruthful the witness is.

9. Legal position cannot be doubted that statements of witnesses made to the police in the course of investigation do not fall under any prohibited category mentioned

in Section 165 of the Evidence Act. Section 165 of the Evidence Act authorises the Judge in order to discover or to obtain proper proof of relevant facts to ask any question he pleases, in any form, at any time of any witness, or of the parties, about any fact relevant or irrelevant. Section 162 Cr.P.C. does not impair the special powers of the Court u/s 165 of the Indian Evidence Act.

10. It is also worthwhile to extract the relevant observations made by the Supreme Court in Raghunandan v. State of U.P. (1974 SCC 355).

"14. It is true that the ban, imposed by Section 162, Criminal Procedure Code, against the use of a statement of a witness recorded by the Police during investigation, appears sweeping and wide. But, at the same time, we find that the powers of the Court, u/s 165 of the Evidence Act, to put any question to a witness, are also couched in very wide terms authorising the Judge "in order to discover or to obtain proper proof of relevant facts" to "ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant". The first proviso to Section 165, Evidence Act, enacting that, despite the powers of the Court to put any question to a witness, the judgment must be based upon facts declared by the Act to be relevant, only serves to emphasize the width of the power of the Court to question a witness. The second proviso in this Section preserves the privileges of witnesses to refuse to answer certain questions and prohibits only questions which would be considered improper under Ss. 148 and 149 of the Evidence Act. Statements of witnesses made to the police during the investigation do not fall under any prohibited category mentioned in Section 165, Evidence Act. If Section 162, Criminal Procedure Code, was meant to be so wide in its sweep as the trial court thought it to be, it would make a further inroad upon the powers of the Judge to put questions u/s 165, Evidence Act. If that was the correct position, at least Section 162, Criminal Procedure Code, would have said so explicitly. Section 165 of the Evidence Act was already there when Section 162, Criminal Procedure Code was enacted.

15. It is certainly quite arguable that Section 162, Criminal Procedure Code, does amount to a prohibition against the use even by the court of statements mentioned there. Nevertheless the purpose of the prohibition of Section 162, Criminal Procedure Code, being to prevent unfair use by the prosecution of statements made by witnesses to the police during the course of investigation, while the proviso is is intended for the benefit of the defence, it could also he urged that, in order to secure the ends of justice, which all procedural law is meant to subserve, the prohibition by taking into account its purpose and the mischief it was designed to prevent as well as its context, must be confined in its scope to the use by parties only to a proceeding of statements mentioned there.

16. We are inclined to accept the argument of the appellant that the language of S. 162, Criminal Procedure Code though wide, is not explicitor specific, enough to extend the prohibition to the use of the wide and special powers of ins court to

question a witness, expressly and explicitly given by Section 165 of the Indian Evidence Act in order to secure the ends of justice We think that a narrow and restrictive construction put upon the prohibition in Section 162, Criminal Procedure Code, so as to confine the ambit of it to the use of statements by witnesses by parties only to a proceeding before the Court, would reconcile or harmonize the two provisions considered by us and also serve the ends of justice. Therefore, we hold that Section 162, Criminal Procedure Code, does not impair the special powers of the court u/s 165, Indian Evidence Act. Consequently, we think that the trial court could and should have itself made use of the statement made by Jailal during the course of the investigation . If that had been done, it is possible that it may have affected appraisal of evidence of other prosecution witnesses."

11. Bearing in mind the above stated legal principles, I have to examine the legality or propriety of the order impugned. Learned counsel for the revision petitioner submitted before me that enough materials are available to come to a conclusion positively that statement of prosecutrix was recorded by the investigating officer (A.S.I.-P.K. Balakrishnan) on 27.2.1996 in the course of investigation. To bolster up his contention counsel relied on the fact that the learned Sessions Judge while disposing of the application for bail moved by some of the accused persons alleged to be involved in the commissions of the offence referred to the statement of prosecutrix made u/s 161 Cr.P.C. in the course of investigation to the effect that she was let free paying a sum of Rs. 1,600/-. Learned Public Prosecutor submitted before me that learned Sessions Judge would not have referred to that statement of prosecutrix if no such statement was made by her in the course of investigation thereby indicating that such a statement was made by her. Learned Public Prosecutor fairly submitted before me that that statement is conspicuously absent in any of the copies of statements of prosecutrix given to the accused persons (statement of prosecutrix recorded u/s 161 Cr.P.C. in the course of investigation by the investigating officer) and on the basis of that fact learned counsel for the revision petitioner submitted that there is suppression and non-supply of the statement of prosecutrix recorded earlier in the course of investigation to the accused persons.

12. There appears to be some force in the above submission made on behalf of the revision petitioner. It is to be pointed out that if the investigating officer P.K. Balakrishnan recorded the statement of the prosecutrix u/s 161 Cr.P.C. on 27.2.1996 as alleged, the revision petitioner has a statutory right to get a copy of that statement and the statement can be made use of by the revision petitioner to test the veracity of the evidence given by the prosecutrix. If such a statement of the prosecutrix (statement alleged to be recorded on 27.2.1996) is in fact recorded by the investigating officer in the course of investigation as asserted by the revision petitioner, I have no hesitation to hold that a statutory right is denied to him by not supplying or furnishing to him copy of that statement. However, I cannot say at this stage whether such a statement was recorded or not, though there appears to be

some force in the contention of the learned counsel for the revision petitioner that there is suppression of the statement of the prosecutrix recorded by the police in the course of investigation.

13. The impugned order cannot be sustained and is set aside. If the learned Sessions Judge is salisfied on the basis of the materials available before him in the course of trial that the statement of the prosecutrix, alleged to have been recorded by the investigating officer (ASI -P.K. Balakrishnan) on 27.2.1996, is in fact recorded by him personally or at his dictation or direction by another police officer, effective opportunity should be given to the accused/revision petitioner after supplying copy of that statement to test the veracity of the evidence given by her by allowing him to contradict her with that previous statement in the manner provided u/s 145 of the Evidence Act drawing attention of her to that part of the statement.

This revision is disposed of accordingly.