

JUDICIAL DISTRICT BEED
THIRD WORKSHOP

SUMMARY OF PAPERS
SUBJECT ON CRIMINAL SIDE

Subject : Examination of witness under section 164 of Code of Criminal Procedure.

Use of the statement recorded under section 164 of Code of Criminal Procedure with reference to section 145 of Evidence Act

PREFACE:

01. The subject for the workshop basically draw our attention to the main two provisions i.e. section 164 of Code of Criminal Procedure hereinafter referred to as “CODE” and section 145 of Evidence Act hereinafter referred to as “ACT”. Normally, statements in the Code is recorded under section 162. Under section 164 the confession of the accused is recorded, so also the statements of the witnesses. As per section 164(1) of Code Judicial Magistrate or Metropolitan Magistrate whether or not having jurisdiction in the case can record any statement or confession made to him in the course of investigation. Section 164(5) of code empower the Judicial Magistrate to record statement (other than the confession) which is in the opinion of the Magistrate a best fitted to the circumstances of

the case. The Magistrate is also empowered to administer the oath to the person making such statement. The statement of the witnesses recorded in the course of investigation under section 164 of the Code shall be forwarded to the Judge by whom the case is enquired into or tried.

02. The term “**statement**” is not defined anywhere in the Act. However, it has got wide connotation. Section itself contemplates that statement which is either written by the witness himself or reduced to writing by someone else and so, the statement recorded under section 164 of the Code is previous statement of the witness. The section speaks of “ In his confession or statement”. It may be the statement of an accused person which is a non-confessional statement or of a witness capable of giving useful information relating to an offence. The word statement means a statement of a witness does not mean a statement of the accused person. Section 164 of the code does not provide for recording of any statement of an accused person other than a confession. This section specifically provides record of two clauses of a thing i.e. (1) the statement of the witnesses and (2) confession of a person accused of an offence. The word statement in sub-clause (1) has been used in wider sense and may include statement either of a person or even of a different person and they would have recorded in course of the Chapter XII if they were intended to be a statement made during the course of investigation. The statements which were made by the persons at identification parade are nothing but the statement under section 164 of the Code. A statement made under section 164 of the

code is not inadmissible in the evidence and may be used to corroborate or contradict a statement made in the Court in the manner provided under section 157 and 145 of the Evidence Act. The statement made under this section cannot be used as a substantive piece of evidence. But it can be used for the purpose of corroboration. It can be used to cross-examine the persons who made it to show that the evidence of the witness is false but that does not establish that what he stated out of court under this section is true. A statement made by a witness under section 164 of the Code can be used for the purpose of cross-examining him and discrediting his evidence in the session's court.

THE NEED FOR RECORDING STATEMENT U/S 164 OF CODE

03. A question may arise as to why there is need to record the statement under section 164 of the code in addition to statement recorded under section 162 of the Code. The object of recording of statements of witnesses under section 164 of the Code is two fold;

(1) to deter witnesses from changing their versions subsequently and

(2) to get over the immunity from the prosecution in regard to information given by the witnesses under section 162 of the code. The another reason of recording statement of witnesses under section 164 of the code is to minimize the chances of changing the versions by the witnesses at the trial under the fear of being involved in perjury.

04. A question may also arise as to why a Magistrate is empowered to record statement in addition to the statements recorded by police under section 162 of the Code and particularly

when section 145 apparently does not distinguish between the statement under section 162 or statement under section 164 of the Code and there is no additional weightage is given to the statements recorded under section 164 of the Code for the purpose of contradicting a witness. The object behind it that when during the course of investigation police records the statements under section 162 of the Code they cannot administer oath to the person making statement and cannot obtained his signature, but under section 164 of the Code, a magistrate recording statement of a person can administer oath to him and obtain his signature over the statement. The person making and signing a statement before the magistrate during the course of investigation will not disown it and will support the case of prosecution. Certainly if a person makes and signs a statement then naturally he comes under moral obligation and chances of his turning hostile will be reduced. In our social condition prevailing in our country tampering of prosecution witnesses is favourite pastime.

05. So, getting statement recorded by the magistrate is the recognized method to deter prosecution witnesses from changing their versions subsequently. However, for that reason alone, their trustworthiness cannot be doubted. But the evidence of witness whose statement is recorded under section 164 of the Code must be approached with caution. This however, cannot invariably bear the rule of law when it is disclosed that a witness whose statement has been recorded under section 164 of the Code was kept in police custody for several days and his whereabouts were not disclosed to

the relatives the evidence tendered by that witness in a court should not be relied upon. Similarly a witness whose statement is recorded under section 164 of the Code is not sticking to his statements so recorded the Court should not rebuke him and threaten him that he will be prosecuted for perjury.

**PROCEDURE TO BE FOLLOWED BY
MAGISTRATE:**

Section 164 (1) of the Code states that – 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.

Section 164 (5) of the Code states that – Any statement (other than a confession) made under sub-section shall be corded 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.

Section 164 (6) of the Code states that – 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.

06. In view of section 164 (5) of the Code it appears that it does not speak as to whether the signature of the witness making statement is to be obtained or not. In fact it specifically states that the Magistrate shall record the statement of the witnesses in a

manner provided for the recording of evidence. While recording of evidence of a person we do not obtain the signature whose evidence is being recorded. That itself means that while recording a statement there is no need to obtain the signature of a witness who is making his statement before the magistrate. Thus after recording a statement of witness a magistrate should endorse his certificate at the foot of such statement. The statement recorded under section 164 of the code is the public document according to the section 74 of the Evidence Act. Such statement is admissible in evidence under section 80 of the Evidence Act.

In the above legal provisions it is necessary to consider the following aspect :-

(A) If a magistrate has recorded the statement of the witness in the manner provided under section 164 (5) of the code. The charge sheet is filed and case is committed to the Sessions Court for the trial. During the trial the witness whose statement has been recorded under section 164 of the code, completely turns hostile. He even goes to the extent that his statement was not at all recorded by the magistrate. Then how to make use of that statement in the trial.

In case of **Kasmira Singh v/s. State of M.P.** reported in **A.I.R. 1952 S.C. 159** it is observed that -

“In case witness denies the fact of recording of his statement by Magistrate or if he denies specific portion of his statement to be not told by him,

examination of Magistrate is not necessary to prove contradiction which is unlike the case of statement recorded by police under section 162”.

In the above authority the Apex court has endorsed the judgment of Privy Council in **Nazir Ahmed v/s. King Emperor** reported in **A.I.R. 1936 P.C. 253**.

In case of **Guruvind palli Anna Rao - of A.P.** reported in **2003 Cri. L.J. 3253**, it has been specifically observed that –

“Statement of witness recorded under section 164 of the code is a public document which does not require any formal proof. Hence summoning of Magistrate by Sessions Court to prove contents of the said statement is improper.

Section 80 of the Evidence Act, states that–Whenever any document is produced before any court, purporting to be a record or memorandum of the evidence, or any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the court shall presume

– that the document is genuine, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was dully taken.

In view of the provision of 164 of the code the

Magistrate has not obtained his signature on the statement but has endorsed his certificate at the foot of the statement. Then it is very difficult to ascertain as to whether the witness is speaking truth or false.

07. The part of presumption at the foot of the section 80 of the evidence act states that— that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it. That means if the statement which bears the signature of the maker can only come under the purview of section 80 of the Evidence Act. In such situation if the statement bears the signature of the maker then and then only the statement can be held as public document and the presumption under section 80 of the Evidence Act can be made applicable to it and the authorities cited supra can be made applicable to it. If the statement does not bear the signature of the maker then it can not be considered as public document and no presumption under section 80 can be applied to it inspite of the endorsement of the magistrate who has recorded the statement. In such circumstances it is incumbent on the prosecution to adduce the evidence of magistrate in order to prove the contents of the statement for making its use in the trial.

(B) In the various court it is observed that after recording of the statement the magistrate sealed it in the envelop and put it in the cash box. Then after filing of the charge sheet he tag that envelop to the charge sheet and send commit the case to the Sessions court. In this context two things are to be considered.

In case of **Patiram V/s.State of Maharashtra of reported in 2003 Cri.L.J. 4718**, it is specifically observed that -

“The statement recorded under section 164 of the code are part and parcel of the case diary of investigation. Even in the charge sheet there should be mention of recording of statement by the magistrate”.

Section 173(5)(b) specifically mention about the statement recorded under Section 161 of the Code and does not speak about statement recorded under section 164 of the code. Keeping this section in the mind or by following the old practice of the station if he kept the statement in a sealed envelop and commit it to the Sessions Court after receiving charge sheet then there is sheer contravention of section 207 of the code which is mandatory.

Section 207 (iv) of the code specifically states that the copies of confession and statement recorded under section 164 has to be supplied to the accused before committing the case under section 209 of the Code.

08. Therefore to overcome all these problems it is always necessary for the magistrate to prepare carbon copy of the statement recorded under section 164 of the code. The original should be kept in the sealed envelop which will travel to the Sessions Court after committal and to hand over the carbon copy of the statement to the Investigating Officer so that while filing charge sheet he will be in position to mention it in the charge sheet and arrange it in proper order. In this manner the committing magistrate can supply the copy of the statement to the accused as per section 207 of the Code.

(C) Now who is qualified person for recording the statement under section 164 of the code.

The person qualified for the statement is the person who is capable of giving useful information relating to an offence. It may be a eyewitness, closely associated with the victim or the accused. In the section 164 there is no specific embargo that only particular set of persons can record their statement. The basic important thing is that such person should be capable of giving useful information relating to an offence.

On these point there are two authorities:

In case of **Jogendra Nayak –v/s. State of reported in 2000**

(1) SCC 272, it is held that-

“The statements other than confession are concerned cannot be recorded by a Magistrate unless the person (who makes such statement) was produced or sponsored by investigation officer”.

In case of **Patiram V/s.State of Maharashtra** of reported in **2003 Cri.L.J. 4718**, it is observed that -

“Magistrate recording statement of the witness who was not sponsored by investigating agency is admissible in evidence”.

Obviously the above authorities are not contradiction but can be distinguished on facts and circumstances. Thus a statement under section 164 may be recorded by a Magistrate not only at the instance of the police but also at the instance of the accused, or the witness or the aggrieved person. It is not necessary at every time that a Magistrate shall record the statement only upon the instance of

Police. But the statement under section 164 of the Code has to be recorded during the course of investigation only or any time afterwards but before the commencement of the inquiry or trial. It is also necessary for the magistrate recording such statement to take all precaution while the same is recorded and to satisfy him that the same is voluntary, it is not out of any fear or favour and there is no policeman present while the same is recorded.

USE OF PROVISIONS OF SECTION 145 OF EVIDENCE ACT.

09. As stated in the foregoing paras that the statement recorded under section 164 of the code is not substantive piece of evidence but corroborative, the same can be used with reference to section 145 of Evidence Act.

Section 145 of the Act states that – Cross- examination as to previous statements in writing- A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved, but if it is intended to contradict him by the writing, his attention must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

The Section 145 of the Act does not speak about as to which statement recorded under section 162 of the code or 164 of the Code is to be considered as a previous statement in writing. Thus both the statements recorded under section 162 and 164 of the Code are the previous statements to invoke section 145 of the Act.

Section 145 of the Act is consisting of two parts –

The first part enables the opponent to cross-examine a witness as to previous statement made by him in writing or reduced to writing, without such writing being shown to him;

The second part gave restriction on the opponent. If the opponent intended to contradict him by the writing, his attention must be called to those parts of it which are to be used for the purpose of contradicting him.

It will be needless to mention that while dealing with section 145 of the Act, the case of *Tahsildarsingh V/s.State of Uttar Pradesh* reported in *A.I.R. 1959 S.C. 1012* has been a milestone of judicial business. Without touching the ratio laid down in Tahsildarsing case no criminal case can accelerates.

10. The basic requirement of section 145 of the Act is that there must be two contradictory statements of the same person available on record. It is a matter of right of a party to cross-examine a witness as to his previous statement if it is relevant to the matter in question. A court cannot refuse to allow the cross-examination of a witness with reference to his previous statement on the ground that the document which contain statement is not being produced at the time of cross-examination. If a person is not examined as a witness in a case, his previous statement cannot be used to contradict the other evidence. Section 145 of the Act makes it necessary to put the previous statement to a witness, if a witness does not go to the witness box the process cannot be adopted. But that does not entitle

a court to use the previous statement to contradict him in his present case. A witness whose previous statement is recorded under section 164 of the Code not entered in the witness box and subsequently introduced as a defence witness then he cannot be contradicted under section 145 of the Act with his previous statement. The previous statement of a witness can be proved ordinarily by the admission of the witness himself or by the evidence of a person who has recorded it. Section 145 of the Act specifically provides cross - examination of the previous statement of the witness himself but not of the statement of third parties.

Thus in the day to day activities in a Criminal Court the statements of witnesses recorded under section 164 of Code can be used to cross-examine the persons under section 145 of the Act.

Important Case Law in reference to section 164 of the Code and section 145 of the Act.

1) **A.I.R. 1953 Orissa 308**:- Statement before committing Magistrate is, no doubt, substantive evidence, but weight which should be attached to such evidence is a matter which is to be decided by the Court according to the facts and circumstances appearing in the case. If the Sessions Judge for his sufficient reason as to why he should accept the evidence taken before committing Magistrate in reference to that taken by himself, he should base his judgment upon such statement even if evidence is not corroborated

by any other independent evidence.

- 2) **Bisipati Padhan v/s. State in A.I.R. 1969 Orissa 289 : Ram Kishan –vs- Harmit A.I.R. 1972 SC 468, State v/s. Shriram Lohiya A.I.R. 1960 SC 490 :-** A statement of a witness u/s 164 of the Code is not substantive evidence, but it is a former statement made before an authority legally competent to investigate the fact. Such a statement can be used either for corroboration of the testimony of a witness u/s 157 of the Act or for contradiction thereof u/s 145 of the Act.

- 3) **Mohanlalv/s State of Mah. In A.I.R. 1982 SC 839 :-** Section 145 of the act applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding.

- 4) **Bharatsingh v/s. Bhagrathi A.I.R. 1966 SC 405 :-** If admission is duly proved, it can be used as substantive evidence whether or not witness was confronted with such admission or not when that witness came to witness box.

- 5) **Sita Ram Patil v/s. Ramchandra Patil in A.I.R. 1977 SC 1712 :-** even if written admission is proved, it can be used as substantive evidence if the witness is so confronted with his previous admission in writing as per section 145 of the act.

- 6) **Balak Ram v/s. State of U.P. A.I.R. 1974 SC 2165, and Ram Charan v/s. State of U.P. A.I.R. 1968 SC 1270** :- evidence of witness cannot be discarded merely because their statements were recorded under section 164 of the Code. All that is required as a matter of caution is a careful analysis of the evidence.

- 7) **Tapan Dass v/s. Sosti Dass A.I.R. 1986 390.** :- Rule of section 145 of the Act.

- 8) **Binay Kumar v/s.State of Bihar A.I.R. 1997 SC 322** :- If the witness disowns having made any statement which is inconsistent with his present stand his testimony in court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second part of section 145 of the act.

- 9) **Thumallapally –State of A.P. 1993 (2) Crimes 179** :- There is no rule of law that an earlier statement should be treated as correct and the subsequent contrary statement shall be discarded.

- 10) **State v/s. Kartar in A.I.R. 1970 SC 1305 :1970 Cr.L.J. 1144** :- Statements under Section 164 of the Code are not substantive evidence. But it can be used to corroborate or contradict the maker under section 145 and 157 of the Act.

- 11) A.I.R. 1980 SC 628 : 1980 Cr.L.J. 439, A.I.R. 1974 SC 2165. : 1974 Cr.L.J. 1486, A.I.R. 1968 SC 1270, 1985 Cr.L.J. 367 (Cal), 1987 Cr.L.J. 242 (Allahabad) :- The evidence of a witness in a court whose statement has been previously recorded by a magistrate under section 164 of the code is always suspect, cannot be accepted as universally true and without any reservation.
- 12) I.B.B.Rao v/s. State – 1985 Cr.L.J. 32 :- When it is disclosed that a witness whose statement has been recorded under section 164 was kept in police custody for several days and his whereabouts are not disclosed to the relatives, the evidence tendered by that witness in Court should not be relied upon.
- 13) Ramchander v/s State A.I.R. 1981 SC 1036 : 1981 Cr.L.J. 609:- When a witness whose statement under section 164 of the Code was recorded was not sticking to his statement so recorded, the Court should not rebuke him nor threaten him that he should be prosecuted of perjury.
- 14) Ram v/s. State – A.I.R. 1968 SC 1270 : 1968 Cr.L.J. 1473 :- Unless witnesses resile from their statements recorded under section 164, those statements cannot be deemed doubtful.
- 15) 1981 Cr.L.J. NOC 138 :- the statement of a witness recorded

under section 164 of the code that the accused made before him extra-judicial confession of having killed the deceased constitutes substantial piece of evidence.

16) Haladhar v/s State 1979 Cr.L.J. NOC 128 :- Recording of statement under section 164 of the Code sometimes becomes very much necessary in the interest of a case if the police seeks to weaken or demolish a case or refusing to take steps for recording the statement of the witness at the earliest opportunity, the magistrate may record the statement of the witness and de facto complainant under section 164 (5) of the Code.

17) T.S.John v/s. state – 1984 Cr.L.J. 753 :- Statement of deceased person recorded under section 164 is not admissible under section 32 (3) of Evidence Act.

18) State of U.P. V/s. Veer singh 2004 Cr.L.J. 3835 (SC), Shrawan v/s. State of Maharashtra 2003 Cr.L.J. 398 –A (SC), Sunil Kumar v/s. State of M.P. 1997 Cr.L.J. 1183 :- Dying declaration recorded with belief that there was no chance of survival of its maker and the victim survived surprisely then such dying declaration forms the part of statement and would be best statement under section 164 of the Code.

19) **2004 Cr.L.J. NOC 266 (Jharkhand)** : Statement of Informant – Magistrate can not refuse to record the statement of informant under section 164 of the Code on the ground that the case is under investigation.

20) **Audumbar v/s. State 1999 Cr.L.J. 1936** :- if a witness turns hostile his statement u/s 164 of the code even if proved by examining a magistrate cannot be used as a substantive evidence.

21) **Kanwar Pal v/s. State of Hariyana 1994 Cr.L.J. 1392, Ramesh –vs- State A.P. 2005 Cr.L.J. 3354 (SC)** :- the evidence of a witness whose statement is recorded u/s 164 of the code be viewed with some initial distrust but it is not a rule of law and such evidence cannot be discarded in all cases.

22) **1972 (3) SCC 280 : 1972 Cr.L.J.266** :- Statement u/s 164 of the Code even if proved cannot be used as substantive evidence.

23) **Choudhari Ramji v/s. State of Gujrat 2004 Cr.L.J. 280 (SC)** :- witness can only be contradicted u/s. 145 of the code of his own previous statement and not with statement of any other witness.

24) **Phool chand V/s. State of U.P. 2004 Cr.L.J. 1904, Mohd. Ansari – of Bihar 2005 Cr.L.J. 1771** :- statements recorded u/s 164 of the code cannot be relied on for purpose of conviction.

CONCLUSION:

In view of the above discussion and the nature and scope of provisions under section 164 of Code of Criminal Procedure with reference to the recording of statement of witnesses along with section 145 of Evidence Act, a specific duty is cast upon the Magistrate to record statement of child witnesses and witnesses under Protection of Children From Sexual Offences Act, 2012 for insuring friendly atmosphere. So also at the time of recording of evidence of child witness presence of parents of the child or any person in whom child has trust or confidence is permitted. The Magistrate can seek the assistance of translator, interpreter or special educator which is necessary for the same. The Magistrate has been given discretion to record statement of the witnesses either sponsored by investigating agency or the witnesses directly before the Court for recording such statement.

Considering the importance of the topic, it is necessary for all the Judicial Officers to pay special attention to the provisions of section 164 of Code with reference to Section 145 of Evidence Act, so as to enable them to have clear notions about all relevant provisions in this regard.