

W E B I N A R

**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)*

by
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INTRODUCTION

The term “statement” is not defined anywhere in the Code of Criminal Procedure. However, it has got wide connotation. Section 164 Cr.P.C. 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. This section speaks of “ In his confession or statement”. It may be the statement of an accused person which is a confessional statement or of a witness capable of giving useful information relating to 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 admissible in 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 Indian Evidence Act. However, the statement made under this section cannot be used as a substantive piece of evidence.

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 given to the statements recorded under section 164 of the Code for the purpose of contradicting a witness. The object behind it is 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 obtain 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 the social conditions, prevailing in our country tampering of prosecution witnesses is favourite pastime.

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 and hence 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. Statement given by a witness U/Sec.164 Cr.P.C. is like a 'previous statement' given during investigation. It is not 'substantive evidence' adduced before the Trial Judge, because it was not recorded in the presence of the accused but was recorded from a witness during investigation. It was recorded - 'res inter alia acta' – recorded behind the back of the accused.

Need for recording the statement U/Sec.164 Cr.P.C.:

The need for recording statements of a witness under section 164 of the code is two-fold:

1. To deter witness from changing their versions subsequently: and
2. To get over the immunity from the prosecution in regard to information given by the witness under Section 162 of the code. Another reason for recording statement of witnesses under the section 164 of the code is to minimize the chance of changing the versions by the witness at the time of trial under the fear of being involved in perjury.

Legal provisions:

Section 164 CrPC talks about the statements recorded by Magistrate:

Sub Section (1) authorizes the Magistrate to record the statement of a person or his confession, no matter whether he possess jurisdiction in the case. If he does not possess such jurisdiction sub-section (6) will apply. The word statement is not limited to statement by a witness but includes accused and not amounting to a confession.

Sub Section (1) 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.

Warning under Subsection 2:

Subsection 2 of Section 164 mentions a warning. Under the statutory provision, the Magistrate is first required to explain to the accused that he was not bound to make a confession and that if did so, it might be used against him. This is the *sine qua non* for

recording confession. The other mandatory requirement is that the Magistrate must put questions to the accused to satisfy himself that the confession was voluntary so as to enable him to give the requisite certificate under subsection(4). The Magistrate must satisfy himself that no pressure or force was used on the accused who makes the confession.

In *Mahabir Singh v. State of Haryana* court observed that, Where the Magistrate fails to explain to accused that he was not bound to make the confession and that if he did so, such confession might be used as evidence against him, that confession so recorded, cannot be taken into consideration.

Bar against police pressure

The Sub Section 3 guarantee that police pressure is not brought on the person who is willing to make a confession. Where the accused was in judicial custody for more than 2 days prior to the giving of confession it was held that the period is sufficient to shed fear and influence of the police, if any and therefore the confession could be made voluntarily by the accused.

Manner of recording Confession, signatures etc.

Subsection (4) says that the confession should be recorded in the manner provided under section 281 and shall be signed by the person making it. The Magistrate shall then make the memorandum at the foot of such confession. The Magistrate cannot merely sign a printed instruction supplied to him. This will be violative of this section. The entire confession must be brought on record. The confession must be shown to be voluntary before it can be acted upon. The confession without memorandum that it is voluntary is bad in law and cannot be admitted in evidence.

Recording the Statement of Victim of Rape or a physically or mentally challenged Victim.

Subsection 5A reads as a mandatory provision for recording the statement of the prosecutrix under Section 164(5A) of CrPC by the Magistrate. As soon as the crime is brought to the knowledge of the police officer, he is duty bound to take the victim to the nearest Judicial Magistrate for recording her statement. If the victim approaches the court for recording her statement being distressed and aggrieved with the attitude of the investigating agency. Thus it is the duty of the Magistrate to record her statement.

Further this section also provides for recording the statement of temporarily/ permanently mentally or physically disabled persons. In such cases, the magistrate shall

take the assistance of an interpreter or a special educator in recording such statement and further it is provided in this section that such statement made by such person shall be videographed. For all purposes, this statement shall be considered as a statement in lieu of examination in chief as specified under S.137 of the Indian Evidence Act and the witness can be directly cross-examined on such statement. In case if the victim is a minor the mother of the victim can be allowed to be present at the time of recording her S.164 statement.

Whether signature of the witness making statement is to be obtained?

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 obtain the signature of the person whose evidence is being recorded. That itself means that while recording a statement there is need to obtain the signature of a witness who is making his statement before the magistrate. After recording such 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 :-

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 has even gone 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 provisions of S.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.

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 cannot 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.

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 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.

Recording of statements of witnesses not being sponsored by the Investigating Agency:

A statement of a witness under section 164 crpc which was recorded by the magistrate even on accord of witness and not being sponsored by investigating agency is admissible in court.

On this point there are two authorities:

In case of *Patiram vs The State Of Maharashtra (2003 CriLJ 4718)* High court of Bombay has made the following observation by interpreting the observation of Hon'ble Apex court in *Jogendra Nahak Vs State of Orissa (AIR 1999 SC 2565)* in para No. 14 as follows:

“The Apex Court in Para 22 has made observations in respect of the Magistrate, who is not expected to record statement under Section 164 of the Code without the Investigating Officer moving for it and this does not indicate that such statement, if recorded by the Magistrate, is either inadmissible in law or cannot be admitted in the evidence. The Apex Court was more concerned about the ensuing consequences if such practice is adopted by the Magistrate which, in a given case, may be helpful to the culprit to shield his crime. ”

The observation of Hon'ble Apex court in *Jogendra Nahak Vs State of Orissa (AIR 1999 SC 2565)* is as follows:

“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 straightway 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 S.164 of the Code.”

Use of provisions of Section 145 of the 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 before the writing can be proved, 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 Tahsildarsingh's case no criminal case can accelerates.

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. 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 and has 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 Laws in reference to section 164 of the Code and section 145 of the Act.

1) In case of *State of Karnataka by Nonavinakere Police Versus Shivanna @ Tarkari Shivanna* reported in *SPL (CRL.) NO. 5073/2011* it is held that --

9. On considering the same, we have accepted the suggestion offered by the learned counsel who appeared before us and hence exercising powers under Article 142 of the Constitution, we are pleased to issue interim directions in the form of mandamus to all the police station in charge in the entire country to follow the direction of this Court which are as follows:

(i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 Cr.P.C. A copy of the statement under Section 164 Cr.P.C. should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 Cr.P.C. should not be disclosed to any person till charge sheet/report under Section 173 Cr.P.C. is filed.

(ii) The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

(iii) The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

(iv) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

(v) Medical Examination of the victim: Section 164 A Cr.P.C. inserted by Act 25 of 2005 in Cr.P.C. imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 Cr.P.C.

2) **MOHAMMED AJMAL MOHAMMAD AMIR KASAB @ ABU MUJAHID vs State of Maharashtra.(2012) 9 SCC 1.**

The Hon'ble Apex court has clearly pointed out in the above case that the right against self- incrimination under Articles 20(3) is fully incorporated in the provisions of the Cr.P.C. (Sections 161, 162, 163 and 164) and the Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance with these statutory provisions is also equal compliance with the Constitutional guarantees.

It was further held that the object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defense lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of investigation. The test to judge the Constitutional and legal acceptability of a confession recorded under Section 164 Cr.P.C. is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally.

In addition the Hon'ble Apex court also held in the above case as follows:

“468. In light of the above discussion, we are in agreement with the submissions of Mr. Subramaniam as formulated in paragraphs II and III of his summing up. We accept that the right against self-incrimination under Articles 20(3) does not exclude any voluntary statements made in exercise of free will and volition. We also accept that We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.”

3) **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.

- 4) **Mohanlal v/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.
- 5) **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.
- 6) **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.
- 7) **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.
- 8) **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.
- 9) **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 seek to weaken or demolish a case or refuse 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.
- 10) **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.
- 11) **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.

12) *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.

C O N C L U S I O N

In view of the above discussion and the nature and scope of provision 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.

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