PETITIONER:
JOGENDRA NAHAK & ORS.

Vs.

RESPONDENT:
STATE OF ORISSA & ORS.

DATE OF JUDGMENT: 04/08/1999

BENCH:
U.C.Banerjee, K.T.Thomas, D.P.Mohapatro

JUDGMENT:

THOMAS, J.

Leave granted.

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 Code of Criminal Procedure (for short the Code). The High Court which initially issued such a direction later resiled therefrom and revoked the order on a second thought and mulcted the aforesaid four persons with compensatory costs. They filed this appeal by special leave.

The backdrop of the above order can be summarised thus: In an incident which happened on 12-8-1997 at Janumi Village (Ganjam District, Orissa) one Balaram Mohanty and his son sustained injuries and later the said Mohanty succumbed to the injuries. F.I.R. was registered with Purusottampur Police Station on the information supplied by Bhagaban Mohanty, brother of the deceased. One Jagadish Murty and three others were arrayed as accused in the F.I.R. and investigation was commenced thereon. On completion of the investigation final report was laid by the police before the magistrate against the said accused persons. According to the present four appellants, though they were interrogated by the Investigating Officer under Section 161of the Code their statements were not kept in the Case Diary.

The four appellants filed a writ petition before the High Court for directing the investigating officer to record their statements under Section 161 of the Code and for a further direction to the magistrate concerned to record their statements under Section 164 of the Code. The High Court permitted the appellants, as per its order dated 22-12-1997, to file a petition before the magistrate for the purpose of recording their statements and the magistrate was directed to pass appropriate orders on such petition. Pursuant to the said order appellants went to the magistrates court and filed a petition. However, the magistrate declined to record the statements. Appellants again moved the High Court and the following direction was issued by a Division Bench on 24-3-1998:

We direct the trial court to comply with our order dated 22-12-1997 by recording the statement under Section 164 Cr.P.C."

It appears that the magistrate, pursuant to the aforesaid direction, recorded the statements of the appellants. Therefore, Bhagaban Mohanty (the informant) filed an application before the High Court to recall the order dated 24-3-1998. The Division Bench which passed the said order heard both side and delivered the impugned order dismissing the writ petition filed by the appellants and also ordering each of them to pay a cost of Rs.2,500/- for filing frivolous and vexatious petition.

The Division Bench held that appellants have miserably failed to prove any mala fide action of the investigating officer so as not to investigate the case properly or to screen any offender. Learned Judges concluded thus:

Therefore, the anxiety of the petitioners to examine themselves, is not with a view to help the investigating agency or the prosecution but to favour a person who has been charge-sheeted as an accused. Under such circumstances, the writ application is devoid of merit. It thus appears that petitioners did not file the writ application for securing fair justice but to play tricks so as to get their statements under Section 161 and/or 164 of the Code recorded to help a charge-sheeted accused.

The argument addressed is that if the magistrate has power to record a statement under Section 164 of the Code at the instance of a witness, this is not the stage to consider whether witness has approached the magistrate with bona fides or not as that aspect should have been left to the trial court to decide while considering the reliability of his testimony. At present we may decide the question whether a witness can, on his own motion, approach a magistrate with a request that his statement may be recorded under Section 164 of the Code.

Learned counsel for the appellants pointed out that Orissa High Court has on previous occasions approved the legal position that a magistrate has wide discretion in recording statements under Section 164 of the Code and that it could as well be done at the instance of the witness himself (vide State of Orissa v. A.P. Das (1979 Cuttack Law Times 298) and Bhima v. State {1994 (7) Orissa Criminal Reports 413}.

Some other High Courts have also taken the said view (vide Mohammad Sarfraz v. Crown {1951 Criminal Law Journal (Lahore) 1425}. In re C.W. Casse (AIR 1948 Madras 489), Kunjukutty v. State of Kerala (1988 Criminal Law Journal 504). Counsel on both sides submitted that the question was not considered by this Court hitherto.

Section 164 of the Code deals with recording of confessions as well as statements. Sub-section (1) empowers the magistrate to record them. It reads thus:

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.

The proviso to the sub-section and sub-sections (2) to (4) are not material for this purpose as they relate only to recording of confessions. Sub-section (5) says that a statement of the witness shall be recorded in the manner in which evidence is recorded under law.

There can be no doubt that a confession of the accused can be recorded by a magistrate. An accused is a definite person against whom there would be an accusation and the magistrate can ascertain whether he is in fact an accused person. Such a confession can be used against the maker thereof. If it is a confessional statement, the prosecution has to rely on it against the accused. But that cannot be said of a person who is not an accused. No such person can straightway go to a magistrate and require him to record a statement which he proposes to make.

Section 164 falls within Chapter XII of the Code which has the appellation Information to the police and their power to investigate. The first three provisions in the Chapter are intended to deal with the steps which precede the registration of the FIR. Those provisions include the lodgment of First Information Statement regarding a crime.

The next two sections provide for the duty of the police to send reports to the magistrate indicating whether the police would proceed with the investigation or not. Section 159 empowers the magistrate to direct an investigation or to hold an inquiry when he gets a report from police in the manner indicated in Section 157(2) of the Code.

Section 160 of the Code deal with the powers and duties of the police regarding examination (including interrogation) of persons who are acquainted with the facts and circumstances of the case and also regarding the use of such statements in the trial. It is in the above context that Section 164 is incorporated in this Chapter for recording of confessions and statements.

By Sections 165 to 173, the Code prescribes provisions which the police have to adopt as follow up steps in the matter of investigation and also the requirements to be complied with on conclusion of such investigation.

Section 173 says that on completion of investigation the officer-in-charge of police station shall forward a report to the magistrate, stating, inter alia, the names of the persons who appear to be acquainted with the circumstances of the case. Sub-section (5) of Section 173 requires that the police officer shall forward to the magistrate along with the said report (a) all documents or relevant extracts thereof on which the prosecution proposes to rely and (b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

Even when a further investigation, as indicated under sub-section (8) is conducted by the police, they have to comply with all the requirements contained in the preceding sub-sections.

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

In re C.W. Casse (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.

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.

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).

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.

On the other hand, if 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 magistrate 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.

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 rightly 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.

The last contention that the High Court should not have mulcted the appellant with costs, as they approached the court in view of the legal position set by the Orissa High Court on earlier occasions. Cost was ordered in the discretion of the High Court, and it is not proper for us to interfere with such a discretion.

Appeal is disposed of accordingly.