

The Rule and the Recording of Evidence

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Abstract: The recording of evidence is an important field of law, traditionally relies on oral and documentary record records of facts. The medium of recording data has varied from stone, clay, metal, parchment and paper over the past centuries to audio – visual tapes and computer disks in modern times. The new techniques and new devises are the order of day. In the present scenario, the evidences are collected under the provisions of the Indian Evidence Act, 1872. In Criminal proceeding, Section 230 to 234 of Criminal Procedure Code specifies that when the evidence have to be given and when to be closed and the power has been given to the court to compel the witness to appear before the court to give evidence.

Keywords: Recording, Evidence, Rules and safety

I. INTRODUCTION

In Civil matters, the witnesses are summoned to appear before the Court and adduce evidence¹. Thus in the present legislative scenario the attendance of witness is required for taking evidence from him. However the provision of section 77 of CPC and Section 284 of criminal procedure Code are exception to this rule, whereby the power has been given to the courts to issue Commissions for examination of witnesses. However, there is no other means contemplated in any statute through which evidence can be taken. In today's world, the nature of crime in the society has also changed which calls for adopting some new measures to cope up with the situation. Tape recording is one of such measures adopted by our judiciary for dealing the cases conveniently. For understanding the concept of the rule and recording of evidence, it is necessary to touch all the facets relating to it.

II. WHAT DO WE MEAN BY EVIDENCE?

According to section 3 of the Indian evidence Act, 1872 "evidence" means and includes –

- (1) All **statements** which the court permits or requires to be made before it by witnesses, in relation to the matter of fact under inquiry; Such statements are called oral evidence;
- (2) All documents (including electronic records) produced for the inspection of the court; Such documents are called documentary evidence.²

It was observed and held by the Supreme Court in Hardeep Singh v. State of Punjab ³ that The word evidence has to be broadly understood and not

literally. Statement made in examination-in-chief constitutes evidence and court exercising power under S. 319 post commencement of trial need not wait for evidence against person proposed to be summoned to be tested by cross-examination.

III. RECORDING OF STATEMENTS DURING INVESTIGATION

During the process of Investigation it is the duty of investigating officer to collect and record all material facts and statements in the manner provided under the code of criminal procedure under section 161 and 162. Section 161 of the Code provides for oral examination of a person by any investigating officer when such person is supposed to be acquainted with the facts and circumstances of the case. The Object and purpose of the statements recorded under section 161 is to collect evidence regarding commission of an offence by examining witnesses to the offence. Though section 162 of the code prohibits the signing of such statements by the witness as the statement recoded therein is prerogative of police officer and the same can be used in used at any trial. Further the statements can also be recorded by audio-video electronic means. the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of The Indian Penal Code is alleged to have been committed or attempted, shall be recorded, by a woman Police officer or any woman officer. Because Civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and

¹ Section 30 , Code of Civil Procedure

²Section 3. The Indian evidence Act, 1872,

³ (2014) 3 SCC 92

the vigilante. They keep themselves away from the Court unless it is inevitable.⁴ Moreover, after filing charge sheet, these statements will also be perused by the Court to take cognizance of an offence. Such a statement can only be utilized for contradicting the witness in the manner provided by Section 145 of the Evidence. The statements of witnesses recorded by police under section 162 Crpc during investigation cannot be used for seeking corroboration or assurance for the testimony of a witness in court. It may be made clear that if the statements recorded by the police used by the party it could be used only for contradicting the prosecution witnesses and for no other purpose. Such statements cannot be used for seeking corroboration or assurance for the testimony of the witnesses in court. However, it is not the law that whenever the signature of the person is obtained in his statement recorded during an investigation that statement should be ignored. But in such situation the court must be cautious in appreciating the evidence that the witness who gave the signed statement may give in court. In *State of Rajasthan Vs Teja Ram and others*⁵, the apex court observed that section 162 of Cr.P.C., does not provide that, evidence of a witness given in the court becomes inadmissible, if it is found that the statement of witnesses recorded in the course of investigation was signed of the witness at the instance of the investigating officer. It merely puts court on caution and may necessitate in depth scrutiny of the evidence.

IV. STATEMENTS RECORDED UNDER SECTION 164 OF THE CR. P.C DURING INVESTIGATION

As per section 164(1) of Crpc, 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 empowers judicial magistrate to record statement (other than confession statement) which is in the opinion of Magistrate a best titled to the circumstances of the case. The object of Section 164, Criminal Procedure Code, is to provide a method of securing a reliable record of statements or confessions made during the course of the Police investigation, which could be used, if necessary, during the enquiry or trial. Under Section 25 of the Indian Evidence Act, a confession to a Police Officer is inadmissible in evidence, and hence when an accused person confesses during the Police investigation, the Police frequently get it recorded by a Magistrate under Section 164, Criminal Procedure Code, and it can then be used to the extent to which it may be admissible under the Indian Evidence

Act. The object behind recording of statement under section 164 is to deter witnesses from changing their versions subsequently and to get over the immunity from the prosecution in regard to information given by the witnesses under section 162 of the code. The other 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. In *Guruvind palli Anna Rao - of A.P*⁶ 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 contemplates that Section 80 of the 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 *Patiram V/s.State of Maharashtra*⁷ it was 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 The evidentiary value of statement recorded under section 164 Cr.P.C, is that, the statement cannot be treated as substantive evidence when the maker does not depose of such facts on oath during trial. before acting on a confession made before a judicial magistrate in terms of section 164, the court must be satisfied first that the procedural requirements laid down in sub section (2) to (4) are complied with. These are salutary safeguards to ensure that the confession is made voluntarily by the accused after being apprised of the implications of making such confession. The endeavour of court should be to apply its mind to the question whether the accused was free from threat duress or inducement at the time of making confession. In *Parmananda Vs state of Assam*⁸ The confession would not be ordinarily considered the basic for conviction. However, it is admissible, and conviction may also be based upon it if it is found truthful and voluntary and in a given case some

⁴ *Appabhai Vs. State of Gujrat AIR 1988 SC 696*

⁵ AIR 1999 SC 1776

⁶ 2003 Cri. L.J. 3253

⁷ 2003 Cri.L.J. 4718

⁸ 2004(2) ALD CrI 657

corroboration is necessary. Confession which is not retracted even at the stage of trial and even accepted by the accused in the statement under section 313 Cr.P.C. can be fully relied upon. So, the conviction based thereon together with other circumstantial evidence is sustainable. The accused in his statement under section 313 Cr.P.C. or during cross-examination never suggested that his statement under section 164 Cr.P.C. is false. Allegation of presence of police officers at the time of recording the confession was without any material. Requirement of section 164(2) Cr.P.C. have been complied with. Such a confession statement was fit to be accepted.

V. THE CONTRADICTORY STATEMENTS

The portion of statement which is about to use for contradiction first brought to the notice of witness, and should be questioned about it. If the witness admits that he made said statements before police then no further proof is needed. But if witness denies that he made confronting statements that he did not make before police then, comes the role of contradiction, court is bound to note the said statements and give exhibit number. By that process contradiction merely brought on record but those are subject to proof. It is said to be proved if investigating officer who recorded statement is confronted with the said statement asking whether witness stated about passage before him or not. If he gives affirmative answer, then the said contradiction said to be proved. In *Ganesh K. Gulve etc. v/s. State of Maharashtra*⁹. It was observed that in order to appreciate the evidence, the Court is required to bear in mind the set up and environment in which the crime is committed. The level of understanding of the witnesses. The over jealousy of some of near relations to ensure that everyone even remotely connected with the crime be also convicted. Everyone's different way of narration of same facts. These are only illustrative instances. Bearing in mind these broad principles, the evidence is required to be appreciated to find out what part out of the evidence represents the true and correct state of affairs. It is for the courts to separate the grain from the chaff" The law laid down by the Apex court as indicated above, in respect of recording contradiction has now been settled, the trial courts are required to carefully read the provisions as prescribed in section 162 of crpc and the relevant provisions of Section 145,155 and 157 of Indian Evidence Act. The statements of witnesses recorded by police officer during investigation cannot be used as

substantial evidence. It cannot be used except for the purpose of contradictions under section 145 of Indian Evidence Act. Where any part of such statement is so used any part thereof may also be used in examination for the limited purpose of explaining any matter referred to in cross examination. The only other exception to this embargo is when the statement comes under the preview of section 32(1) or section 27 of Indian Evidence Act. The bar created by section 162 has no application in the proceedings under Article 32 and 227 of the Constitution or in civil proceedings and a statement made before police officer during investigation can be used as evidence in such proceedings provided it is otherwise relevant under the Evidence Act. But it has been held down in *Punya Pd. Sankola Vs Balvadra*¹⁰ that the expression investigation under this chapter in section 162 means chapter 14 of the Cr.P.C., where in section 162 occurs.

VI. TAPE AND VIDEO RECORDS

Tape recorded conversation could be only relied upon as corroborative evidence of conversation deposed by any of the parties of the conversation. In the absence of any such corroboration or corroborative evidenced the tape is not a proper evidence and could not be relied upon.¹¹ And a video is to be supported by an independent testimony.¹² Moreover the time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.¹³ The authenticity of the video and audio recording should be certified either by the Forensic Laboratory¹⁴ or by a competent authority or Independent testimony of the person tendering or who has recorded or made it. In case of *Tukaram S.Dighole v Manikrao Shivaji Kokate*¹⁵, a cassette placed before the Court was discarded from evidence. This was the cassette produced from the custody of an Election Commissioner's office. It was taken to be a public document. It was held that mere production of the audio cassette even certified by the Election Commissioner is not conclusive of the fact that what is contained in the cassette was true and correct. This is on par with the certified copy of any document produced from public record. Such a document would show that it was a document filed in the public office and

⁹ decided on 21.08.2002 in appeal (Cri) 501 of 1999

¹⁰ 1985 cri.L.J. 159

¹¹ Mahabir Parshad v Surinder Kaur, AIR 1982 SC 1043

¹² R.K Malkani v State of Maharashtra, AIR 1973 SC 157

¹³ Yusufalli Esmail Nagree vs The State Of Maharashtra, AIR 1968 SC 147

¹⁴ R. Venkatesh v State, 1980 Cri.LJ 103

¹⁵ 2008 (3) BomCR 141

is a true production of whatever was filed in the public office. It however cannot prove the truth of the contents of the document merely by the production of even its certified copy by the public office. Consequently, in that case when the party who produced the record did not lead any evidence to prove that the cassette produced on record was a true reproduction of the original speeches by the Respondent or his agent, which he was incumbent to be proved either himself or through his witness who is the maker of the record, it was held not to be considered in evidence. It was held by the Supreme Court that the "standard of proof" in the form of electronic evidence should be "more accurate and stringent" as compared to other documentary evidence. In, *Fatima Riswana v. State and others*,¹⁶ the prosecution was relating to exploitation of certain men and women for the purpose of making pornographic photos and videos in various acts of sexual intercourse and thereafter selling them to foreign websites. The case was allotted to fast track court presided over by a lady judge. The accused applied for copies of the CDs. The trial court rejected that prayer. The High Court also rejected such prayer by observing that if their copies are provided, they can be copied further and put into circulation. However, the High Court allowed viewing of the CDs in the chamber of the judge. It was contended on behalf of the accused that it may cause embarrassment to the lady judge. Hence, the matter was directed to be transferred to the court of a male judge. However, the concern of the victim side was not considered. The apex court observed that a judicial officer be it a female or male is expected to face this challenge when call of duty required it. Therefore that order was set aside.

VII. CONCLUSION

As the Aristotel said the search for the truth is in one way hard, and in another easy – for it is evident that no one of us can master it fully, nor miss it wholly. Each one of us adds a little to our knowledge of nature, and from all facts assembled arises certain grandeur. The entire existence of Law and Justice is governed by the law of evidence itself and there is or will be no exceptions to it. Recording of statements under section 161 and 164 of Cr.P.C., plays a pivotal role in criminal trial. The purpose of contradiction between evidence of a witness before the court and the statement recorded under section 161 and 164 of Cr.P.C is primarily to shake credit of the witness, it is only to put the court on guard, to scrutinise the evidence with great care. In *Anvar v. P. K. Basheer*,¹⁷ the Supreme Court noted that “there is a revolution in the way that evidence is produced before the court”. When electronically stored information was treated as a document in India before 2000, secondary evidence of these electronic “documents” was adduced

through printed reproductions or transcripts, and the authenticity was certified. When the creation and storage of electronic information grew more complex, the law had to change more substantially

¹⁶ AIR 2005 SC 712

¹⁷ AIR 2015 SC 180