

Rajasthan High Court

Smt Tanu Kanwar vs State Of Rajasthan Through Pp on 13 March, 2012

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

BENCH AT JAIPUR.

ORDER

1. SB CRIMINAL MISC. BAIL APPLICATION NO.2304/2012.

Smt. Tanu Kanwar

Vs.

State of Rajasthan

2. SB CRIMINAL MISC. BAIL APPLICATION NO.2076/2012.

Chotu Lal

Vs.

State of Rajasthan

Date of Order:

13th March, 2012.

PRESENT

HON'BLE MR. JUSTICE RAGHUVENDRA S. RATHORE

Mr. H.S. Rathore) for the petitioner.

Mr. Bharat Yadav)

Mr. Javed Choudhary public prosecutor for the State.

Mr. Amit Kumar Gupta for the complainant.

REPORTABLE

BY THE COURT:-

Since both the above bail applications arise out of the same FIR No.94/2011 registered at police station Pratap Nagar, Jaipur for the offences under sections 363, 366, 376(2)(G), 342, 372, 373 and 120B IPC, they are being decided by this common order.

2. The accused petitioners had moved an application under section 439 Cr.P.C. before the learned Sessions Court which came to be dismissed by the learned Special Judge, Women Atrocities and Dowry matters, Jaipur city, Jaipur, by the impugned order on 28th January, 2012. The learned court below had decided the bail applications of the accused petitioners after considering the statement of the prosecutrix Rekha Kanwar under section 164 Cr.P.C. It is to be noted that in the instant case the said statement of the prosecutrix Rekha Kanwar came to be recorded on 26th March, 2011 by the learned Additional Civil Judge (Junior Division) and Metropolitan Magistrate No.18, Jaipur Metropolitan, Jaipur. Thereafter, another statement on 20th December, 2011 by the learned Civil Judge (Junior Division) and Metropolitan Magistrate No.13, Jaipur Metropolitan, Jaipur.

3. While assailing the impugned order passed by the learned court below on 28th January, 2012, the learned counsel for the petitioner has submitted that no offence is made out against the petitioners from the material on record, particularly the statement of the prosecutrix Rekha Kanwar recorded under section 164 Cr.P.C. by the learned Magistrate on 26.3.2011. Further, he has submitted that a bare perusal of the first information report goes to show that there is no accusation against the petitioner in respect of the offence under section 376 IPC. He has also submitted that a perusal of the first statement of the

prosecutrix recorded under [section 164](#) Cr.P.C. goes to show that she had gone, on her own, with Mohar Singh and willingly solemnized the marriage with him. It has been submitted that the second statement of the prosecutrix under [section 164](#) Cr.P.C. recorded on 20.12.2011 is illegal and there was no just reason for having recorded the same before another Magistrate. Therefore, it has been submitted that the accused petitioners, who are in custody, be enlarged on bail.

4. Learned public prosecutor as well as counsel for the complainant have opposed the bail applications filed by the petitioners and submitted that the learned court below has rightly dismissed their bail applications and no interference in the impugned order is called for by this Court. They have submitted that the prosecutrix has levelled allegations against the petitioners for the offence under [section 363](#) and [366](#) IPC as well as under [section 376](#) IPC. It has also been submitted by them that the earlier statement of the prosecutrix under [section 164](#) Cr.P.C. recorded by the learned Magistrate on 26.3.2011 was not with her free will and rather it was under pressure. Therefore, the father of the prosecutrix had moved an application to again record the statement of the prosecutrix before the learned Magistrate. In the statement of the prosecutrix recorded under [section 164](#) Cr.P.C. on 20.12.2011, she has levelled allegations against the petitioner and, therefore, the instant bail application deserves to be dismissed.

5. After giving my thoughtful and anxious consideration to the submissions made by the counsels for the rival parties as well as on careful perusal of the material on record and the relevant principle of

law on the question involved herein, I am of the opinion that the bail applications have merit.

6. The report in the instant case was lodged by Hanuman Singh son of Mool Singh, the father of the prosecutrix, on 3.3.2011 in respect of an incident which is said to have taken place on 26.2.2011. A perusal of the said report goes to show that the accusation against the petitioner has been made mainly for the offences under [sections 363](#) and [366](#) IPC. During the course of investigation a statement of the prosecutrix Rekha Kanwar was recorded under [section 164](#) Cr.P.C. on 26.3.2011 by the learned Civil Judge (Junior Division) and Metropolitan Magistrate No.18, Jaipur Metropolitan, Jaipur. According to the said statement, the prosecutrix was working at the residence of the accused Smt. Tanu Kanwar and thereafter she had left the place on her own and gone to one Mohar Singh. Thereafter, she solemnized the marriage, at her free will, with Mohar Singh. She has also deposed that she does not want to go with her parents. It is to be noted that the age of the prosecutrix is 20 years. It was on the basis of the material on record including the statement of the prosecutrix under [section 164](#) Cr.P.C. which was collected by the police during investigation that they had proposed for filing of a final report.

7. Subsequently, the complainant had filed a representation before the ACP, Police, Jaipur (East) levelling various allegations against the accused petitioner and also the police persons who had accompanied the prosecutrix at the time of recording of the statement under [section 164](#) Cr.P.C. on 26.3.2011. The complainant had tried to build up a new case that the prosecutrix is a minor and has alleged that her age shown in the medical examination as 16 years is not correct. The complainant

Hanuman Singh had then filed an application on 7.10.2011 before the Chief Judicial Magistrate, Jaipur Metropolitan, Jaipur for again recording a statement of the prosecutrix under [section 164](#) Cr.P.C. and also to call for the progress report under [section 210](#) Cr.P.C. It was prayed in the said application that in the interest of justice the statement of the prosecutrix be again recorded without any pressure or fear. The said application was considered by the learned Chief Judicial Magistrate, Jaipur Metropolitan, Jaipur on 14.10.2011 and after taking into consideration the facts and circumstances of the case as well as the legal position on the point, he had dismissed the same. Feeling aggrieved of the order passed by the Chief Judicial Magistrate on 14.10.2011, the complainant filed a revision petition which came to be considered by the learned Additional District & Sessions Judge No.9, Jaipur Metropolitan, Jaipur, who had dismissed the same on 24.10.2011. However, on a misc. petition filed by the complainant and after considering the case of Jogendra Nahak and others Vs. State of Orissa and others- AIR 1999 SC 2565, the High Court had on 13.12.2011 ordered for recording of the statement of the prosecutrix. Accordingly, the statement of the prosecutrix came to be recorded by the learned Civil Judge (Junior Division) and Metropolitan Magistrate No.13, Jaipur on 20.12.2011. The said statement is a detailed one running in seven pages which reveals that a totally different story has been given and the allegations have been levelled against the accused persons.

8. At this juncture, it would be just and proper to take note of the material fact that the statement of the prosecutrix under [section 164](#) Cr.P.C. was again recorded on 20.12.2011 at the behest of the

informant Hanuman Singh who had submitted an application before the Chief Judicial Magistrate, Jaipur Metropolitan, Jaipur on 7.10.2011 and also to consider the principle of law in this regard.

9. In the case of Smt. Rajesh Bai Vs. State of Rajasthan- 1997 RCC (Supp) 616, wherein an application presented by the petitioner before the learned trial court to once again record her statement under [Section 164](#) Cr.P.C. was rejected on 11.8.1997. The learned Single Judge of this High Court had dismissed the misc. petition filed by the prosecutrix and held that the reasons assigned by the learned Magistrate in his impugned order rejecting the application of the petitioner cannot be said to be unreasonable.

10. The Hon'ble Supreme Court had subsequently considered the question of again recording the statement of the prosecutrix under [section 164](#) Cr.P.C. in the case of Jogendra Nahak (supra). In the said case the petition had been filed by four persons for issuing direction to the Magistrate to record their statement under [section 164](#) Cr.P.C. The High Court had initially issued such a direction but lateron resiled therefrom and revoked the order on a second thought and imposed a compensatory cost. The said order was then challenged before the Hon'ble Supreme Court by way of appeal.

In the said case, with regard to an incident of 12.8.1997, an FIR came to be lodged by the brother of the deceased. In the report, four persons were arrayed as accused and on completion of investigation final report was submitted before the Magistrate against them. The aforesaid four petitioners were interrogated by the police but their statements recorded under [section 161](#)Cr.P.C. were not kept in the case

diary. Thereupon, they filed a writ petition before the High Court for directing the investigating officer to record statements under [section 161](#) Cr.P.C. and for further direction to the Magistrate to record their statements under [section 164](#) Cr.P.C. The High Court by its order dated 22.12.1997 permitted the petitioners to file an application before the Magistrate for the purpose of recording of their statements. However, the Magistrate declined to record the statements and the petitioners again moved to the High Court.

The High Court by its order dated 24.3.1998 directed the Magistrate to comply with their earlier order by recording the statements under [section 164](#) Cr.P.C. The Magistrate thereafter recorded the statements of the petitioners. The informant then filed an application before the High Court for recalling the order dated 24.3.1998. The learned Division Bench of the High Court of Orissa heard both the sides and delivered the order dismissing the writ petition filed by the appellant and also ordered each of them to pay a cost of Rs.2,500/- for filing frivolous and vexatious petition.

11. The Hon'ble Supreme Court had decided the question as to whether a witness can, on his own motion, approach a Magistrate with a request that his statement may be recorded under [section 164](#) Cr.P.C. While considering the said question, the views taken by the various High Courts on the point; namely, the Orissa High Court in the case of State of Orissa Vs. A.P. Das (1979) 47 Cut LT 298 and Bhima Vs. State (1994)7 OCR 413 and the cases of Lahore High Court in the case of Mohammad Sarfraz Vs. Crown, 1951 Cri.L.J. 1425 (Lahore) and that of Madras High Court in the case of re C.W. Case,

AIR 1948 Madras 489 and that of Kerala High Court in the case of Kunjukutty Vs. State of Kerala 1988 Cri.L.J. 504 had been considered.

12. The Hon'ble Supreme Court had then taken into consideration the provisions with regard to [section 164](#) Cr.P.C. which deals with recording of confessions as well as statements. It was held that 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.

13. The Hon'ble Supreme Court also proceeded to analyse the scheme of Chapter XII of the Code within which the provision of [Section 164](#) falls. There upon it held that in the scheme of the said 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.

The Hon'ble Court in para 22 and 23 held thus:

'22, 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.

23. 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.'

14. Ultimately, the Hon'ble Supreme Court laid down the proposition of law in para 24 of the said judgment which is as under:

'24. 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.'

15. Coming back to the facts of the present case, it is reiterated that after lodging of the report the investigating agency had got the statement of the prosecutrix Rekha Kanwar recorded on 26.3.2011 by the learned Civil Judge (Junior Division) and Metropolitan Magistrate No.18, Jaipur Metropolitan. The said statement of the prosecutrix is self explanatory which reveals that no offence what-so-ever had been committed by the accused persons. Subsequently, an application under [section 164](#) Cr.P.C. as well as [section 210](#) Cr.P.C. was filed by the informant Hanuman Singh, father of the prosecutrix, before the learned Chief Judicial Magistrate, Jaipur Metropolitan on 7.10.2011 with the prayer, inter-alia, that the statement of her daughter may be recorded again. The application so filed by the complainant party was rejected by the learned Chief Judicial Magistrate, Jaipur Metropolitan, Jaipur on 14.10.2011 and rightly so because it had taken into consideration the settled principle of law on the point in question as had been enunciated by the Hon'ble Supreme Court as well as the Rajasthan High Court, as referred to above. The learned revisional court while dismissing the revision petition filed by the informant Hanuman Singh on 24.10.2011 had referred to the principle of law laid down by the Hon'ble Supreme Court in the case of Jogendra Nahak

(supra) by referring that the statement under [section 164](#) Cr.P.C. should be got recorded only on the request of the investigating officer. Therefore, the inevitable conclusion is that the statement of the prosecutrix recorded on 26.3.2011 is in accordance to law and that alone has to be considered by the court.

16. In view of the aforesaid facts and circumstances of the case as well as the principle of law laid down by the Hon'ble Supreme court and on perusal of the statement of the prosecutrix under [section 164](#) Cr.P.C., recorded on 26.3.2011 this court considers it just and proper to enlarge the petitioners on bail.

Consequently, both the bail applications are allowed and it is ordered that the accused petitioners Smt. Tanu Kanwar wife of Shivpal Singh and Chotu Lal son of Kalu in FIR No.94/2011 police station Pratap Nagar, Jaipur Metropolitan, Jaipur shall be released on bail; provided each of them furnishes a personal bond of Rs.50,000/- and two sureties of Rs.25,000/- each to the satisfaction of the learned trial court with the stipulation to appear before that Court on all dates of hearing and as and when called upon to do so.

(RAGHUVENDRA S. RATHORE), J.

bblm All corrections made in the judgment/ order have been incorporated in the judgment/ order being e-mailed.

BBL Mathur Private Secretary.

Supreme Court of India