IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA Nos.288, 289, 242, 234, 241 and 246 of 2011

(From the judgment dated 16th March, 2011 passed by Smt.D.Mohapatra, Additional Sessions Judge, Bhubaneswar in Sessions Trial Case No.4/82 of 2007)

CRLA No.288 of 2011

Tuku @ Abdul Naim Khan ..... **Appellant**

Versus

State of Odisha ..... **Respondent**

Advocate(s) appeared in this case :-

For Appellant : Mr.J.N.Kamila, Advocate

For Respondent : Mr.J.Katikia, AGA

CRLA No.289 of 2011

Sk.Roman ..... **Appellant**

Versus

State of Odisha ..... **Respondent**

Advocate(s) appeared in this case :-

For Appellant : Mr.J.N.Kamila, Advocate

For Respondent : Mr.J.Katikia, AGA

CRLA No.242 of 2011

Mir Askar @ Raju ..... **Appellant**

Versus

State of Odisha ..... **Respondent**

Advocate(s) appeared in this case :-

For Appellant : Mr.R.Roy, Advocate

For Respondent : Mr.J.Katikia, AGA

CRLA No.234 of 2011

Babaji @ Siba Prasad Mohanty ..... **Appellant**

Versus

State of Odisha ..... **Respondent**

Advocate(s) appeared in this case :-

For Appellant : Mr.J.N.Kamila, (Amicus Curiae)

For Respondent : Mr.J.Katikia, AGA

CRLA No.241 of 2011

Sudam Sundar Satapathy ..... **Appellant**

Versus

State of Odisha ..... **Respondent**

Advocate(s) appeared in this case :-

For Appellant : Mr.J.N.Kamila, (Amicus Curiae)

For Respondent : Mr.J.Katikia, AGA

CRLA No.246 of 2011

Bablu @ Nasiruddin Ahmed ..... **Appellant**

Versus

State of Odisha ..... **Respondent**

Advocate(s) appeared in this case :-

For Appellant	:	Mr.R.C.Maharana, Advocate
For Respondent	:	Mr.J.Katikia, AGA

CORAM :
THE CHIEF JUSTICE
JUSTICE B.P. ROUTRAY

JUDGMENT
04.02.2022

B.P. Routray, J.

1. All the six Appellants in the above appeals have been convicted under Section 302/34 of the I.P.C. in the same trial i.e., S.T.Case No.4/82 of 2007. Further, the Appellants in CRLA Nos.241, 234, 289 and 288 have been convicted under Section 27 of the Arms Act additionally. They have been sentenced to undergo R.I. for life for the offence under Section 302 of the I.P.C. and R.I. for a period of seven years under Section 27 of the Arms Act.

2. All the Appellants along with two others were prosecuted in S.T.Case No.4/82 of 2007 in the court of learned Additional Sessions Judge, Bhubaneswar.

3. Prosecution case is that, the deceased namely Chuna @Mallik Hanan was killed by Sk Hyder (since dead) and his associates on 31st May, 2005 between 7.30 to 7.45 P.M. by gunshot firing near Stewart School, Bhubaneswar due to group rivalry relating to tender fixing. The Inspector-in-Charge (P.W.47) of Nayapalli Police Station upon receipt of telephonic information of the incident immediately proceeded to the spot and found the deceased lying dead in front of the tyre-shop of one Tahir Alli. P.W.47 drew the plain paper F.I.R., which was registered as Nayapalli P.S.Case No.157 dated 31st May,2005. He held inquest over the dead body and seized one motorcycle, one Nokia mobile set, ten empty cases of cartridges and other articles from the spot. There was arch enmity between Sk Hyder and the deceased, both gangsters.

Subsequently, Sk.Hyder and others were arrested from Nagpur (Maharashtra) on 6th June, 2005 and were brought to Bhubaneswar. P.W. 47 continued with investigation which was later taken over by P.W.48, the Inspector of C.I.D.C.B., Cuttack. P.W.48 submitted the charge-sheet on 2nd October, 2005 for the offences stated above along with offence under Section 120-B of the I.P.C.

4. Prosecution examined 48 witnesses in course of the trial and exhibited 34 documents as well as 8 material objects. Among those witnesses, P.Ws.1 to 5, P.Ws.8 to 18 and P.Ws.20 to 23 were projected as eyewitnesses. But all such witnesses were turned hostile and did not support prosecution version. Similarly P.Ws.27, 28, 32, 33, 34, 36, 37 & 38, the seizure witnesses, were also turned hostile and denied their knowledge about the case as well as the seizures. P.W.9, 24 & 25 – the wife and sisters of the deceased, P.W.14 & 15 –the brother and brother-in-law of the deceased have all turned hostile and did not support the

prosecution case. P.W.26 is the Sub-Inspector of Police of Maharashtra, who arrested the Appellants at Nagpur. P.Ws.43, 44 and 45 are the Officers, who accompanied P.W.47 to the spot on 31st May, 2005 after the occurrence. P.W.46 is the Officer, who registered the F.I.R.

5. It is submitted on behalf of the Appellants that in absence of any substantial evidence with regard to direct eye witnessing of the occurrence or any circumstance connected thereto, the learned trial judge has convicted the Appellants based on the statements of some witnesses recorded under Section 164 Cr.P.C. It is further submitted that the learned trial judge has committed gross illegality by relying on 164 statements of those witnesses viz. P.Ws. 2, 13, 14 & 17 despite their retraction in course of trial.

6. Having perused the trial court record, it reveals that the deceased sustained 11 gunshot injuries including entry and exist wounds. As per the opinion of forensic expert as well as ballistic expert marked under Exts.12, 15 & 24, six bullet injuries covering an area of 8" x 8" on the left abdomen were fired from a greater distance of 25ft. and rest of the injuries were fired from a shorter distance of 20ft. Some of the entry wounds do not have corresponding exit wounds due to lodging of the bullets inside the body either in any bonny cavity or bonny canal. The postmortem examination report under Ext.12 and the expert's opinion under Exts.15 & 24 were not disputed in course of trial and the contents thereof have been admitted by the Appellants. These are also not disputed in the appeals and as such going through the contents of those documents and based on the opinion of the experts, the death of the deceased can safely be said as homicidal in nature. Such homicidal nature of death of the deceased is never disputed by the Appellants.

7. As stated earlier, all the independent witnesses including the projected eyewitnesses did not support prosecution version and have turned hostile. The learned trial judge has stated at paragraph-19 of the impugned judgment that the statements of four eyewitnesses, namely, Mallik Lokman (P.W.14), Akhila Rout (P.W.2), Bapina Panda (P.W.13) and Pabitra Naik (P.W.17) were recorded under Section 164 Cr.P.C. before the learned Judicial Magistrate (P.W.39) which are marked under Exts.31 to 34 respectively. It is further mentioned in paragraph-23 that such witnesses though have made statements before the Magistrate, but denied to say so during their examination in the court being under threat, which is quite obvious and natural on the part of an ordinary human being when the case relates to a gangster. After discussions, it is observed by the trial court at paragraph-25 of the impugned judgment as follows:

> "25. xxx xxx xxx
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> Here in the instant case, the statement recorded under this provision of law by the Magistrate found to be true and voluntary. As it reveal from those Ext.31 to Ext.34 the Magistrate administered the oath after recording the statement read over and explained to them where no police personnel were present and the concerned deponents finding the statement correct put their respective signatures on the body of the statement. Accordingly, in view of the discussion held (Supra), the statement of these eye witnesses u/s 164 of the Code though not substantive piece of evidence can inspires confidence to the case of prosecution."

Resultantly, the Appellants were convicted.

8. In view of the nature of evidence brought in course of trial, the question falls for determination is that, whether the statements of those witnesses recorded under Section 164 Cr.P.C. can be relied on to sustain the conviction.

9. Admittedly, the statement of witnesses recorded under Section 164 Cr.P.C. is not a substantive piece of evidence. Section 164 Cr.P.C. stipulates as follows:

> "**164. Recording of confessions and statements-**(1) 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:
>
> Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
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> (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.
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> (3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.
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> (4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and

the Magistrate shall make a memorandum at the foot of such record to the following effect:-

" I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded 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.

(6) 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."

(before 2009 amendment w.e.f.31.12.2009)

10. In the case of ***Ram Kishan Singh v. Harmit Kaur and another,*** (1972) 3 SCC 280, the Supreme Court has held that a statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness.

11. In ***Balak Ram V. State of U.P.,*** AIR 1974 SC 2165, it was held that the evidence of a witness cannot be discarded for the mere reason that his statement was recorded under Section 164. It is of course open to the Court to accept the evidence of a witness whose statement was

recorded under section 164, but the salient rule of caution must always be borne in mind.

12. In ***Ram Charan v. State of U.P.,*** AIR 1968 SC 1270, the Supreme Court relied upon the observation of the Andhra Pradesh High Court in ***Re: Gopisetti Chinna Venkata Subbiah*****,** AIR 1955 Andhra 161 which runs as follows:

> "We are of opinion that if a statement of a witness is previously recorded under section 164, Criminal Procedure Code, it leads to an inference that there was a time when the police thought the witness may change but if the witness sticks to the statement made by him throughout, the mere fact that his statement was previously recorded under section 164 will not be sufficient to discard it. The Court, however, ought to receive it with caution and if there are circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon."

13. In ***Dhanabal and another v. State of Tamil Nadu, AIR (1980) 2 SCC 84***, a three judges Bench of the Supreme Court held as follows:

> "13. The second legal contention raised by the learned counsel was that the High Court was in error in taking into account the statements recorded from the witnesses under Section 164 of the Code of Criminal Procedure in coming to the conclusion that the evidence given by them in the committal Court could be relied upon. The High Court stated "we are satisfied having regard to 164 statements of PWs 1 to 3 and 5 that the statements given by those witnesses before the committing Court are true and could be relied on" and proceeded to observe "that as there are more statements admitted in evidence under Section 288 of the Code of Criminal Procedure than one, the evidence of one witness before the committing Court is corroborated by that given by others". Mr. Mulla, learned Counsel, submitted that a

statement recorded under Section 164 of the Code of Criminal Procedure indicates that the Police thought that the witnesses could not be relied on as he was likely to change and, therefore, resorted to securing a statement under Section 164 of the Code of Criminal Procedure. The statement thus recorded, cannot be used to corroborate a statement made by witness in the committal Court. In support of this contention the learned counsel relied on certain observations of this Court in *Ram Charan v. State of U.P.* In that case, in a statement recorded from the witness under Section 164 of the Code of Criminal Procedure, the Magistrate appended a certificate in the following terms:-

> "Certified that the statement has been made voluntarily. The deponent was warned that he is making the statement before the 1st Class Magistrate and can be used against him. Recorded in my presence. There is no Police here. The witness did not go out until all the witnesses had given the statement."

The Court observed that the endorsement made is not proper but declined to infer from the endorsement that any threat was given to those witnesses or that it necessarily makes the evidence given by the witnesses in Court suspect or less believable. The view of the Patna High Court in *Emperor v. Manu Chik,* where the observations made by the Calcutta High Court in *Queen Empress v. Jadub Das,* that statements of the witnesses obtained under this section always raises a suspicion that it has not been voluntarily made was referred to, was relied on by the learned counsel. This Court did not agree with the view expressed in the Patna case but agreed with the view of Subba Rao, J. (as he then was) in *Re Gopisetti Chinna Venkata Subbiah,* where he preferred the view expressed by Nagpur High Court in *Parmanand v. Emperor,* it was observed that the mere fact that the witnesses' statement was previously recorded under section 164 will

not be sufficient to discard it. It was observed that the Court ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witnesses, it can be acted upon. During the investigation the police officer, sometimes feels it expedient to have the statement of a witness recorded under Section 164 of the Code of Criminal Procedure. This happens when the witnesses to a crime are closely connected with the accused or where the accused are very influential which may result in the witnesses being gained over. The 164 statement that is recorded has the endorsement of the Magistrate that the statement had been made by the witness. The mere fact that the Police had reasons to suspect that the witness might be gained over and that it was expedient to have their statements recorded by the Magistrate, would not make the statements of the witnesses thus recorded, tainted. If the witness sticks to the statement given by him to the Magistrate under Section 164 of the Code of Criminal Procedure, no problem arises. If the witness resiles from the statement given by him under under Section 164 in the committal Court, the witness can be cross-examined on his earlier statement. But if he sticks to the statement given by him under section 164 before committal enquiry and resiles from it in the Sessions Court, the procedure prescribed under Section 288 of the Code of Criminal Procedure, will have to be observed. It is for the Court to consider taking into account all the circumstances including the fact that the witness had resiled in coming to the conclusion as to whether the witness should be believed or not. The fact that the police had Section 164 statement recorded by the Magistrate, would not by itself make his evidence tainted.

14. S. 157 of the Evidence Act makes it clear that the statement recorded under Section 164 of the Code of Criminal Procedure can be relied on for corroborating the statements made by the witnesses in the committal Court vide State of Rajasthan v. Kartar Sing."

14. In the ***State of Rajasthan v. Kartar Singh,*** AIR 1970 SC 1305, is held as follows:

> "It is thus clear from the authorities referred to above that the requirements of section 288 would be fully complied with if the statements of the witnesses are read *in extenso* to them and they admit that they have made these statements in the committal Court."

15. In the case of ***R. Shaji v. State of Kerala,*** (2013) 14 SCC 266, the Supreme Court held as follows :

> "26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.
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> 27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted.

(Vide *Jogendra Nahak v. State of Orissa and CCE v. Duncan Agro Industries Ltd.*).

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.

29. During the investigation, the police officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 CrPC. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced. (vide *Mamand v. Emperor, Bhuboni Sahu v. R.Ram Charan v. State of U.Ps and Dhanabal v. State of T.N.*)

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61. Be that as it may, when a statement is recorded in court, and the witness speaks under oath, after he understands the sanctity of the oath taken by him either in the name of God or religion, it is then left to the court to appreciate his evidence under Section 3 of the Evidence Act. The Judge must consider whether a prudent man would appreciate such evidence, and not appreciate the same in accordance with his own perception. The basis for appreciating evidence in a civil or criminal case remains the same. However, in view of the fact that in a criminal case, the life and liberty of a person is involved, by way of judicial interpretation, courts have created the requirement of a high degree of proof."

16. The principles discussed in above decisions make it clear that 164 statement of the witness is not substantive evidence of facts and the same cannot be used so. The earlier statement recorded under Section 164 Cr.P.C. can only be used for corroboration or contradiction. If the witness while giving evidence in Court sticks to his earlier statement recorded under Section 164 Cr.P.C, such statement can be acted upon subject to rule of caution. But when the witness resiles from his earlier statement, procedure is that he should be cross-examined and his statement made earlier as recorded under Section 164 Cr.P.C. should be confronted to him *in extenso*. The prosecution can place reliance on such statement only for the purpose of corroboration and that too, subject to rule of caution and if there are other sufficient evidence before the Court.

17. It is true that though the statement under Section 164 Cr.P.C. is recorded before a Judicial Magistrate on oath, but the witness is not cross-examined there. When the statement of a witness is not tested through cross examination, truthfulness of his statement is not ascertained. It is the test of knowledge of the witness what he testifies. This is a major difference between the statement of a witness made under Section 164 Cr.P.C. and his deposition recorded by the Court under Section 137 of the Indian Evidence Act and the provisions contained in Chapter XXIII of the Cr.P.C.

18. Sections 59 and 60 of the Indian Evidence Act stipulate that the facts may be proved by oral evidence and such oral evidence must be direct. In the instant case, as stated earlier, none of the projected eyewitnesses and other independent witnesses have supported the prosecution version. Most of those witnesses were cross-examined by

the prosecution under Section 154 of the Indian Evidence Act. It is true that the evidence of a hostile witness is as good as a normal witness. Here the conviction is mainly founded on the earlier statement of P.Ws.2, 13, 14, and 17 recorded under Section 164 Cr.P.C. Such statements of those witnesses have been marked under Exts.31 to 34.

19. First, looking to the evidence of those witnesses, it reveals that P.W.14 is the brother of the deceased. He denied to identify any of the accused persons except Sk.Hyder. The other three witnesses have stated that they neither know the accused persons nor the deceased. The prosecution has cross-examined all those four witnesses under Section 154 of the Indian Evidence Act. Except P.W.17, other three witnesses were not asked any question with regard to their earlier examination and recording of statements under Section 164 Cr.P.C. But P.W.17 being asked so by the prosecutor has denied to have given any such statement before any Magistrate. He has categorically denied to have stated before the Magistrate about seeing the accused persons at the time of occurrence and gun-firing by them.

20. Admittedly, none of those four witnesses have been confronted with their previous statements marked under Exts.31 to 34 nor any suggestion was given to them by the prosecutor if they were subject to any threat by any of the accused persons. Exts.31 to 34 are marked through the investigating officer or any other witnesses. Those were marked into evidence on 10th February, 2011 in course of argument. So it is clear that none of those statements under Exts.31 to 34 were either confronted to the respective witnesses or their contents were read in extenso through confrontation to those witnesses. The depositions of

P.Ws.2, 13, 14 & 17 do not whisper anything about any threat or influence exerted on them by any of the accused persons. No other material is also produced in evidence to suggest any threat or pressure used by the accused persons on the witnesses. Therefore the observation of the learned Judge to presume for any threat to life and property on any of the witness compelling to resile them from their earlier statement is seen unfounded. Such a presumption canvassed by the trial court is without merit and without material.

21. Coming to the see if any other material is there on record to suggest such circumstances completing the chain against the Appellants appearing from the evidence, it is seen that the test identification of one of the Appellants namely Siba Prasad Mohanty by P.W.13, the Judicial Magistrate who conducted the T.I.Parade and recovery of three live bullets from the possession of another accused namely Kasur Niaz Khan and identification of the Bolero vehicle as well as those accused persons at Nagpur based on the evidence of P.W.26 and the Manager of the Hotel (P.W.24), have been highlighted by the trial court to sustain the conviction. It needs to be mentioned here that no fire-arm was produced before the trial court and none of the independent witnesses have stated about seizure of the same. The circumstances of the seizure of the fire arm have not been explained by the investigating officer. The bullets recovered from the dead body are not substantially connected to the Appellants nor recovery of the fire-arms and their use to commit the offence are substantially established by the prosecution. None of the witnesses have stated about anything to connect the possession of any firearm by any of the Appellants. The presence of the Appellants in the Bolero vehicle at the spot or even presence of the vehicle during the

occurrence cannot, at any stretch, be inferred from the evidence of P.W.26. In other words, the circumstances discussed by the learned trial court as residual materials to connect the Appellants to the alleged crime are found unsatisfactory.

22. The law on circumstantial evidence has been reiterated by the Supreme Court in catena of decisions. It demands that the circumstances on the basis of which conclusion of guilt is to be drawn must be fully established pointing guilt of the accused excluding all hypothesis of innocence. The chain of circumstances must be complete and conclusive in nature without leaving any reasonable doubt in favour of the accused. [See: *Tahasildar Singh v. State of U.P.*, **AIR 1959 SC 1012**, *Sharad Birdhichand sarda* **(1984) 4 SCC 116**, *Paramjeet Singh* **(2010) 10 SCC 439**].

23. Therefore, as discussed above, no substantial evidence is found against of the Appellants and as such in absence of the same, the question of corroboration through 164 statements does not arise. Thus in absence of substantial evidence and keeeping in view the nature of evidences in entirety, the conviction founded on the earlier statement of hostile witnesses recorded under Section 164 Cr.P.C. is bound to fall and liable to set aside.

24. Resultantly, the conviction and sentences as directed by the learned trial court in respect of the appellants are set aside. All the Appellants are acquitted from the charges and they be set at liberty forthwith, if their detention is not required in any other case.

25. The appeals are allowed.

26. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020, modified by the Notice No.4798, dated 15th April, 2021, and Court's Office Order circulated vide Memo Nos.514 and 515 dated 7th January, 2022.

(B.P.Routray)
Judge

(Dr. S. Muralidhar)
Chief Justice

C.R. Biswal, Secy.