
(2009) 01 MAD CK 0048

In the Madras High Court

Case No : Criminal R.C. No. 1609 of 2008 and M.P. No's. 1 and 2 of 2008

Achal Khemka

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 20-01-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 172, 172(2), 207

Evidence Act, 1872 — Section 145

Penal Code, 1860 (IPC) — Section 304(A)

Citation : (2009) 01 MAD CK 0048

Hon'ble Judges : R. Regupathi, J

Bench : Single Bench

Advocate : R. Shanmugasundaram for Anil Kumar, for the Appellant; R. Muniyapparaj, Government Advocate, for the Respondent

Judgement

R. Regupathi, J.—The petitioner is the sole accused in the proceedings taken on file by the XII Metropolitan Magistrate/Juvenile Justice

Board, Kellys, in J.C. No. 81 of 2008, for the offence u/s 304(A) IPC. In the course of trial, among other documents, the statement of PW-13

recorded by the Investigating Officer during investigation and also a letter written by the said witness, were supplied to the accused u/s 207

Cr.P.C. Further, PW-13 admitted before court about such letter having been written by him and the admission was made by him when he was

confronted with a xerox copy of the letter. Under such circumstances, a petition ie., CrI. M.P. No. 803 of 2008 in J.C. No. 81 of 2008, u/s 91

read with 172 Cr.P.C. was filed by the defence for production of original of the letter written by PW-13. By the impugned order, the request was

turned down and aggrieved thereby, the petitioner has come up with the present Revision Case.

2. Learned Senior Counsel for the petitioner submits that availability of the original of the letter is not denied and, in fact, a copy of the said letter

has already been supplied to the accused u/s 207 Cr.P.C. Further, PW-13 emphatically admitted during the course of cross examination the

factum of having written such letter; that being so, the accused is entitled to mark the same for the purpose of impeaching the merit of the witness.

3. Per contra, learned Government Advocate submits that a case diary could not be marked as evidence and that the same can be summoned by

the court if such course is warranted for the purpose of its reference.

4. I have perused the materials available on record with reference to the submissions made on either side.

5. It is not in dispute that PW-13, while giving statement during investigation, had also written a letter to the police and admittedly, a copy thereof

has been furnished to the accused as per Section 207 Cr.P.C. During cross examination, a xerox copy of the letter was shown to the witness and

when he was confronted with the contents of the same, it was admitted that the letter was written by him alone. Unfortunately, the original was not

produced before court, however, it is available with the Investigating Officer. The letter written by PW-13, in such circumstances, forms part of the

statement given by him. Not only the statement given by a witness but a letter or document or any other material furnished during the course of

investigation by such witness to the Investigating Officer could be used for the purpose of contradicting or impeaching the credibility of the witness.

6. The Supreme Court, in State of Kerala v. Babu 1999 SCC (Cri.) 611 , referring to Tahsildar Singh and Another Vs. The State of Uttar

Pradesh, , held that a statement recorded by an Investigating Officer in any case which was under investigation, being a statement u/s 161 of the

Code, the same can be used for the limited purpose provided u/s 162 of the Code read with Section 145 of the Evidence Act. Further, Section

91(1) Cr.P.C. stipulates that whenever any court considers that production of any document or thing is necessary or desirable for the purposes of

trial, such court may issue summons to the person in whose possession such documents is available and may require him for production of the

same.

Section 91(3) Cr.P.C. is not applicable to the case on hand, for, Section 91(3)(b)

provides that nothing in Section 91 shall be deemed to apply to

a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

7. The case law reported in Malkiat Singh and Others Vs. State of Punjab, , has been referred to, wherein, after adverting to Section 172 Cr.P.C.,

at paragraph No. 11, it was held as follows,

11. It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day

investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under Sub-section (2) the

court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his

agent, by operation of Sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the court

referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court

uses it for the purpose of contradicting such witness, by operation of Section 161 of the code and Section 145 of the Evidence Act, it shall be used

for the purpose of contradicting the witness i.e., Investigation Officer or to explain it in re-examination by the prosecution, with permission of the

court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating

officer as previous statement u/s 161 that too after drawing his attention thereto as is enjoined u/s 145 of the Evidence Act, the entries cannot be

used by the accused as evidence. Neither PW5 nor PW6, nor the court used the case diary. Therefore, the free use thereof for contradicting the

prosecution evidence is obviously illegal and it is inadmissible in evidence. Thereby the defence cannot place reliance thereon. But even if we were

to consider the same as admissible that part of the evidence does not impinge upon the prosecution evidence.

Since Section 172(2) Cr.P.C. is not applicable to the facts and circumstances of the case, the above case law is distinguishable on facts, for, it

deals with entries in the case diary and not in respect of a document already furnished u/s 207 of the Code. In the case on hand, a copy of the

letter in question was supplied to the accused along with the statement of

PW-13. Further, PW-13 admitted that he himself had written the letter.

In such circumstances, the defence is entitled to use the same for the purpose of Section 162 Cr.P.C. and Section 145 of the Evidence Act.

8. In this view of the matter, the impugned order is liable to be set aside; accordingly, set aside. The trial court is directed to receive the original

letter in question from the prosecuting agency and if necessary, allow it to be marked as evidence at the instance of the defence.

9. With this observation, the Revision Case is ordered. Connected Miscellaneous Petitions are closed.