

AFR

Reserved on 25/26/28.04.2023 &

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Delivered on 03.05.2023

Court No. - 76

1. **Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 1777 of 2023

Applicant :- Ajay Diwakar

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Ramesh Kumar

Counsel for Opposite Party :- G.A.

2. **Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 8331 of 2023

Applicant :- Chhotu @ Ajeet

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Arun Kumar Singh

Counsel for Opposite Party :- G.A.,Uttam Singh

3. **Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 9686 of 2023

Applicant :- Deepak Upadhyay

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Vinod Kumar Tirpathi,Nimesh Kumar Shukla

Counsel for Opposite Party :- G.A.,Shweta Singh Rana

4. **Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 3332 of 2023

Applicant :- Narendra @ Chhuiya

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Surendra Kumar Tripathi

Counsel for Opposite Party :- G.A.,Abhishek Srivastava,Lalit Kumar Srivastava

5. **Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 2964 of 2023

Applicant :- Sani Madhav

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Tufail Hasan

Counsel for Opposite Party :- G.A.,Anoop Tiwari,Bhishm Pal Singh

6. **Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 2079 of 2023

Applicant :- Sunil Tiwari

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Saurabh Chaturvedi,Sr. Advocate

Counsel for Opposite Party :- G.A.,Vinay Kumar Pal

7. Case :- CRIMINAL MISC. BAIL APPLICATION No. - 11424 of 2023

Applicant :- Sumit Saini

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Ravi Prakash Singh

Counsel for Opposite Party :- G.A.,Dinesh Kumar

8. Case :- CRIMINAL MISC. BAIL APPLICATION No. - 410 of 2023

Applicant :- Vicky @ Bicky

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Pradeep Kumar Bhardwaj,Dheeraj Kumar Tiwari

Counsel for Opposite Party :- G.A.,Anand Vikram Singh

9. Case :- CRIMINAL MISC. BAIL APPLICATION No. - 14673 of 2023

Applicant :- Ravi

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Puneet Kumar

Counsel for Opposite Party :- G.A.,Ram Sagar Chaudhary

10. Case :- CRIMINAL MISC. BAIL APPLICATION No. - 14842 of 2023

Applicant :- Hari Singh

Opposite Party :- State Of U.P. And 2 Others

Counsel for Applicant :- Faizan Habeeb,Shahabuddin

Counsel for Opposite Party :- G.A.,Sunil Kumar Upadhyay

Hon'ble Saurabh Shyam Shamshery,J.

1. Details of criminal case, offences etc. in above referred bail applications are given in the form of chart hereinafter:

Sl. No.	Bail Appl. No.	Name of applicant	Case Crime No.	Under Sections	Police Station	District
1	1777/23	Ajay Diwakar	29/2022	363, 366, 376 IPC & 3/4 POCSO Act	Kamla Nagar	Agra
2	8331/23	Chhotu alias Ajeet	304/2022	363, 376(3) IPC & 3/4 POCSO Act	Rura	Kanpur Dehat
3	9686/23	Deepak Upadhyay	178/2022	363, 366, 376, 354-D, 120-B, 506 IPC & 3/4 POCSO Act	Chandwak	Jaunpur
4	3332/23	Narendra alias Chhuiya	570/2022	363, 366, 376 IPC & 3/4 POCSO Act	Shahganj	Agra
5	2964/23	Sani Madhav	230/2022	363, 366, 376 IPC & 3/4 POCSO Act	Makkanpur	Firozabad
6	2079/23	Sunil Tiwari	342/2019	342, 323, 376, 506 IPC, 4 POCSO Act & 3(2)5 SC/ST Act	Karvi Kotwali Nagar	Chitrakoot
7	11424/23	Sumit Saini	08/2023	363, 366, 376 IPC &	Gajraula	Amroha

				3/4 POCSO Act		
8	410/23	Vicky alias Bicky	376/2022	363, 376 IPC & 3/4 POCSO Act	Shikarpur	Bulandshahar
9	14673/23	Ravi	12/2023	363, 376 IPC & 3/4 POCSO Act	Biharigarh	Saharanpur
10	14842/23	Hari Singh	241/2018	363, 366, 376 IPC & 3/4 POCSO Act	Azeem Nagar	Rampur

2. Common question of law arose for consideration in all above referred bail applications was reframed during final hearing that:

“Whether material collected during investigation such as further/ subsequent / Mazid Bayan or a statement given by a victim (a minor girl) before Child Welfare Committee or that victim has stayed/ lived as wife and husband with accused, would be sufficient evidence for Investigating Officer to take a different or contrary view of statements of victim recorded under Sections 161 and 164 Cr.P.C., wherein she has either denied or does not refer allegation of physical relationship with accused with or without her consent?”

3. Court has heard arguments of Sri Shamsheer Singh and Sri Sarfaraz Ahmad, Amicus Curiae and learned counsel for rival parties on the basis of undisputed principles of criminal jurisprudence that, any Investigating Officer or Agency has a right to investigate any case on its own way by undertaking procedure duly recognized under Criminal Procedure Code, 1973 (*hereinafter referred to as “Code”*) or under Police Manual/ Regulation or under any Special Act with object to unearth the truth which also includes custodial interrogation and recording statement of witnesses. It is also well settled that manner of investigation, being a subjective matter of Investigating Officer, cannot be fixed in a straight jacket formula, however, there are certain settled principles and procedures which have to be followed.

4. Word ‘investigation’ is defined under Section 2(h) of Code and reproduced as under:

“(h) " investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any

person (other than a Magistrate) who is authorised by a Magistrate in this behalf.”

5. Power of Police to investigate, including procedure till submission of report on completion of investigation, is provided under Chapter XII vide Sections 154 to 176 of Code.

6. Court cannot interfere or direct any Investigating Officer to conduct any investigation in a particular manner. However, it does not mean that if any aggrieved party seeks direction for fair investigation, Court becomes helpless rather it can exercise powers granted under Sections 156 or 482 of Code or under Article 226 of the Constitution of India, as the case may be.

7. This Court has advantage of a judgment passed by Coordinate Bench on similar issue in bunch of cases leading being **Criminal Misc. Bail Application No. 31695 of 2021 (Dharmendra alias Patra vs. State of U.P.)**, decision dated 01.10.2021 where question for consideration was:

"Whether the Investigating Officer of a case can after recording the statement of a prosecutrix/victim once under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') who has supported the prosecution case and then in her statement recorded under Section 164 of the Code recorded before a Magistrate has given a different version and more particularly does not state about any wrongful act being committed on her as has been recorded in her statement under Section 161 of the Code earlier, can again interrogate the prosecutrix/victim under Section 161 of the Code and put specific questions to her pertaining to the two different versions given by her in the said two statements and then record the statements and proceed with the Investigation further ?"

8. Above question was answered by Coordinate Bench in following paragraphs:

"9. In the matters in hand the prosecutrix/victim after giving her statement under Section 161 of the Code levelling allegations of rape against the accused, has given up the same in her statement recorded under Section 164 of the Code. The Investigating Officer then records the statement of the prosecutrix/victim again under Section 161 of the Code and puts specific questions to her with regards to the

said variations in her statements and records her answers to the said questions.

10. The said action of the Investigating Officer is not appreciable. Putting questions to the prosecutrix/victim with regards to the change in version by her in the statements under Section 161 of the Code and in the statement under Section 164 of the Code, clearly shows disrespect to the courts who have recorded the statements under Section 164 of the Code. The said statements under Section 164 of the Code recorded by Judicial Magistrates is in discharge of their judicial functions and the act of recording of the said statements was a judicial act which was performed by a public servant while discharging his judicial functions. The said document is relevant under Section 35 of Indian Evidence Act and also under Section 72 of Indian Evidence Act and, as such, assumes the character of being a public document.

11. The statement made by the prosecutrix/victim under section 164 of the Code before the Magistrate stands on a high pedestal and sanctity during the course of investigation than that of her statement recorded under section 161 of the Code by the Investigating Officer.

12. Though the Investigating Agency has unfettered powers to investigate a matter, but they cannot on their whims and fancy adopt a procedure which would clearly be challenging the sanctity of an act done by a court of law while discharge of a judicial function. By putting questions to the prosecutrix/victim in her second statement under Section 161 of the Code after recording of the statement under Section 164 of the Code relating to the different versions in the said two statements, the Investigating Officer cannot frustrate the same and also make an attempt to make the purpose of the said exercise look a farce.

13. The act of putting specific questions pertaining to the variations in the said two statements by the Investigating Officer is viewed with an impression of clearly challenging the authority of a judicial act. The Investigating Officers have clearly exceeded their jurisdiction by proceedings to investigate in such a manner. The

same appears to be with a sole purpose to frustrate the statements recorded by a Magistrate.

14. Even the Uttar Pradesh Police Regulations while dealing with the particular duties of Police Officers for "Investigations" in its Chapter XI do not in any manner authorize Investigating Officers to act as such. Although Paragraph-107 of the same states that the Investigating Officer would not act as a mere clerk while recordings of statements but has to observe and infer. Paragraph-109 empowers for recording of supplementary statements. But the manner in which supplementary statements in the present matters have been recorded clearly show that they are for the sole purpose to put the variations to the witnesses and record the same.

15. This court thus finds that the manner in which the supplementary statements are recorded and the purpose for recording of the same is only and solely for frustrating the purpose of statements recorded under Section 164 of the Code and to negate and defeat the earlier statement of the prosecutrix/victim given under section 164 of the Code whether it is in favour or against the accused otherwise the sanctity of the statement under section 164 of the Code will loose its value. The same is neither the intent of Investigation nor is the purpose of it." (Emphasis supplied)

9. Coordinate Bench has also issued following directions:

"16. The Director General of Police, Uttar Pradesh Lucknow is directed to look into the said new trend of Investigation as adopted and issue suitable guidelines for such matter so that the sanctity and authority of judicial proceedings are maintained and they should not be frustrated by any act done during Investigation.

17. The Registrar (Compliance) of this Court and the learned counsels for the State are directed to communicate this order to the Director General of Police, Uttar Pradesh Lucknow for its compliance and necessary action within a period of one month from today and submit a compliance report within one week thereafter."

10. Another Coordinate Bench of this Court has touched this issue in **Criminal Misc. Bail Application No. 22430 of 2021 (Bulle vs. State of U.P.)**,

decision dated 11.08.2021 and relevant paragraphs thereof are mentioned hereinafter:

“8-In a criminal offence one of the established canons of just, fair and transparent investigation is the right of accused as well as victim, therefore high responsibility lies upon the Investigating Officer not to conduct an investigation in tainted and unfair manner, which may legitimately lead to a grievance of accused that unfair investigation was carried out with an ulterior motive. It must be impartial, conscious and uninfluenced by any external influences. Avoiding any kind of mischief, effort should be made to bring the guilty to law as nobody stands above the law. It is not only the responsibility of the Investigating Officer but as well as that of Courts to ensure fair investigation. The purpose and object of case diary is to maintain fairness in the investigation, transparency and record for ensuring proper investigation. The proper investigation is one of the essentials of the criminal justice system and an integral facet of rule of law. The investigation is a delicate painstaking and dexterous process, therefore ethical conduct is also essential and investigation should be free from objectionable features or legal infirmities.

9-It would be relevant to mention that 1st and 2nd proviso to Section 161(3) Cr.P.C had been inserted by Act 5 of 2009 (w.e.f. 31.12.2009) and Act 13 of 2013 (w.e.f. 2.03.2013) respectively, but this Court has been noticing that in majority of cases, the said provisions are not being followed by the Investigating Officers in true sense and practice of recording second statement under section 161 Cr.P.C. of the victim/prosecutrix after recording her statement under Section 164 Cr.P.C. is on higher side and in some cases, conclusions are drawn by the Investigating Officer on the basis of second statement under section 161 Cr.P.C., ignoring the statements under Section under Section 164 Cr.P.C. This Court also found that it is common argument on behalf of the prosecution in all such cases that there is no bar for recording the second statement under section 161 Cr.P.C. of the victim/prosecutrix. In the opinion of this Court, the statement

under Section 164 Cr.P.C. will prevail over the statement under Section 161 Cr.P.C.”

11. Factual matrix, in brief, of above referred bail applications are as follows (in all cases victim is a minor girl):

Bail Appl. No.	Statement of victim u/s 161 Cr.P.C.	Statement of victim u/s 164 Cr.P.C.	Mazid Bayan/ any other statement/ material
1777/23	No immoral act was committed by applicant on victim.	No allegation of sexual/ physical relation.	Applicant put vermilion on her and made physical relationship during they stayed together.
8331/23	Stayed together for few days. No reference of any physical relationship.	No reference of any physical relationship.	In medical examination hymen found freshly healed. In Mazid Bayan reference of physical relationship.
9686/20	Lived as husband-wife. No reference of any physical relationship.	Solemnized marriage and lived together but physical relationship was specifically denied.	No details available.
3332/23	Court marriage. Physical relationship with consent.	Marriage solemnized but denied any physical relationship.	No details available.
2964/23	Stayed together. No physical relationship and no bad thing.	Allegation of kidnapping denied-accused not recognized.	Victim gave statement during counselling before Child Welfare Committee that applicant made physical relationship with victim.
2079/23	Abducted/ kidnapped, stayed with applicant for four days where victim was raped.	Lived with applicant. No reference of physical relationship.	Document/ affidavit of victim stating that marriage in Mandir was solemnised with applicant. Victim gave birth to a baby of accused.
11424/23	Marriage solemnized. Stayed together as husband-wife. No reference of physical relationship.	Marriage solemnized. Lived together. No reference of physical relationship.	No details available.
410/23	Marriage solemnized and stayed together as husband and wife and made physical relationship.	Marriage solemnised. No reference of physical relationship.	No details available.
14673/23	Solemnized marriage at a Mandir and lived as husband and wife and also made physical relationship.	Solemnized marriage at a Mandir and lived as husband and wife and also made physical relationship.	No details available.
14842/23	Marriage solemnized	Marriage solemnized	There was an agreement of

	and stayed together as husband and wife. No reference of any physical relationship.	and stayed together as husband and wife. No reference of any physical relationship.	marriage as well as photographs wherein father of victim has given blessings to applicant and victim as married couple.
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12. Sri Shamsher Singh and Sri Sarfaraz Ahmad, Amicus Curiae, have assisted the Court and referred various provisions of Code as well as effect of “Mazid Bayan”. The submissions are summarized as under:

- (i) In case of any contradiction/ improvement/ denial amongst statements recorded under Sections 161 and 164 of Code, statement of victim recorded under Section 164 of Code would prevail since it being recorded before a Magistrate and victim has made statement without any fear or pressure.
- (ii) Statement recorded under Section 164 of Code has legal basis of a fair investigation which an Investigating Officer has to follow during investigation.
- (iii) There is no bar to record any further statement during investigation. However, it ought to be to unearth the truth and not for any clarification of denial, improvement or contradiction between statements of victim recorded under Sections 161 and 164 of Code.
- (iv) There is also no bar for making request for recording subsequent statement of victim under Section 164 of Code, however, the final decision would be of Magistrate on the basis of any subsequent event or evidence or otherwise, which ought to be relevant circumstance for fair investigation.
- (v) Section 80 of Indian Evidence Act, 1872 provides presumption of documents produced as record of evidence to be genuine. Section 157 of Evidence Act provides that former statement of witness may be proved to be corroborated later testimony as to same fact.
- (vi) Section 164(5) of Code provides manner of recording of statement under Section 164(1) of Code.

13. Sri Daya Shankar Mishra, learned Senior Advocate, who was present during hearing in Court, on request, has assisted Court and submitted that:

(i) Investigation is not a mere process to unearth the truth but it presupposes fairness which shall be applicable equally for accused and victim. Article 21 of Constitution also provides right to accused and victim of fair investigation.

(ii) Recording of Mazid Bayan may not be used for the purpose of re-investigation but it could only be towards further continuous investigation and Investigating Officer must disclose reasons for recording any such Mazid Bayan during investigation.

14. S/Sri Ramesh Kumar, Arun Kumar Singh, Nimesh Kumar Shukla, Surendra Kumar Tripathi, Tufail Hasan, I.K. Chaturvedi, Senior Advocate assisted by Saurabh Chaturvedi, Ravi Prakash Singh, Dheeraj Kumar Tiwari Puneet Kumar and Sri Shahabuddin, learned counsels appearing for applicants in all bail applications have adopted submissions of Amicus Curiae in principle and pointed out that in one of case affidavit of application has been filed by victim herself, in another case victim is presently residing alongwith family members of accused and in another case victim has become mother of a child of accused concerned.

15. Sri Rishi Chaddha, Sri Chandan Agarwal and Sri Sunil Srivastava, learned Additional Government Advocates appearing for State, submitted that procedure for investigation cannot be put in a straight jacket formula. Investigating Officer has liberty to investigate case in its own manner. Only restriction would be that process may not be contrary to legally established principles.

16. Provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 (*hereinafter referred to as "JJ Act, 2015"*) provides statutory obligation on Child Welfare Committee to have interaction with victim to provide her support and also to provide counselling, therefore, any statement of victim recorded before Child Welfare Committee cannot be thrown away and it has certain evidentiary value and it could be made a part of investigation, i.e., part of case diary.

17. Section 19 of Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as "POCSO Act"*) provides a duty on a citizen to inform authority concerned, if any offence is committed on a minor victim.

Learned AGAs also referred provisions related to constitution of Child Welfare Committee and its duties and obligations.

18. Victim is entitled to ask Investigating Officer to record her Mazid Bayan or to request Investigating Officer to produce her before Magistrate concerned for purpose of recording a subsequent statement before him as well as she has also liberty to record her statement before Child Welfare Committee. In a given case it may not be ruled out that victim may not be able to say truth before Police as well as before Magistrate but after counseling she muster strength to say truth before Child Welfare Committee and, therefore, in these circumstances statement before Child Welfare Committee would be relevant and it will have evidentiary value being a statement recorded under the provisions of JJ Act, 2015 and Trial Court can consider it according to principles of evidence. It may be a valid ground for Magistrate to record a subsequent statement under Section 164 of Code.

19. Mazid Bayan is also a part of investigation and it can be relied on by Investigating Officer while filing a final report/ charge sheet and only caveat is that it may not be a tutored statement or recorded only for the purpose of predetermined object to continue investigation in a particular way and it may not be on whimsical approach of Investigating Officer.

20. I have heard Amicus Curiae, learned counsels for parties and perused the material available on record.

21. Supreme Court in a very recent judgment passed in **Criminal Appeal No. 915 of 2016, Maghavendra Pratap Singh vs. State of Chhattisgarh, decided on 24th April, 2023** has considered the duties of an Investigating Officer and relevant paragraphs of judgment are reproduced hereinafter:

*“38. The Investigating Officer is the person tasked with determining a direction, the pace, manner and method of the investigation. In Amarnath Chaubey v. Union of India (2021) 11 SCC 80, it was observed that the police has a primary duty to investigate upon receiving the report of the commission of crime. In Manohar Lal Sharma v. Union of India (2014) 2 SCC 532, this Court observed that **one of the responsibilities of the police is protection of life, liberty and property of citizens. The investigation of offences to bring the offender to the book and facilitate the ultimate search***

for truth is one of the important duties the police has to perform. This is a statutory duty under the Cr.P.C. and is also a constitutional obligation ensuring the maintenance of peace and the upholding of rule of law.

39. On the responsibility cast on an officer investigating a crime, this Court in *Common Cause v. Union of India (2015) 6 SCC 332*, observed as under :

“31. There is a very high degree of responsibility placed on an investigating agency to ensure that an innocent person is not subjected to a criminal trial. This responsibility is coupled with an equally high degree of ethical rectitude required of an investigating officer or an investigating agency to ensure that the investigations are carried out without any bias and are conducted in all fairness not only to the accused person but also to the victim of any crime, whether the victim is an individual or the State.”

40. It is well recognised that the Magistrate concerned is not empowered to interfere with the investigation being carried out up until the submission of the report by the said officer. Needless to state then that the role of the Investigating Officer is essential and crucial. Chapter XII of Cr.P.C. titled as “information to the police and their powers to investigate”, lays down the procedure and course of action to be taken by the police upon receipt of the commission of an offence cognizable in nature. Section 156 lays down the power of investigation; Section 157 the procedure thereof; Section 160 the power to require attendance of a witness, Section 161 conduct examination of such witness, etc. Section 172 requires such police officer to maintain a case diary and Section 173 lays down the format and the procedure for the report to be issued by such officer.

41. This Court has in *Pooja Pal v. Union of India (2016) 3 SCC 135*, expounded as under for criminal investigations and its success :

“96. The avowed purpose of a criminal investigation and its efficacious prospects with the advent of scientific and technical advancements have been candidly synopsised in the prefatory chapter dealing with the history of criminal investigation in the treatise on Criminal Investigation — Basic Perspectives by Paul B. Weston and Renneth M. Wells:

“Criminal investigation is a lawful search for people and things useful in reconstructing the circumstances of an illegal act or

omission and the mental state accompanying it. It is probing from the known to the unknown, backward in time, and its goal is to determine truth as far as it can be discovered in any postfactum inquiry.

Successful investigations are based on fidelity, accuracy and sincerity in lawfully searching for the true facts of an event under investigation and on an equal faithfulness, exactness, and probity in reporting the results of an investigation. Modern investigators are persons who stick to the truth and are absolutely clear about the time and place of an event and the measurable aspects of evidence. They work throughout their investigation fully recognising that even a minor contradiction or error may destroy confidence in their investigation.

The joining of science with traditional criminal investigation techniques offers new horizons of efficiency in criminal investigation. New perspectives in investigation bypass reliance upon informers and custodial interrogation and concentrate upon a skilled scanning of the crime scene for physical evidence and a search for as many witnesses as possible. Mute evidence tells its own story in court, either by its own demonstrativeness or through the testimony of an expert witness involved in its scientific testing. Such evidence may serve in lieu of, or as corroboration of, testimonial evidence of witnesses found and interviewed by police in an extension of their responsibility to seek out the truth of all the circumstances of crime happening. An increasing certainty in solving crimes is possible and will contribute to the major deterrent of crime—the certainty that a criminal will be discovered, arrested and convicted.” (Emphasis in original)

42. With reference to case diaries, it has been observed by this Court in *Bhagwant Singh v. Commission of Police* (1983) 3 SCC 344, a two Judge Bench observed that entries into the police diary shall be with (a) promptness; (b) in sufficient detail; (c) containing all significant facts; (d) in chronological order; and (e) with complete objectivity.

43. This Court in *Mohd. Imran Khan v. State (Govt. of NCT of Delhi)*, (2011) 10 SCC 192, observed as under while noting the effect of objectionable features and infirmities on criminal investigations:

“31. The investigation into a criminal offence must be free from all objectionable features or infirmities which may legitimately lead to a grievance to either of the parties that the investigation was unfair or had been carried out with an ulterior motive which had an adverse impact on the case of either of the parties. The investigating officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party. He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct so that any kind of suspicion to his conduct may be dispelled and the ethical conduct is absolutely essential for investigative professionalism. The investigating officer “is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth”. (Emphasis supplied)

22. This Court has also discussed law with regard to statement recorded under Section 161 of Code in **Application under Section 482 No. - 23696 of 2022 , Faisal Ashraf vs. State of U.P. and others, decided on 22.12.2022** and relevant paragraphs no. 6 to 11 are reproduced as under:

“6. Before advertng to rival submissions, it will be relevant to quote relevant Section 161 Cr.P.C.

"161. Examination of witnesses by police -:

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he

does so, he shall make a separate and true record of the statement of each such person whose statement he records."

7. *In present case, I.O. has visited place of witnesses Smt. Manju Rani and Talat Zameer who handed over their written statements which were transcribed by I.O. in case diary in their presence as well as original statements were made part of case diary also. I.O. asked few questions to witnesses and answers thereof were also reduced into writing in case diary, therefore, only lacuna, if exists, was that witnesses have not mentioned their statements orally i.e. stated in their own voice.*

8. *The purpose of statements made under Section 161 Cr.P.C. is to investigate an occurrence to find out culprits. So far as evidentiary value of these statements is concerned, it would only for purpose of contradiction, if any, committed by said witness during his testimony in trial. Other than it, it has no evidentiary value.*

9. *Word "orally" also includes a statement recorded by audio video also. Purpose of "to examine orally" is to ensure that I.O. may record whatever is said by witness to him or relevant part of it and which has to be reduced into writing by him to avoid any kind of coercion, misrepresentation or mischief. A written statement sent by post or delivered by another person may not fall under "to examine orally" but a written statement submitted by witness himself to I.O. and I.O. has assured its genuineness and same, if reduced in writing, shall be a statement duly recorded under Section 161 Cr.P.C.*

10. *The word "may" used in Section 161 Cr.P.C. gives discretion to police officers to examine orally any person as well as may reduce into writing any statement made to him, therefore, he has discretion not to reduce into writing the entire statement made to him or he may reduce into writing only gist of statement. Sole object of statement under Section 161 Cr.P.C. is to investigate allegations and to prepare case diary for purpose of consideration by Court at stage of cognizance and summon as well as use to show contradictions during trial.*

11. *In view of above discussion, there is no illegality in taking a written statement of a witness under Section 161 Cr.P.C., when it was reduced in recording in case diary in presence of witnesses as well as I.O. has made questions also which are also reduced in writing along with answers. The*

I.O. has taken sufficient precautions to ensure it to be a written statement of witnesses only.” (Emphasis supplied)

23. Mazid Bayan is a terminology normally used for further/ subsequent statement of a witness recorded during investigation and definitely it would be a part of investigation. However, as held in **Dharmendra alias Patra (supra)** that any Mazid Bayan, if it is recorded with object for frustrating the purpose of statement recorded under Section 164 of Code or to negate and defeat the earlier statement of victim given under Section 164 of Code, then it would be against the intent of investigation and sanctity of statement recorded under Section 164 of Code will lose its value. Therefore, if Mazid Bayan is recorded on personal request of victim that she herself wanted to restate from earlier statement or to give certain other evidence, Mazid Bayan can be recorded, however, it will depend upon Investigating Officer to rely upon it or not and at this stage it would be a better course if a subsequent statement under Section 164 of Code may be recorded and for that a request can be made before Magistrate by concerned Investigating Officer, who will be at liberty to record it or not. Investigating Officer will be at liberty to make out an overall opinion on the basis of overall evidence collected during investigation. However, any statement recorded before Child Welfare Committee would not be a statement recorded under Section 161 of Code as under said provision any statement has to be recorded before a Police Officer making an investigation under the Code, whereas Child Welfare Committee is acting under JJ Act, 2015, therefore, it will not be legally appropriate to solely rely upon statement made by victim before Child Welfare Committee though it may be made a part of case diary which can be proved during trial if prosecution desires or if Trial Court may consider it in accordance with law.

24. Another issue would arise when a minor victim has stated in her statements recorded under Sections 161 and 164 of Code that she had solemnized marriage with accused and/ or lived as husband and wife, however, she emphatically denied any physical relationship or conspicuously kept silent on this issue. In these circumstances, whether the fact that they have admitted to live as married couple, with or without

marriage, it would be presumed that normal relationship as husband and wife was in existence during their stay which also includes a physical relationship and that minor victim's consent for physical relationship is immaterial. Section 114 of Evidence Act provides that a Court may presume existence of certain facts which includes human conduct likely to have happened. Therefore, Investigating Officer will have liberty in such a situation if he makes an opinion that offence of rape is made out since accused has lived with minor girl as husband and wife and, therefore, it would be presumed that they had physical relationship as it is settled law that consent of minor is immaterial.

25. Considering above referred submissions of rival parties, Amicus Curiae and above discussion on facts and law the question formulated above is answered as follows:

- (i) An Investigating Officer is under obligation to conduct fair investigation which is an equal right of an accused as well as of victim and for that Investigating Officer has to follow procedure prescribed under the Code as well as Police Manual/ Regulation or procedure prescribed under any Special Act.
- (ii) Investigating Officer has liberty to record statement of witnesses more than one time also. Mazid Bayan/ further statement can be recorded to unearth the truth and Investigating Officer has liberty to carry out investigation on its own way but in a legally permissible way till final report/ charge sheet is filed before Court concerned or under "further investigation".
- (iii) Investigating Officer cannot record further statement/ Mazid Bayan of victim only for the purpose of clarification or to dilute any statement of victim recorded under Section 164 of Code with only object to make the accused culpable of an offence. [See, **Dharmendra alias Patra (supra)**]
- (iv) Child Welfare Committee is under obligation to provide legal as well as psychological counseling to victim and during this process she may give statement before Child Welfare Committee, however, it would not be considered to be a statement recorded under Section 161

of Code being not recorded by a Police Officer investigating the case. Therefore, any statement before Child Welfare Committee cannot be a sole ground to dilute or to take a different view of statement given by victim before Magistrate.

(v) Medical evidence may be a factor to take a contrary view to the statement of victim recorded under Sections 161 and 164 of Code by Investigating Officer, however, Investigating Officer has to record specific reasons in final report/ charge sheet for such opinion/ view.

(vi) If there is a statement of victim that either they have solemnized marriage or stayed as husband and wife, then there will be a presumption that during stay they have physical relationship except where victim has specifically denied any physical relationship and since consent of minor victim is immaterial, therefore, offence of rape can be made out.

(vii) Above factors may be taken into consideration while hearing a bail application.

26. In view of above, all bail applications are decided in following manner:

(i) **Bail Application No. 1777 of 2023**-As referred above, victim has not stated about commission of any immoral act or physical relationship with accused, however, she has stated in her Mazid Bayan that they had solemnised marriage and lived as husband-wife. Said Mazid Bayan appears to be recorded only for the purpose of making a case contrary to statement recorded under Section 164 of Code, therefore, in given circumstances, applicant has made out a case for bail.

(ii) **Bail Application No. 8331 of 2023**-Victim has stated that they stayed together for few days, however, no reference was made with regard to any physical relationship. Medical examination of victim opined that hymen was freshly healed, therefore, Investigating Officer was within its jurisdiction to opine that it was a case of physical relationship with a minor victim. However, considering that

Investigating Officer has recorded a Mazid Bayan only to make out a contrary case as stated by victim in her statement recorded under Section 164 of Code, therefore, applicant has made out a case for bail.

(iii) **Bail Application No. 9686 of 2020**-Victim has stated that they got married and lived together as husband-wife, however, she has denied that they have entered into any physical relationship. As referred above that though victim and applicant lived as husband-wife, however, since there is a specific denial of physical relationship, therefore, there cannot be any presumption, and thus, applicant has made out a case for bail.

(iv) **Bail Application No. 3332 of 2023**-Victim and applicant married each other. Though in the statement recorded under Section 161 of Code victim said that they have entered into physical relationship but she specifically denied any physical relationship in the statement recorded under Section 164 of Code, therefore, it would not be a case of any 'presumption' of physical relationship, and thus, applicant has made out a case for bail.

(v) **Bail Application No. 2964 of 2023**-Victim and applicant stayed together but have no physical relationship, however, since victim has denied all allegations in her statement recorded under Section 164 of Code and as referred above, victim's statement before Child Welfare Committee, that they had physical relationship, would not be a sole ground to held that physical relationship took place. Therefore, applicant has made out a case for bail.

(vi) **Bail Application No. 2079 of 2023**-Victim and applicant stayed together and got married. However, in statement recorded under Section 161 of Code, there was no reference of physical relationship. There is a document that they had agreement to marriage and have a baby of two years. Since they have solemnised marriage and a baby also, therefore, it is evident that they entered in physical relationship. However, considering that they have a two years old baby and victim

is living with family members of accused-applicant, therefore, he is entitled for bail.

(vii) **Bail Application No. 11424 of 2023**-Victim has stated that she got married with accused-applicant, however, there is no reference of any physical relationship. Therefore, as referred above, there would be a presumption that they have made physical relationship. However, considering overall aspect including age of victim, her statements under Section 161 and 164 of Code as well as that there is only a presumption of physical relationship during a period of about two and half weeks when victim stayed with applicant, therefore, he has made out a case for bail.

(viii) **Bail Application No. 410 of 2023**-Victim has stated that applicant has solemnised marriage with her but she has not referred about any physical relationship in her statement recorded under Sections 161 and 164 of Code. Therefore, as referred above, it would be a case of presumption that they have physical relationship also. However, considering overall aspect of case including that there is only a presumption of physical relationship when victim stayed with applicant for about ten days, therefore, a case for bail is made out.

(ix) **Bail Application No. 14673 of 2023**-Victim has stated in her statements recorded under Sections 161 and 164 of Code that not only they have solemnised marriage but stayed together as husband and wife and also entered into physical relationship. However, taking note of age of victim, according to documents, i.e., about 16 years and according to ossification report about 18 years, applicant is entitled for bail.

(x) **Bail Application No. 14842 of 2023**-Victim has stated in her statements recorded under Sections 161 and 164 of Code that they solemnised marriage and lived as husband and wife, however, there is no reference of any physical relationship. Therefore, as referred above, there is presumption that they had physical relationship also. However, considering that age of victim according to ossification

report is about 19 years as well as that father of victim has no objection on marriage, therefore, applicant has made out a case for bail.

27. In view of above, **all Bail Applications are allowed**. Let Applicants- **Ajay Diwakar, Chhotu alias Ajeet, Deepak Upadhyay, Narendra alis Chhuiya, Sani Madhav, Sunil Tiwari, Sumit Saini, Vicky alias Bicky, Ravi and Hari Singh** be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the Court concerned with the following conditions which are being imposed in the interest of justice:-

(i) The applicants will not tamper with prosecution evidence and will not harm or harass the victim/complainant in any manner whatsoever.

(ii) The applicants shall file an undertaking to the effect that they shall not seek any adjournment or exemption from appearance on the date fixed in trial. In case of default of this condition, it shall be open for the Trial Court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(iii) The applicants will not misuse the liberty of bail in any manner whatsoever. In case, the applicants misuse the liberty of bail during trial and in order to secure their presence proclamation under Section 82 Cr.P.C., may be issued and if applicants fail to appear before the Court on the date fixed in such proclamation, then, the Trial Court shall initiate proceedings against them, in accordance with law, under Section 174-A I.P.C.

(iv) The Trial Court may make all possible efforts/endeavour and try to conclude the trial expeditiously, preferably within a period of six months after release of applicants, if there is no other legal impediment.

28. The identity, status and residential proof of sureties will be verified by Court concerned and in case of breach of any of the conditions mentioned above, Court concerned will be at liberty to cancel the bail and send the applicants to prison.

29. In all above cases, Trial Court is directed to record statement of victim during trial, if not already recorded, within a period of six weeks from today and for that Registrar (Compliance) shall take steps.

30. The Court appreciates the assistance given by Sri Shamsheer Singh and Sri Sarfaraz Ahmad, Amicus Curiae and High Court Legal Services Committee is directed to pay Rs. 7500/- to Sri Shamsheer Singh, Advocate and Rs. 5000/- to Sri Sarfaraz Ahmad, Advocate within a period of four weeks from today.

Order Date :-03.05.2023

AK

(Saurabh Shyam Shamsheer)