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JUDGMENT SHEET

LAHORE HIGH COURT, MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

Writ Petition No. 3962/2023

Muhammad Asghar Ali Shah

Vs.

The State etc.

JUDGMENT

Date of hearing:	**15.6.2023**
For the Petitioner:	Mr Bilal Saeed, Advocate.
For the Respondents:	Mr Sanam Fareed Khan Baloch, Assistant Advocate General, and Mr Muhammad Ali Shahab, Deputy Prosecutor General.

Tariq Saleem Sheikh, J. – The Petitioner is one of the accused in case FIR No.1193/2022 dated 3.11.2022 registered at Police Station Fareed Town, District Sahiwal, for an offence under section 9(c) of the Control of Narcotic Substances Act, 1997. The allegation against him is that he and his co-accused, Nadia Rubab, were transporting a huge quantity of narcotics in Car No.AKT-1498. The Petitioner claims it is a false case, and the police have planted the narcotics on them. According to the Petitioner, the Investigating Officer did not pen his version, so he applied to the Magistrate Section-30, Sahiwal, under section 164 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "Code of 1898" or "Cr.P.C."), to record it. He declined his request on the ground that an accused can only have his confession recorded under that provision. The Petitioner has challenged the Magistrate's order dated 28.11.2022 (the "Impugned Order") before this Court through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution").

2. Mr Bilal Saeed, Advocate, contends that the Petitioner has a right to be treated in accordance with the law under Article 4 of the Constitution. Section 164 of the Code of 1898 does not exclude an accused,

and the Petitioner has every right to have his statement recorded by the Magistrate. The counsel argues that the Impugned Order is perverse and not sustainable.

3. Mr Sanam Fareed Khan Baloch, Assistant Advocate General, strongly opposes this petition. He contends that under section 164 of the Code of 1898, a Magistrate may only record an accused's confession and no other statement. The Petitioner wishes to use section 164 to have his counter-version recorded in FIR No.1193/2022, which is impermissible.

Opinion

4. The Code of 1898 was enacted during British Rule to consolidate and amend the law relating to criminal procedure[1] in the Indo-Pak sub-continent. Pakistan adopted it after the Partition, and it is still in force with some amendments. India followed it until the enactment of the Code of Criminal Procedure, 1973 (the "Indian Code"). Section 164 of the Code of 1898 empowers certain Magistrates to record statements and confessions. Incidentally, it is analogous to section 164 of the Indian Code. Its relevant portion is reproduced below for ready reference:

> **164. Power to record statements and confessions.–** (1) Any Magistrate of the First Class and any Magistrate of the Second Class specifically empowered in this behalf by the Provincial Government may, if he is not a police officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.
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> (1A) Any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement.
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> (2) Such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.
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> (3) …
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> **Explanation.–** It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

5. Section 164 of the Code of 1898 authorizes the Magistrates of the First Class and of the Second Class, who are specifically empowered by the Provincial Government, to record any statement or confession made to them during an investigation by the police or at any time afterwards but

[1] Preamble of the Code of Criminal Procedure, 1898.

before the commencement of the inquiry or trial. The Magistrate should take down the statement in the manner prescribed by the Code of 1898 for recording evidence as, in his opinion, is most suited to the circumstances of the case. He may record it in the accused's presence and give him an opportunity to cross-examine the maker. However, the Magistrate must record the confessions as stipulated in sections 164(3) and 364 of the Code of 1898. The Explanation states that the aforesaid Magistrates may exercise these powers even if they do not have jurisdiction in the case. The object of section 164 is to protect a person against extortion or oppression[2] or to fix him to it when it is feared that he may resile afterwards or tamper with it.[3]

6. The phrase "before the commencement of the inquiry or trial" in section 164 of the Code of 1898 is crucial. The term "inquiry" has a wide connotation. Section 4(k) states that "inquiry" encompasses any inquiry other than a trial conducted under the Code by a Magistrate or a Court. The terms "inquiry" and "investigation" must be distinguished. The former refers to proceedings before Magistrate prior to trial, while "investigation" is confined to proceedings taken by the police or by any person other than a Magistrate who is authorized in this behalf. Inquiries may be in respect of (i) offences or (ii) of matters which are not offences.[4]

7. The Code of Criminal Procedure of 1872 defined the trial as "the proceedings taken in court after a charge has been drawn up and includes the punishment of the offender." However, this definition was omitted from the subsequent Codes.[5] In ***Hema Singh and another v. The Emperor*** (AIR 1929 Patna 644), it was held that a "trial" is a judicial proceeding before the court which ends in conviction or acquittal. The trial commences when a charge is framed under Chapter XIX of the Code of 1898. In ***Haq Nawaz and others v. The State and others*** (2000 SCMR 785), the Supreme Court of Pakistan explained:

> "From a review of the above provisions of the Code [of 1898], it is quite clear to us that taking of cognizance of a case by a court is not synonymous with the commencement of the trial in a case. Taking cognizance of a case by the court is the first step, which may or may not culminate in the trial of the accused. Therefore, the trial in a criminal case does not commence with the taking of the cognizance of the case by

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[2] Basu's Commentary on Code of Criminal Procedure, 14th Edn., p.1099

[3] Sarkar, S.C., *The Code of Criminal Procedure,* 10th Edn., Vol. 1, p. 770

[4] *ibid,* p.17

[5] *ibid,* p.18

> the court. A careful examination of the above provisions in the Code makes it clear that until the charge is framed and copies of the material (statement of witnesses recorded under sections 161 and 164 Cr.P.C., inspection note of the first visit to the place of occurrence and recoveries recorded by investigating officer, if the case is initiated on police report, and copies of complaint, other documents filed with complaint and statements recorded under section 200 or 202 if it is a case upon complaint in writing) are supplied to accused free of charge and he is called upon to answer the charge. In the case before us, the challan was filed before the court on 5.1.1991, and the accused were also summoned to appear before the court on 6.1.1991, which may amount to taking of the cognizance of the case by the court. However, in view of the provisions of the Code referred to above, these steps could not amount to commencement of the trial of the appellant."

8. As adumbrated, section 164 of the Code of 1898 empowers the Magistrate to record "any statement or confession" while the investigation is underway. However, it does not say which individual. Again, a "statement" may or may not amount to a confession, or it may be partially confessional and partially exculpatory.

9. In ***Jogendra Nahak and others v. State of Orissa and others*** (AIR 1999 SC 2565), the question arose as to whether a witness could approach a Magistrate on his own initiative and have his statement recorded under section 164 of the Indian Code. The facts of the case were that four persons, claiming to be witnesses to an occurrence that was the subject of a criminal proceeding, petitioned the High Court for an order directing a Magistrate to record their statement under section 164. The High Court dismissed the writ petition with costs, holding that the petitioners were playing tricks to help a charge-sheeted accused. They did not file it to secure fair justice. It was contended before the Supreme Court that the Magistrate could not inquire into the motive of the witnesses when they came to him for a statement under section 164. He should have left it to the trial court to judge their trustworthiness. The Supreme Court ruled that although the language of section 164 of the Indian Code is expansive, an individual cannot go before a Magistrate and demand that he record the statement he wishes to make. He must be sponsored by the investigating agency. It stated:

> "In the scheme of the above 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 witnesses brought up at the behest of accused persons."

The Supreme Court of India further stated:

> "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 [Indian] 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 [Indian] Code.[6] 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 [Indian] Code. 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."

10. In ***Muhammad Sarfraz Khan v. The Crown*** (PLD 1953 Lahore 495), a Division Bench of this Court held that a statement under section 164 of the Code of 1898 may be recorded not only at the instance of police but also at the request of any aggrieved person or the witness himself. This view was followed in ***Mst. Mumtaz Akhtar v. Illaqa Magistrate, Chakwal, and others*** (1997 MLD 3021); ***Mst. Amina Bibi v. Sessions Judge, Layyah, and others*** (1999 PCr.LJ 2044); ***Muhammad Yousaf v. The State and others*** (2002 YLR 397); and ***Mst. Mansab Mai v. The State*** (2005 YLR 1403). In ***Abdul Sattar and another v. The State and others*** (2018 YLR 977), the Sindh High Court held that the statement of a witness under section 164 of the Code of 1898 is ordinarily recorded by a Magistrate when he is sent by the investigating agency so that he cannot retract afterwards. When a witness goes directly to a Magistrate and asks that his statement be recorded, the Magistrate has the discretion to accept or decline his request, as indicated by the word "may" in section 164. However, he should apply his judicial mind while exercising such discretion and consider whether this would be proper and foster justice. To that end, he should go over the case diary to identify the current status and direction of the probe. There may be a situation where a witness working in concert with the accused may try to exploit section 164 to skew the investigation and prevent the truth from being revealed. Conversely, a dishonest investigating officer may be attempting to bury the

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[6] Section 311 of the Indian Code is *pari materia* with section 540 of the Code of 1898.

truth by not examining the key and crucial witness to the occurrence. Closing the window of section 164 in such instances could be disastrous.

11. The courts in Pakistan have consistently held that anyone, including a witness, may approach the Magistrate for a statement under section 164 of the Code of 1898 on his own without involving the police. The Indian Supreme Court has a different viewpoint on this matter. True, the principles established by the Indian Courts are not binding on the courts in Pakistan and merely have persuasive value; yet, we may need to examine which of the two perspectives is more appropriate. We are not undertaking that exercise in this case for two reasons: first, that issue does not arise directly in these proceedings, and second, because a coordinate Division Bench rendered the judgment in *Muhammad Sarfraz Khan*, only a Larger Bench can re-examine it.

12. The Evidence Act of 1872 did not define "confession". Qanun-e-Shahadat, 1984 ("QSO") does not do that either. In ***Muthukumaraswami Pillai and others v. King Emperor,*** (1912) I.L.R. 35 Mad. 397 at p. 490, Abdul Rahim J. stated: "Whether a statement is to be called a confession or not depends, not merely on the nature of the statement itself, but on the use that is sought to be made of it." The courts in the Indo-Pak sub-continent for a long time understood the aforesaid concept in terms of Article 22 of *Stephen's Digest of the Law of Evidence*. According to that definition, "confession is an admission made at any time by a person charged with a crime, stating or suggesting the interference that he committed that crime". However, in ***Pakala Narayana Swami v. Emperor*** (AIR 1939 PC 47), the Privy Council did not accept it for the purposes of the Evidence Act of 1872 in India. Lord Atkin observed:

> "… no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession."

13. The Supreme Court of Pakistan approvingly cited *Pakala Narayana Swami's* case in ***Raza v. The State***[7] and further observed:

> "There is a distinction between admissions and confessions. It would appear that confessions are a species of which admission is the genus. All admissions are not confessions, but all confessions are admissions. If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If, on the other hand, the statement falls short of it, it amounts to an admission. No statement, which contains self-exculpatory matter, can amount to a confession, if the exculpatory statement is of some fact which, if true, would negate the guilt. A confession is thus an admission by an accused in a criminal case, and if he does not incriminate himself, the statement cannot be said to be a confession."

14. In ***Aghnoo Nagesia v. State of Bihar*** (AIR 1966 SC 119), the Supreme Court of India ruled that a "confession" may be defined as an admission of guilt by a person charged with the crime. A statement containing self-exculpatory matter cannot be regarded as a confession if the exculpatory statement is of some fact which, if true, would negate the offence alleged to be confessed. If an accused's admission is to be used against him, the whole of it must be tendered in evidence. If part of the admission is exculpatory and part inculpatory, the prosecution cannot use only the inculpatory component as evidence. The Supreme Court further stated:

> "Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession. If proof of the confession is excluded by any provision of law such as sections 24, 25 and 26 of the Evidence Act,[8] the entire confessional statement in all its parts, including the admissions of minor incriminating facts, must also be excluded, unless proof of it is permitted by some other section such as section 27 of the Evidence Act.[9] Little substance and content will be left in sections 24, 25, and 26 if proof of admissions of incriminating facts in a confessional statement is permitted."

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[7] Crl. Petition Nos.1124-L of 2015 and 1120-L of 2015 decided on 25.06.2020 (Available at: Crl.p_1124_I_2015.pdf)

[8] See Articles 37 to 39 of Qanun-e-Shahdat, 1984.

[9] See Article 40 of Qanun-e-Shahadat, 1984.

15. In India, the courts' previous view was that the expression "statement" in section 164 referred to the statement of a witness rather than that of an accused, whether or not it amounted to a confession. However, subsequent cases held that it covers a witness's statement as well as an accused's confessional and non-confessional statements. The distinction is not between persons making the "statement" but in the mode of recording a statement and a confession.[10]

16. The principle that emerges from the above discussion is that section 164 of the Code of 1898 does not prohibit the Magistrate from recording the statement of an accused not amounting to a confession. We find further support for this view in Chapter 13 of Volume II of the Rules and Orders of the Lahore High Court and Rule 25.28(1)(a) of the Police Rules, 1934. Chapter 13 is captioned "*Confessions and Statements of accused persons*" and Rule 1 thereof reads as follows:

> **Statements of accused at various stages explained.–** The provisions of sections 164, 342 and 364 of the Criminal Procedure Code [of 1898] with regard to the confessions and statements of accused persons should be carefully studied. Section 164 deals with the recording of statements and confessions at any stage before the commencement of an enquiry or trial. Section 342 deals with the examination of accused persons during the course of the enquiry or trial. Section 364 prescribes the manner in which the examination of an accused person is to be recorded.

Rule 25.28(1)(a) of Police Rules, 1934 is reproduced below:

> **25.28 Statement recorded by Magistrates.–** (1) The circumstances under which police officers may require a statement to be recorded by a Magistrate are as follows:
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> (a) The statement, made in the course of an investigation by a witness or an accused person, and not amounting to a confession, may be recorded by a Magistrate under section 164 Code of Criminal Procedure [1898], in order that it may be available as evidence at a later stage. Such statements may be recorded in any of the manners prescribed for recording evidence.

17. The High Court Rules and Orders distinguish explicitly between "confessions" and "statements" of accused persons. The language in Rule 1 that "Section 164 deals with the recording of statements and confessions at any stage before the commencement of an enquiry or trial" indicates that an accused may have his non-confessional statement recorded during the investigation. Rule 25.28(1)(a) of the Police Rules is clearer. It specifically discusses the accused's statement "not amounting to confession".

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[10] Sarkar, S.C., *The Code of Criminal Procedure*, 10th Edn., Vol. 1, p. 769

18. It should, however, be noted that the accused's non-confessional statement would not be on oath because clause (b) of Article 13 of the Constitution of 1973, section 5 of the Oaths Act, 1873, and section 342 of the Code of 1898 prohibit it. Section 340(2) is an exception to the general rule, which provides that an accused person shall, if he does not plead guilty, give evidence on oath to disprove the charges or allegations made against him or any person charged or tried with him at the same trial. According to Sarkar, an approver's statement following a pardon can be recorded like that of any other witness and may be done on affirmation.[11]

19. The accused's statement under section 164 of the Code of 1898 is not substantive evidence. He must prove the facts he narrates in that statement according to Qanun-e-Shahdat. In ***Ghulam Hussain v. The King*** (PLD 1949 PC 326), the Privy Council held that a statement under section 164 not amounting to confession can be used against the maker as an admission under sections 18 to 21 of the Evidence Act.[12] The relevant excerpt is reproduced below:

> "The question here is quite different. It is whether a statement made under section 164, which does not amount to a confession, can be used against the maker as an admission within the purview of sections 18 to 21 of the Indian Evidence Act. This question has been raised in courts in India, and it has been answered in the affirmative – see *Golam Muhammad Khan v. The King Emperor* (1 LR 4 Pat. 327), *Abdul Rahim and others v. The King Emperor* [A1R (1925) Cal. 926] and *Muhammad Bakhsh v. The King Emperor* [AIR (1941) Sind 129]. Their Lordships consider that the affirmative answer is right. The fact that an admission is made to a Magistrate while he is functioning under section 164 of the Code of Criminal Procedure [1898] cannot take it outside the scope of the Evidence Act. [co-accused] Fatehsing's statement under section 164 of the Code of Criminal Procedure [1898] contained admissions provable under the Evidence Act, and therefore, the learned Judge was right in reading it to the jury as evidence in support of the charge against Fatehsing himself, having made it quite clear that the jury was not to take it into consideration against the appellant."

20. In the present case, the Magistrate Section-30, Sahiwal, has misconstrued the law while refusing to record the Petitioner's statement under section 164 of the Code of 1898. Therefore, we **accept** this petition and set aside the Impugned Order dated 28.11.2022. The Magistrate is

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[11] Sarkar, S.C., *The Code of Criminal Procedure*, 10th Edn., Vol. 1, p. 770. He cites *Rambharose Narbadaprasad Kachhi v. Emperor* (AIR 1944 Nagpur 105); *Emperor v. Hussaina* (AIR 1933 Lahore 868); and *Emperor v. Amar Singh* (AIR 1938 Lahore 796).

[12] See Articles 31 to 34 of Qanun-e-Shahdat, 1984.

directed to consider his request and proceed in accordance with the law elucidated above.

(Sadiq Mahmud Khurram)
Judge

(Tariq Saleem Sheikh)
Judge

Announced in open Court on _____

Approved for reporting

Judge

Naeem