

CRIMINAL RULES OF PRACTICE – AMENDMENT

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CONTRADICTIONS IN EVIDENCE – MARKING OF:

By a notification in the Official Gazette of Tamil Nadu, the Criminal Rules of Practice as amended by the High Court of Madras was published. The amendment regarding marking of contradictions during evidence is the subject matter of this short note.

In order to driver home the points urged in this paper, some hypothetical illustrations are appended.

The veracity of the oral evidence of a witness in a criminal trial , is tested among other things by looking into corroboration or contradiction with his previous statements, if any. Some examples of such prior statements may be stated as follows:

- Statement to police during investigation of the case recorded as per Section 161 CrPC.
- Statement, if any, in case of injury cases, to the doctor at the time of examination of the injured witness . This statement shall be by the injured witness himself, who is subsequently examined during trial.
- Statements, if any, in writing , made to employer,etc about the incident which is the subject matter of the later trial.
- Statements made to Magistrate as per Section 164 CrPC.
- Sworn statement, made as per Section 200 CrPC at the time of the cognizance of the offence.

It may be noted that the prior statement denotes that the witness now in the witness box , has earlier made a statement before entering into the witness box about the facts in issue in the

case under trial.

Out of the several such previous statements, the statement recorded as per Section 161 CrPC during investigation by the Investigating Police Officer, stand on a different footing. That is all other prior statements of a witness can be used by the prosecution for corroboration during chief examination or by the accused/defence during cross examination. One of the mode of cross examination is to point out and prove contradiction between the evidence of the witness in court with his prior statement. Thus prior statement as far as the accused/defence is concerned can be used both for cross examination and for establishing contradictions. In so far as Section 161 CrPC statement is concerned , it cannot be used by the prosecution for corroboration. The defence/accused cannot use the said statement for cross examination. The limited use is it can be used only for proving contradiction. This can be done by the accused/defence or by the prosecution when it treats the witness in terms of Section 154 Indian Evidence Act, considering him hostile to the prosecution’s case.

EFFECT OF SECTION 162 CrPC

Amongst other aspects, in Section 161 CrPC, the statement recorded thereunder can be put to limited use in terms of Section 162 CrPC. They can be summarised as follows:

It cannot be used for any purpose other than to what is mentioned in the section 162 CrPC itself.

The said only use is that it can be used by the accused/defence or by the prosecution with the permission of the Court to prove contradictions.

Now Section 162 CrPC states that such statements will not cover or will not apply to :

Statements falling within the provisions of Section 27 Indian Evidence Act ,OR

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Statements falling u/s. 32[1] of Indian Evidence Act.[Commonly known as dying declarations.]

The above clearly indicates a subtle distinction between the first and second parts. The first part carves out an **exception** to the general rule regarding user of Section 161 CrPC statement , whereas the second part spells out the **non application** of the Section 162 CrPC or the statement recorded u/s. 161 CrPC to two different statements. In order to clarify the second part, let us take two hypothetical illustrations.

ILLUSTRATION -1

A police officer receives a first information from one Chandran that his neighbour Krishnan ,was found unconscious with severe head injuries. Chandran also states that he has admitted his neighbour in the hospital and he is under treatment. The Police officer registers a FIR based on this against unknown person/persons and proceeds to hospital.

There in the hospital it is found that Krishnan has regained consciousness but is still critical. The doctor permits the Inspector to see and seek details from Krishnan, but cautions that the least possible time is to be taken. The Inspector accordingly sees Krishnan, who states that two days before, he has during night time shot down the XYZ Bank branch watchman with a pistol and attempted to commit theft in the bank but it was not fruitful. Krishnan also states that though the son of the deceased watchman by name Sameer knew as to who shot his father, he did not tell anyone. Today early morning Sameer clandestinely entered his house when he was asleep and whispering “ this is what I deserve for what I have done to his father” beat me two times on the head with an iron rod and fled away when I lost conscious. You can locate the gun I used in the bedroom in my house below the pillow on the cot. The Inspector writes this statement but before he could get the signature of Krishnan, Krishnan becomes unconscious.

It could be seen from the above, that the statement of Krishnan at the time of beginning of the writing by the Inspector would have been one under Section 161 CrPC. This is because, the FIR is already registered and investigation has started. The Inspector did not know at that time that Krishnan may confess to a crime. However, the statement of Krishnan will qualify to be one under section 161 CrPC. Moreover, the Inspector at the time of commencement of his enquiry with Krishnan only knows that Krishnan may be person acquainted with the facts and circumstances of the case and as such qualify himself to be a witness. It is another aspect that his statement discloses later that he is an accused himself in the attempted theft of bank and assault on the watchman. Added to this is the ratio of the Hon'ble Supreme Court in DIPAKBHAI JAGDISHCHANDRA PATEL VS STATE OF GUJARAT 2019 [2] MWN [Cr] 85 that even persons who are accused or who later on become accused can be examined as per Section 161 CrPC and their statements recorded.

We can see now, that with the highlighted portion in the above statement of Krishnan , ie., You can locate the gun I used in the bedroom in my house below the pillow on the cot. , the Inspector takes two witnesses and recovers the pistol from the house of Krishnan. Now that portion of the Section 161 CrPC statement leading to recovery of the pistol is admissible as per Section 27 IEA.

Section 27 of the IEA falls under the Chapter II of IEA under the caption " OF THE RELEVANCY OF FACTS". **Hence that portion of the 161 CrPC statement of Krishnan amounting to relevant fact as per Section 27 IEA requires specific marking as an exhibit .**

In this illustration except for the above part the rest of the Section 161 CrPC statement of Krishnan is totally inadmissible as per Section 162 CrPC.

ILLUSTRATION II

In the above Illustration, let us see a small modification. Krishnan shortly within five minutes of his above statement to the Inspector , dies.

Now though the statement of Krishnan is basically one under section 161 CrPC, in view of his death and the statement narrating the circumstances which led to the death of Krishnan, becomes admissible as a dying declaration as per Section 32 IEA. This is the second instance mentioned in Section 162 CrPC. Now the entire statement of Krishnan is admissible as a dying declaration u/s. 32[1] IEA. **Naturally it deserves to be marked as an exhibit during subsequent trial. It is again a relevant fact as per Chapter II of IEA.**

Now we can see the position regarding the only exception to the rule mandated by Section 162 CrPC. As already stated the illustrations given above deals with **Non applicability** of Section 162 CrPC itself to two different relevant facts, the only **exception** , relates ,on the other hand, to Section 145 IEA.

EFFECT OF CONTRADICTIONS AS PER SECTION 145 IEA:-

This section is grouped with other provisions under the Chapter X 'OF THE EXAMINATION OF WITNESSES ' in the Indian Evidence Act. Once a contradiction is proved as per the mode stated in Section 145, its effect is that it may impeach the credit of the witness concerned in terms of Section 155 [3] IEA. It may be noted that the proof of such contradiction does not have the effect of definitely impeaching the credit but **may** have such effect. For example if the court considers that it is not relevant to matters in issue or in other words if it is not a material contradiction, it may not have the effect of impeaching the credit of the witness. [In case the Court considers it as a material contradiction, the contradiction thus pointed out, may probably fall under Section 11 [1] of IEA as inconsistent with a relevant fact. It may be noted that Section 162

CrPC consciously and patently carve out two different instances of the non applicability of the section itself,[namely S.27 IEA and S.32[1] IEA,] S.11 [1] IEA is not so specifically mentioned.

We may look into some illustrations on this respect.

ILLUSTRATION 1

Amongst the acts of cruelty meted out to a wife in a prosecution u/s. 498A IPC, the wife deposes in her Chief examination, about an incident of her being slapped by her husband on a day prior to Deepavali festival of a particular year. During rigorous cross examination, she admits that she professes Christianity and that in that year she was planning to celebrate Christmas with her parents. She further states that she stated her plans to her husband . He got infuriated and slapped her. To a further specific question, she admits that it was one day prior to Christmas of that year and it was the only time that her husband physically slapped her.

Now it could be noticed that the wife gave inconsistent version in Chief and Cross examination about a relevant fact or fact in issue. If one intends to believe her version that prior to Deepavali she was slapped, her own inconsistent answer [fact] that the slapping was prior to Christmas festival makes it doubtful. The converse also has the same result. Hence while appreciation of her evidence on this aspect, the Court may entertain a doubt as to whether the factum of alleged slapping stand "Proved".

ILLUSTRATION II

In the above illustration the wife has deposed about the alleged slapping on a day prior to Deepavali of a particular year. In cross examination her attention is drawn to the exact words in her prior Section 161 CrPC statement, in the following manner:

- Q: Have you been enquired by the Police officer in connection with this case and your statement as recorded by the police

officer, read over to you and accepted as correct to him at that time?

- A: Yes
- Q: Have you then stated as “ One day prior to Christmas festival, when I told my plan, my husband got infuriated and slapped me. He has slapped me only on that occasion during our marital life.”
- A: Yes.

Now she has admitted her own inconsistent statement. The said inconsistent statement now forms part of her deposition. During appreciation of evidence, the Court can come to a conclusion.

[MY VIEW IN THE LIGHT OF THE SCOPE OF THIS PAPER :

It may be noted here that in view of her admission the concerned portion of her Section 161 CrPC statement need not be marked]

ILLUSTRATION III

In the above illustration suppose her answer proceeds as follows:

- Q: Have you been enquired by the Police officer in connection with this case and your statement as recorded by the police officer, read over to you and accepted as correct to him at that time?
- A: Yes
- Q: Have you then stated as “ One day prior to Christmas festival, when I told my plan, my husband got infuriated and slapped me. He has slapped me only on that occasion during our marital life.”
- A: I don’t remember/ I have not stated so

Now at the time of examination of the Investigation Officer who is the author of the said S.161 CrPC statement will be asked as

follows:

- Q: During your investigation did you examine.....,the wife , record her statement ?
- A: Yes.
- Q: Have you read over the recorded statement to her and admitted by her to be correct?
- A: Yes.
- Q: In that statement has she stated as follows ? “ One day prior to Christmas festival, when I told my plan, my husband got infuriated and slapped me. He has slapped me only on that occasion during our marital life.
- A: Yes.

It may be seen that the contradiction now stand proved through the author of the writing. However the Investigation Officer is only permitted to refresh his case diary on this aspect and he cannot legally claim to look into the S.161 CrPC statement. The proved contradiction now becomes part and parcel of the oral evidence on record. **In other words there need not be specific marking of the concerned portion of S. 161 CrPC statement with an Exhibit Number.**

As early as in TAHSILDAR SINGH VS STATE OF UP AIR 1959 SC 1012 a Hon'ble Bench six Judge of the Supreme Court has succinctly discussed the scope of the proviso to S. 162 CrPC among other things. There is nothing to indicate therein that a portion of the S.161 CrPC statement of a witness used for contradiction has to be marked.

CONCLUSION :- With great and utmost respect to the Hon'ble Supreme Court , which has suggested amendments to the draft rules of Criminal Rules of Practice , I submit that apart from my above discussion on legal issues, there is also a practical difficulty in the conduct of a trial if every contradiction is required to be

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marked as separate exhibits.

In several cases where there are numerous witnesses, the prosecution or defence exhibits on contradictions alone, if required to be marked will only lead to loading the records of the case. Further the trial Judge may be overburdened in giving a rule in reference to each of such exhibit. Last but not the least , there is a danger of the trial Judge acting on such exhibit , reckoning it as a piece of reliable evidence, being mislead in the appreciation of evidence.

I place these views for the kind and benign consideration of Your Lordships.
