

All About the Examination of Witnesses by Police

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Abstract

The article deals with Section 161 of the Criminal Procedure Code, 1873 (hereinafter, CrPC), which is the examination of witnesses by police, and its interpretation, such as what is the meaning of any person, what is the extent to which a witness is bound to answer truly, the punishment otherwise he could get, and how this section is connected with Article 20(3) of the Indian Constitution. Further, the project discusses the effect of delay in examining the witnesses on the prosecution version, the discretion which the police has either to record or not to record the statement in writing, the mandate of making a separate and true record of the same if he chooses to reduce it to recording, and the ways of writing a true record of statements. Then, the amendments to this section are mentioned. After this, other aspects of this section, or rather, utilities, are discussed, like whether the record under this section is available to the accused and other citizens, whether the interpretation of the statement of a police officer or its gist is admissible, what consequences would follow if the statement under Section 161 does not contain the relevant fact, the position of the statement made under this section if the witness who recited it becomes hostile, whether statements under this section were used to contradict the witness in some other case, and whether the re-recording of the statements in a situation when the case has been transferred to another investigating agency is allowed. Each of the topics is supplemented with the relevant provisions in the CrPC, Indian Penal Code, 1860, and Evidence Act, 1872. Examples and case laws have been provided wherever necessary. All the facts have been well substantiated and possess a genuine source, as mentioned in the endnote and the references.

Keywords: Examination, record, witness, hostile, self-incrimination

INTRODUCTION

Section 161 of the Chapter XII of the CrPC deals with the examination of witnesses by police. It purports to secure a fair investigation into the facts and circumstances of any criminal case. However serious the crime and however incriminating the circumstances may be against a person supposed to be guilty of a crime, the CrPC aims at securing a conviction if it can be had by the use of utmost fairness on the part of the officer investigating the offense before the lodging of a charge sheet [1]. Obtaining evidence that can be produced at the trial is the prime objective of Section 161. A charge may be framed against the accused based on the statements that the police records abiding by Section 161 in the case of a trial before a court of session or the trial of a warrant case. The copies of all statements recorded

under this section are to be furnished to the accused free of charge before trial. Even if a case has been instituted against the accused otherwise than on a police report but is investigated by the police, this requirement is applicable to the accused. The reason is that the accused can know before his trial the nature and volume of evidence against him.

Any Person

The expression “any person” in Section 161(1) is also meant to include the person who is accused of having committed the crime whose investigation is

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going on. This is so for the simple reason that “any person” in Section 161 is the one who is supposed to be acquainted with the facts and circumstances of the case, and the accused person fills that role because police suspect him to have committed the crime and therefore be familiar with the facts [2]. In *Pakala Narayan Swami v. Emperor* [3], the court remarked that the words “any person” in Section 161 should be read in conjunction with Section 162 and would include the person who may subsequently be accused of the crime in respect of which the investigation is made by the police officer.

Answer Truly

Any person who is examined as a witness by the police officer in relation to the case must truly answer all questions asked of him under sub-section (2) of Section 161. It is very important for effective information that the witnesses render true information and therefore must be under a legal duty to ensure the same. To put it differently, ensuring that the information is true and not misleading is the prime objective of the law [4]. That is why various provisions have been designed to punish the person who fails to perform the duty expected of him.

Section 179 of the Indian Penal Code, 1860 (hereinafter, IPC) punishes any person who refuses to answer, and it is a non-cognizable case. Besides, we have Section 193 and Section 177 of the IPC, which punish a person for giving false evidence and false information, respectively. These would mean that a person can be punished under these sections if he gives false answers (which he knows or believes to be false or does not believe to be true) to the questions asked under Section 161. In *Sankaralinga Kone v. State* [5], it was held that the word “truly” used after the word “answer” signifies that the person examined is bound by law to speak the truth. Sections 202 and 203 of the IPC may be attracted in case the person provides false information in answer to questions put to him. We can thus conclude that the law has numerous weapons in the form of its provisions to punish a witness trying to mislead the investigation process.

Relation with Article 20(3)

The next most important aspect of Section 161 is that it bestows the right to self-incrimination and the right to be silent on the person who is to be questioned by police as part of an examination.

As per Section 161(2), the questions that might expose any person to a criminal charge, a penalty, or forfeiture are not binding on that person to answer. It is very interesting to note here that under this section, every person must answer truly, and every person includes the accused as well. Despite this fact, this section itself and Article 20(3) of the Indian Constitution give even the right not to answer questions, which can incriminate the person questioned.

The *causa celebre* relating to the right to self-incrimination and right to be silent provided under Section 161(2) CrPC is *Nandani Satpathy v. P.L. Dani* [6]. The Hon’ble Supreme Court held that

- Questioning a suspect is desirable for detection of crime and *even for the protection of accused person*.
- Protection for a suspect against self-incrimination has been given both by Section 161(2) CrPC and Article 20(3) of the constitution. The area covered by both is *substantially the same*, and Section 161(2) is a *parliamentary gloss* on the constitutional clause.
- The accused person *may remain silent* (right to silence) or *refuse* to answer when confronted with incriminating questions.
- A person may have accusations, actual or imminent, in some other case; that is, not the case in which an investigation is going on. If any question asked is likely to expose him to guilt in that other case, then the person can also choose to remain silent under Section 161(2). So, this section guards the accused even in respect of other offenses that are imminent or pending.
- Compelled testimony includes tiring interrogative prolixity, intimidatory methods like frequent threats of prosecution, atmospheric pressure, psychic torture, overbearing, and environmental coercion, though no physical threats or violence have been used. In such a case, Article 20(3) is violated.

- The totality of circumstances, the setting, and the equation, personal and social, which tend to make the answer substantially wrong but in effect guilty in import, are the parameters to be taken note of by the accused while determining the incriminatory character of the answer.
- The accused person cannot escape under the guise of vague possibilities, fanciful claims, and unreasonable apprehensions.

Effect of Delay

Now, we should analyze the effect of delay in the examination of witnesses. The evidence in the form of recorded statements would become suspicious if the investigating agencies were making long delays in recording them. For instance, in the case of *Balkrishna Swain v. State of Orissa* [7], there were some contradictions as well as an unexplained delay of ten days. The court observed that the delay in examining the witness was suspicious and the contradictions were not of much significance.

However, delay does not, *ipso facto*, make the prosecution's version suspect [8]. In *Mohd. Khalid v. State of West Bengal* [9], the hon'ble Supreme Court opined that where the delay is explained and the testimony of the witness is found to be cogent and credible, the court can take action based on the same, and the length of the delay would be immaterial. For example, *State of U.P. v. Satish* [10] was a case of rape and murder. The investigating officer made a delay in the examination of the witness, but no question was asked of him about the delay. The Supreme Court said that it was improper to have disbelieved the version of the prosecution witness. It can be inferred, therefore, that heinous cases like rape and murder themselves explain the delay.

Discretion to the Police

The police have been accorded the discretion to record or refuse to record any statement made to him while examining the witness under Section 161, by clause (3) of the section. It is sufficient if the police officer examines the witnesses orally. This seems to be necessary as well, because in the course of an investigation, a police officer has to question and then orally examine a large number of people, many of whom may not be useful or may later prove to be pointless. Therefore, it would have been a burden on the police officer if law require him to record every statement made to him, which would have served no purpose apart from distracting attention from the main task. In fact, this discretion is less likely to be abused by the police officer.

The Mandate

If the police officer has exercised the aforesaid discretion in the affirmative and decided to reduce any statement made to him during the investigation, then Section 161(3) issues some mandates for the police officer to deny which is no longer at the discretion of the police. This is so because the sub-section says, "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 [11]." A police officer has to make a separate record, which means that if the investigating police officer records only one joint statement of several witnesses during the investigation, such a statement is clearly a contravention of Section 161(3). It would, however, not render these persons incompetent witnesses or render their evidence inadmissible; it can only affect the weight attached to their evidence [12]. Whether contravention of Section 161(3) would invalidate the trial or not depends on the facts and circumstances of each case, but unless any prejudice has been caused to the accused in his defense due to the non-compliance or the contravention has resulted in a failure of justice, it cannot vitiate the trial as held in *Asservadam re* [13].

The sub-section (3) further says that the police officer shall make a true record of the statements made to him. The judiciary, in the form of its various rulings, has laid down how the police can fulfill the mandate imposed on them by this sub-section. In *Sudhir Kumar Mandal v. The King* [14], the court observed that merely recording that one witness corroborates the other or making a precis of the statement made by the witness is a violation of Section 161(3). No indirect form of speech must be used in recording statements, but the statements should be recorded verbatim. In *Bommanaboyina Ramaiah v. State of Andhra Pradesh* [15], the court held that the writing should be a record in the first person.

Amendments

The statements made under clause (3) of Section 161 may also be recorded by audio-video means, as per the amendment made to the CrPC in 2008. Another proviso to Section 161(3) was inserted on the recommendation of the Justice J.S. Verma Committee. It required that only a woman police officer or any woman officer would record the statement of a woman against whom an offense under Sections 354, 354-A, 354-B, 354-C, 354-D, 376, 376-A, 376-B, 376-C, 376-D, 376-DA, 376-DB, 376 E, or 509 of the Indian Penal Code is alleged to have been committed or attempted. This has been done to protect a victim woman from the embarrassment of narrating the sexual acts before a male police officer.

Utilities and Other Aspects

The statements recorded under Section 161 have been permitted to be accessed by the accused. Interpreting *Shamshul Kanwar v. State of U.P.* [16], the Supreme Court said:

“As rightly submitted by learned counsel for the appellant, in different states, case diaries are maintained in different ways. Some states have a composite case diary, which includes the statements recorded under Section 161 CrPC as well as the observations of the investigating officer under Section 172 CrPC. This Court, in the *Shamshul Kumar* case, held that the statements under Section 161 need to be separated from observations that are recorded under Section 172 in order to make the statements under Section 161(3) available to the accused [17].”

Before the proceedings begin, it is the duty of the police to ensure that the accused gets copies of the statements made by witnesses under Section 161 [18]. The citizens are entitled to obtain the statements recorded by police officers and the documents that they receive as proof of the same, as they are public documents [19].

The statement made under Section 161 does not include an interpretation of the statement by the investigating officer or its gist. Directions to supply gist are unsustainable. Now, we need to think about what would happen if relevant facts were not mentioned in the Section 161 statement.

If any witness has not made a particular relevant fact in his or her statement before the police under Section 161 but has made it before the court in his or her testimony and the fact is creditworthy and acceptable, then its absence in the earlier statement cannot be the reason for rejecting his or her current evidence. The rationale that supports this is the omission on the part of the police officer, which would otherwise tamper with the nature and character of the evidence. The significance of the fact would depend on whether the specific question relating to the omitted matter was put to the witness or not.

The evidence cannot be rejected in totality, even if any of its portions are not consistent with the statement made under Section 161 and the witness has become hostile. That portion of the evidence may be accepted by the court, which favors the prosecution or the accused; however, the court would subject it to close scrutiny.

The statements under this section were used to contradict the witness in another case. In *State of Kerala v. Babu* [20], the apex court held that the case diary could be summoned by the court with respect to the statement of the witness made in some other matter during the course of investigation. Restrictions envisaged under Section 172(2) and (3) do not apply to the use of such a diary, but the restrictions imposed by Section 162, CrPC, and those under Section 145, Evidence Act, will.

The statements of an injured person recorded under Section 161 have not been taken to be admissible evidence under Section 33 of the Evidence Act, 1872. In fact, the same is not accepted as a dying declaration within the meaning of Section 32 of the Evidence Act. The re-recording of the statements in a situation where the case has been transferred to another investigating agency is allowed. He is not required to rely on the statements recorded by the earlier police officer [21–31].

CONCLUSION

It can, thus, be concluded that the prime objective of Section 161 CrPC is to obtain evidence that may later be produced during the trial. The accused person, that is, the person on whom allegations of committing the offense have been made or can be made at a later time, is also included in the words “any person” in clause (1) of Section 161. Any person who is examined under Section 161 has an obligation to state the truth in his or her statement to the police in answer to all questions asked as required by subsection (3) of Section 161. Various provisions have been designed for punishing the person who fails to perform the duty expected of him as a witness. It bestows the right to self-incrimination and the right to be silent on the person who is to be questioned by police as part of an examination, which is the most unique feature of this section and is a parliamentary gloss on Article 20(3) of the Indian Constitution.

The investigating authorities should not delay recording the statements of witnesses for a long period of time. However, delay does not, *ipso facto*, make the prosecution’s version suspect. If the delay has been reasonably explained, then there is no suspicion about the credibility of the prosecution version. Heinous cases of crimes like rape and murder themselves explain the delay. The police have been given the discretion of recording or not recording any statement made during the course of examination by clause (3) of Section 161. Some mandates have been issued to the police officer for reducing or writing any statement made to him during the investigation, once he has so decided. These cannot be denied by the police officer at his discretion. A separate and true record of the statement made to the police officer has to be maintained by him or her. The judiciary, in the form, of its various rulings, has laid down how the police can fulfill this mandate imposed on him by this sub-section, such as by writing as it is, in direct form of speech, in the first person, and so on.

Two amendments were made to this section in 2008 and 2013. The former was to include recording by audio and video electronic means as a mode of recording statements under this section, whereas the latter was to protect a woman victimized by sexual offenses from the embarrassment of narrating the sexual acts before a male police officer. The witness might miss any relevant facts while making a statement to the police under Section 161. But if he or she deposes the same before the court, the same cannot be denied on the ground that the same was not made earlier before the police, provided the fact must be otherwise creditworthy and acceptable. The statements under this section were used to contradict the witness in another case. The re-recording of the statements in a situation where the case has been transferred to another investigating agency is allowed.

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