
(1980) 04 KL CK 0011
In the High Court Of Kerala

Chadayam Makki Nandanan and Others	APPELLANT
Vs	
State of Kerala	RESPONDENT

Date of Decision : 18-04-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 309, 344, 41, 482
Penal Code, 1860 (IPC) — Section 379, 429

Citation : (1980) CriLJ 1195 : (1980) 2 ILR (Ker) 507

Hon'ble Judges : V. Khalid, J

Bench : Single Bench

Judgement

V. Khalid, J.—These two petitions filed u/s 482, Cr.P.C. seek to quash the order passed by the learned Judicial Magistrate of the First Class, Manantoddy, in C.M.P. No. 129 of 1980, hereinafter referred to as the Magistrate. The facts giving rise to these two petitions can be stated as follows: The petitioners are accused in O. R. No. 2 of 1980 of Kannothe Range in Wynad Forest Division, pending before the Magistrate. Originally, the petitioners were taken into custody by the Meenchanda Police at Calicut u/s 41 read with Section 102 of the Code of Criminal Procedure, hereinafter referred to as the Code, and Crime No. 11 of 1980 was registered by the Meenchanda Police. Subsequently the petitioners were handed over to the Range Forest Officer, Wynad Forest Division, who registered O. W. No. 2/1980. The petitioners were produced before the Magistrate. The petitioners moved applications for bail. The bail applications were finally posted to 15-2-1980. On 15-2-1980, the Dy. Superintendent of Police, C.I.D. Forest Cell, Bangalore (Karnataka) filed an application before the Magistrate to hand them over along with the other accused to police custody for investigation of several crimes registered in Mysore District. The said application was numbered as C. M. P. No. 129 of 1980. The petitioners opposed the application. Their counsel submitted before the Magistrate that the report by the Karnataka Police was vague, that there were no details as to the stage of investigation, about the dates of the offences, the part played by the accused or the purpose for which police wanted their custody. The Magistrate ordered

release of the petitioners on bail and passed the following order in C. M. P. No. 129/80:

...Heard the A.P.P. perused the case diaries of Crime No. 18/79 of the Kodihally Police Station, Cr. No. 7/79 of Sathanur Police Station, Cr. No. 22/79 of the Chamarajanagar East Police Station. These case diaries are produced before me for perusal by the petitioner. Dy. S.P.C.I.D. Forest Cell, Bangalore. The Dy. S.P. also produced before me the case diaries in Saragur Police Station Crime No. 50/79, Saragur Police Station Cr. No. 52/79 and Gundalpat Police Station Cr. No. 92/79. These case diaries will reveal that these cases registered are under various provisions of the Wild Life Protection Act and under Sections 379, 429, I.P.C. which are non-bailable cognisable offences. Considering the entire circumstances of the matter, I think it is expedient in the interest of justice to hand over the accused to the custody of the Dy. S.P.C.I.D. Forest Cell, Bangalore, Karnataka State for production before the Judicial First Class Magistrate, Nanjangud, Mysore District, Karnataka State on or before 19-2-1980. I do so. The J.F. CM., Nanjangud will send back the accused to this Court after the accused are no longer required for the purpose of investigation of the cases. Address the Supdt., Sub Jail, Manantoddy to cause the accused to be produced before this Court today itself, so as to enable this Court to comply with the aforesaid order, and hand over them to the Dy. S.P.C.I.D. Forest Cell, Bangalore, with a copy of this order to be produced before the J.F.C.M. Nanjangud, on or before 19-2-1980.

Pursuant to the aforesaid order, the petitioners were entrusted to the Karnataka Police.

2. The petitioners before me moved for an interim direction, I directed the Magistrate to get the petitioners immediately from the custody of the Karnataka Police and directed that they be released on bail as soon as they were produced before him with an additional condition that they should report to the Meenchanda Police Station on every day between 8.00 A. M. and 5.00 P. M. It was further directed that all further proceedings on the application made by the Karnataka Police would await orders in the main petitions before this Court. This Court directed the Magistrate to submit a report about the steps taken by him. The Magistrate has sent a report which reads as follows;

All the five accused were brought to the local Sub Jail, Manantoddy on 27-2-1980 from the Sub-Jail, Nanjangud as per the direction of the Judicial 1st Class Magistrate, Nanjangud. The Superintendent, Sub Jail, Manantoddy refused to take them and they were then brought by the escort police of the " Karnataka State Police to this Court and this Court received the above accused on 27-2-1980 itself in compliance of the order of the Hon'ble High Court of Kerala. Since the sureties of the accused were not present to execute the bail bonds, the accused will be released on the sureties and the accused executing the bail bonds.

3. Though the petitioners have since been released I directed issue of notice to the learned Advocate-General since the matter involved a question of some importance about the jurisdiction of the Magistrates in directing remand of accused persons before them. The learned Addl. Advocate-General appeared in the case and assisted me.

4. The powers of Magistrates to remand accused are found in Section 167, Cr.P.C. The original Section 167 in the Code of 1898 has been amended by the Amending Act 2 of 1974, adding provisos (b) and (c) to Sub-section (2) and an explanation after proviso (c). Proviso (b) states that no Magistrate shall authorise detention in any custody unless the accused is produced before him. Proviso (c) prevents the Magistrate of II Class from detaining the accused in police custody unless specially empowered by the High Court. Under the Criminal Procedure Code Amendment Act 1978 (Act 45 of 1978) the proviso to Sub-section (2) was amended and explanation I was newly added. The old Explanation I was renumbered as Explanation II. Sub-section (2A) was newly inserted. The scheme of the section after the amendment is intended to protect the accused from unscrupulous police officers. Great care has now been taken to see that the accused persons are not unnecessarily remanded. The object of the section is to see that persons arrested by the police are brought before a Magistrate with the least possible delay so that the Magistrate could decide whether the persons produced should further be kept in police custody and also to allow them to make such representations as they wish to make. Section 167 bears the heading "Procedure when investigation cannot be completed in 24 hours". Section 167(1) requires the police to transmit the person arrested and detained in custody, to the nearest Judicial Magistrate, whether this Magistrate has jurisdiction to try the case or not. Section 167(2) authorises detention by the Magistrate to whom an accused person is forwarded under the section. If such Magistrate has no jurisdiction to try the case and he considers further detention unnecessary, he has to forward the accused to the Magistrate having such jurisdiction. By the proviso to Sub-section (2) it is provided that the accused person shall be released on bail if he is prepared to and does furnish bail after the expiry of 90 days or 60 days as the case may be depending upon the offence alleged to have been committed by the accused. Proviso (b) clearly states that the Magistrate can exercise jurisdiction only when the accused is produced before him. Explanation 2A has been newly added, again safeguarding the rights of the accused persons directing the police to produce the accused before an Executive Magistrate on whom powers of a Judicial Magistrate have been conferred when the police finds that there is no Judicial Magistrate available and such Magistrate can for reasons to be recorded in writing authorise the detention of the accused person to custody only for a term not exceeding 7 days in the aggregate. Sub-section (3) enjoins on the Magistrate to record his reasons when he authorises detention in the custody of the police and Sub-section (4) enjoins on a Magistrate other than the Chief Judicial Magistrate to forward copy of his order with his reasons for making it, to the Chief Judicial Magistrate. I thought it

necessary to refer to the scheme of the section to highlight the limitations imposed upon the Magistrate by law.

5. Section 167 of the Code is the sole repository of the power of remand during investigation. No Magistrate can travel outside the section to exercise this power. Section 344 of the Code (now Section 309) deals with remand during trial or enquiry. In *Gouri Shankar Jha Vs. The State of Bihar and Others*, the Supreme Court has thus observed:

...Section 167 appears in Chapter XIV which deals with information and investigation. As its language shows, it deals with the stage when a person is arrested by the police on information that an offence has been committed.

X X X X X The object of the section is twofold, one that the law does not favour detention in police custody except in special cases and that also for reasons to be stated by the Magistrate in writing, and secondly, to enable such a person to make a representation before a Magistrate.

X X X X X Sec. 344, on the other hand, appears in Chapter XXIV which deals with the inquiries and trials.

X X X X X 6. The confines of prisoners' access jurisprudence have been steadily expanding. Therefore, greatest care should be taken to see that no person accused of an offence or brought before a Magistrate is unnecessarily put in custody and no such person is subjected to undue influence or physical or mental torture. The theory of prisoner's rights is veering round to establishing that the prisoner is a legal personality, that he should be accorded basic human rights and that he should in reality be treated as an innocent person till proved guilty. A crucial conceptual change of existing practice is therefore necessary. It is correctly said:

A prisoner need not justify his claim to a particular right but that there would be an assumption of liberty within the prison system.

The modern theory is that liberty and custody are not mutually exclusive concepts. It rejects the notion of the inherent restrictions of imprisonment and values rationalisation of restriction by reference to the prescribed purposes of imprisonment. In this context, it will be useful to refer to Rule 76(1) of the Criminal Rules of Practice (Madras) which reads:

76 (1). Magistrate shall not grant remands to police custody unless they are satisfied that there is good ground for doing so and shall not accept a general statement made by the Investigating or other Police Officer to the effect that the accused may be able to give further information. A request for remands to Police custody shall be accompanied by an affidavit setting out briefly the prior history of the investigation and the likelihood of further clues which the Police expect to derive by having the accused in custody, sworn to by the investigating or other Police Officer, not below the rank of a Sub-Inspector of Police. Magistrates may decide after perusal of the affidavit. Magistrates shall personally see and satisfy

themselves about the accused being sound in mind and body before entrusting him to Police custody and also at the end of the period of custody by questioning him whether he had in any way been interfered with during the period of custody. Where the object of a Demand is verification of the statement of an accused he shall whenever possible, be remanded to the charge of a Magistrate; and the period of remand shall be as short as possible.

There is no corresponding rule in the Travancore-Cochin Criminal Rules of Practice, Rule 47, which is extracted below, does not contain the safeguards in the Madras Rules:

47. Reason for ordering remand to be noted: Whenever a Magistrate other than a District or Sub-Divisional Magistrate remands an accused person to the custody of the Police u/s 167 of the Code of Criminal Procedure, a copy of the order of remand with the recorded reasons therefore shall be forwarded within 24 hours to the Magistrate to whom he is immediately subordinate.

The Madras Rules contain very valuable safeguards for persons arrested. Though this rule is not applicable to the non-Malabar area of Kerala, I do not know whether the safeguards contained in this rule are observed by the police even in Malabar in requesting for remand. The remaining part of the rule though very useful, is not extracted since it is not relevant in this case.

7. Coming to the facts of this case, the Magistrate committed an error of law in directing the accused to be handed over to the Karnataka Police after granting bail. Once the accused persons are ordered to be released on bail, the Magistrate ceases to have jurisdiction to make any direction to again commit them to custody. If he had refused the petitioners bail, he could have, on being "satisfied from the reports filed by the Karnataka Police that there were sufficient materials against the accused, forward them to the said police. Even in such a case, it is necessary for the Magistrate to specify the period during which alone the Karnataka Police could commit the accused to custody. The direction in the order in question is that

the Karnataka Police will bring back the accused to the Court after the accused are no longer required for the purpose of investigation of the cases.

This is patently wrong. If he had refused bail, he could have forwarded the accused to the Karnataka Police after fixing a date for production before him. This should be within the time he could himself have remanded them u/s 167 of the Code. The only occasion when the Magistrate could in the peculiar circumstances of this case, forward the petitioners to custody is if he cancels the bail granted to them for one or the other grounds mentioned in the Code and they are produced before him. That is not the case here. Under these circumstances, I set aside the order forwarding the accused-petitioners to the Karnataka Police. I feel that uniformity between the criminal rules of practice in the Malabar and non-Malabar area is necessary especially in cases like this, so that proper guidelines could be given to Magistrates while ordering remand u/s

167 of the Cr.P.C.

The Crl. M. Ps. are disposed of as above.