

(1985) 07 OHC CK 0015

In the Orissa High Court

Case No : Criminal Miscellaneous No. 307 of 1985

D. Bhaskar Rao

APPELLANT

Vs

State or Orissa

RESPONDENT

Date of Decision : 23-07-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2), 309, 309(2), 439
Penal Code, 1860 (IPC) — Section 395, 457, 75

Citation : (1985) 60 CLT 228

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—This is a petition by one of the accused in G.R. Case No. 269 of 1984 of the Court of the learned Chief Judicial Magistrate, Berhampur u/s 439 read with Section 482 of the Code or Criminal Procedure (referred to as "Code").

2. The facts on brief are. A dacoity took place in the house of the informant A. Subba Rao of Tulasinagar in Berhampur town in the night of 2-3-1984 and cash and valuables worth of Rs. 6,000/- were stolen. Information was lodged at Berhampur town police station the very same night and investigation was commenced. Copy of the F.I.R. was forwarded to the court of the learned Chief Judicial Magistrate on 5-3-1984. On 16-7-1984, warrant was issued requesting the learned Chief Judicial Magistrate, Puri for causing production of the Petitioner and some other accused persons who were detained in connection with another case u/s 395 of the Indian Penal Code (referred to as "I.P.C."). But the Petitioner was not produced in the said court despite reminders. On 16-10-1984 charge sheet was submitted against the Petitioner and the other accused persons for having committed offence under Sections 457 and 395 read with Section 75, I.P.C. On 25-10-1984, the learned court below took cognizance of the offence and directed issuance of fresh production warrants. The order was not executed and the Petitioner was not produced in the said court. On, 9-4-1985 the

Petitioner surrendered in court and prayed for being released on bail. The prayer was disallowed, but no specific order was passed by the learned Chief Judicial Magistrate remanding the Petitioner to jail custody although as a member of fact, he was sent to the jail. On 11-4-1985, 26-4-1985, 13-5-1985 and 3-6-1985 the Petitioner was neither produced in court despite issuance of production warrants nor any specific orders of remand were passed. The case of the Petitioner therefore is that in the absence of remand order being passed from time to time his detention in jail custody was in violation of the provisions of Section 309(2) of the Code and so he is entitled to be released on bail when he is willing to offer the same. Otherwise also there are no materials to implicate him in the alleged offences for which his continuous detention in custody is unwarranted.

3. The learned Sessions Judge refused to enlarge the Petitioner on bail by his order dated 24-4-1985 on the ground that the Petitioner was identified in a T.I. parade by some prosecution witnesses as one of the culprits. This apart the Petitioner has the stigma of a previous conviction. Charge sheet was submitted revealing a prima facie case against the Petitioner. This part of the finding was not challenged. Therefore on facts, the Petitioner cannot be released on bail as he is implicated in a heinous offence of dacoity. It is however, to be considered if he is entitled to be released on bail, because the learned court below did not comply with the provisions of Section 309(2) of the Code.

4. This case is patently not governed by Section 167(2) of the Code for the simple reason that charge sheet was submitted against the Petitioner on 16-10-1984. His case is governed by proviso (a) of Section 309(2) of the Code, because after submission of charge sheet the learned Chief Judicial Magistrate took cognizance of the offence against the Petitioner and others on 25-10-1984. This distinction has been clearly pointed out in a decision reported in *Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa*, in which it was laid down;

The law is engrafted in proviso (a) to Section 167(2) and Section 309 of the New Code confers the power of remand to jail custody during the pendency of the investigation only for the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded.

After clear enunciation of the scope and ambit of proviso (a) of Section 167(2) of the Code along with the legislative intention it was further laid down:

It is also clear that after the taking of the cognizance the power of remand is to be exercised u/s 309 of the New Code.

Principle of law is therefore settled that after taking cognizance of an offence, a Judicial Magistrate is to exercise his discretion of passing an order of remand of the accused in custody for a term not exceeding 15 days at a time in accordance with the provisions of Section 309(2) of the Code.

5. Mr. B.P. Roy, learned Counsel for the Petitioner urged with reference to the facts on record that the learned Chief Judicial Magistrate did not pass a valid order of remand after taking cognizance of the offence against the Petitioner. Even on other dates to which the case was posted valid orders of remand were not passed. Therefore, the further detention of the Petitioner is illegal and so he is entitled to be enlarged on bail. The learned Additional Standing Counsel on the other hand contended that as the Petitioner was not produced in court, it was not possible for the learned Chief Judicial Magistrate to pass order of remand from time to time. The contention of the learned Additional Standing Counsel can at once be repelled in view of that clear principle laid down by the Supreme Court that even in the absence of an accused valid order of remand can be passed by a Judicial Magistrate. In *Raj Narain Vs. Superintendent, Central Jail, New Delhi*, , the question that arose for consideration was whether the prisoner in custody should be enlarged on bail, on the ground that his detention was illegal for the technical reason that he was not produced before a Magistrate. Hidayatullah, C.J. speaking for the Court held:

There is nothing in the law which required his personal presence before the Magistrate because that is a rule of caution for Magistrate before granting remands at the instance of the police. However, even if it be desirable for the Magistrate to have the prisoner produced before them, when they recommit him to further custody, a Magistrate can act only as the circumstances permit.

Relying upon the above decision, it was held by Chandrachud, C.J. in *Sandip Kumar Dey v. The Officer-in-charge, Sakchi. P.S. Jamshedpur* and Ors. 1974 Cr. L.J. 740, as follows:

This issue is no longer *res intergra*. In *Raj Narain Vs. Superintendent, Central Jail, New Delhi*, this Court held by a majority of five to two that even if it be desirable for the Magistrates to have the prisoner ordered before them when the prisoners are remitted to further custody, an order of remand made without producing the accused in court is not invalid as it may on occasions be necessary to order remand in the absence of, an accused. This decision was followed by the Court in *Gouri Shankar Jha Vs. The State of Bihar and Others*, and in *M. Sambasiva Rao v. Union of India* AIR 1973 S.C. 850 : 1973 Cri. L.J. 663.

On the ratio of the aforesaid decision it was open to the learned Chief, Judicial Magistrate to pass orders of remand of the Petitioner from time to time despite his absence in court due to non-production after the order of cognizance was passed on 25-10-1984. Patently, he did not keep himself informed of the principle enunciated in the decisions referred to above.

6. The next point for consideration is the net effect of the learned Chief Judicial Magistrate not passing orders of remand according to Section 309(2) of the Code. According to Mr. B.P. Roy, the detention of the Petitioner was illegal and that being so the Petitioner should be enlarged on bail. In support of his contention he relied upon a decision of the Karnataka High Court reported in

Gyanu Madhu Jamkhandi and Ors. v. The State of Karnataka 1977 Cr. L.J. 632. An identical question arose in that case, because the Magistrate had not passed an order of remand of the accused persons on the date he took cognizance of the offences. The learned Judge after analysing the facts held:

The Magistrate having not passed any order of remand on 6-9-76 in exercise of his powers u/s 309(2) of the Code of Criminal Procedure, the period of detention of the Petitioners from 6-9-1976 till 10-9-1976, which is the date of the order in question, cannot be considered as the period of remand fixed by the Magistrate in exercise of his powers either u/s 167 or u/s 309(2) of the Code of Criminal Procedure. In this view of the matter, it will have to be held that the Petitioners were detained in custody during this period, viz., between 6.9.1976 and 10.9.76 without any valid and legal orders of detention in custody passed by a Magistrate.

After having held as above, the learned Judge enlarged the Petitioners on bail. The facts of the present case are worse than the facts of the Karnataka case. In the Karnataka case as has been already referred to, the period of illegal detention in custody in the absence of an order of remand was from 6-9-1976 to 10-9-76. In the present case, the period of detention without passing an order or remand commenced from 25-10-1984 when cognizance of the offences was taken and continued from date to date until the lower court records were submitted to this Court by order dated 27-6-1985 for the purpose of reference in the present case. The learned Additional Standing Counsel did not cite any decision in order to persuade me not to accept the view expressed by the Karnataka High Court. On the other hand, on the basis of the principles laid down by the Supreme Court and the Karnataka High Court relating to the scope and ambit of Section 309(2) of the Code and applying the same to the facts of the present case in which there was a complete departure from the above provisions, I cannot but arrive at the inescapable conclusion that in the absence of valid orders or remand, the detention of the Petitioner in custody for the period referred to above was illegal and so he is entitled to be enlarged on bail, though not on appreciation of facts relating to the charges brought against him, but purely on legal grounds.

7. Before parting with the case, I cannot but notice with grave concern the grim picture presented by the lower court record. It appears therefrom that the learned Chief Judicial Magistrate made several attempts by passing several orders to secure the production of the Petitioner and the other accused persons and issued production warrants with escort requisition. I am astonished to see that absolutely no heed was paid to the orders passed in the judicial proceeding. Beginning from 5-3-1984 when copy of the F.I.R. was sent till 29-6-1985 when the records were despatched to this Court for reference in this case, the Petitioner and the other accused persons were never produced in the Court. As a result, the committal proceeding in a case of dacoity has not commenced. This may not be the only case and there may be several such cases in which accused persons are not being produced in courts resulting in delay in disposal of criminal

cases. Production of accused persons in courts through escort party is the duty of the police administration. If they fail in their duty, it will be futile to expect early disposal of cases including heinous offences such as rape, dacoity and murder. The Code of Criminal Procedure, 1973 replaced the Code of Criminal Procedure, 1882 with the objective of curtailing procedural delay so as to achieve expeditious disposal of criminal cases. If the present situation as indicated continues, the desired objective cannot be fulfilled.

8. In the result, the petition is allowed and the Petitioner is enlarged on bailor Rs. 5,000/- with two sureties for the like amount each to the satisfaction of the learned Judicial Magistrate before whom the case is now pending. This order shall be effective if the Petitioner has not been detained in connection with any other case.