

(2003) 09 BOM CK 0119

In the Bombay High Court

Case No : Criminal Application No. 1824 of 2003

Iqbal Hasan Shaikh Ibrahim Kaskar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-09-2003

Acts Referred:

Constitution of India, 1950 — Article 14

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(1), 167(2), 167(5), 167(8)

Maharashtra Control of Organised Crime Act, 1999 — Section 13, 14, 15, 16, 17

Citation : (2003) 2 ALD(Cri) 3 : (2003) BomCR(Cri) 1815

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : Shirish Gupte, instructed by S.B. Keshwani and Sultan A. Khan, in Criminal application No. 1824 of 2003, A.P. Mundergi and W.Y. Pathan, in Criminal application No. 2089 of 2003 and Waris Pathan, in Criminal application No. 2090 of 2003, for the Appellant; Rohini Salian, Spl. P.P., P.H. Kantharia and K.V. Saste, Assistant Public Prosecutor in Criminal Application Nos. 1824 and 2089 of 2003 and D.P. Adsule, A.P.P in Criminal Application No. 2090 of 2003, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Kanade, J.

P.C.

1. The applicants in all these applications are challenging the order passed by the Special Judge under Maharashtra Control of Organised Crimes Act (hereinafter for short "MCOCA") dated 2nd May 2003, in Misc. Application No. 54 of 2003 in Remand Application No. 4 of 2002 whereby the Special Court has remanded the applicants herein to police custody for three days. Though the special court has disposed of the applications by a common order, three separate applications have been preferred by these three applicants. After the said order was passed, the applicants moved the vacation bench of this Court when this Court passed the following order:-

"Heard the learned Advocate for the petitioner and learned A.P.P. for State. The matter requires detailed consideration. Therefore, it is posted before the regular court on 10th June 2003; Ad-interim reliefs in terms of prayer Clause (c) till then."

Thereafter the matter was finally heard on 7th July 2003. The brief facts which are relevant for the purpose of deciding these application are as under:-

2. The applicant in Criminal Application No. 1824 of 2003 was arrested on 6th March 2003. The applicants in Application No. 2089 and 2090 of 2003 were arrested on 5th March 2003. All of them were arrested by the D.C.B., C.I.D. Unit I, Mumbai in connection with an offence registered vide C.R. No. 20 of 2003. All the applicants were produced before the learned Magistrate, 19th Court Esplanade on 6th March 2003 and they were remanded to police custody till 13th March 2003.

3. On 13th March 2003 provisions of MCOCA were applied to the case of the applicants in C.R. No. 20 of 2003 and the case was transferred to the Special Court under the MCOCA Mumbai. The special court extended the police custody till 20th March 2003. Thereafter, the special court further extended the police custody till 27th March 2003. On 27th March 2003 the special court remanded the applicants to judicial custody till 10th April 2003 and thereafter the judicial custody was extended till 2nd May 2003.

4. On 2nd May 2003, an application was made by the prosecution u/s 21(7) of the MCOCA wherein it was stated that in view of the fresh information which the prosecution had received, the applicants were required for questioning and therefore, a prayer was made for remand of the applicants to police custody for five days. This application was made by the Assistant Commissioner of Police, S.S. Kambale. The Special court after hearing the P.P. as also the Advocates appeared for the applicants, allowed the said application. However, the special court directed that the applicants be remanded to police custody for only three days. The special court directed that the investigating officer should take the applicants to police custody from 6th May 2003.

5. The applicants in the meantime moved this Court and obtained an ad-interim order from the vacation court.

6. By consent of the parties the matter was heard at the admission stage. Hence, rule. By consent, rule is made returnable forthwith.

7. I have heard the learned Counsel for the applicants and Ms. Salian Special P.P. for State. The learned Counsel for applicants has filed written submissions in which the applicants have challenged the order passed by the special court on the following grounds which are reproduced hereinbelow:-

a) Whether the police are entitled to seek police custody remand after a period of 30 days after the arrest of the petitioner even though they have not exhausted the entire 30 days of remand as contemplated u/s 21(2) of Cr.P.C. as modified by

Section 21(2) of MCOCA Act is the question involved in this petition.

b) It is submitted that this issue is considered in relation to provisions of 167(2) of Cr.P.C. by the Apex Court in the case of C.B.I. versus Anupam Kulkarni. In the light of this judgment, it is submitted that except the number of days mentioned in Section 167(2), which are extended u/s 21(2) of MCOCA, there is virtually no differences in the language of these two sections. Therefore, the interpretation as done by the Apex Court of Section 167(2) of Cr.P.C. has to be taken as a guiding principle for deciding similar issue arising out of Section 21(2) of MCOCA.

c) It is submitted that the Magistrate/Special Judge can authorise the detention of the accused for a total period not exceeding 30 days in the whole. Within this period there can be more than one order changing the nature of such a custody either from police to judicial and vice versa. After the expiry of 30 days to be counted from the date of the first remand any further remand during the period of investigation (i.e. 90 days or 180 days as the case may be), can only be in judicial custody. There cannot be any detention in police custody after the expiry of first 30 days after the arrest (i.e. First remand date).

d) The period for the purpose of duration of the custody must be counted from the date of the arrest and not from the date on which the police chose to apply the provisions of MCOCA.

e) That Section 21(7) does not authorise the police to seek police custody at any time and the said provision cannot override Section 21(2). The said provision is required to be used by interpreting the same to further the object of the legislature in framing Section 21(2) and not to destroy the effect of the same. It is submitted that Section 21(7) will come to the help of the police for instance like when the accused is sent to the judicial custody under ordinary law and MCOCA is applied to him within the period of 30 days of his arrest. In such a situation the police can ask for his police custody by resorting to Section 21(7) for the purpose of exhausting the remainder term of police custody provided that it is within the time limit of Section 21(2). In short Section 21(7) is an enabling provision to compliment Section 21(2) and not in derogation to Section 21(2).

f) Alternatively, it is submitted that even Section 21(7) does not give unfettered discretion to the police and the section comes with two reservations namely an application justifying with reasons; the need for custodial interrogation and also giving explanation for the delay caused for making such a request. These details are conspicuously absent. There is neither a reason given for custodial interrogation nor there is any whisper explaining the delay in making such an application.

g) There is difference between interrogation and custodial interrogation. The police can always interrogate the accused in jail or been seek examination warrants u/s 287 of Cr.P.C. Since even on facts the application dated 2nd May 2003 is silent about the necessity of custodial interrogation, the said application deserves to be rejected and the present petition deserves to be allowed.

h) Even the situation has changed after 2nd May 2003 as on today, the charge sheet is already filed.

8. The learned Counsel for the applicants, thereafter, submitted written arguments on behalf of the applicants in respect of Section 21(7) of the MCOCA which are reproduced hereinbelow:-

a) It is submitted that Sub-section 7 of Section 21 only speaks about the seeking of police custody of any person by the police officer. It casts an additional duty upon the police officer that application for seeking police custody should be made in writing and it should contain the reasons for seeking police custody.

b) It is submitted that due to the stringent provisions of the MCOCA such as stringent punishment and heavy amount of fine provided u/s 3 and 4 of the Act, Special rules of evidence u/s 17 admissibility of confessional statements made to the police officer u/s 18, special protection provided to the witnesses u/s 19, forfeiture of property u/s 20, presumption as to offences u/s 22, this additional duty and responsibility is cast upon the police officer that whenever a police officer wants to seek police custody of the accused he should file a written statement explaining the reason and also delay, if any, in seeking the police custody.

c) It is submitted that this is a kind of safeguard provided to the accused persons against the unnecessary harassment in police custody, in view of the stringent provisions of the MCOCA. It is submitted that more stringent the law more strict compliance is required from the prosecution in respect of the same.

d) It is submitted that Section 21(7) of the MCOCA only authorises the police officer to seek police custody of any person in particular manner i.e. by filing written statement etc. It does not indicate the period of police custody.

e) It is submitted that for the purpose of calculation of period of police custody, one has to go back to Section 21(2)(a) of the MCOCA which lays down the period of police custody as 30 days by way of modified application of Section 167 of the Cr.P.C.

f) It is submitted that by virtue of the modified application of Section 167 of Cr.P.C. read with Section 21(2)(a) of the MCOCA the police custody of an accused person can be granted only for the period of first 30 days from the date of arrest of an accused person.

g) It is, therefore, submitted that Section 21(7) of the MCOCA cannot be read in isolation, and it has to be read along with Section 21(2)(a) of the MCOCA read with modified provisions of Section 167 of the Cr.P.C. which enlarges the period of 15 days and restricts it to 30 days.

h) It is submitted that the only provision which describes the period of police custody is Section 21(2)(a) of the MCOCA which modifies the period of 15 days of police custody into 30 days.

i) It is submitted that so far as the word pre-indictment or pre-trial is concerned, it refers to the police custody of a person for the period of first 30 days.

j) It is submitted that assuming for the sake of arguments that it includes the police custody of an accused person even at the stage of pre-indictment or pre-trial which covers the period till the start of trial, then in that case, even if a person is released on bail either u/s 167 of Cr.P.C. read with 21(2) of the MCOCA for non filing of charge sheet within the stipulated period of time or on merits of the case, the police can file an application for police custody on the ground that when the person was in custody he was not interrogated in police custody for a period of 30 days and, therefore, he should be given in police custody for the remaining period.

h) It is submitted that this will render the order of grant of bail as in-effective and null and void. It is submitted that this can not be done under the law.

9. The learned A.P.P. has submitted that the present applications are not maintainable and are liable to be dismissed. It is submitted that the facts of the offences disclose involvement of the organized crime syndicate and a proposal for approval u/s 23(1) was granted by the Commissioner of Police and, thereafter, the provisions of MCOCA were invoked in the said matter. It is further submitted that on 27th March 2003, the police custody of the accused was not sought and the accused were remanded to judicial custody. It is submitted that, thereafter, the investigation was in progress and various letters were addressed to the authorities of Municipal Corporation and copies of the records of Municipal Corporation and Public Works Department were requested for. In response to the correspondence, the Municipal Corporation and the other departments supplied the agreements for the year 1939 and the other records wherein serious irregularities and illegalities committed at the instance of the organised crime syndicate in acquiring illegal possession of the said property had come to light. It was submitted that in view of the new material and information which was received from the other agencies during the course of investigation, a need was felt to obtain police custody of the accused persons and, therefore, an application was preferred on 2nd May 2003 u/s 21(7) of the MCOCA and police custody of the accused was granted for a period of three days though initially the police custody was requested for a period of five days.

10. It is submitted by the learned A.P.P. that by virtue of the provisions of Section 21(7) of the MCOCA the police custody of any person could be asked for either for pre-indictment or pre-trial interrogation from judicial custody. It was submitted that in the present case, admittedly the total period of 30 days of police custody had not been completed and by virtue of the specific provision under MCOCA as laid down u/s 21(7) the police was entitled to demand the custody of the accused either before filing of the charge sheet or before framing of the charge by the Court.

11. It is further submitted by the learned A.P.P. that as per Section 25 of the

MCOCA the provisions of MCOCA had an over-riding effect over any other law which is for the time being in force. It was, therefore, submitted that as per the modified provisions of Section 21(2) of the MCOCA read with Section 21(7) of the said Act, the police custody could be obtained for 30 days unlike 15 days under the Cr.P.C. It was also submitted that the admitted position in the present case is that the total period of police custody which was granted in the present case was for a period of about 22 to 23 days and, therefore, the said application made by the prosecution was tenable. It was further submitted that the police were seeking custody of the applicants after the period of 57 days and this was also permissible under the law as the provisions of MCOCA permits filing of such an application by the police stating reasons therein at the pre-indictment stage or pre-trial stage. The learned A.P.P. further relied upon the judgment of the Apex Court in the case of Kosanapu Ramreddy Vs. State of Andhra Pradesh and Others, . The learned A.P.P. has also relied upon a judgment of the Apex Court in the case of State of Maharashtra v. Dr. Shashikant Karnik wherein after a period of nine months the Apex Court had permitted police custody for a period of three days. It was further submitted that the ratio laid down by the Apex Court in the case of Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni, would be applicable to the facts of the present case as in the present case also MCOCA is made applicable which is a special statute, in which special provision u/s 21(7) of the Act was incorporated.

12. I have heard the learned Counsel for the parties at length. The learned Counsel appearing for the applicants have taken me through the applications, annexures thereto as also reply filed by the State.

13. The learned Counsel for the applicants have assailed the order of the special court on legal grounds as also on factual counts. Apart from challenging the said order on legal grounds, it is submitted that the application which was made by the State seeking remand for a period of three days did not spell out any sufficient reasons as to why custodial interrogation is required and further no sufficient cause has been given to explain the delay in filing of the said application.

14. Before deciding the submissions made by the rival parties, it would be necessary to examine the relevant provisions as laid down under Cr.P.C. and MCOCA. Three provisions which are required to be taken into consideration are the provision of Section 167 of Cr.P.C. Section 21(2), Section 21(7) and Section 25 of the MCOCA, which read as follows:-

Section 167 Cr.P.C.

Procedure when investigation cannot be completed in twenty four hours:- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or the

police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole: and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:-

Provided that:-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding --

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than the years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter:

(b) No Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) No Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

2-A. Notwithstanding anything contained in Sub-section (1) or Sub-section (2), the officer incharge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate, or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the

aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused persons has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to Sub-section (2);

Provided that before the expiry of the period aforesaid, the executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer incharge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under Sub-section (5), the Sessions Judge may, if he is satisfied on an application made to him or otherwise. That further investigation into the offence ought to be made, vacate the order made under Sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

Section 21(2) of MCOCA

Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in Sub-section (2) -

(a) the references to "fifteen days" and "sixty days" wherever they occur, shall be construed as references to "thirty days" and "ninety days", respectively;

(b) after the proviso, the following proviso shall be inserted, namely:-

Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty days, on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the

accused beyond the said period of ninety days.

Section 21(7)

The police officer seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody shall file a written statement explaining the reason for seeking such custody and also for the delay, if any, in seeking the police custody.

Section 25

The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having the force of law.

15. At this stage it must be pointed out that the validity of the MCOCA was challenged in this Court and this Court by its judgment and order has struck down the validity of Sections 13, 14 to 16 in the case of *Bharat Shah v. State of Maharashtra* reported in 2003 All. M.R. (Cri) 1061. In the said case, the division bench of this Court has held that the provisions of Section 13 to 16 of the MCOCA are liable to be struck down as they are beyond the legislative competence of the State Legislature. Further from the provisions of Section 21(5) of the MCOCA the words "or under any other Act on the date of offence in question" are deleted and they are held to be unconstitutional for violation of Article 14 of the Constitution. The Court however, held that except the above, the MCOC Act is constitutionally valid. Para 66 of the said judgment is reproduced hereinbelow:-

66. In view of the foregoing discussions and as a result thereof we make the rule absolute in the following terms only;

- i) The enactment called Maharashtra Control of Organised Crime Act is constitutionally valid except as otherwise specifically stated hereinafter;
- ii) The provisions of Sections 3 and 4 contemplate the existence of mens rea inherently and shall always be read therein as a necessary ingredient of the offences;
- iii) Provisions of Sections 13 to 16 of Maharashtra Control of Organised Crimes Act are liable to be struck down and are hereby struck down as beyond the Legislative competence of State Legislature;
- iv) From the provisions of Section 21(5) of the Act the words "or under any other Act on the date of offence in question" be deleted and are hereby deleted as unconstitutional for violation of Article 14 of the Constitution of India;
- v) The Criminal Application No. 1504 of 2002 in Criminal Writ Petition No. 110 of 2003 is rejected with liberty to apply to the said trial court again after the charge sheet is put up;

vi) All Writ Petitions thus stand disposed of;

16. it is an admitted position that the applicants have not challenged independently the validity of the provisions of Section 21(7) of MCOCA in the present applications. Thus it will have to be held that the provisions of Section 21(7) of the said Act are declared valid by this Court. The admitted facts in the present case are that the applicants were arrested on either 5th March 2003 or 6th March 2003. All of them were produced before the learned Magistrate on 6th March 2003. They were remanded to police custody till 27th March 2003 and thereafter, they were in judicial custody till 2nd May 2003. An application was made with the request to grant police custody of the applicants for a period of three days after a lapse of 57 days from the arrest of the applicants.

17. So far as the submissions of the learned Counsel for the applicants is concerned that the provisions of Section 21(7) of the MCOCA has to be read with the provisions of Section 21(2) of the MCOCA and, therefore, the police was not entitled to ask for the custody of the accused after the initial period of 30 days are over. He has submitted that since in this case, admittedly when the application for police remand was made, the period of 30 days was already over and therefore, the police could not take resort to the provisions of Section 21(7) of the Act. He submitted that in the present case by the time the order was to be passed by the session court, the charge sheet was already filed and, therefore, after filing of the charge sheet, the question of further custodial interrogation did not arise. He submitted that though the police had obtained permission u/s 167(8) of the Act, that did not give them right to ask for police custody again. He submitted that the special court had clearly erred in relying on the case of Kosanapu (supra). He submitted that in that case the period of 60 days as contemplated under TADA was not over and under those circumstances police custody was granted. He further submitted that the facts of the present case are entirely different and that in the present case the period of 30 days was already over. He submitted that the ratio of the Apex Court as laid down in Anupam Kulkarni's case (supra) is squarely applicable to the facts of the present case and, therefore, the question of seeking police custody of the accused did not arise. He submitted that it was open for the investigating agency to hold identification parade and/or to confront the accused while they were in judicial custody and for that purpose it was not necessary to have police custody of the present accused.

18. If we consider the provisions of the MCOCA from the statement of objects, reasons and preamble it would be seen that the said Act was passed after taking into consideration the menace of organized crime within the State of Maharashtra and since, it was extremely difficult to deal with the said menace effectively within the laws available it was considered necessary by the State to enact an comprehensive legislation for the purpose of providing adequate provisions of law to deal with this menace of organised crime.

19. If we take into consideration the provisions of Section 21, from the perusal of

the section it is clear that so far as Sub-section 21(2) of the Act is concerned, it modifies the provisions of Section 167(2) of the said Act and in the place of fifteen days the word thirty days have been substituted. Thus the police is authorised to detain a person in police custody for a period of thirty days. The Apex Court in the case of Anupam Kulkarni (supra) has, while interpreting the provisions of Section 167 has taken into consideration the scope of Section 167 Cr.P.C. and has summarised the law in para 13. The Apex Court has held that the accused can be detained in police custody for a total period not exceeding fifteen days in the whole. It has further held that within this period of fifteen days there could be more than one order changing the nature of such custody either from police to judicial or vice a versa. It has been further held that after the expiry of first period of fifteen days the further remand during the period of investigation can only be in judicial custody and lastly the Apex Court has observed that the period of ninety days or sixty days has to be computed from the date of detention as per the order of the Magistrate and not from the date of arrest by the police. The Apex Court, therefore, held that the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of fifteen days it should only be judicial custody. However, it must be noted that in para 14 the Apex Court has clarified that the said position applies to Section 167 as it stands in the Cr.P.C. It has stated that if there are any State amendments enlarging the periods of detention, different considerations may arise on the basis of the language employed in those amendments. It is, therefore, necessary to reproduce the two relevant paras i.e. 13 and 14 which are as follows:-

13. Whenever any person is arrested u/s 57 Cr.P.C. he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the

expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided u/s 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.

14. We may, however, in the end clarify that the position of law stated above applies to Section 167 as it stands in the Code. If there are any State amendments enlarging the periods of detention, different considerations may arise on the basis of the language employed in those amendments."

20. The provisions of MCOCA is a special statute, in which provisions of Section 167(2) are modified by increasing the number of days of keeping a person in police custody from fifteen to thirty. The period during which investigation can be carried out is also increased from ninety days to 180 days after relevant permission is obtained from the special court.

21. Apart from the said provision of Section 21(7) has also been added to the said provision. The said provision is already reproduced above. From the bare perusal of the said provisions it does appear that an additional power appears to have been given to the police to interrogate the accused in police custody, either before filing of the charge sheet or before framing of a charge.

22. From the perusal of the other similar Acts it will be seen that neither under the provisions of TADA nor under the provisions of POTA such a provision has been incorporated. In my view, therefore, the submission made by the learned A.P.P. that police custody of an accused can be sought even the period of 30 days is not over either before filing of the charge sheet or before framing of a charge, has to be accepted. It is no doubt true that so far as the legal position in respect of Section 167 is concerned, the Apex Court has taken a consistent view that the Legislature has imposed a restriction on the investigating agency and with that in mind, the police have been authorised to ask for custody in the first fifteen days only. However, from the perusal of Section 21(7) it appears that the Legislature has permitted the police to seek police custody not only during the thirty days but even after the said period is over till the framing of charge. The said

provision no doubt appears to be very draconian. However, since the validity of the said Act has been upheld, and provisions of Section 21(7) were not specifically challenged, either in the present applications or before the Division Bench of this Court, it will have to be held that if the period of 30 days of police custody is not over, then the police can seek custody of the accused either before filing of the charge sheet or before framing of charge. The wording of the Section 21(7) is very wide, wherein it has been mentioned that this can be done either before pre-indictment or pre-trial interrogation from judicial custody. In the present case, the prosecution had filed an application on 2nd May 2003 and in that application reasons for the police custody was required to be mentioned. The special court has accepted the reasons which are given by the prosecution. Apart from the provisions of Section 21, the provisions of Section 25 are also relevant. Section 25 of MCOCA in terms state that the provisions of this Act or any rule made thereunder or any order made under such rule shall have effect notwithstanding anything inconsistent therewith, contained in any other law. Thus provision of Section 21 shall have an over-riding effect over the provisions of Cr.P.C. to the extent to which such an over-riding effect has been prescribed by the said Act.

23. In this view of the matter, there is no infirmity in the order which is passed by the special court and, therefore, the said order will have to be confirmed. The special court while passing the order has further observed that the investigating officer will permit the Advocate for the accused to attend the custodial interrogation which would be within the sight but not within the hearing of Mr. Sayani. The special court has, therefore, exercised its discretion as laid down by the Apex Court and has permitted the Counsel for the accused to remain present at the time of interrogation. In this view of the matter the criminal applications are rejected.

24. At this stage the learned Counsel for the applicants prays for stay of this order. In my view, the ends of justice would be met if this order is stayed for a period of four weeks. The investigating officer is therefore directed to not to give effect to this order for a period of four weeks from today. All parties to act on a copy of this order duly authenticated by the Sheristedar.