
(2001) 08 AHC CK 0102
In the Allahabad High Court
Case No : Criminal Revision No. 1911 of 2001

Jagat Narain Pandey

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 16-08-2001

Acts Referred:

Criminal Law (Amendment) Act, 1932 — Section 7
Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2), 173(2), 173(8), 207
Penal Code, 1860 (IPC) — Section 255, 301(2), 304, 34, 394

Citation : (2002) CriLJ 120 : (2002) 3 RCR(Criminal) 38101

Hon'ble Judges : U.S. Tripathi, J

Bench : Single Bench

Advocate : Sudhir Agarwal, for the Appellant; A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

U.S. Tripathi, J.—The revision has been filed against the order dated 20-7-2001 passed by Chief Judicial Magistrate, Auraiya in Criminal Case No. 1473 of 2000 : Crime No. 205 of 2000 under Sections 304/34 506 and 394, I.P.C. and Section 7, Criminal Law Amendment Act, P.S. Kotwali Auraiya, district Auraiya.

2. An F.I.R. was lodged by applicant-Jagat Narain Pandey on 3-5-2000 at 6.30 p.m. at P.S. Kotwali Auraiya alleging that he along with his two sons Pramod Kumar Pandey and Kapil Kumar Pandey had gone to purchase vegetables in Sabjimandi at Phoolganj. He was standing at some distance and his two sons were purchasing vegetables. In the meantime, at about 5v30 p.m. Ambrish Kumar Mishra armed with rifle, Rajesh Kumar Mishra alias Raju Mishra, Alok Kumar Mishra and Kallu armed with double barrel gun arrived there. All the above four accused (opposite parties Nos. 2 to 5) started firing from their weapons, due to which Pramod Kumar Pandey and Kapil Kumar Pandey received gun shot injuries and died on the spot. The above accused also looted licensed rifle of Pramod Kumar. The occurrence was witnessed by the complainant, Sri Sanjeev Kumar, Rajendra Singh, Chandra Prakash, Abhisekh and others.

3. On the basis of above report, a case was registered at Police Station. The local Police started investigation. One Smt. Ramwati, who was mother of accused-Ambrish Kumar Mishra and Rajesh Kumar Mishra moved an application before the Chief Minister praying that the investigation of the case may be got done by C.B.C.I.D. Thereafter, the State Government took a decision that the investigation of the case be done by C.B.C.I.D. and the decision was communicated to Director General of Police, vide letter dated 29-5-2000. Thereafter, by another order dated 19-1-2001 the State Government transferred the investigation of the case from C.B.C.I.D. to local Police.

4. The local Police had already submitted charge-sheet on 19-5-2001 against the accused persons as absconders. The learned Chief Judicial Magistrate after taking cognizance issued non-bailable warrants against the accused. On 16-8-2001 the accused persons surrendered before the Court. The copies of document relied on by the prosecution were supplied to them u/s 207, Cr. P.C. on same date and they were remanded to judicial custody on a warrant u/s 209, Cr. P.C.

5. On 17-7-2001 the Station Officer-In-Charge, P.S. Kotwali Auraiya moved an application for remanding the accused persons to Police custody for three days as looted rifle and weapon of assault were to be got recovered. The accused (opposite parties Nos. 2 to 5) filed objection against the above application through their counsel before the Chief Judicial Magistrate mainly on the ground that the stage of Section 167, Cr. P.C. had been over and they were remanded to judicial custody u/s 209, Cr. P.C. and there was nothing in the application moved by the Station Officer to show that any of the accused made statement that they would get, the licensed rifle allegedly looted recovered.

6. The learned Chief Judicial Magistrate on considering the contentions of the parties learned Counsel held that the stage of Section 167, Cr. P.C. was over and since the accused were in judicial custody on a remand u/s 209, Cr. P.C, they could not be given in police custody, as the stage on which accused could be remanded to Police custody was over. He further held that there was nothing on record to show that accused had made statement to get the looted rifle or weapon of assault recovered. Therefore, there was no ground for remanding the accused opposite parties to Police custody. With these findings he rejected the above application by the impugned order dated 20-7-2001.

7. The above order of the Chief Judicial Magistrate has been challenged in this revision.

8. Heard Sri Viresh Mishra, learned senior counsel for the applicant and Sri V. C. Tiwari, learned Senior counsel for opposite parties Nos. 2 to 5 and the learned A.G.A. and perused the record.

The first point raised by the learned Counsel for the applicant was that the learned Magistrate had wrongly held that an accused cannot be remanded Police custody, if he had been sent to judicial custody under a remand u/s 209, Cr. P.C. or 309, Cr. P.C, that in the instant case after the occurrence the accused

absconded. Charge-sheet was submitted against them as absconders. That the accused surrendered before the Court only on 16-7-2001 and the application for Police remand was moved just after one day i.e. on 17-7-2001. Therefore, there was no question of denial of Police custody remand on the above ground. He placed reliance on the Apex Court decision in State through State through C.B.I. Vs. Dawood Ibrahim Kaskar and others,

9. On the other hand, the learned Counsel for the opposite parties Nos. 2 to 5 contended that the accused can be given in Police custody only at the stage of Section 167, Cr. P.C. and that too before second remand and not when the accused is in judicial custody either u/s 209, Cr. P.C. or Section 309, Cr. P.C.

10. The relevant provision in this regard contained under Sub-section (2) of Section 167, Cr. P.C. reads as under :--

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not 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 necessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

11. In the case of Dawood Ibrahim (supra) on 12-3-1993, a series of bomb explosions took place in and around the city of Bombay which resulted into death and injuries of several persons. As many as 27 criminal cases were registered and on completion of investigation a composite charge-sheet was forwarded to the Designated Court under the TADA Act on 4-11-1993 against 198 accused persons showing 45 of them absconders. On that charge-sheet Designated Court took cognizance. A few days thereafter on November 11, 1993 the case was transferred to C.B.C.I.D. In the course of such investigation C.B.I, apprehended certain accused, who made confessional statement on August 18, 1995. Thereafter on 22-5-1996, C.B.I, moved an application before the Designated Court for issuing non-bailable warrant of arrest against the accused. However, that application was rejected. Few months later one Mansuri came to be arrested by the C.B.I., Delhi in connection with some other offence. On the request of Police of Bombay he was brought to Bombay and produced before Designated Court and on such production the prosecution prayed for remand of Mansuri to Police custody. The prayer was allowed by the Designated Court remanding him to Police custody, but kept the order in abeyance for few days to enable Mansuri to challenge the same in Superior Court. Assailing the above order of Designated Court, Mansuri moved the Bombay High Court and submitted that once investigation into an offence was complete and a charge-sheet was filed, the provisions of Section 309, Cr. P.C. came into operation and Sub-section (2) of said Section left no discretion to a Court. The only course open to the Court then was to remand the accused to judicial custody. It was further submitted that whereas Section 167 conferred a discretion upon the Court of authorising

detention of accused either in judicial custody or Police custody such a discretion was completely absent in Section 309 of the Code. Accordingly, it was submitted that the order passed by the Designated Court granting Mansuri to Police custody was without jurisdiction and liable to be set aside. The above contention was accepted by the High Court and the order of remand to Police custody was set aside. Dissatisfied with the above order, the State through C.B.I, went before the Apex Court. The Apex Court on considering various provisions of Cr. P.C. such as Sections 167 209 and 309 etc. held as below :--

In keeping with the provisions of Section 173(8) and the above quoted observation, it has now to be seen whether Section 309(2) of the Code stands in the way of a Court, which has taken cognizance of an offence, to authorise the detention of person, who is subsequently brought before it by the Police under arrest during further investigation in Police custody in exercise of its power u/s 167 of the Code. Section 309 relates to the power of the Court to postpone the commencement of or adjournment of any inquiry or trial and Sub-section (2) thereof reads as follows :

If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

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10. There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody u/s 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to a stage of investigation and can initially be either in Police custody or judicial custody. Since, however, even after cognizance is taken of an offence the Police has a power to investigate into it further which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the Police in course of such investigation. If Section 309(2) is to be interpreted -- as has been interpreted by the Bombay High Court in *Mansuri*, 1994 Cri LJ 1854 (supra) -- to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in Police custody u/s 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (Police) custody was essential for that purpose. We are, therefore, of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and

relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category, is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who comes under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance of the offence may exercise its power to detain him in Police custody, subject to the fulfilment of the requirements and the limitation of Section 167.

12. In the instant case, the accused deliberately avoided the stage of Section 167, Cr. P.C. as they were absconding during investigation and surrendered before the Court after charge-sheet was submitted and cognizance was taken by the Court. In view of above decision of the Supreme Court it is clear that discretion u/s 167, Cr. P.C. in remanding an accused in Police custody may be exercised even at latter stage if the accused were absconding.

13. But in this case there is nothing on record to show that after surrender of the accused opposite parties the Police sought permission for further investigation u/s 173(8), Cr. P.C. or after transfer of investigation from C.B.C.I.D. to local Police, the Police was again investigating the case with the permission of the Magistrate. Without further investigation the remand for Police custody would have been of no use-.

14. The learned Counsel for the opposite parties Nos. 2 to 5 vehemently challenged the maintainability of the revision and prayer for Police custody of the accused on the part of complainant of the case. It was submitted that no doubt the Police moved an application before the Magistrate for Police custody, which was rejected and thereafter, the Police or the State had not filed any revision against the said order. Only the complainant has come before this Court in a revision and not the Police or the State and the prayer was to give the accused in Police custody. That prayer cannot be granted in favour of complainant. In other words he submitted that the complainant had no right to claim Police custody of accused.

15. On the other hand, the learned Counsel for the applicant contended that the complainant is an aggrieved person and has right to challenge the order of the Magistrate rejecting the prayer for Police remand in a revision. He placed reliance on two decisions of the Apex Court, Bhagwant Singh Vs. Commissioner of Police and Another, and M/s. J.K. International Vs. State, Govt of NCT of Delhi and Others,

16. In Bhagwant Singh's case (supra) it was held that in a case where the Magistrate to whom a report was forwarded u/s 173(2)(i) decides not to take cognizance of the offence and to drop the proceedings or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the

informant and provide him an opportunity to be heard at the time of consideration of the report.

17. In the case of M/s. J.K. International Vs. State, Govt of NCT of Delhi and Others, it was held that the scheme envisaged in the Code of Criminal Procedure indicates that a person who is aggrieved by the offence committed is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the Police and the charge-sheet was laid by them. Even the fact that the Court had taken cognizance of the offence is not sufficient to debar him from reaching the Court for ventilating his grievance. Even in the Sessions Court, where the Public Prosecutor is the only authority empowered to conduct the prosecution as per Section 225 of the Code, a private person who is aggrieved by the offence involved in the case is not altogether debarred from participating in the trial. This can be discerned from Section 301(2) of the Code. Further, when the trial is before a Magistrate's Court the scope of any other private person intending to participate in the conduct of the trial in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them. The complainant on whose behest the proceedings were initiated, must on his request be permitted by the Court to be heard before the proceedings are quashed.

18. Those cases related to accepting a final report and closing the criminal proceeding or quashing the criminal proceeding in a writ jurisdiction.

19. In this revision the complainant had agitated the matter of remand of accused in Police custody for purposes of recovery of looted rifle of his son, the deceased. This sort of prayer relates to investigation of the case. It is pertinent to mention at this stage that after rejecting of the application for Police custody of the accused by the Magistrate, investigation or the prosecution agency did not approach either the Sessions Court in revision or this Court. Even after filing of the revision, the State had not moved any application that the Investigating Agency is still investigating the case further and is ready to take the accused in Police custody and no revision was filed by the State though the Investigating Officer of the case had appeared in this Court on 31-7-2001, the date of hearing, in pursuance of order of this Court. As held above there is also nothing on record to show that matter is being investigated further with the permission of the Magistrate u/s 173(8), Cr. P.C. In case, the Police custody is allowed, the complainant cannot utilise the same. Therefore, the discretion u/s 167(2), Cr. P.C. cannot be exercised at the instance of complainant.

20. Moreover, the learned Magistrate had also observed in his order that there was nothing in the application for Police custody remand to show that any of the accused had made confessional statement relating to discovery or recovery of looted rifle or weapon of assault and, therefore, there also existed no sufficient ground for allowing the Police custody remand.

In view of aforesaid discussions and observations I find that revision has no force and is liable to dismissed.