
(1976) 04 MAD CK 0048
In the Madras High Court

Krishnaswami Naidu and Another

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 22-04-1976

Acts Referred:

Citation : (1977) CriLJ 1013

Hon'ble Judges : Natarajan, J

Bench : Single Bench

Judgement

Natarajan, J.—These two petitions are connected and raise the interesting question whether a Sessions Judge, acting as a Special Judge

under the Criminal Law Amendment Act 1952, can exercise the power conferred on a Magistrate u/s 167 of the CrI. P.C., to authorise detention

of an accused in the custody of the police. The petitions have come to be filed under the following circumstances.

2. The first petitioner who is the son of the second petitioner was the Gazetted Personal Assistant to the former Minister for Health, State of Tamil

Nadu. He as well as the second petitioner were arrested by the Vigilance and Anti-corruption Unit of the Tamil Nadu Police on April, 2, 1976 for

alleged offences under the Prevention of Corruption Act. They were produced before the Principal Sessions Judge, Madras who is the Special

Judge to try offences under the said Act within the city of Madras, on the next day, i.e. April 3, 1976. The petitioners unsuccessfully moved the

Special Judge for enlargement on bail. It appears the Inspector of Police, Vigilance and Anti-corruption, Madras moved the Special Judge for the

petitioner being placed in police custody for a period of fifteen days and the application was rejected. Notwithstanding the rejection of that

application, the complainant, who is the respondent in these petitions has filed a fresh application in CrI.M.P. No. 616 of 1976 before the Special

Judge for placing the petitioners in police custody for a period of fifteen days. It is in this state of affairs, the petitioners have come forward with

these two petitions. Cr. M.P. No. 1582/76 has been filed for a direction that the petitioners should be kept in judicial custody pending investigation

in Crime No. 2/AC/76-M:C-2, Vigilance and Anti-Corruption, Madras. CrI.M.P. No. 1605/1976 has been filed for quashing the application in

CrI M.P. No. 616/1976 on the ground that the Special Judge is not a Magistrate as defined in the Cr.P.C., and as such, he cannot exercise the

power conferred on a Magistrate u/s 167 of the Code, to place an accused in the custody of the police.

3. To appreciate the contentions of Mr. K. Ramaswami, learned Counsel for the petitioners, it is necessary to make a comparative study of

Sections 167 and 344 of the CrI. P.C. 1898 (hereinafter referred to as the old Code) and Sections 167 and 309 of the CrI. P.C. 1973 (hereinafter

referred to as the new Code). The difference made in the new Code by Parliament have been considered by the Supreme Court in *Matabar*

Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa, . It was pointed out therein that u/s 167 of the old

Code as well as the new Code, a person arrested without a warrant could not be detained by a police officer for a period exceeding 24 hours and

the police officer had to forward the accused to the nearest Magistrate if the investigation could not be completed within a period of 24 hours and

there were grounds for believing that the accusation or information against the accused was well founded. The Magistrate, to whom an accused

person is forwarded u/s 167 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 the Magistrate thinks fit for a term not exceeding fifteen days on 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. While

Section 167 under the old Code did not confer a power of remand on a Magistrate for a period longer than fifteen days, Section 167 of the new

Code provides that a Magistrate, having jurisdiction to try the case, may authorise the detention of the accused person, otherwise than in the

custody of the police, beyond a period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise

detention of the accused person in custody under this Section for a total period exceeding sixty days and, on the expiry of the said period of sixty

days, the accused person shall be released on bail if he is prepared to furnish bail.

4. Under the old Code, though an accused cannot be remanded for a total period exceeding fifteen days, u/s 167, his further detention could,

however, be ordered by virtue of Section 344 of the Code. The fact that Section 344 occurred in the Chapter dealing with enquiries and trial, did

not mean that it would not apply to cases in which the process of investigation and collection of evidence was still going, on. In *Gouri Shankar Jha*

Vs. The State of Bihar and Others, it was pointed out that the power u/s 344 can be exercised even before the submission of the charge-sheet, i.e.

at a stage when the investigation is still not over. Section 309 of the new Code, which corresponds to Section 344 of the old Code, though

worded in almost similar terms except for slight variation, is, however, of restricted application in view of the drastic change made in Section 167

by reason of the Proviso to Sub-section (2). The effect of the change has been considered in *Matabar Parida, Bisnu Charan Parida, Batakrushna*

Parida and Babaji Parida Vs. The State of Orissa, . The court observed:

Although the expression "reasonable cause" occurring in Sub-section (1A) of Section 344 is nowhere to be found in Section 309 of the new

Code, the Explanation to Section 844 of the old Code, has been retained as Explanation 1 to Section 309 in the identical language. The law as

engrafted in proviso (a)" to Section 167(2) and Section 309 of the new Code confers the powers 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. In such a situation what is the purpose of Explanation-I in Section 309 is not quite clear. But, then, the

command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and

cannot be kept in detention beyond the period of sixty days, even if the investigation may still be proceeding.

5. Thus, it may be seen that under the new Code, only a Magistrate who is

competent to try a case or commit for trial can authorise the detention of the accused person, otherwise than in the custody of the police, beyond a period of fifteen days, if he is satisfied that adequate grounds exist for doing so, such authorisation of detention, however not exceeding a total period of sixty days. u/s 309(2), a Court competent to enquire into or try a case can order further detention only after taking cognizance of an offence or after commencement of trial. It is in this background the question whether a Special Judge under the Criminal Law Amendment Act can entertain an application for an accused person being handed over to police custody pending investigation has to be answered. The answer has to be obviously in the negative, for, a special Judge cannot be deemed a Magistrate who is empowered u/s 167 of the Code (old or new) to order the detention of an accused person to police custody. Section 6 of the Criminal Law Amendment Act, 1952 (XLVI of 1952) empowers the State Government to appoint, by notification in the Official Gazette, special judges to try offences punishable u/s 161, Section 165 or Section 165-A of Indian Penal Code (Act XLV of 1860) or Sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 (II of 1947). Section 7(1) of the same Act provides that, notwithstanding anything contained in the Cri.P.C. 1898, or any other law, the offences specified in Sub-section (1) of Section 6 shall be triable by special judges only. Section 8 of the Act prescribes the powers of the special Judges and the procedure to be followed by them in the trial of the cases referred to above and that section may be usefully extracted here as it has relevance to the matter in controversy.

Section 8 : Procedure and powers of special judges:

1. A special judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Cr.P.C. 1898 (Act V of 1898) for trial of warrant cases by Magistrates.
2. A special judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof; and any pardon so

tendered shall, for the purposes of Sections 339 and 339-A of the Cr.P.C. 1898, be deemed to have been tendered u/s 338 of the Code.

3. Save as provided in Sub-section (1) or Sub-section (2), the provisions of the Cr. P G, 1898, shall, so far as they are not inconsistent with this

Act, apply to the proceedings before a special judge; and for the purposes of the said provisions, the court of the special judge shall be deemed to

be a court of session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special judge

shall be deemed to be a public prosecutor.

4. A special judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such

person is convicted." It may thus be seen that a Special Judge trying a case for one or more of the offences enumerated in Section 6(1) is to be

deemed a Sessions Judge, though he has to follow the warrant procedure in the trial of cases. In Major E.G. Barsay Vs. The State of Bombay, the

court had to consider the question whether a Special Judge constituted under the Criminal Law Amendment Act, 1952 could be deemed a

Magistrate for the purpose of Rule 3 of the Rules made by the Central Government in exercise of the power conferred u/s 549 of the old Code.

Said the Supreme Court thus:

This rule obviously cannot apply to a case tried by a Special Judge constituted under the Criminal Law Amendment Act, 1952, unless he is a

Magistrate within the meaning of that Rule.

After referring to Sections 6 and 8 of the Criminal Law Amendment Act, the Supreme Court observed thus:

These provisions equate a special judge with a sessions judge, and the provisions of the Cr.P.C. (old Code) applicable to a sessions judge, in so

far as they are not inconsistent with Act (Criminal Law Amendment Act), are made applicable to a special judge. But, it is said that Section 8(1) of

the Act puts him on par with a magistrate and therefore Rule 3 of the Rules framed u/s 549 which applies to a magistrate equally applies to a

special judge. This argument overlooks the limited purpose for which Section 8(1) is enacted. Section 8 of the Criminal Law Amendment Act

makes a distinction between the power of a special judge to take cognizance of an offence and the procedure to be followed by him in trying the

case. In trying accused persons, he is enjoined to follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases

by Magistrates. The warrant procedure is incorporated in the Act by reference to the Cr.P. C Chapter XXI of the Cr.P.C. provides the procedure

for the trial of warrant cases and Section 549 is not one of the sections in that chapter. Nor does it empower the Central Government to make

rules modifying the warrant procedure. That apart, can it be said that, by reason of the procedure to be followed by the special judge, he would be

a magistrate empowered to try such a person within the meaning of Rule 37? Section 8(1) of the Criminal Law Amendment Act maintains a clear

distinction between jurisdiction and the procedure. It is therefore not possible to hold that a special judge is a magistrate within the meaning of Rule

3. If so, it follows that Rule 3 has no application to the trial of any army personnel by a special judge.

The same ratio would govern the facts of the instant case. Section 167 which confers the power of remand on a Magistrate is contained in Chapter

XXI (of the new Code) dealing with information to police and their power to investigate, while the procedure to be adopted in the trial of warrant

cases by magistrate is contained in Chapter XIX (of the new Code.) Merely because Section 8 of the Criminal Law Amendment Act enjoins a

special judge to follow the procedure to be adopted by a magistrate in the trial of warrant cases, it cannot be said that the special judge must be

held to have the powers of a magistrate u/s 167 to order detention of an accused person in police custody or judicial custody. The contention of

the petitioners is therefore well founded and the complainant will not be entitled to move the Special Judge to place the petitioners in police custody

for the purposes of investigation.

6. The learned Public Prosecutor opposes the petitions and contends that the petitioners are not entitled to invoke the powers of this Court u/s 401

of the New Code. (Section 439 of the Old Code) and Section 482 (Section 561-A of the Old Code) to interfere with the statutory powers of the

police to conduct investigation or to interfere with proceedings at an interlocutory stage. In support of his contentions, he relies on the following

decisions namely, R.P. Kapur Vs. The State of Punjab, , State of West Bengal Vs. S.N. Basak, , and Jehan Singh Vs. Delhi Administration, . On

a reading of these cases, I find that they do not have any application to the facts of the instant case. Those were cases where investigations by the police of cognizable offences were sought to be quashed. It was in that context, the decisions were rendered in the case cited, to the effect (1) that criminal proceedings instituted against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with proceedings at an interlocutory stage and (2) the inherent jurisdiction of the High Court u/s 561-A cannot be invoked to interfere with the statutory powers of the police to investigate into the alleged offences. By means of their applications, the petitioners are not asking for any interference with the cases registered against them being investigated into by the police or the charge-sheet being filed after the investigation is over. All that they contend is that the complainant is not entitled to move the Special Judge to hand over the petitioners to police custody. That prayer does not, in any manner, stand in the way of the case against the petitioners being investigated and charge-sheeted. The respondent (complainant) cannot be heard to say that they have a statutory right to obtain police custody of the petitioners and any interference with the exercise of such right by them would have the effect of hampering the investigation. In *State v. Santokh Singh* 1956 CrL. LJ 619 : AIR 1956 Madh Bha 130 it was pointed out that there is no provision in the Cr.P.C. (Old Code) which lays down that for purposes of investigation, detention of the accused person in police custody is essential and therefore, the assumption, that a right to investigation includes a right to have the accused in police custody, is unwarranted.

7. In the result, the petitions are allowed and Criminal Miscellaneous Petition No. 616 of 1976 on the file of the Special Judge, Madras (Principal Sessions Judge, Madras) will stand quashed as not maintainable, as prayed for in the petition, CrL.M.P. No. 1605 of 1976, and the petitioners will be kept in judicial custody till they are released on bail.

[These petitions having been set down on Tuesday the 20th day of April and this day for being spoken to in the presence of the aforesaid

Advocate, the Court made the following Order]-

8. Two points are now mentioned by the learned Public prosecutor to sustain the contention of the State that a Special Judge can exercise the

powers of a Magistrate and order the detention of an accused in police custody. The first is that, in the General Clauses Act, 1897 as well as in the

Madras General Clauses Act, it is stated that the term "Magistrate" shall include every person exercising all or any of the powers of a Magistrate

under the Cr.P.C. for the time being in force. It is, therefore, urged that a special Judge, who is also entitled to exercise powers u/s 309 of the

Cr.P.C. (New Code) can be held to be a Magistrate and as such entitled to exercise powers u/s 167 of the Code. This contention overlooks the

fact that a Special Judge can exercise his power u/s 309 only after he takes cognizance of the case or the trial has commenced. Hence, even if a

special Judge is to be deemed a Magistrate by reason of the definition contained in the General Clauses Act, still he can exercise magisterial

powers only after he has seisin of the case. Alternatively, it is contended that u/s 19 of the Indian Penal Code, the word "Judge" will denote not

only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or

criminals, a definitive judgment. Illustration (b) to Section 19 states that a Magistrate exercising jurisdiction in respect of a charge on which he has

power to sentence to fine or imprisonment with or without appeal, is a judge, Illustration (d) of Section 19 states that a Magistrate exercising

jurisdiction in respect of a charge on which he has power only to commit to another Court, is not a judge. Even this Section cannot come to the aid

of the prosecution, for the Section only lays down that in certain circumstances a Magistrate can be deemed a Judge but does not say that the vice-

versa would also occur i.e. a Judge would become a Magistrate.

9. The Second contention is that if a Sessions Judge, acting as a Special Judge under the Criminal Law Amendment Act, is not to be treated a

Magistrate for purposes of remand, it will have the effect of nullifying Sub-section (2) of Section 167 of the Cr.P.C. u/s 167(2), if a Magistrate not

having jurisdiction to try a case against an accused or commit him for trial has initially remanded the accused to custody for a term not exceeding

fifteen days and it then transpires that further detention is unnecessary, then the accused has to be forwarded to a Magistrate having jurisdiction

over the case registered against the accused for further action. The question asked is, what is to happen to an accused charged under the

provisions of the Prevention of Corruption Act, remanded for an initial term of detention of fifteen days by a Magistrate if his further detention is

considered unnecessary. No doubt, the situation is problematic, but it is an irremediable one as things now stand. When the Criminal Law

Amendment Act makes the Sessions Judge a Special Judge, he can exercise the powers of remand granted to Courts only u/s 309 of the Cr.P.C.

and cannot go further and exercise the powers of remand conferred on a Magistrate u/s 167 Cr.P.C. Unlike Section 306 which contemplates a

Court, Section 167 makes references only to a Magistrate. The status of a Special Judge vis-a-vis the provisions of the Cr.P.C. and the starting

point for the exercise of the powers of remand by a Court u/s 309, Cr.P.C. have been clearly laid down in the Supreme Court decisions in Major

E.G. Barsay Vs. The State of Bombay, and Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of

Orissa, referred to in my order dated 19-4-1976.

10. Any lacunae in the Code with regard to the powers of a Special Judge and the consequent difficulty felt by the prosecution have to be set right

only by the Legislature.