
(2019) 03 CAL CK 0077
In the Calcutta High Court
Case No : Writ Petitions (WP) 3731 Of 2019

Nazma Khatun

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

Date of Decision : 18-03-2019

Acts Referred:

Narcotic Drugs And Psychotropic Substances, Act, 1985 — Section 21(c), 36, 36A, 36C
Code Of Criminal Procedure, 1973 — Section 3, 155(2), 156, 157, 167, 167 (2), 173,
193, 309, 309(2), 549
General Clauses Act, 1897 — Section 3(2), 3(32), 32
Criminal Law Act 1967 — Section 8

Citation : (2019) 03 CAL CK 0077

Hon'ble Judges : Joymalya Bagchi, J;Manojit Mandal, J

Bench : Division Bench

Advocate : Ayan Bhattacharya, Sharequl Haque, Saibal Bapuli, Sabir Ahmed

Final Decision : Disposed Off

Judgement

An interesting question is raised in the instant application seeking a writ of habeas corpus for immediate release of an under trial who is facing a prosecution under Section 21(c) of the N.D.P.S. Act.

Shorn of details the challenge is to the legality of the order of remand dated 19.2.2019, committing the accused to judicial custody till 25.3.2019 on the premise such remand is for a period exceeding 15 days is violation of the first proviso to section 309(2) Cr.P.C. and, therefore, illegal.

Relying on the first proviso to section 309(2) of the Code of Criminal Procedure, Mr. Bhattacharyya, learned Counsel appearing for the petitioner submits that the impugned order remanding the accused to custody for a period exceeding 15 days is illegal and without jurisdiction. In his usual fairness, he admits that the said issue was considered by a Co-ordinate Bench of this Court in *Aparna Makhil Vs. State of*

West Bengal, 2014 (3) RCR (Criminal) 18, wherein it was held that the limitation

engrafted in the first proviso to Section 309(2) does not apply to a Special Court under NDPS Act. He submits that the aforesaid authority requires reconsideration as the Bench had not considered the definition of the word 'Magistrate' under Section 3 (32) of the General Clauses Act, 1897. He relies on various authorities in support of his contention.

On the other Mr. Bapuli, learned Additional Public Prosecutor along with Mr. Ahmed, appearing for the State submits that the writ is not maintainable as the petitioner had been remanded to custody in terms of a judicial order passed by a competent court. He submits the said issue is no longer *res integra* in view of the ratio in *Aparna Makhal (Supra)*.

Relevant portion of section 309 (2) of the Code of Criminal Procedure reads as follows:-

"309. Power to postpone or adjourn proceedings - (1)

(2) 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 be 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 :

....."

The aforesaid provision empowers a court to adjourn or postpone a proceeding for reasons to be recorded in writing during enquiry and trial and to remand an accused to custody for such purpose. In short, the provision authorizes post cognizance remand by a Court in contradistinction to a pre-cognizance remand by the Magistrate under Section 167 of the Code of Criminal Procedure. First proviso of section 309(2) of the Code restricts the power of the Magistrate to remand an accused to custody under the said section for a term exceeding 15 days at a time. Interpreting the aforesaid provision, a Co-ordinate Bench of this Court in *Aparna Makhal (Supra)* held as follows:-

"16. Mr. Manjit Singh, learned Public Prosecutor, per contra, argues that the order impugned is not illegal. The Code uses two expressions 'Court' and 'Magistrate' separately. He submits that had the remand been made by a Magistrate, the remand exceeding 15 days would have been illegal, but since the remand has been made by the Special Court in course of trial, the order is not illegal and, therefore, the petitioner is not entitled to relief. He has referred to a decision in the case of *Koomar Indraneel @ Caesar & Anr. Vs. State of Bihar*, reported in 2001 Criminal Law Journal 1040 where a Division Bench of the Patna High Court held that limit of 15 days for remanding an accused to custody as provided under Section 309 of the Code of 1973 was meant for Magistrate only and not for the court of Sessions, which was clear from the proviso to Section

309(2) of the said Code of 1973. The absence of mention of court of Sessions in this proviso left no room for any doubt that a court of Sessions had been kept out of this proviso defining the limit of period of remand at a time of an accused to custody.

17. There is a practical aspect of the matter. The session is on. One witness has been examined, cross-examined and discharged.

18. The trial court considering the pendency of the cases in the court fixed February 20, 2014 and February 21, 2014 for recording of the evidence of the case and directed the accused persons to be produced on the next date.

19. If Mr. Banerjee's submission is accepted and the accused is produced every fortnight to rule out the rigour of proviso of Section 309(2) of the Code, no useful purpose will be served as the court will again send him on remand. This will only complicate the situation and embarrass the proceedings before the court.

20. When the legislation has exercised to expressions in the statute it has to be presumed that the expressions were used consciously.

21. In Section 309 (2) of the Code, the expression 'Court' was mentioned, but in the proviso of Section 309 (2) of the said Code the expression 'Magistrate' was mentioned. It should have been better if the court concerned fixed next date of the trial expeditiously, but we cannot say that fixing a date of trial after about four months vitiates the trial or makes the order illegal. The order asking the authorities to produce the accused on the next date is not also illegal."

We are called upon to reconsider the said ratio in the light of the definition clause in the General Clauses Act, 1897 particularly Section 3(32) thereof defining the expression "Magistrate" and in the event we differ from the ratio in *Aparna Makhal* (Supra) to refer the matter to the Hon'ble the Acting Chief Justice for decision by a Special Bench.

Section 3 (32) of the General Clauses Act, 1897 defines 'Magistrate' as follows:-

"Magistrate" shall include every person exercising all or any of the powers of a magistrate under the Code of Criminal Procedure for the time being in force".

Definition of the expression 'Magistrate' under the General Clauses Act, 1897 is an inclusive one and would, therefore, include all judicial authorities exercising all or any magisterial power under the Code. On such premise, it has been argued as the power of remand is a magisterial exercise, the Special Court while exercising such power under section 309 (2) Cr.P.C. must be deemed to be a Magistrate. This is further fortified by the argument that the special court is a court of first instance under the N.D.P.S. Act and must be deemed to be a Magistrate when it exercises power of remand under the N.D.P.S. Act.

Section 36 of the N.D.P.S. Act provides for constitution of special courts to try offences under the N.D.P.S. Act. A special court shall consist of a Special Judge who shall be appointed by the Government in concurrence of the Chief Justice of

the High Court and he must be qualified before appointment to be a Sessions Judge or an Additional Sessions Judge. Section 36A empowers the special court to exercise powers of the Magistrate under Section 167 of the Code of Criminal Procedure in relation to cases falling within its jurisdiction and also to take cognizance of an offence on a police report without the case being committed to it for trial.

Section 36 C of the N.D.P.S. Act provides save as otherwise provided in the Act, provisions of the Code of Criminal Procedure (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions.

Scheme of the N.D.P.S. Act envisages the special court trying offences under the Act to be a court of Sessions for all purposes save and except when it exercises magisterial power to remand an accused during investigation under Section 167 of the Code of Criminal Procedure or takes cognizance on a police report without the case being committed to it. When the power and jurisdiction of the Special Court is tested from this perspective, it is evident that the Special Court while exercising remand powers at the post-cognizance stage under section 309(2) Cr.P.C acts as a Courts of Session unlike the pre-cognizance stage when it is exercises remand powers as if it were a Magistrate. Reference to the definition "Magistrate" in section 3(2) of the General Clauses Act, 1897 does not alter the position. The said definition merely provides that "every person" exercising "all or any of the powers of a Magistrate under the Code of Criminal Procedure" shall be fall within the term "Magistrate". As per the said definition, a Special Court shall fall within the expression 'Magistrate' when it exercises all or any powers of the Magistrate under the Code. Interpreting this provision in State of T.N. Vs. Krishnaswami Naidu, (1979) 4 SCC 5, the Apex Court held Special Judge under Criminal Law (Amendment) Act, 1952 is a Magistrate while exercising pre-cognizance remand powers under section 167 (2) Cr.P.C. The Court analysed the position as follows:-

"7. We will now examine the provisions of Section 167 of the Criminal Procedure Code. Section 167 of the Criminal Procedure Code requires that whenever any person is arrested and detained in custody and when it appears that the investigation cannot be completed within a period of 24 hours the police officer is required to forward the accused to the Magistrate. The Magistrate to whom the accused is forwarded if he is not the Magistrate having jurisdiction to try the case may authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days on the whole. If he has no jurisdiction to try the case and if he considers that further detention is necessary he may order the accused to be forwarded to any Magistrate having jurisdiction. The Magistrate having jurisdiction may authorise the detention of the accused person otherwise than in custody of the police beyond the period of 15 days but for a total period not exceeding 60 days. In the present case the accused were produced before

the Special Judge who admittedly is the person who has jurisdiction to try the case. The contention which found favour with the High Court is that the words "Magistrate having jurisdiction" cannot apply to a Special Judge having jurisdiction to try the case. No doubt the word "Special Judge" is not mentioned in Section 167 but the question is whether that would exclude the Special Judge from being a Magistrate having jurisdiction to try the case. The provisions of Chapter XII CrPC relate to the information to the police and their powers of investigation. It is seen that there are certain sections which require the police to take directions from the Magistrate having jurisdiction to try the case. Section 155(2) requires that no police shall take up non-cognizable case without an order of the Magistrate having power to try such case or commit the case for trial. Again Section 157 requires that when the police officer has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report. Section 173 requires that on the completion of every investigation under the chapter the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence a police report as required in the form prescribed. Section 8 of the Criminal Law Amendment specifically empowers the Special Judge to take cognizance of the offence without the accused being committed to him. In taking cognizance of an offence without the accused being committed to him he is not a Sessions Judge for Section 193 CrPC provides that no Court of Session Judge shall take cognizance for any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Strictly he is not a Magistrate for no Magistrate can take cognizance as a Court of Session without committal. The Criminal Law (Amendment) Act being an amending Act the provisions are intended to provide for a speedy trial of certain offences. The Criminal Law (Amendment) Act is not intended to be a complete Code relating to procedure. The provisions of the CrPC are not excluded unless they are inconsistent with the Criminal Law (Amendment) Act. Thus read there could be no difficulty in coming to the conclusion that the CrPC is applicable when there is no conflict with the provisions of Criminal Law (Amendment) Act. If a Special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail it will lead to an anomalous situation. A Magistrate other than a Magistrate having jurisdiction cannot keep him in custody for more than 15 days and after the expiry of the period if the Magistrate having jurisdiction to try the case does not include the Special Judge, it would mean that he would have no authority to extend the period of remand or to release him on bail. So also if the Special Judge is not held to be a Magistrate having jurisdiction, a charge-sheet under Section 173 cannot be submitted to him. It is relevant to note that the General Clauses Act, Section 32 defines a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. Section 3 of the Criminal Procedure Code provides that any reference without any qualifying

words, to a Magistrate, shall be construed, unless the context otherwise requires in the manner stated in the sub-sections. If the context otherwise requires the word "Magistrate" may include Magistrates who are not specified in the section. Read along with the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the Special Judge as a Magistrate for the purposes of Section 167."

The court factually distinguished its earlier ratio in Major General E.G. Barsay Vs. State of Bombay, AIR 1961 SC 1762, in the following manner:-

"8. In coming to the conclusion that the Special Judge is not a Magistrate the High Court strongly relied on a decision of this Court in Major E.G. Barsay v. State of Bombay¹. This Court in construing Rule 3 made under Section 549 of the Criminal Procedure Code held that the Rule was applicable to only a Magistrate and not to a Special Judge who is not a Magistrate within the meaning of Rule 3. Section 549 of the Code of Criminal Procedure empowers the Central Government to make rules as to cases to which persons subject to military, naval or air force shall be tried by the Court to which this Code applies, or by a Court Martial. The Central Government made rules in exercise of the powers conferred on it under this section. Rule 3 which is considered by the Court runs as follows:

"Where a person subject to military, naval or air force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a Court Martial, such Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such court, unless,

(a) he is of opinion, for reasons to be recorded that he should so proceed without being moved thereto by competent military, naval or air force authority, or

(b) he is moved thereto by such authority."

9. Rule 3, it will be seen, provides that the Magistrate shall not proceed to try such persons or inquire with a view to his commitment for trial by the Court of Session Judge unless he is of opinion that he should so proceed without being moved thereto by such authority. The sub-section, therefore, contemplates a Magistrate who can try the offence himself or inquire with a view to commitment. This part of the section is not applicable to a Special Judge as he cannot inquire with a view to his commitment. Therefore, the Magistrate referred to under Rule 3 cannot include a Special Judge. This Court observed that Section 549 is not one of the sections in Chapter 21 of the Code of Criminal Procedure and that it does not empower the Central Government to modify the warrant procedure and that Rule 3 would not be applicable and further it cannot be said that by reason of the procedure to be followed by a Special Judge he would be a Magistrate empowered to try such a person within the meaning of Rule 3. Relying on this decision the learned Judge held that the same ratio would govern the facts of the present case. The learned Judge was in error in applying the decision of this Court relating to Rule 3 which is framed under Section 549 to Section 167 of the

Criminal Procedure Code. The Magistrate contemplated under Rule 3 is a Magistrate who is empowered to inquire with a view to committal which cannot apply to a Special Judge."

Enunciation of law in the aforesaid report shows that the Special Court may be treated as a Magistrate only in situations where it exercises magisterial powers and not otherwise.

Special Court while remanding an accused in the post cognizance stage under section 309 (2) Cr.P.C. does not exercise magisterial powers as envisaged under Section 167 Cr.P.C. and cannot be treated as a Magistrate within the ambit of the definition clause of the General Clauses Act. Although remand of an accused at the pre-cognizance and post cognizance stage may fall in the same genus, but they are of different species deriving jurisdiction from independent provisions, namely, Section 167(2) in the former and Section 309(2) in the latter. While the power to remand an accused at pre-cognizance stage under section 167 of the Code is purely magisterial, the power to remand an accused during inquiry or trial at post-cognizance is vested in every Court having jurisdiction to inquire or try the offences and not upon a Magistrate only. Hence, the Special Court under N.D.P.S. Act exercising power of remand during inquiry and trial shall be treated as 'Court 1953 SCC 277 of Sessions' in terms of section 36 C of N.D.P.S. Act and not a Magistrate in the light of section 3(32) of the General Clauses Act, 1897. Consequentially, restriction on the magisterial power to remand beyond 15 days engrafted in the first proviso of section 309(2) Cr.P.C. does not apply to Special Court while remanding the accused during inquiry and trial under the said section.

Accordingly, we are not impressed by the submission of the petitioner that the ratio in *Aparna Makhal* (Supra) requires re-consideration as the Bench had not taken into consideration the definition of the word "Magistrate" under Section 3(32) of the General Clauses Act.

Authorities relied upon by the petitioner are inapplicable in the facts of the case. In *Ram Narayan Singh vs. The State of Delhi & Ors.*, AIR a Constitution Bench of the Apex Court held that a writ of habeas corpus was maintainable without when an undertrial is detained without an order of remand. In the present case the accused had been remanded to custody in exercise of powers under Section 309(2) Cr.P.C. and, accordingly, there is no scope of invoking the extraordinary writ jurisdiction in the facts of the present case. In *Sapmawia Vs. Deputy Commissioner, Aijal*, 1970 (2) SCC 399, the Apex Court held that an unlimited order of remand at the pre-cognizance stage by the Magistrate was illegal. Present case relates to the power of the Special Court to remand an accused under Section 309 (2) Cr.P.C. at the post cognizance stage. Restrictions on power of remand under Section 167 Cr.P.C., therefore, have no manner of application and as the court was not exercising magisterial power of pre-cognizance remand and the aforesaid ratio is clearly distinguishable on such score.

In *Harshad S. Mehta vs. C.B.I.* DRT 1992 (24), *Yogesh Mittal Vs. Enforcement*

Directorate, 2018 Delhi Law Times 630 and Asalamkhan Vs. State of M.P., M.Cr.C. No.3100/1991, the issue before us did not directly fall for decision and no sustenance can be drawn from these authorities which are of persuasive value in the face of the clear enunciation of law in Aparna Makhal (Supra).

In the light of the aforesaid discussion, we Thana Singh Vs. Central Bureau of find no reason to differ from and are in humble agreement with the ratio in Aparna Makhal (Supra) and we hold that there is no illegality in the order of remand passed by the trial judge.

Although, we are of the view that the limitation engrafted in the first proviso to Section 309(2) Cr.P.C. is inapplicable to the Special Court while remanding an accused during inquiry and trial, we are not unmindful of the fact that an accused particularly an undertrial in custody has a fundamental right to speedy trial and remand to custody for protracted periods at a time during inquiry or trial may not be conducive to the enjoyment of such fundamental right. Special Courts while conducting custody trials require to bear in mind this legal imperative and ought not grant long and unnecessary adjournments during trial and must make all endeavours to conduct trial on a day to day basis without unnecessary adjournments as laid down in Narcotics, (2013) 2 SCC 590.

We are informed although the petitioner is in custody for about ten months, witness action is not complete.

We direct the trial court to ensure prompt examination of witnesses on a day-to-day basis (as far practicable) without granting unnecessary adjournments to either of the parties and to conclude the trial at an early date preferably within six months from the next date fixed before the said court.

The writ petition is, accordingly, disposed of.