

(1999) 07 BOM CK 0067

In the Bombay High Court

Case No : Criminal Revision Application No. 101 of 1999

State of Maharashtra

APPELLANT

Vs

Yadav Natthuji Kohachade

RESPONDENT

Date of Decision : 19-07-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 167(2), 169, 209, 266
Penal Code, 1860 (IPC) — Section 34, 420, 468, 471
Prevention of Corruption Act, 1947 — Section 12

Citation : (2000) 5 BomCR 743 : (2000) CriLJ 959

Hon'ble Judges : J.N. Patel, J

Bench : Single Bench

Advocate : V.M. Deshpande, app, for the Appellant; Shashank Manohar, for the Respondent

Judgement

J.N. Patel, J.—Heard the learned Additional Public Prosecutor for the applicant-State and the learned Counsel for the non-applicant.

The State of Maharashtra was required to approach this Court by invoking its powers of revision as well as its inherent powers impugning the order of the First Additional Sessions Judge, Nagpur, in Criminal Revision No. 490/99 passed on 3rd July, 1999, under which the learned First Additional Sessions Judge having partly dictated the order went on to observe, "The fate of this revision is based on the findings of the proceedings before the Hon"ble High Court. Therefore, in the interest of justice, it will not be just and proper on the part of this Court to proceed with this revision till the decision of the proceedings pending before the Hon"ble High Court. Therefore, the interim stay granted by this Court on dated 28-6-1999 shall continue until further orders."

2. This, according to the prosecution, has resulted in scuttling the investigation in case of offences registered under sections 420, 468 and 471 read with section 34 of the Indian Penal Code, vide Crime No. 194/99 against the non-applicant/accused by Sitabuldi Police Station, Nagpur.

3. The brief facts which led to the arrest of the non-applicant/accused, Yadav son of Nathuji Kohachade is that while P.S.I. Anil Lokhande was investigating Crime No. 194/99, he received a phone call from the non-applicant/accused on 18-6-1999, pursuant to which, a meeting was held and the Police Officer was offered a bribe of Rs. 7,00,000/- for not involving the non-applicant/accused and one Banty Uike. The Police Officer, rather than accepting the bribe, appears to have reported the matter to the Anti Corruption Bureau which laid a trap, in which the non-applicant/accused was caught red-handed while offering bribe to the concerned Police Officer. The Anti Corruption Bureau registered Crime No. 3119/99 against the non-applicant accused u/s 12 of the Prevention of Corruption Act. The non-applicant accused was then produced before the Special Judge seeking his remand for the purposes of investigation. The Special Judge initially granted Police Custody Remand for a period of seven days, i.e., till 25-6-1999. On 25-6-1999, the non-applicant/accused was produced before the "Special Judge" and further police custody was sought, which was granted till 28-6-1999. In the meantime, the non-applicant/accused moved an application for bail in Crime No. 3119/99. After Police Custody Remand of the non-applicant/accused was over, he was produced before the Special Judge on 28-6-1999. As no further request for police custody was sought, he came to be remanded to the judicial custody and was sent to the Central Prison, Nagpur.

4. On 28-6-1999, the Investigation Officer in Crime No. 194/99 moved an application before the Judicial Magistrate, First Class, Court No. 2, Nagpur, for transferring of the non-applicant accused to his custody for the purposes of investigation. On this, the learned Judicial Magistrate, First Class, Court No. 2, sent a request letter to the Special Court, Nagpur. Therefore the Special Court, Nagpur, is supposed to have placed all these matters before him on 30th June, 1999, i.e., the bail application filed by the non-applicant accused as well as the request of the learned Judicial Magistrate, First Class, Court No. 1, for consideration. In the meantime, the prosecution filed an application in the Court of the Judicial Magistrate, First Class, Court No. 2, Nagpur, on 29-6-1999, seeking a production warrant so as to seek custody of the non-applicant/accused for the purposes of investigation in Crime No. 194/99. This application came to be granted by the learned Magistrate and the learned Magistrate issued a warrant of production addressed to the Superintendent of Jail for production of the non-applicant/accused. Pursuant to this production warrant, the Investigating Officer took over the custody of the non-applicant accused from Jail and produced him before the Judicial Magistrate, First Class, Court No. 2, Nagpur, and prayed for his police custody for the purposes of investigation. The learned Judicial Magistrate then granted police custody remand of the non-applicant/accused for a period of fourteen days.

5. Aggrieved by this order, the non-applicant/accused moved the Court of Sessions by filing a Criminal Revision Application, which came to be registered as Criminal Revision Application No. 490/99, and challenged the order dated 29-6-1999 passed by the learned Judicial Magistrate, First Class, Court No. 2,

Nagpur, granting police custody remand of the non-applicant accused for a period of fourteen days. In the Criminal Revision Application, the non-applicant/accused also sought for interim relief. The Criminal Revision Application was placed before the 5th Additional Sessions Judge, Nagpur, who after hearing the parties, passed an interim order on 30-6-1999 under which he suspended the order of remand passed by the learned Judicial Magistrate, First Class, Court No. 2, Nagpur, on 29-6-1999, for a period of two days and directed the Officer. In charge of the Police Station to restore the position ante to the date of the order dated 29-6-1999 and has restored the custody of the non-applicant accused to the Court and the matter was ordered to be heard. In compliance with the said interim order, the Investigating Officer surrendered the non-applicant-accused to the Superintendent of Central Prison, Nagpur.

6. The learned 1st Additional Sessions Judge then heard the matter and passed an order on 3-7-1999, which is impugned before this Court.

7. It is submitted by Mr. Deshpande, the learned Additional Public Prosecutor that Smt. Kusum Kohachade, the wife of the non-applicant accused, moved a contempt petition before this Court which came to be registered as Contempt Petition No. 5/99, and came to be dismissed on 16th July, 1999, as such there is no impediment in the way of the Court of Sessions or this Court to consider the applications filed by the parties. It is submitted that though the proceedings before the Revisional Court are also progressing from day-to-day, it would be proper for this Court to hear the matter and dispose it of upon merits, so that the controversy is put at rest.

8. It is submitted that there was no error or illegality committed by the learned Judicial Magistrate, First Class, Court No. 2, Nagpur, in issuing a warrant of production as contemplated u/s 267 of the Criminal Procedure Code for the purpose of considering the application for remand filed by the Investigating Officer in Crime No. 194/99, as the non-applicant accused was required to be arrested for having committed offences under sections 420, 468, and 471 read with section 34 of the Indian Penal Code and in the circumstances, the prosecution is entitled for taking over police custody of the non-applicant accused as ordered by the Court. It is further submitted that even the order passed by the Court was complied, i.e., the Jail authorities, in pursuance of the warrant of production, had handed over the custody of the non-applicant accused to the police for his production before the Court and on being so produced, the non-applicant accused was remanded to the police custody, but before the investigating agency could do any fruitful investigation, due to the interim order passed by the Court of Sessions, the non-applicant accused was required to be surrendered at Central Prison, Nagpur. Mr. Deshpande, the learned Additional Public Prosecutor, has relied upon the case of B.S. Rawat, Asstt. Collector of Customs Vs. Mohmed Azan Khan and others, ; Ranjeet Singh Vs. State of U.P. and Others, and C. Natesan Vs. State of Tamil Nadu and Others, . Mr. Deshpande, therefore submits that this Court may pass appropriate orders so

that the investigation in the case is done with expeditiously. He also apprised this Court that there is likelihood of several cases being registered by the police as is revealed from the preliminary investigation concerning the Marks scandal and issuance of bogus Degrees and Certificates of Nagpur University and, therefore, it requires that non-applicant accused is interrogated in the police custody.

9. Mr. Manohar, learned Counsel appearing for the non-applicant accused submits that the whole procedure adopted by the prosecution was irregular and it deprived procedural justice to the non-applicant accused being contrary to the express procedure provided under the Code of Criminal Procedure and, in the circumstances, the Court of Sessions was justified in passing the interim order. It is further submitted that the Court of Sessions is now seized with the matter and as this Court has dismissed the Contempt proceedings initiated by the wife of the non-applicant accused, there is no legal impediment in the way of the Court of Sessions to dispose of the application filed by the non-applicant accused on merits. It is submitted by the learned Counsel for the non-applicant/accused that the Court may, at the most, direct the Revisional Court to dispose of the matter expeditiously and that the non-applicant/accused is ready to go on with the matter before the Court of Sessions, immediately.

10. Considering the seriousness of the matter in which the non-applicant accused is sought to be arrested, and as submitted by the learned Additional Public Prosecutor that the investigation in the case will widely affect several persons and lead to various repercussions requiring large scale investigation, considering the enormity of the marks scandal and issuance of bogus Degrees and Certificates of Nagpur University, this Court proposes to discuss the proposition of law in reference to the facts of the case so that the courts below do not find it difficult or get stuck up in any procedural wrangles. The courts should keep in mind that the Criminal Procedure Code is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities.

11. Let me first dwell on the subject as to what are the primary aims of Criminal Justice System. These can be summarized as to detect crime and convict those who have committed it; to have rules relating to arrest, search, questioning, interrogation and admissibility of evidence which do not expose suspects to unfair treatment likely to lead to unjust convictions; to have rules as above which do not unnecessarily impede the proper investigation of crime; to ensure that innocent persons are not convicted; to maintain public order; to maintain public confidence in the Criminal Justice System; and to properly balance considerations of justice and fair procedure with those of efficiency and funding.

12. The investigation of crime is the first step in the criminal process. Different Chapters of the Criminal Procedure Code lay down detailed provisions relating to mode in which it has to be ascertained by whom, the alleged offence has been committed and the mode in which it is to be tried and punished by the competent Court. The role of Investigating Agency falls in the sphere of pre trial proceedings which includes information to the police and or to a Magistrate,

investigation or enquiry into the alleged offence. These are dealt with by Chapter XII to XVII and the procedure for bringing the person accused of before the Court which is dealt with by Chapters IV to VII. Further the role of Investigating Agency is also reflected in Chapters X-XII which are concerned with prevention of offences and the powers of the police and the public in this regard.

13. Investigation into the crime is one of the primary functions of the police and the final test of criminal investigation is in the presentation of evidence in Court and, therefore the next important step in the investigation of crime is arrest of the suspect after receipt of the First Information Report. Chapter V of the Criminal Procedure Code deals with arrest of persons. Section 41(1) of the Criminal Procedure Code confers general power upon any Police Officer to arrest without warrant, but it is subject to various other provisions. Thus, section 41(1) of the Criminal Procedure Code is confined only to power to arrest and extends to both cognizable and non-cognizable offences, but it does not empower the Police Officer to investigate into offence, if it is non-cognizable, without the order of the competent Magistrate, u/s 155(2) of the Criminal Procedure Code.

14. I need not probe into the procedure which is required to be followed for arrest of a person who is not detained in prison, but section 56 of the Criminal Procedure Code clearly provides that a person, who is arrested without warrant, should be taken before the Magistrate, or any officer incharge of the police station, without unnecessary delay and subject to the provisions contained as to bail. Section 57 provides safeguards to a person arrested, in the sense that no Police Officer shall detain in custody a person arrested, for more than 24 hours, in absence of special order of a Magistrate u/s 167 of the Criminal Procedure Code. Once a person who is so arrested is produced before a Magistrate, there are three provisions in the Code which authorise remand of an accused person who has not been released on bail or u/s 169 of the Code of Criminal Procedure. The first is u/s 167(2) which is applicable during investigation of an offence; the next is u/s 209(b) which is applicable during the pendency of Sessions trial; and the third is u/s 309(2) which can be invoked during enquiry or trial other than the Sessions trial.

15. For the purposes of this case, section 167 of the Criminal Procedure Code is the relevant section, which requires consideration. Section 167(1) clearly lays down that whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within 24 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 and seek his further detention. u/s 167(2), the Magistrate, to whom an accused person is forwarded 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 unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. The proviso to section 167(2) further provides that in what manner and for what period the accused can be detained.

16. Insofar as the present case is concerned, it is not in dispute that the offences under sections 420, 468, 471 read with section 34 of the Indian Penal Code against the non-applicant accused have been registered by the Police Station Officer, Police Station, Sitabuldi, Nagpur, on 24-3-1999, vide Crime No. 194/99, on the basis of the report filed by Dr. Prakash Mistry, Controller of Examination of Nagpur University. It is also not in dispute that it is the Police Officers of Sitabuldi Police Station who are competent to investigate the offence as the offences are committed within their jurisdiction. Similarly, for the purposes of remand, it is the , First Class, Court No. 2, at Nagpur, who has the jurisdiction to try the case or commit it for trial. If the non-applicant/accused was otherwise available, then there was no impediment in the way of the Investigating Officer to cause his arrest and produce him before the learned Magistrate and seek his remand as contemplated u/s 167 of the Criminal Procedure Code; but in this case, the non-applicant/accused was in judicial custody of the Special Judge trying offences under the Prevention of Corruption Act, vide Crime No. 3119/99 and lodged in Central Prison, Nagpur.

17. In respect of attendance of persons, who are confined or detained in Prison, Chapter XII of the Criminal Procedure Code makes provisions which are laid down in sections 266, 267, 268, 269, 270 and 271 thereof.

18. For the purposes of this case, section 267(1)(a) is relevant, which reads as under :-

"267. (1) Whenever, in the course of an inquiry, trial or other proceedings under this Code, it appears to a Criminal Court-

(a) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or for the purpose of any proceedings against him, or

(b)

the Court may make an order requiring the officer-in-charge of the prison to produce such person before the "Court for answering to the charge or for the purpose of such proceedings or, as the case may be, for giving evidence."

19. In the present case, the prosecution did move an application before the Judicial Magistrate, First Class, Court No. 2, at Nagpur, seeking production of the non-applicant accused before the learned Magistrate, and as such a warrant was issued as provided under Form No. 36, u/s 267(1)(a) of the Criminal Procedure Code by the learned Magistrate. When the Police Officer served this order on the Superintendent, Central Prison, Nagpur, who was the officer in-charge of the

Prison where the non-applicant/accused was held in Judicial Custody pending investigation, the Superintendent, Central Prison, Nagpur, handed over the non-applicant/accused to the Investigating Officer who, in turn, produced him before the concerned Court and obtained police custody remand of the non-applicant/accused for a period of 14 days.

20. The whole controversy leading to the arrest of the non-applicant/accused in the case arose as the non-applicant accused was detained in prison and the prosecution did not take appropriate steps to procure his presence before the Court for remand.

21. Section 269 of the Criminal Procedure Code reads as under :-

"269. Where the person in respect of whom an order is made u/s 267-

- (a) is by reason of sickness or infirmity unfit to be removed from the prison; or
- (b) is under committal for trial or under remand pending trial or pending a preliminary investigation; or
- (c) is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained; or
- (d) is a person to whom an order made by the State Government u/s 268 applies.

the officer-in-charge of the prison shall abstain from carrying out the Court's order and shall send the Court a statement of reasons for so abstaining:

Provided that where the attendance of such person is required for giving evidence at a place not more than twenty-five kilometres distance from the prison, the officer-in-charge of the prison shall not so abstain for the reason mentioned in Clause (b)."

In view of section 269 of the Criminal Procedure Code, the officer-in-charge of the prison was expected to abstain from carrying out the Court's order i.e., the warrant of production issued by the Judicial Magistrate, First Class, Court No. 2, Nagpur, u/s 267 of the Criminal Procedure Code and could have been well justified in his action if he had sent to the Court a statement of reasons for so abstaining, that the accused is confined or detained in prison for the reason given in section 269(b) of the Criminal Procedure Code, which is relevant in the present case, i.e., he is under remand pending a preliminary investigation; but as the Superintendent of Central Prison, Nagpur, who is the officer-in-charge of the prison, did not do so, in my opinion, it is merely an irregularity which would not vitiate the proceedings and no prejudice is caused to the non-applicant accused.

21-A. At this state, I would like to clarify that in such cases, it is always better for the prosecution after obtaining an order u/s 267 of the Criminal Procedure Code to approach the Court under whose orders a convict or an accused is confined or detained in prison for seeking permission of the concerned Court, on

the basis that the custody of the accused is required for the purposes of proceedings pending before a Court of competent jurisdiction and describe the nature of the proceedings as in this case, seeking remand of the accused, i.e., his police custody for the purposes of investigation in Crime No. 194/99 and on such application being made, the concerned Court, under whose order the accused is confined or detained in the prison, can direct the jail authorities to produce the accused in terms of the order passed by the competent Court u/s 267 of the Criminal Procedure Code with or without condition relating to the proceedings pending before it in which accused is required to be produced before it. This would avoid unnecessary controversy and in such cases, a warrant of production issued by a competent Court for the said purpose need not be returned back by the officer-in-charge of the prison, because in case the officer-in-charge of prison abstains from carrying out the Court's orders issued u/s 267 of the Criminal Procedure Code, the prosecution will then have to undergo the same exercise and, therefore, before such an order u/s 267 of the Criminal Procedure Code is sought to be enforced, if the prosecution is already armed with the consent of the concerned Court under whose orders a person who is required to be arrested is confined or detained in the prison, the officer-in-charge of the prison will have to comply with the said order.

22. Mr. Manohar, learned Counsel for the non-applicant/accused, submits that an order u/s 267 of the Criminal Procedure Code could not have been passed by the learned Magistrate, unless the person confined or detained in a prison is required for answering to a charge of an offence or for the purpose of any proceeding against him, or if he is required to be examined as a witness. According to him there was no proceeding pending before the Judicial Magistrate, First Class, Nagpur so as to vest him with the jurisdiction of passing an order u/s 267 of the Criminal Procedure Code. Mr. Manohar relies upon the case of B.S. Rawat, Asstt. Collector of Customs Vs. Mohmed Azan Khan and others, . It is submitted that in that case, this Court has observed:

"It is apparent that in order that sub-section (1) of section 267 should apply, it is necessary that the requirement should be that he has to be brought before the Court for one or the other purposes mentioned in Clauses (a) and (b) and it would not apply to a situation where it is necessary to produce the person for the purposes of investigation, before the agency which is engaged in the investigation."

23. Such is not the case in respect of the order in question, as it is passed by the competent Magistrate for the purposes of proceedings in remand. I have already spelt out the procedure required for arrest of a person who has committed a cognizable offence, without warrant, by a Police Officer. The Police Officer is so empowered u/s 41 of the Criminal Procedure Code; and u/s 167(1), when it appears that the investigation cannot be completed within the period of 24 hours fixed by section 57, then only course open to the Investigating Officer is to transmit the accused so arrested to the nearest Judicial Magistrate who may, or

may not be, a Magistrate having jurisdiction to try the case or commit it for trial, and as soon as such an accused is produced before the Magistrate, the proceeding for the purposes of taking remand, as is normally known, is initiated before the Magistrate. Proviso (b) to sub-section (2) of section 167 unequivocally says that "no Magistrate shall authorise detention..... unless the accused is produced before him," and therefore, it was obligatory on the part of prosecution to seek warrant of production u/s 267 of the Criminal Procedure Code for production of the non-applicant accused before the Court for the purpose of seeking his remand.

24. "Proceedings" would mean and include an action or prosecution and sometimes as meaning a step in an action and, therefore, it includes all steps taken in furtherance of prosecution, i.e., arrest, remand, interrogation and investigation. The Judicial Magistrate, First Class, 2nd Court, was, therefore, justified in passing an order u/s 267 of the Criminal Procedure Code and issuing warrant as per Form No 36 of Second Schedule addressed to the officer-in-charge of Central Prison, Nagpur, to produce before him the non-applicant accused for the purpose of proceedings, i.e., remand. The legislature has used the words "other proceedings and any proceedings under the Code" in section 267 of the Criminal Procedure Code and not judicial proceedings and, therefore, seeking production of the accused for remand u/s 267 of the Criminal Procedure Code cannot be faulted. There can be no quarrel over the decision in B.S. Rawat's case (cited supra) relied upon by Mr. Manohar, as what the Court observed was that the order u/s 267 of the Criminal Procedure Code cannot be passed to produce a person for the purpose of investigation before the agency which is engaged in the investigation; as in the said case, the warrant was sought for production of the accused before the Custom Officer for the purposes of investigation. Therefore, it cannot be said that the Magistrate was not competent to issue such a warrant of production of the accused confined or detained in a prison, before him, for the purposes of considering the request of the Investigating Officer to order his detention is police custody.

25. The decision of this Court and the observation made herein would enable the Revisional Court to consider the matter in proper perspective. We cannot ignore the importance of the fact that investigation has to be done with a sense of urgency and the Court should extend all possible assistance to the investigating agency, subject to the constitutional right and procedural safeguards available to an accused person, as the sphere of investigation lies in the hands of investigating agency. The jurisdiction of the Court does not extend to any stage before the police prefers a charge in exercise of their statutory right to investigate and normally the Court should refrain from interfering with the investigation, unless it is brought to the notice of the Court that there is any violation of fundamental rights of an accused person and or the investigation is done contrary to the procedural safeguards and by violation of the rights of an accused, thereby assuring the accused procedural justice.

26. The parties are, therefore, directed to appear through their Counsel before the Court of First Additional Session Judge, Nagpur, tomorrow, the 20th day of July, 1999, at 3.00 p.m. The First Additional Sessions Judge, Nagpur, is directed to forthwith dispose of the Concerned Revision Application in accordance with law.

27. Rule is made absolute in the of aforesaid terms with no order as to the costs. C.C. expedited.

28. Order accordingly.