

(1984) 12 DEL CK 0041

In the Delhi High Court

Case No : Criminal Writ Appeal No. 20 of 1983

Sunil Batra

APPELLANT

Vs

Commissioner of Police, Delhi

RESPONDENT

Date of Decision : 18-12-1984

Acts Referred:

Citation : (1984) 3 Crimes 771 : (1985) ILR Delhi 694

Hon'ble Judges : S.B. Wad, J;Rajinder Sachar, J

Bench : Division Bench

Advocate : Usha Kumari and S.T. Singh, for the Appellant;

Judgement

Sachar, J.

(1) The proceeding in this case were initiated on receipt of an application from jail pointing out-that a large number of persons are unjustifiably arrested by the Police apparently u/s 107 Criminal Procedure Code without complying with the provisions of law and that they are kept in jail without being offered the facility of being released on bail. It was also stated that none of these persons were supplied the reasons for which apparently the proceedings were being taken against them. We then issued notice to the Delhi Administration.

(2) In the reply filed the stand taken was that the procedure laid down u/s 111 and 114 Criminal Procedure Code was being followed. It was denied that any arrest was being made by procedure other than that permitted by law.

(3) A further affidavit was filed by the applicant dated 2 5/11/1983 in which another objection was taken that the prisoners who are committed to jail custody u/s 114 Cr. Pc are not supplied the reasons and the warrants which accompanied them are in blank form which is the violation of the statute. Further affidavit were filed by persons who were in jail taking the stand that they were not guilty and that they have been wrongly picked up by the police and remanded to judicial custody, that they do not have knowledge of the bail order having been passed in their favor and in any case could not have furnished bail because they

have no resources nor any friends who could do so. We, Therefore, directed by order dated 6/02/1984 to have the full record and tiles of some of the cases which have been mentioned in the application C.M. 2119183 filed by the petitioner. Some of these files were produced on the next date. It was found "hat some of the cases by them had been discharged. In that view the Court did not see any useful purpose being served by going into those matters and that is why we directed on 5/04/1984 that the file of the case of Balbir Singh to be produced. We had also directed a further affidavit to be filed by the respondent. explaining the procedure followed by it in such like cases. A further affidavit dated 13-9-84 Has been filed by Krishan Gopal, Assistant Commissioner of Police/ Special Executive Magistrate who was dealing with the said case. The records shows that Balbir Singh was proceeded against and arrested under Section. 107/151 on 9/10/1983 at 7-15 P.M. He was produced before the Special Executive Magistrate, Haus Khas on 10th October, 1983 when a notice u/s 111 Criminal Procedure Code was served on him and he was also ordered to furnish a security bond for his appearance as well as to keep peace till the conclusion of enquiry u/s 116(3) Criminal Procedure Code . He remained in judicial custody till 16/11/1983 when he was released on security being furnished. It may be noted that though Balbir was present on 27-12-1983, he was absent on, all the next dates. As a matter of fact even bailable and non-bailable warrant were issued for his presence ultimately he was discharged in his absence on 9-5-1984, as proceedings had become time barred u/s 116(6) Criminal Procedure Code .

(4) Section 107 Criminal Procedure Code empowers the Executive Magistrate to require a person to show cause for keeping peace for such period not exceeding one year as the Magistrate thinks fit. Section 111 requires such a Magistrate that when he requires any person to show cause he shall make an order in writing stating forthwith the statement of information received, the amount of bond to be executed ,the term for which it is to be enforced and the number and the class of sureties. If the person in respect of whom such an order is made is present it shall be read over to him. If such a person is not present the Magistrate shall issue a summon requiring him to appear vide Section 113 Cr. PC. Every summon or warrant issued u/s 113 shall be accompanied by a copy of the order made u/s 111 and such copy shall be delivered by the officer requiring or executing such summons or warrants to the person served with or arrested under the same vide Section 114, Section 116(3) empowers the Magistrate if he considers that immediate measures are necessary for the prevention of breach of peace that he may for reasons to be recorded in writing direct the person in respect of whom the order u/s 111 has been made to execute a bond for keeping peace until the non-conclusion of the enquiry and may detain him in custody until such bond is executed.

(5) It will be seen that Legislature has provided a fairly detailed reasonable mode to see that the liberty of a citizen is not unnecessarily or unduly curtailed. Procedurally the Code does provide for the protection of a citizen by requiring the reasons for proceeding against him to be supplied to him u/s 111 read with

Section 114 Criminal Procedure Code and also for reasons to be recorded by the Magistrate if he requires the person to execute a bond in terms of Section 116(3). The unfortunate aspect however, is that most of the time the procedure which is provided in the Code is observed more in the breach. Also unfortunately quote sometime the power u/s 107 are invoked quite rashly thus causing great deal of avoidable suffering. The- Executive Magistrates are also police officers and by their very nature and training find it difficult to demarcate their dual functions as the custodians of law and order and as a protector of the human liberty. That executive and judicial functions should be merged in one functionary is a sad commentary 34 years after the Constitution came into force considering that Article 50 In the Chapter of Directive Principles of the Constitution has directed that the State shall take steps to separate judiciary" from the executive in the public services of the State."

(6) Unfortunately, however, the responsibility for vesting the powers u/s 107 exclusively in the Executive Magistrate is to be laid at the doors of the Law Commission which in its 41st Report published in 1969 recommended that the functions in this section should be assigned to the Executive Magistrate and that it is not necessary to invest the Judicial Magistrates with the concurrent powers. How one little gate-way which destroys the concept of separation of executive and judiciary can result in wider power being snatched by the Executive is clear from the history of legislation of Sections 108 to 110 of the Criminal Procedure Code. In that very report (41st) the Law Commission had noted that as power under sections 108 to 110 affects the liberty of the person against whom the proceedings are instituted, it is desirable to vest those powers exclusively in judicial magistrates. The Law Commission also did not think that the powers under these sections need be vested concurrently in both the judicial and executive magistrates although this was the position in some States at present. According to the Law Commission under a statutory scheme of separation, such a system is likely to create confusion and even otherwise has nothing to commend it. The Law Commission, however, did not realise that having provided an opening that the proceedings u/s 107 which also deal with liberty of citizens, may vest in the Executive Magistrates, this argument had lost its punch. Though in the unamended Code of Criminal Procedure 1973 Sections 108 to 110 require proceedings to be taken before a judicial magistrate of the first class the said part was amended by Act No.63180 by substituting the word "Executive Magistrate" for a "Judicial Magistrate". It is indeed ironical that though the legislature may seek to justify the provision of a "Executive Magistrate" in Section 107 by seeking aid from the report of the Law Commission, yet at the same time it should have overturned it when amending the Code in 1980 and thus acting against the specific recommendation of the Law Commission with regard to Sections 108 to 110 Criminal Procedure Code . The position in Delhi ,however, is even worse. In the other States where the office of Police Commissioner does not exist, the exercise of power u/s 107 is atleast exercised by the Executive Magistrate who belong to administrative service and is not

concerned with day to day maintenance of law and order, and may Therefore, make an attempt to bring an objective approach to the problem. But in Delhi we are governed by the Delhi Police Act, 1978 which is in force since 1-7-78. Section 70 of the said Act authorises the Central Government to empower the Commissioner or any other subordinate to the Commissioner of Police not below the rank of an Assistant Commissioner of Police to exercise and perform in relation to Such area in Delhi as may be specified in the notification, the powers and duties of an Executive Magistrate under such of the provisions of the said code as may be specified in the notification ..In exercise of the said powers the Government of India issued a notification No. So 422 published in the Gazette of India, Extraordinary Part II, dated 20-11-1978 empowering every Additional Commissioner of Police, Deputy Commissioner of Police, Additional Deputy Commissioner of Police and Assistant Commissioner of Police to exercise and perform in relation to all area in the Union Territory of Delhi the powers and duties of an "executive magistrate under Sections 107, 111, 113, 115, 116, 117, 118 and 121. Thus in Delhi the capital of Republic of India proceedings which have serious repercussions concerning the liberties of the citizens of India are to be controlled by police officers exercising the powers of executive magistrates. A more serious in-road on the concept of separation of powers between instrumentalities States, namely the judiciary and executive is hard to imagine though unfortunately the ancestry for then situation may be traced back to peculiar recommendation of law commission report. But whatever the source, the seriousness of the situation is not lessened. Need one be surprised at the consequences which must inevitably flow from such a retrogressive step.

(7) The record of Balbir Singh which has been produced was commented upon by the applicant and the counsel Mrs. Kumar who at our request was appearing amicus curie to have been tailored since the last time the file was produced. We do not feel the necessity to go into this aspect especially now that he has since been discharged though we must comment that the papers produced as they do not produce a happy impression on our mind. Apparently, the notice under Sections 107 and 111 does give the detail of a quarrel by the said Balbir as the reason for proceeding against him. This order is dated 10/10/1983 and is allegedly served on Balbir on the same day when he was stated to be in custody of the police. It appears that most of the time resort is also simultaneously made to Section 151 Criminal Procedure Code . which empowers the police officer to arrest a person without Warrant if it appears to such officer that such person has a design to commit any cognizable offence. Apparently the police arrest a person u/s 151 Criminal Procedure Code then to produce him before the Magistrate who on the said report purports to give him a notice u/s 111 and also at the same time calls upon him to execute a bond u/s 116(3). The file of Balbir Singh shows that on that date i.e. 10/10/1983 he was asked whether he had received the order u/s 111 and whether he has understood the order and to both of them the answer is yes. The peculiarity and the surprising feature of this record is that the whole Performa is cyclostyled. Even the answers whether the notice u/s 111 has

been served on him is already cyclostyled with only one answer namely "yes". It is rather curious because this would seem to show that the cyclostyled forms have already put the answers of the persons arrested as "Yes". This does show the unsatisfactory manner in which the proceedings are taking place. One could understand a cyclostyled form containing questions, especially as possibly a number of persons may have to be examined. But then proceedings must show that the Executive Magistrate has applied his mind. There should at least be a column containing answers both yes "and "no" because it is the answers of persons which has to be put there and it cannot always be assumed that the answer is "yes" in all the cases as seems to be the practice as indicated in the cyclostyled form. Moreover, the form is in English and the person arrested Balbir Singh apparently was totally illiterate because his thumb impression is there meaning that he could not ever write any of the Indian languages. The questions posed by the applicant cannot be brushed aside as to what kind of a proper procedure was being followed by the Executive Magistrate when disposing of the matter like this. We then have on the record the statement allegedly made by the police officer as to how and why he arrested Balbir Singh and a nothing that opportunity for cross examination was given but none was availed of. This again is a strange phenomenon. A person brought in police custody could not have been in a position to engage a counsel. And to expect him to cross-examine himself would be to make a mockery of his rights to have a fair trial. The record also discloses that proceedings are initiated without any seriousness it appears the purpose is to arrest on a particular day. "The immediate purpose having been served the case is forgotten and in the course of time both the police and the Magistrate lose sight of him and ultimately, as is clear from the record of this case the proceedings are terminated without any proceedings having taken place. One can well imagine the harassment and the inconvenience and the loss of liberty that is occasioned to the person concerned. This aspect needs to be looked into seriously. But then all this aspect is related to there being no separation of executive and judicial functions. In our view, it is necessary that when the person is produced before the Magistrate should be supplied the reasons why the Magistrate wants a "bond to be executed. In our view it is also absolutely necessary that when a person is sent to jail on his inability to pay the surety, the warrant that is sent must be accompanied by a copy of the order made u/s 111. The Superintendent of Jail should see to it that when any warrant is received it must contain the reasons as required by Section 111 Cr. P.c as is the requirement of Section 114 Cr. P.C. The Superintendent of Jail and his staff should satisfy themselves that this requirement is satisfied because if it is not then it is a moot question whether such a custody would be legal at all. We need not in these proceedings go any further because as all the applicants who had applied and whose names had been given are no longer now being proceeded against and Therefore, no directions are necessary. But we are very anxious, to see that the various lacunae and procedural violations must stop at once. We hope immediate appropriate steps will be taken by the appropriate authorities. Let A copy of this order be sent to the Delhi Administration and to the Commissioner of

Police ,Delhi so that proper directions and remedial measures are taken by the authorities concerned at the earliest.

(8) The District Judge, Delhi as a part of his normal functions ,is expected to ..tihar jail regularly. We hope that in his normal visits to Jail he would keep in his view the observations made in the judgment and see that the violation of law and statute are not permitted to continue. A copy of this judgment should also be sent to him.

(9) We also give our thanks to Mrs. Kumar who appeared as amicus curiae to assist the court. With these observations the petition is disposed of.