

(2003) 01 PAT CK 0094
In the Patna High Court
Case No : Criminal Writ No. 354 of 2002

Suraj Singh alias Suraj Bhan Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 03-01-2003

Acts Referred:

Citation : (2003) 01 PAT CK 0094

Final Decision : Dismissed

Judgement

S.N. Jha, J.—This writ petition has been filed for release of the Petitioner, in custody in connection with Ahiyapur P.S. Case No. 33/97 u/s 302 of the Indian Penal Code and Section 27 of the Arms Act, by a writ of habeas corpus.

2. In the occurrence giving rise to the said case four persons were killed in broad day light at 1 P.M. in the town of Muzaffarpur. According to the prosecution case four persons including the Petitioner armed with A. K. 56 rifle, A.K. 47 rifle and Carbine chased the victims travelling in Maruti car on a Gipsy and fired shots as a result of which the driver suffered injury and the vehicle stopped. All the four accused (including the Petitioner) thereafter got down from their Gipsy and started firing at the victims indiscriminately resulting in the death of four persons.

3. It may be mentioned here that the Petitioner had earlier unsuccessfully moved this Court for bail four times. Against two of the orders he had also moved the Supreme Court but without success. While rejecting the prayer for the fourth time on 23.4.2002 this Court directed the Chief Judicial Magistrate, Muzaffarpur to fix a firm date for passing necessary order on the point of commitment. The Court directed that the date so fixed should be intimated to the Superintendent, Adarsh Central Jail, Beur, Patna where the Petitioner was supposedly lodged, well in advance with a corresponding direction to the Jail Superintendent to produce him and other accused in Court. The Court observed that the exercise should be completed within two months from the date of receipt of a copy of the order. This order too was challenged by the Petitioner before the Supreme Court in SLP (Cr.) No. 2100/ 2002 which was dismissed as withdrawn.

4. It is relevant to mention here that the above said order was passed in view of the plea of the Petitioner that till date the case had not been committed to the Court of Session. The report submitted by the Chief Judicial Magistrate, Muzaffarpur indicated that it was due to non-production of accused in Court. It is an admitted position that the Petitioner was not produced on the date fixed by the court below i.e. 27.5.2002 or on subsequent dates and, indeed, till the date of final hearing of this case, as a result of which the order on the point of commitment has so far not been passed and order of this Court has not been complied with.

5. It may also be mentioned here that the above said occurrence took place on 20.2.97. However, the Petitioner stayed away from the Court for more than a year. On 22.5.1998 he filed application in the Court of Chief Judicial Magistrate, Muzaffarpur stating that he was in judicial custody in Bihar Sharif/Nalanda Jail in connection with Laheri, P.S. Case No. 61/98 of Nalanda district and he may be remanded in the present case i.e. Ahiyapur P.S. Case No. 33/97. On the said application on 22.5.98 itself the Chief Judicial Magistrate, Muzaffarpur directed that production warrant be issued to the Nalanda Jail for production of the Petitioner on 5.6.98. The Court was informed that the Petitioner was lodged in Adarsh Central Jail, Beur, Patna, and accordingly on 27.8.98 a fresh production warrant was issued to the Beur Jail for Petitioner's production on 7.9.98. Fresh production warrant was accordingly issued on 29.8.98 and on 7.9.98 the Petitioner was produced in the Court of Chief Judicial Magistrate, Muzaffarpur and he was remanded to judicial custody. A custody warrant was also issued for his production on the next date i.e. 19.9.98. This was his last production.

6. The case of the Petitioner is that on account of his non-production and in absence of remand order his continuance in detention is illegal and this Court should set aside his detention and release him. It is relevant to mention here that during the intervening period chargesheet was submitted in the case on 20.11.98 and on 4.1.99 the Chief Judicial Magistrate, Muzaffarpur took cognizance for offences under Sections 302, 307, 379/34 of the Indian Penal Code and Section 27 of the Arms Act.

7. It was submitted on behalf of the Petitioner that while the production of an accused may be dispensed with in certain situations and therefore, the non-production by itself may not vitiate the detention, he cannot be kept in custody without order of remand and as no remand order was passed with respect to the Petitioner, his detention must be held to be illegal. On account of omissions on the part of the Respondents the Petitioner is languishing in jail for last four years. It was submitted that the right to speedy trial has been held to be a fundamental right of an accused. On the point of illegality of the custody, reliance was placed on Ram Narayan Singh Vs. The State of Delhi and Others, , Chaganti Satyanarayana and Others Vs. State of Andhra Pradesh, , State through C.B.I. Vs. Dawood Ibrahim Kaskar and others, , Jitendra Mishra v. State of Bihar 1976 BBCJ 644 and Chandradeep Rai and Anr. v. State of Bihar 1976 BBCJ 645 . On

the point of speedy trial reliance was placed on the cases of Khatri and Others Vs. State of Bihar and Others, and Kadra Pehadiya and Others Vs. State of Bihar,

8. On behalf of the State it was submitted that from the ordersheet of the court below it will appear that the Petitioner was produced in the court below on 7.9.98 and remanded to the custody with a direction for his production on 19.9.1998 under custody warrant. On 11.11.98 the prayer for bail was rejected. On 4.1.99, after submission of the chargesheet cognizance was taken and the case was kept in the personal file of the Chief Judicial Magistrate for commitment. As before, production warrant was issued for production of the accused, in custody, on 5.2.99. However, neither on 5.2.99 nor any date thereafter the Petitioner was produced despite successive production warrants issued on subsequent dates. It was submitted that in terms of Section 209(a) of the Code of Criminal Procedure as amended by Act 45 of 1978, the Magistrate is empowered to remand the accused to custody until commitment is made. The instant case is admittedly in the stage of commitment and production warrant was issued only for this purpose. It was submitted that where the accused is in custody, the Magistrate has no option but to direct his production so that he may perform his duties u/s 207 or 208, as the case may be, and commit the case to the Court of Session. Where the accused is not produced despite production warrants, his custody cannot be said to be illegal.

9. The Code of Criminal Procedure, 1973 as it stood up to 17.12.1978 contained three provisions of remand-under Sections 167(2), 209(b) and 309(2). Section 167(2) refers to the stage of investigation while Section 309(2) refers to the stage of enquiry and trial. Section 209(b) also refers to the stage of trial-to use the words of the Section, "during, and until the conclusion of, trial". From a conjoint reading of Sections 309(2) and 209(b) of the Code it would appear that whereas the provisions of Section 309(2) are general provisions applicable to enquiry and trial where the Court finds it "necessary or advisable to postpone the commencement, or adjourn, any enquiry or trial", the provisions of Section 209(b) can be invoked only in cases exclusively triable by Court of Session. Section 309 occurs in the Chapter titled "General provisions as to enquiries and trials". Section 209 on the other hand is part of the Chapter "commencement of proceedings before Magistrates". Indeed, the very heading of Section 209 is "Commitment of case to Court of Session when offence is triable exclusively by it". Thus the remand provisions u/s 209(b) relating to remand during the stage of trial are special provisions applicable to the cases triable exclusively by Court of Session. Once the trial has commenced and it becomes necessary or advisable to postpone the same, while doing so, that Court may remand the accused, if in custody, u/s 309(2).

10. Another remand provision was added by Act 45/78 with effect from 18.12.78 to cover the stage of commitment by amending Clause (a) of Section 209 of the Code of Criminal Procedure. The commitment proceeding as contained in Section 207A of the Old Criminal Procedure Code, 1898 continues to be in the nature of

enquiry as held by the Supreme Court, for example, in the case of State of Uttar Pradesh Vs. Lakshmi Brahman and Another, Though the term en-quiry" occurs in Section 309(2) as well and therefore, the remand provisions are applicable to the stage of enquiry under that Section, the Legislature felt that a separate and specific provision be made with respect to commitment proceeding conferring power on the Magistrate to remand an accused until commitment is made. Before noticing the amendment-which has bearing in the present case-it would be appropriate to refer to the aims and objects of the amendment, so far as relevant, as under:

Clause (a) of Section 209 is being replaced by a new clause which clarifies that the commitment is to be made after complying with the provisions of Section 207 or 208 and that the committing court will also have the power to make an order for the remand of the accused in custody until the commitment has been made. This is intended to remove the difficulty actually experienced in cases where the committing Magistrate is unable to commit the accused on the same day. (S.O.R. Gazette of India dated 15.5.78 Part-II, Section 2, Ext. Page 669) Clause (a) of Section 209 as it stood prior to the amendment was as under:

... he shall-

(a) commit the case to the Court of Sessions. After the amendment, by Act 45/78, Clause (a) now reads as under:

he shall-

(a) commit, after complying with the provisions of Section 207 or 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made.

11. In Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others, the Supreme Court held that the committing Magistrate exercises judicial functions u/s 209 of the Code. The Court also held that Section 209 obliges the Magistrate to commit the case to the Court of Session when it appears to him that the offence is triable exclusively by the Court of Session. Therefore, the Magistrate has to be satisfied that offence is prima facie disclosed and that the offence so disclosed is triable exclusively by the Court of Session. If no offence is disclosed, the Magistrate may refuse to take cognizance of the case or if the offence disclosed is one not triable exclusively by the Court of Session he may proceed to deal with it under other provisions of the Code. Where, however, offence so disclosed is triable exclusively by the Court of Session he has no option but to commit the case to the Court of Session for trial. To that extent the committing court does discharge a judicial function.

12. Now adverting to the instant case, as seen above, after final form/ chargesheet was submitted against the Petitioner and other accused, on 4.1.99 the Chief Judicial Magistrate, Muzaffarpur took cognizance for offence under

Sections 302, 307 of the Penal Code, besides other offences-triable exclusively by the Court of Sessions. u/s 209(a) of the Code of Criminal Procedure, therefore, he was under a mandate to commit the case to the Court of Session for trial. Section 209 says that in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall after complying with the provisions of Section 207 or 208, as the case may be, commit the case to the Court of Session. In the instant case, however, the accused was not in attendance on production or otherwise. It was, for this purpose that the Chief Judicial Magistrate issued production warrant by the same very order dated 4.1.99. It is not in dispute that despite the said order, reiterated in the subsequent orders, the Petitioner was never produced for more than three years, not till date. The point for consideration is whether the Petitioner can claim benefit from his non-production.

13. The submission of the counsel for the Petitioner was that while actual production may not be essential and the same may not vitiate the custody, remand is a must. Answer to the submission can be found in the second part of Section 209(a). It would appear from a close reading of the Section, already quoted above, that Section 209(a) is in two parts. The first part refers to commitment and the second part, refers to remand, This would be clear by reading the Section in the following manner:

... he shall-

commit, after complying with the provisions of Section 207 or 208, as the case may be, the case to the Court of Session,"

he shall-remand the accused to custody until such commitment has been made.

As observed above, the order of commitment can be passed where the accused is in attendance-on production or otherwise-after complying with the provisions of Section 207 or Section 208, as the case may be. The presence of the accused thus is essential. Where the accused is in custody but not produced before the Magistrate, he has no option but to issue production warrant for his production. The question is where despite successive production warrants the accused is not produced, can he claim any benefit? The second part of Section 209(a) in my opinion, would cover such a case. If this interpretation is not given, it would enable the resourceful accused having liaison with unscrupulous jail officials securing release even in heinous cases though his prayer has been rejected on merit by the competent Court. It is apparent that Magistrate cannot commit the case to the Court of Session which he is obliged to do in cases triable exclusively by the Court of Session without ensuring compliance of Section 207 or Section 208, as the case may be. Section 207 provides for supply of copies of police report and other documents in cases instituted on a police report to the accused while Section 208 provides for supply of copies of the statements and documents to the accused in cases instituted otherwise than on a police report. But this can

be done only when the accused is in attendance. Thus, it is only that the case can be committed to the Court of Session. The Magistrate is thus obliged, further, to secure the presence of the accused. It was for this purpose that the Chief Judicial Magistrate, Muzaffarpur issued production warrant while taking cognizance by order dated 4.1.99. It is unfortunate that his orders have been treated with an impunity by the concerned officials of the Adarsh Central Jail, Beur, Patna. This, indeed, happened even after a firm direction of this Court with which the Supreme Court did not interfere.

14. It is well settled that there are only three stages in a criminal case, namely, investigation, enquiry and trial. In the case of *Rabindra Rai Vs. State of Bihar*, a Full Bench of this Court held that after submission of the chargesheet, it may not be necessary for the Magistrate to pass an express or formal order saying that the cognizance has been taken. The moment the Magistrate looks into the chargesheet and proceeds with the next stage of the proceeding, cognizance is deemed to have been taken. The stage of investigation in the instant case undoubtedly came to an end with the submission of the chargesheet and the stage of enquiry commenced in the form of commitment proceeding. The commitment proceeding would come to an end only with the commitment of the case for which provisions of Section 207 or 208 read with 209 of the Code have to be complied with. Setting the Petitioner free on technical ground even though his prayer for bail is rejected on merit up to the Supreme Court, would be a travesty of justice. I say so after being prima facie satisfied that the Petitioner has managed to remain out of reach of the Court by bringing not only the officials of the Adarsh Central Jail, Beur, Patna but also the concerned officials of the State Secretariat for which I propose to issue contempt notice to them for wilfully circumventing the order of this Court dated 23.4.2002 (*supra*).

15. It may not be out of place to mention that the Petitioner is an MLA and he seems to a person of immense clout. The instant case i.e., *Ahiyapur P.S. Case No. 33/97* was instituted on 20.2.97. After absconding for more than one year, on 22.5.98 he was supposedly taken into custody in a petty case in another district being *Laheri P.S. Case No. 62/98 u/s 379 of the Indian Penal Code* when he filed application to remand him in the present case. The Petitioner's so called arrest in connection with a case u/s 379 of the Penal Code in another district appears to be stage-managed. Be that as it may, there is no dispute about the validity of his remand by order dated 7.9.98 in the present case. There is also no dispute about validity of the order dated 4.1.99 by which while taking cognizance of the case, production warrant was issued for production of the Petitioner and others, in custody, on 5.2.99. The said order, in my opinion, in the facts and circumstances of the case, would fall within the ambit of the second part of Section 209(a) of the Criminal Procedure Code. The case is in the stage of commitment and the issue of production warrant will be deemed to be remand of the Petitioner until the commitment is made.

16. A Division Bench of this Court in the case of *Mishri Yadav and Anr. v. State of*

Bihar 1998 (1) PLJR 915 seems to have taken more or less the same view which I have taken above regarding the scope of Section 209(a) of the Code. The relevant observations at page 917-918 of the report may be quoted as under:

A combined reading of both the provisions would show that prior to replacement of Section 209(a) by Act 45, a Magistrate was only required to commit the case to the court of Session, subject to the provisions of the Code relating to bail and remand to the accused. But now the newly replaced Clause (a) clarifies that commitment of a case is to be made after complying with the provisions of Section 207 or 208 of the Code and while doing so, the committing court will also have the power to make an order for remand of the accused to custody until the commitment is made. In our view, probably having noticed similar problems in other cases, the Legislature to remove the difficulty, experienced by the committing Magistrates, where due to such requirements commitments could not be made on the day of filing of the chargesheet. Section 207 of the Code requires a Magistrate to furnish police report and other papers, as detailed in that Section, without any delay to the accused. Similar compliance will be necessary with regard to the provisions of Section 203 in a case instituted otherwise than a police report at the time of issuing processes, provided the offence is exclusively triable by a court of Session. The provisions of Section 209 pre-supposes that all the materials, which are required to be furnished to the accused are already available before the Magistrate, the moment a chargesheet was filed by the police. But there may be cases, where certain requirements of Section 207 or Section 208 of the Code are still lacking. Therefore, to meet such a situation, the Magistrate will have no option but to record order of remand until the commitment is made.

17. The decision in the case of *Chaganti Satyanarayan v. State of Andhra Pradesh* (supra), relied upon on behalf of the Petitioner was rendered in a different context, and the observations in paragraph 15 specifically relied upon refer to the period of remand not exceeding 15 days "in the whole" or "at a time" in the context of Section 167(2) and proviso to Section 309(2) Code of Criminal Procedure having no bearing on the present case. The decision in the case of *Ram Narayan Singh v. State of Delhi* (supra) is no different. The decision in *State through CBI v. Dawood Ibrahim Kaskar* (supra) was relied upon in support of the proposition that after the conclusion of the investigation remand can be made only u/s 309(2)-and for a period not exceeding 15 days in the whole or at a time. I have already dealt with this aspect of the case. Section 309 comes into play only after commencement of the enquiry or trial where the court finds it necessary or advisable to postpone the commencement or adjourn the same, from time to time and where he does so it may "by a warrant remand the accused if he is in custody". Section 209(a) of the Code envisages different stage of the case. Though commitment proceeding partakes the character of enquiry, it is so only for limited purpose. Until that stage is over and the case is committed to the Court of Session the remand of the accused must be held to be under that Section. As observed above, the remand provisions of Section 209(a) are special

provisions. It is well settled that special provision, if any, operates to the exclusion of the general provision. In the facts and circumstances, I have no difficulty in holding that the case of the Petitioner is covered by the second part of Section 209(a) of the Code of Criminal Procedure and the above decisions are of no avail to him.

18. The decisions of this Court in the cases of Jitendra Mishra v. State of Bihar 1976 BBCJ 644 and Chandradeep Rai v. State of Bihar 1976 BBCJ 645, rendered in the context of Section 309(2) also are of no relevance. The other decisions, Khatri v. State of Bihar (supra) or Kadra Pahadiya v. State of Bihar (supra) rendered on the point of speedy trial in the context of Articles 21 and 22 of the Constitution too have no relevance in the instant case. If the trial is held up, it is the Petitioner who is primarily to blame. It is difficult to believe that he was not being produced against his wishes. After this Court passed a peremptory order for his production he managed to be shifted to Delhi on medical ground. It is not known what kind of medical treatment the Petitioner is getting there. Be that as it may, circumstances of the case make me believe that had there been due cooperation with the Court, the trial might have been over by now. And it does not lie in the mouth of the Petitioner to make any grievance of the delay.

19. In the result, I come to the conclusion that the Petitioner does not deserve any relief in this writ petition which is accordingly dismissed.

Prithvi Narayan Yadav, J.

20. I agree.