

(1973) 10 GUJ CK 0006
In the Gujarat High Court

The State of Gujarat

APPELLANT

Vs

Patel Pramkhlal Gordhandas

RESPONDENT

Date of Decision : 30-10-1973

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 167, 167, 167(2), 344, 344

Citation : (1975) CriLJ 324 : (1974) 15 GLR 174

Hon'ble Judges : T.U. Mehta, J

Bench : Single Bench

Judgement

T.U. Mehta, J.—The main point which is involved in this Reference is whether while making order of remand of the accused "in custody" as contemplated by Section 344 of the Criminal Procedure Code, it is open to the Magistrate to remand the accused to the police custody or not. The contention of Shri Barot, who appeared on behalf of the accused is that the custody which is contemplated by Section 344 of the Code of Criminal Procedure, is only judicial custody and not the police custody, which the contention of Shri Nanavati. who appeared on behalf of the State, is that the custody contemplated by Section 344 of the Code is judicial as well as police custody.

2. In order to appreciate the contentions raised by the learned Advocates of the parties, it would be necessary to state shortly the facts relevant to this Reference. The prosecution case is that the opponent-accused has committed an offence of murder of one Bai Savita, whose dead body was found at a Dharamsala at Khedbrahma. The offence is said to have been committed somewhere between 2nd April, 1973 and 4th April. 1973. The complaint was lodged at the relevant police station by one head constable On 4th April, 1973, at about 2.50 p.m. After this complaint was recorded the police was in search of the accused, but could not arrest him immediately. Ultimately on 30th May, 1973, the accused voluntarily appeared before the Judicial Magistrate, First Class, Idar and made an application for enlarging him on bail. The Magistrate thereupon took the accused into his judicial custody and fixed the bail application for

hearing.

3. On the next day i.e.. on 31st May, 1973, the police applied to the learned Magistrate for remanding the accused to police custody. This application for remand was fixed for hearing on 1-6-1973. On that day, the advocate of the accused could not reach the court in time and, therefore, in his absence the matter was disposed of by the learned Magistrate who ordered the accused to be handed over to the police custody on remand for 3 days. After the learned Advocate of the accused reached the court, he applied to the learned Magistrate contending that the order of remand to the police custody from judicial custody was illegal. This application was fixed for hearing on 4-6-1973. In the meanwhile the remand period of 3 days already granted by the court was over and therefore, the police prayed for further remand. This prayer of the police was resisted by the accused on the ground that the Code of Criminal Procedure does not contain any provision empowering the Judicial Magistrate to hand over an accused person to the police custody on remand after he is already taken into judicial custody. The learned Magistrate heard both the parties on this question on 6-6-1973 and delivered his judgment on 22-6-1973 holding that he had no jurisdiction to order the remand of the accused to police custody after once he was taken in judicial custody.

4. Against this judgment of the learned Magistrate, the State approached the Sessions Court in revision. The learned Sessions Judge disapproved of the view taken by the learned Magistrate and has preferred to make this Reference by holding that the accused could have been remanded to police custody by the learned Magistrate u/s 344 of the Code of Criminal Procedure. The learned Sessions Judge has, however, held that this is not a case in which the provisions of Section 167 of the Criminal Procedure Code would apply. This is how this Reference has come to this Court .

5. So far as the detention and custody of an accused person are concerned, there are three relevant provisions in the Code of Criminal Procedure. These provisions are contained in Sections 61, 167 and 344 of the Code. Section 61 provides that the police cannot detain any person in its custody for more than 24 hours without obtaining a special order of the Magistrate to that effect u/s 167. Thus, according to this section, if an accused person is required to be kept in police custody for more than 24 hours, an order of the nearest Judicial Magistrate should be obtained by the Police u/s 167 of the Code. According to Section 167 it is not necessary that the Magistrate, to whom the Police would approach for detaining the accused person for more than 24 hours, should have jurisdiction to try the complaint in question, because, according to that section the accused can be forwarded to the "nearest Judicial Magistrate" for obtaining proper orders. But even this section stipulates that limitation upon the period for which the accused can be kept in police custody beyond 24 hours on orders by a Magistrate, because, Sub-section (2) thereof contemplates that the accused cannot be kept in police custody even on orders of the Magistrate for a period

exceeding 15 days in the whole. The third relevant section is Section 244 which finds its place in Chapter XXIV relating to general provisions as to Inquiries and trials. This section empowers the Magistrate having the jurisdiction over the case to postpone and adjourn inquiry or trial which is likely to take place before him. Sub-section (1-A) of this section, which is relevant for our purpose is in the following terms:"?

(1-A). If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the court may, if it thinks fit, by order in writing stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit. or such a time as it considers reasonable and may by 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.

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

This section contains an Explanation which is in the following terms:

Explanation: If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Thus, this section contemplates the cases wherein for a reasonable cause an inquiry or trial and postponement of the commencement of or adjournment of an inquiry or trial is necessitated. In such cases this section empowers the Magistrate to "remand the accused, if in custody" but such a remand of the accused person to custody under this section cannot exceed the term of 15 days at a time.

6. Now the contention which is raised on behalf of the accused by Shri Barot is that neither of these three sections has any application to the facts of the present case, because, none of these sections contemplates the cases wherein an accused person is required to be sent to police custody after he has already been received in judicial custody. According to Shri Barot Section 167 of the Code has no application to the facts of the present case, inasmuch as that section contemplates the cases wherein the concerned accused is arrested by the police and then forwarded to the Magistrate for continuing him in detention. Shri Barot further pointed out that even Section 344 of the Code does not apply to the facts of the present case because the custody which is contemplated by that section is the "judicial custody" and not the "police custody" According to Shri Barot. therefore, even if it is held that Section 344 of the Code applies to the facts of the present case, the most which the Magistrate can do is to remand the accused to judicial custody for 15 days at a time. Under the circumstances, contended

Shri Barot, the request of the police in this case to remand the accused to police custody is not entertainable as there is a lacuna in the provisions of the Criminal Procedure Code not to provide for a police custody after the accused is already taken into judicial custody.

7, The first question which arises to be determined is whether Section 167 has any application to the facts of this case, This section assumes some importance in view of the fact that two High Courts of our country have been of the opinion that even in cases wherein an accused person has voluntarily surrendered to judicial custody an order of remand of that accused to the police custody can be passed u/s 167 of the Criminal Procedure Code. Such a view has been taken by the Kerala High Court in *Velu Viswanathan and Others Vs. State Etc., (Ker)* and by Andhra Pradesh High Court in *State of Andhra Pradesh v. Golla Ramulu*, 1971 Cri LJ 1368 (Andh Pra). The learned Sessions Judge has been of the opinion that Section 167 of the Code would have no application to the facts of the case wherein the accused has voluntarily surrendered to the judicial custody and is not forwarded by the police to the Magistrate concerned for taking him on remand. After perusing the above referred two decisions. I am of the opinion that the view taken by the Kerala and Andhra Pradesh High Courts on this point is not acceptable. This is evident from the plain reading of the language employed by the Legislature in Section 167 of the Code. Reference to Sub-section (1) of this section shows that it contemplates the cases wherein the police is required to "forward the accused" to the concerned Magistrate. Sub-section (2) of this section, which contemplates the power of the Magistrate to authorise the detention of the accused in police custody for a term not exceeding 15 days in the whole, also refers to those Magistrates to whom the "accused person is forwarded under this section". Now it is evident that no accused person, who has voluntarily surrendered to the judicial custody can be "forwarded" to the concerned Magistrate by the police. The section is invariably connected with the provisions contained in Section 61 which authorises the police to detain an accused person for not more than 24 hours without the special order of a Magistrate. Thus, Sections 61 and 167 of the Code should be read together and if so done, it becomes quite evident that Section 167 has no application to the cases wherein the accused person has voluntarily surrendered to the judicial custody and is not "forwarded" by the police to the nearest judicial Magistrate.

8. The Kerala High Court has observed in the above referred case of *Velu Viswanathan* that in cases where the accused persons are not arrested by the police, but who surrendered before the Magistrate, the taking into custody of such persons by the Magistrate falls really u/s 167 of the Code. The learned Judges have been inclined to take this view because, according to them, if a contrary view is taken, a person who absconds and surrenders before a Magistrate without allowing himself to be arrested by the police, cannot be questioned at all by the police and in their opinion, the Legislature would never have intended such a consequence. With great respect to the learned Judges, who have taken this view, I find that this reasoning would not be acceptable in

view of very specific and plain language used by the Legislature in framing Section 167. This language shows that the provisions of this section apply only to those cases wherein the accused concerned could be "forwarded" by the police to the nearest Judicial Magistrate, The Kerala High Court has, in support of this view relied upon an Allahabad High Court decision in *Empress v. Ashraf Ali* ILR 1884 All 129. In my opinion the facts of that Allahabad decision show that it cannot govern the facts of the present case. In the Allahabad case the accused had escaped from the police custody and then surrendered himself to the judicial custody. It was in view of these facts that the court held that the police custody of the accused continued and Section 167 applied. In my opinion, therefore, the Allahabad decision would not be of any help in the case before me. So far as Andhra Pradesh decision is concerned, it gives no reasoning whatever for holding that Section 167 of the Code would have any application to the facts which are found in the instant case. The learned Single Judge of the Andhra Pradesh High Court, who has decided this case, has rather relied upon Sub-section (3) of Section 167 which requires the Magistrate sanctioning detention of the accused in police custody to record his reasons for so doing. It is difficult to see how this Sub-section (3) of Section 167 would in any manner be helpful in showing that the provisions of that section apply even to the cases wherein the accused is not arrested or detained by the police.

9. To conclude therefore, I agree with the learned Sessions Judge that Section 167 has no application to the facts of this case.

10. Then the question which arises to be considered is whether the learned Magistrate had any jurisdiction to remand the accused to the police custody u/s 344 of the Code, The relevant portion of this section is already quoted by me in the foregoing portion of this judgment. It is by now a settled position that Section 344 of the Code applies even at a stage when the case is under police investigation and an inquiry or trial thereof has not yet commenced before the court. This is evident from the fact that Section 344 of the Code contemplates the postponement of the commencement of the inquiry or trial. This particular aspect of the matter does not admit of any further discussion in view of the decision given by the Supreme Court in *A. Lakshmanarao Vs. Judicial Magistrate, First Class, Parvatipuram and Others*, wherein it is held that Section 344 of the Code also covers the stage prior to the commencement of inquiry. Supreme Court has sought support to this view from the Explanation which is attached to this section. It, therefore, follows that Section 344 of the Code applies as effectively to the stages prior to the commencement of inquiry or trial as to the stages subsequent to the commencement of the inquiry or trial. In other words, provisions of Section 344 of the Code do apply even when the case is pending the investigation by the police.

11. So far there is no dispute about the interpretation of Section 344. Shri Barot has, however, contended that even if it is held that Section 344 of the Code applies even at a stage when the case is pending the investigation of the police,

there is no warrant for the view that the custody of the accused which is contemplated by Section 344 includes the police custody also. According to Shri Barot if the court while using its powers u/s 344 of the Code wants to utilise this power to remand the accused to custody, it can remand him only to the judicial custody and not to the police custody and if this is so, the learned Magistrate was right in holding that he had no jurisdiction to remand the accused to police custody u/s 344 of the Code. In support of this contention Shri Barot has relied upon the decision given by a Full Bench of Delhi High Court in *Ajit Singh and Another Vs. The State*, and by a Division Bench of Trayancore-Cochin High Court in *In Re: Kunjan Nadar*, .

12. As against this, it was contended by Shri Nanavati, on behalf of the State, that the custody, which is contemplated by Section 344 of the Code, is judicial custody as well as police custody and there is nothing in the language of the section which would require the court to confine the meaning of this word only to judicial custody. In support of his view, Shri Nanavati has referred to certain observations made by Division Bench of Kerala High Court in the above referred decision of *Velu Viswanathan*.

13. Before discussing the judicial decisions above referred to it would be proper to note that there is nothing in the language of Section 344 of the Code to suggest that the custody which is mentioned in this section is only the judicial custody. If again a reference is made in this connection to Sub-section (1-A) of the section, it will be evident that if for any reasonable cause including the absence of a witness it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the court may postpone or adjourn the same for such time as it considers reasonable and may by a warrant remand the accused "if in custody". This Sub-section does not say that the custody which is referred to above should be either a judicial custody or a police custody. The first proviso which is attached to this Sub-section says that the remand of an accused to custody should not exceed 15 days at a time. Here also the word "custody" is not exclusively meant to be a judicial custody. Now if once it is held that this section has full application even at a stage wherein the matter is pending the investigation by the police, it cannot be said that the accused concerned should necessarily be in judicial custody. He is equally likely to be in police custody at the time when postponement of the commencement of the inquiry or trial is required to be ordered. In view of that the court's powers to remand the accused would extend to judicial as well as police custody, and this would be especially so when there is not even the most indirect indication in this section to suggest that the custody, which is referred to therein, is only the judicial custody.

14. Shri Barot however, contended that if it is held that Section 344 of the Code contemplates the remand of the accused even to police custody for a period of 15 days at a time, it may result in a situation wherein an accused person may continue to remain in police custody for a much longer period than 15 days, and

if this be so. the purpose of limiting the period of police custody to 15 days under the provisions of Section 167 will be completely lost. This contention of Shri Barot is not acceptable, because, Sections 167 and 344 operate in totally different fields. If again a reference is made to the provisions of both these sections, it will be found that Section 167 contemplates cases wherein a person is arrested and detained by the police and is forwarded to the nearest judicial Magistrate for detaining him for a period which is more than 24 hours. u/s 167, it is not necessary that the Magistrate ordering the detention of the accused in police custody for more than 24 hours, should have jurisdiction to decide the case, against the accused. It is thus evident that Section 167 contemplates urgent cases in which the police can detain an accused person in their custody for more than 24 hours without approaching the Magistrate who would have jurisdiction to try the matter. Such a Magistrate cannot order the detention of the accused in police custody for more than 15 days. But if once the case is brought before the Magistrate, who has jurisdiction to try the matter, the Legislature has definitely conferred wider powers of remand either in police custody or in judicial custody because the Magistrate concerned has got jurisdiction to decide the case finally and is, therefore, competent to pass proper orders after applying his mind to the merits of the case. The Legislature, therefore, seems to have advisedly made the distinction as between those cases wherein the nearest Judicial Magistrate not necessarily having the jurisdiction over the matter, is approached and the cases wherein the Magistrate, who is competent to try the case is approached. In the latter type of cases the Magistrate can take cognizance of all the facts of the case and would be able to apply his mind judiciously on the question whether remand of the accused to the police custody is necessary or not. Therefore, it follows that limitation of 15 days, which is contemplated by Section 167 of the Code, would not have any relevance to a case when, it falls u/s 344 of the Code. In a fit case when the court acts u/s 344 of the Code, the court may find it necessary to keep the accused in police custody even for a period which is greater than the period of 15 days contemplated by Section 167 of the Code. It is for this reason that the Legislature has avoided to qualify the term "custody" and thereby to confine it only to the judicial custody.

15. Now so far as Delhi and Travancore-Cochin decisions on which reliance is placed by Shri Barot, are concerned, I find that they are not at all helpful in deciding the controversial point. It is undoubtedly true that in both these decisions the High Courts have held that the word "custody" appearing in Section 344 of the Code refers only to "judicial custody" and not to "police custody". But on perusing these decisions, I find that the proposition is not supported by any convincing reasons. I will, therefore presently touch this aspect of the matter.

16. So far as Delhi decision is concerned the question which arose before a Full Bench of that High Court was whether after the period of further detention contemplated by Section 167 of the Code was over, any order of remand could be passed u/s 344 of the Code if charge-sheet u/s 173 of the Code was not forwarded to the Magistrate empowered to take cognizance of the offence. In

other words, the question which was agitated in that case was whether provisions of Section 344 of the Code could be invoked before the charge-sheet against the accused was filed by the police. The court answered this question in the affirmative but while answering this question the court also observed as under:

It may also be mentioned that the accused has to be remanded u/s 344 not to police custody but to judicial lock up.

There is nothing in the reported decision to show that any question was raised before the learned Judges of the Full Bench of Delhi High Court to the effect that the accused concerned could be remanded u/s 344 of the Code to the police custody or not. Since this question was not agitated before the Court, the above observations are obviously in the nature of obiter dicta. Nonetheless, these observations would have assumed greater weight had there been some discussion going to show the reasons which induced the learned Judges to come to such a conclusion. But since I find that beyond a bare statement that the custody should be judicial custody and not the police custody, there is no further discussion of the point, this decision is not found to be of any help to me in interpreting the provisions of this section.

17. So far as Travancore-Cochin decision is concerned, it has taken the view that the word "remand" as used in Section 344 of the Code means "remand to the custody in a judicial lock up or jail during the postponement or adjournment of an inquiry or trial". In that case it was contended before the High Court that the Magistrate concerned had sent the accused persons back to the custody of the police and not to his own or other judicial custody. The High Court held that this was a distortion of the true facts because the charge-sheets did not ask the Magistrate to authorise the detention of accused persons brought before the court to the custody of the police. The High Court further found that once what purported to be final reports u/s 173 were filed, there was no purpose, in or any warrant for, keeping the accused persons arrested before that in police custody. It was in context of these facts that the court observed that in Section 344 of the Code "remand" meant remand to custody in a Magisterial lock up or jail during a postponement or adjournment of an inquiry or trial. The decision does not contain any discussion or interpretation of the wordings of Section. 344 and looking to the fact that the relevant observations were made in context of the filing of the final reports u/s 173 of the Code, I find that even this decision has no persuasive value.

18. Even the Allahabad High Court has touched this question in *Dukhi and Another Vs. State and Another*, but has refrained from expressing any definite opinion. In this case the High Court has made the following observations, which are relevant to the point under discussion:

A Magistrate granting remand u/s 167 (2) has discretion to remand the accused either to police custody or the jail custody. But it is doubtful if the court granting

remand u/s 344 has such discretion and can remand the accused to police custody.

The most which the court has done in this case is to express a doubt with regard to the proposition which is under discussion in this case. This Allahabad decision, therefore, cannot be cited as any authority either for or against this proposition.

19. In the foregoing discussion I have referred to Kerala decision given in Velu Viswanathan's case. One of the points which was urged before that High Court was that the custody u/s 344 of the Code is only judicial custody and in support of this proposition the above referred Travancore-Cochin case of Kunjan Nadar, Allahabad case of Dukhi and Delhi case of Ajit Singh were cited. The court while discussing this question is found to have made the following observations:

Though the language of Section 344 makes us also, at first blush, think on the same lines indicated in the aforesaid decisions (that the remand under the section can only be to judicial custody), we have still doubts regarding the position. Cases are conceivable where the investigation cannot be completed within 15 days and where even after an accused person is remanded u/s 344 he may have to be handed over to the police to be questioned not only for getting evidence in support of the prosecution but may even be to drop him from the array of accused persons. Suppose there are several accused persons in a case, of whom some have been arrested and have been remanded u/s 344 and subsequently the rest of the accused are arrested. On questioning the accused persons arrested later, if the police got some information on which they want to question further one of the accused persons already under remand, we fail to see why he should not be handed over to the police. We are not bold enough to think that the legislature would not have been alive to such a situation. At any rate, we need not express a final opinion on this question because this question does not arise in the cases before us.

Thus, after showing their inclination for the view that Section 344 contemplates police custody as well as judicial custody, the learned Judges have cautiously refrained from expressing any final opinion on the question because the point did not directly arise before them for decision. So far as the instant case is concerned, the point does directly arise before me and I find that on a true interpretation of Section 344 it must be held that the word "custody" which appears therein, is "police custody as well as judicial custody". Under the circumstances, the learned Magistrate was not right in holding that he had no jurisdiction to remand the accused to police custody u/s 344 of the Code. The view taken by the learned Sessions Judge on this question is, therefore, found to be correct and acceptable.

20. I, therefore, accept this Reference, set aside the order passed by the learned Magistrate and order the learned Magistrate to pass an appropriate order on the application Ex. 7 made by the police. The reference is disposed of accordingly.

21. Shri Barot appearing on behalf of the accused informs the court that he

wants to approach the Supreme Court in the matter and, therefore, the execution of the above order passed by this Court should be stayed for two weeks. In view of this, the execution of this order is stayed for two weeks from now. At the end of these two weeks, the stay in question shall automatically vacate and the Magistrate shall be at liberty to proceed with the matter according to law.