

(1994) 03 MAD CK 0005

In the Madras High Court

Case No : Criminal O.P.No.1022 of 1994 and Criminal M.P. No's. 920 and 1014 of 1994

Udaya

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 31-03-1994

Acts Referred:

Constitution of India, 1950 — Article 141

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2), 167(2)(a), 482, 57

Citation : (1994) 2 LW(Cri) 751

Hon'ble Judges : N. Arumugham, J

Bench : Single Bench

Advocate : N. Natarajan, for M/s. Raja Elango and A.S. Chakravarthi for the Petitioner in CrI.OP. No.1022/94 and CrI.MP. 920/94 and in CrI.MP. 1014/94, for the appearing parties; B. Sriramulu Public Prosecutor on behalf of the Respondent in CrI.OP. No. 1022/94 and CrI.MP. No. 920/94 and for the petitioner in CrI.MP. 1014/94, for the Appearing Parties

Final Decision : Dismissed

Judgement

N. Arumugham, J.—The above CrI.O.P.No.1022/94 has been filed invoking power of this court u/s 482 of the Code of Criminal

Procedure, to set aside the order passed by the learned Principal Sessions Judge, Madras in CrI.RC.No.5/94 on 9.2.1994, which provides for the

custody of the petitioner to the respondent police for a period of five days from 9.2.94 till 13.2.1994.

2. The matrix of the problem which led to the filing of this petition may be stated briefly as follows:-

For the offences alleged to have been committed under the Tamil Nadu Prohibition Act as well as NDPS Act, against the petitioner and 7 others,

four cases in crime numbers 3, 4, 6 and 16 of 1994 were registered in D.5

Marina Police Station originally, and following the same, some of the accused were arrested, some surrendered, among whom, the petitioner herein being the second accused surrendered before the 18th Metropolitan Magistrate, Saidapet, Madras on 13.1.1994 and consequently, she was remanded to judicial custody. It appears that for administrative purposes, the case against the petitioner registered in D.5 Police Station Crime Number 6 of 1994 was transferred to D.6 Anna Square Police Station which was registered as Crime Number 14 of 1994. For the purpose of making some recovery on the basis the confession statement given by one of the co-accused the investigating agency, namely, the respondent herein filed a petition before the learned 13th Metropolitan Magistrate, Egmore, Madras seeking police custody of the petitioner, on 25.1.1994. This petition has not been ordered by the learned Magistrate on the same day but however it was adjourned to 28.1.1994 as ""Call on 28.1.94"". In the mean while, the 15 days period of remand for Judicial custody granted by the learned 18th Metropolitan Magistrate, Saidapet, Madras expired on 27.1.1994., one day prior to the date on which the petition seeking the police custody was posted by the learned 13th the tropolitan Magistrate. After the 15 days time was over, it appears that the learned 13th Metropolitan magistrate, having jurisdiction over these cases and the petitioner has extended the remand for a further period of 15 days. While so, the petition filed by the respondent seeking police custody was taken up on 28.1.1994 but however dismissed by the learned Magistrate on the ground that the custody of the petitioner herein/accused for police investigation cannot be granted as on that day, the first period of 15 days of judicial custody was over. Therefore, the police custody of the petitioner was refused by the court to the respondent.

3. Aggrieved at this, a revision in CrI.RC.No.5 of 1994 was filed by the respondent before the learned Principal Sessions Judge, Madras, challenging the propriety and legality of the order passed by the learned 13th Metropolitan Magistrate and he granted police custody of the petitioner from 9.2.1994 to 13.2.1994. Aggrieved at this order, the present application has been filed challenging the correctness of the reversal order passed by the learned Principal Judge in CrI.RC.No.5 of 1994. on 9.2.1994.

4. The interim police custody granted by the revisional authority was stayed by

this Court in view of the urgent motions made on behalf of the petitioner on 9.2.1994 when the original petition was admitted. Subsequently, a petition in Crl.MP. No. 1014 of 1994 has also been filed on behalf

of the respondent to vacate the stay and at the request of both parties, since the matter was urgent, the whole case was heard in full.

5. While challenging the impugned order passed by the learned Principal Sessions Judge, Mr. N. Natarajan, learned Senior Counsel would

contend that the learned Principal Sessions Judge, while passing the impugned order has totally over looked and ignored the well settled judicial

pronouncements by the Supreme Court as well as this court and various other High Courts in granting the police custody after the expiry of the first

15 days of judicial custody is over and that for the said reason alone, the impugned order is liable to be set aside.

6. Per contra, Mr. B. Sriramulu, learned Public prosecutor assisted by the learned Additional Public Prosecutor contended that if for any reason a

mistaken order is passed in advertently or even erroneously by not granting the petitioner the police custody for the purpose of proper

investigation, then Court has get ample power and is vested with such power to order police custody for the purpose of ensuring a fool-proof

investigation and to enable the prosecution to make out a good Case and that therefore, the impugned order passed by there personal authority is

perfectly correct and is not bereft of legality or propriety and it cannot be interfered with.

7. In support of the respective contentions, several case law held by the Supreme Court and other Courts have been cited before me, which

reference of the same, I do not consider as necessary, for the reason of the question to be decided in this case is within a very narrow and a short

one.

8. In this context, the only question that arises for consideration is whether the police can be granted custody of an accused if for any reason after

the expiry of the first period of remand to judicial custody a maximum of 15 days? If so, under what circumstances?

9. With regard to the factual aspects in this case there is no controversy or dispute among the parties herein. It is the common case that the

petitioner by name Udaya wife of Veermani has voluntarily surrendered before

the learned XVIII Metropolitan Magistrate, Saidapet, Madras on 13.1.1994 for her alleged involvement in D.5 Police Station Crime Numbers 3, 4, 6 and 16 of 1994 for the offences under the Tamil Nadu Prohibition Act. Accordingly, it is seen further that she was remanded to judicial custody for a period of 15 days which fell due on 27.1.1994. The case records called for from the court below contains the letter in this regard written by the learned 18th Metropolitan Magistrate. But, it is worthwhile to note at this stage, that the learned remanding Magistrate has no jurisdiction over the concerned D.5 Police Station at the relevant time. The letter of surrender intimation dated 19.1.1994 has been written by the remanding Magistrate to the learned 13th Metropolitan Magistrate, who is having jurisdiction. Bar also agreed that the petitioner had surrendered before the court by filing a petition for surrender and as such, it is seen that the alleged surrender of the petitioner was done with the assistance of the bar. Since the other accused involved in this case are not made to be involved in this petition, I do not propose to refer anything about them.

10. It is seen that on point of jurisdiction, the F.I.R. in crime number 6 of 1994 of D.5 Police Station had been transferred to D.6 Anna Square Police Station and registered as crime number 14 of 1994, it appears further from the case records that on 25.1.1994, while the petitioner was within the first remanded period of 15 days of judicial custody, a petition in Crl.M.P. No.51 of 1994 was filed by the respondent herein for police custody so as to enable him to collect and gather further particulars in investigation. In support of the requisition, Mr. Lakshmiah, Inspector of D.6 Police Station is claimed to have given a sworn statement on that day itself, however, the learned 13th Metropolitan Magistrate though received the said petition on 25.1.1994 and recorded the sworn statement from the Inspector of D.6 Police Station, has not disposed of the said petition in accordance with law but adjourned the matter to 28.1.1994 by endorsing as ""Call on 28.1.1994."" It is manifest that without disposing the petition on that day, without ascribing any reasons, the learned Magistrate has adjourned the petition to 28.1.1994, obviously after the expiry of the first remand period of 15 days. The records called for from the court below demonstrates clearly that on 28.1.1994, the above Crl.MP.No.51 of 1994

was taken up by the learned Magistrate and disposed of by rejecting the same. For the proper appreciation of the case on hand, I have extracted

the verbatim order of the learned 13th Metropolitan Magistrate, made in green ink, as follows:-

Order. 28.1.94 Police custody cannot be granted as Police custody should be granted within 15 days of the first remand. In this case, time for

police custody is bared and the accused are not interested to go under Police Custody and hence this petition dismissed.

11. Obviously and very conspicuously aggrieved at this order, the respondent has preferred a revision as above referred. For various reasoning

discussed and elaborately given by the learned Principal Sessions Judge, he found that the impugned order passed by the learned Magistrate is

not correct and to be without legal sanctity and propriety and accordingly he has set aside the same and allowed the revision and where upon, he

has granted the police custody to the respondent as afore-mentioned. One of the main grounds, which the learned Sessions Judge has relied on to

allow the revision is that the respondent police has prayed for the police custody in CrI.MP.No.51 of 1994 on 25.1.1994 itself within and before

the expiry of the first 15 days of remand to judicial custody granted to the petitioner and that since police custody of the petitioner was asked for

within that period and that petition has not been disposed of, the learned Principal Sessions judge, dissented from the view of the learned

Magistrate and thereby allowed the revision which is being strenuously challenged before me.

12. Let me decide first whether the performance of the learned 13th Metropolitan Magistrate, Egmore, Madras in disposing CrI.MP.No.51 of

1994 on 28.1.1994 is valid in law and correct. Since this matter necessitated a thorough probe, original records were sent for and "erused. From a

cursory perusal of the same, it is seen, that the petition requiring the police custody was filed in the court on 25.1.1994, as evident from the date

seal of the court and the initial put by the learned Magistrate in green ink. Since the reason for not disposing this petition on the day it was filed viz.

25.1.1994 on the following day or on 27.1.1994 remains still a mystery, the learned 13th Metropolitan Magistrate was summoned to appear

before me in person and permitted to peruse the records and give an explanation. With great constraint, I may say that the learned magistrate was

not able to give any explanation for not being able to dispose of the petition on that day itself. Added to which, the learned Magistrate has referred in here above order that the accused are not interested to go under the police custody. I am rather shocked to see from what source of information and interrogation or basis, the learned Magistrate has come to know that the accused are not interested to go to the police custody for the obvious reason that on 28.1.1994, the accused was in judicial custody and not produced before the learned Magistrate. Yet another disturbing feature available in this case, is the course that has been adopted by the learned 13th Metropolitan Magistrate, it was claimed that on the day of filing the above petition CrI.MP.No.51 of 1994 by Mr. Lakshmiah, the Inspector of Police, D.6 Anna Square Police Station, gave a sworn statement which has been recorded by the learned Magistrate. However, this recording of the statement is found in typing but not in her own hand. Signature of the deponent along is found underneath the so-called sworn statement. Never the less, the endorsement found at the bottom of the alleged sworn statement on the next page shows that the above statement was dictated to the typist by translation upon performing the oath. Even so, it has not been certified by the learned Magistrate. Then on affixture of the signature or initial of the Magistrate assumes every primordial importance and concern in this matter. Above all, another disturbing feature is that the date seal of the court below depicting the date 27.1.1994 is found in the first page of the so-called sworn statement. If the claim that the Inspector of Police filed CrI.MP.51/94 seeking police custody of the petitioner on 25.1.1994 as initialled by the learned Magistrate commensurate with the date seal found therein and the sworn statement given by the concerned Inspector of Police on that day, then the appearance of the date seal found, therein with date 27.1.1994 is clearly a mystery and miraculous thing that has happened. Another serious handicap which betrays the claim of the police is that the sworns statement has been assigned with M.P.No.49 of 1994 and not 51 of 1994. The deponent, Inspector of Police, while subscribing his signature after the typed sworn statement has unfortunately given the date as 25.1.1994. Therefore, having considered all the above aspects so meticulously, with great constraint, if I may say so, the truth in filing CrI.MP.51 of 1994 seeking police custody of the petitioner on 25.1.1994 itself, giving sworn statement on that day itself by the respondent

police, for all the laches aforementioned, cannot at all be true, genuine and thus inhere not with every great suspicion. Above all, I may observe that

the learned Magistrate has not discharged her judicial duty in accordance with the law and procedure, which attitude is highly reprehensible. True,

a judicial officer is bound to exercise his judicial conscience without fear or favour, impartially and so quickly with judicial mind and render justice

to the parties. Otherwise, the whole system of rendering justice would be stultified by the extraneous circumstances or pressure. If this is the

cardinal principle accepted and long followed, I do not see any reason for the 13th Metropolitan Magistrate to have her lamentable laches to be

excused.

13. Rightly or wrongly, police custody asked for on or before the expiry of the first remand period of 15 days has been rejected by a court of law.

But however, in the revision, the learned Principal Sessions Judge, while setting aside the order passed by the learned Magistrate, if I may observe

with great constraint, has committed another error in setting aside the impugned order. To substantiate my view, it has become necessary for me to

extract sections 167 of the Code, procedure, which are as follows:- Procedure when investigation cannot be completed in twenty four hours-

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty

four 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 forth with transmit to the nearest

Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same forward the accused to such

Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from

time to time, authorise the detention of the accused in such custody to 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;

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen

days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody

under this paragraph for a total period exceeding:-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life, imprisonment for a term of not less than

ten years.

(ii) sixty days, where the investigation relates to any other offence, and on the expiry of the said period of ninety days, or sixty days, as the case

may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released to bail under this sub-

section shall be deemed to be so released under the provisions of Chapter 33 for the purpose of that Chapter;

(b) no Magistrate shall, authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the

police.

Explanation 1 - for the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the

accused shall be detained in custody so long as he does not furnish bail.

Explanation 2 - if any question arises where an accused person was produced before the Magistrate as required under paragraph (b), the

production of the accused person may be provided by his signature on the order authorising detention".

Since the other sub-section and provision are not germane for the purpose of this case, I do not propose to traverse each one of the same. From a

careful reading of the above section of law, it is seen that if investigation regarding a person arrested and detained in custody could not be

completed within 24 hours then by virtue of Section 57 of the Code, specifying the grounds for believing that the accusation or information is well-

founded, at the initiation of the investigating officer not below the rank of a Sub Inspector, he shall be forwarded to the nearest Magistrate with the

copies of the entries in the diary and other records. Sub Section (2) clearly spells out the duty cast upon the Magistrate to whom an accused is thus

forwarded/whether he has or has no jurisdiction to try the case from time to time authorise the detention of the accused in such custody, which the

Magistrate thinks fit but for a term not exceeding 15 days in the whole. Proviso (a) to this sub-section assumes every significance and importance

in this case. The phraseology employed in this proviso (a) "otherwise than in the custody of the Police" "beyond the period of fifteen days" assumes

every significance and lays the foundation and basis for the exercise of the power by the concerned Magistrate. The first words "otherwise than in

the custody of the police", clearly demonstrates not the police custody but only the judicial custody, even that too, the detention period can be

extended further only on the subjective satisfaction of the learned Magistrate with regard to the existence of adequate grounds for such an

extension.

14. I have heard Mr. N. Natarajan, learned Senior counsel on behalf of the petitioner, who dwells his attack on the order passed by the learned

Principal Sessions Judge that it is without any jurisdiction and unmindful of the above legal command in-built in the above provision of law per

contra Mr. B. Sriramulu, learned Public Prosecutor submitted that for the lapses or mistakes, whatever it may be, committed by the judiciary, the

investigating agency should not be made to suffer in collecting the evidence and materials which are necessary to prove the guilt of the accused, for

which, the learned Additional Public Prosecutor cited several Supreme Court rulings. But enough for me at this stage to rely upon two decisions,

very recent in origin, one by the Apex Court and the other by Division Bench of this Court. In the context Of the case law which are to be quoted

herein, I do not find any reason to refer all the previous judgments rendered by the Supreme Court.

15. In Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni,) their Lordships of the Supreme Court,

while elaborately discussing the scope and object of the terms and phraseology adumbrated in Section 167 of the Code of Criminal Procedure,

have clearly laid down the law in this regard. At this juncture, I may also point out that the learned Addl. Solicitor General of India has raised the

same contention as the learned Public Prosecutor has submitted before me on the basis of the difficulties and contingencies being faced by the

investigating officers. However, the Supreme Court has negated the said contention with the following judicial pronouncement:

12. As the points considered above have an important bearing in discharge of the day- to-day magisterial powers contemplated u/s 167(2), we

think it appropriate to sum up briefly our conclusions as under:

13. Whenever any person is arrested u/s 57, Cr. P.C. he should be produced before the nearest Magistrate within 24 hours as mentioned therein.

Such Magistrate may or may not have jurisdiction to try the case. If judicial Magistrate is not available, the Police Officer may transmit the arrested

accused to the nearest Executive Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the

case. If Judicial Magistrate is not available, the Police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the

judicial powers have been conferred." The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e.

either police or Judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days

there can be more than one order changing the nature of such custody either from police to judicial or vice versa. If the arrested accused is

produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in

the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the

records. When the arrested accused is so transmitted the Judicial Magistrate for the remaining period, that is to say excluding one week or the

number of days of detention ordered by the Executive Magistrate may authorise further detention within that period of first fifteen days to such

custody either police or judicial - After the expiry of the first period of fifteen days the further remand during the period of investigation can only be

injudicial custody. There can be any detention in the Police custody after the expiry of first fifteen days even in a case where some more offences

either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested

accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided u/s 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above, if the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period fifteen days mentioned in Section 167 (2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.

14. We may, however, in the end clarify that the position of law stated above applies to section 167 as it stands in the Code. If there are any State amendments enlarging the periods of detention, different considerations may arise on the basis of the language employed in those amendments.

16. A Division Bench of this Court in *Karuppasamy v. State* (1989 L.W. (Cri) 100), after having an elaborate discussion upon the scope and object of Section 167 of the Code of Criminal Procedure has held as follows:

A reading of the proviso (a) of S. 167 (2), Cr.P.C. make it clear that the detention of the accused person by Magistrate beyond the period of 15

days can only be "otherwise than in the custody of the Police". Therefore, after 15 days the custody that is possible excludes police custody (i.e.,

the Police custody can be allowed only during the period within the initial 15 days or remand period). The Court will have no power to remand the

accused to police custody beyond the initial 15 days, since the power to remand to police custody has to be expressly conferred and cannot be in

the realm of inference.

While considering S. 167, Cr.P.C. we have to refer to S. 57 of the Code which specifies that a person arrested cannot be detained for more than

24 hours by a police officer and he has to forward the person so arrested to the nearest Judicial Magistrate. The necessity of producing the

accused together with the relevant documents before a Magistrate if the investigation cannot be completed within 24 hours is the underlying

purpose of this Section. S. 167 (2) of the Code takes in its fold the authority to detain the accused in such custody as the Magistrate thinks fit for a

term not exceeding 15 days on the whole. This custody can be police custody, Judicial custody, or custody in mental asylum, children's home or

vigilance home as the case may be. The Magistrate has a choice to determine about the type of custody to be granted within the first fifteen days

including police custody. For the first 24 hours a person can be detained by a police-officer and later, he can be detained or kept in custody only

under the order of a Judicial Magistrate. Within the initial 15 days, the nature of custody can be altered from time to time. Subsequently, in view of

the specific mandate of the proviso (a) of S. 167 (2) Cr.P.C. Police custody does not appear to be possible.

On the facts of that case, the Bench held further that since the Police custody had been obtained after the statutory period of 15 days, it was illegal.

17. If the judicial pronouncement is the unequivocal declaration made by the Apex Court as well as by this Court following very many case law

rendered by various other High Courts, then, one cannot be expected to have a dissenting view, for the reason that the law laid down by the Apex

court has become the law of the land under Article 141 of the Constitution of India. This view is further fortified by the fact that the phraseology

employed in Section 167(2)(a) directly refers to the legislative command, which, in no event and circumstances can be controverted or

circumvented by the court by substituting its own method and contingencies. Though the learned Principal Sessions Judge has simply referred to

various rulings and case - law in setting aside the impugned order passed by the learned Magistrate and allowed the revision, he has clearly over

looked the above aspect of the law in this regard and thus it is manifest that he has committed an error and a patent mistake, which amounts to the

lack of legal sanctity.

18. Even coming to the factual aspects, assuming that the grounds and facts given by the Inspector of Police, law and order, in the so-called sworn

statement is true, I feel that I am totally unable to persuade myself to identify any ground to grant police custody as required. The allegations, and

grounds are vague, mechanical and not pertaining to any new fact or new case, which requires the interrogation or the examination of the petitioner, who is an accused. As was clearly laid down by their Lordships of the Supreme Court, if the respondent Police wants to interrogate the petitioner, who is in judicial custody, with regard to any factum, they can do so whilst the petitioner is lingering behind the bars and not to take her elsewhere, and if so done, it will naturally produce serious dire consequences and what was the reason why the legislature had very carefully used that phraseology ""otherwise than in the custody of the Police"" in the proviso itself. It is thus, after having considered the overall aspects of the case with reference to the original case records, I do not come across any grounds to sustain the order passed by the learned Principal Sessions Judge, in Crl. R.C. 5 of 1994 made on 9.2.1994. The learned Judge has totally overlooked and ignored the above legal implications. Therefore, it is liable to be interfered with and set aside.

19. In the result, the petition u/s 482 of the Code of Criminal Procedure is allowed. Consequently, the impugned order passed by the learned Principal Sessions Judge, in Crl. R.C. 5 of 1994 dated 9.2.1994 is set aside. Police custody of the petitioner asked for is hereby refused. Crl M.P.920 and 1014 of 1994 stands dismissed.