

Matabar Parida, Bisnu Charan Parida, Batakrushna Parida, Babaji Parida

Vs

The State of Orissa

Criminal Appeal No. 359 of 1974

(N. L. Untawalia, Syed Fazal Ali JJ)

16.04.1975

JUDGMENT

UNTWALIA, J. –

1. An occurrence took place on March 8, 1974 at a place situated in the district of Cuttack, Orissa. First information report was lodged on March 9, 1974 and a police investigation started in connection with the offences alleged to have been committed under Sections 147, 148, 307, 302 simpliciter as also with the aid of Section 149 of the Indian Penal Code. The four appellants in this appeal by special leave were arrested by the police in the course of the investigation on March 10 and four others who have been enlarged on bail by the Sessions Judge of Cuttack were arrested on March 14. They were produced before the Magistrate who remanded them to jail custody from time to time. The learned Sessions Judge released on bail four of the accused but refused to grant bail to the appellants. An argument based upon proviso (a) to sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) - hereinafter referred to as the New Code, was rejected by the Session Judge relying on the saving clause (a) of sub-section (2) of Section 484.

2. The appellants approached the Orissa High Court and pressed their cases for releasing them on bail on merits as well as on the ground of the provision of law aforesaid contained in the New Code. A Bench of High Court by its order dated August 6, 1974 has repelled the arguments put forward on behalf of the appellants and dismissed their application for bail. They have filed the present appeal by special leave of this Court.

3. This Court is not expected to examine afresh the question of releasing the appellants on bail on merits. But the question for consideration is whether the appellants are entitled to be released on bail under the proviso (a) of Section 167(2) of the New Code.

4. The New Code came into force on and from April 1, 1974. Section 484(1) repealed the Code of Criminal Procedure, 1898 - hereinafter called the Old Code. But there were certain saving clauses engrafted in sub-section (2) : the relevant clause (a) would be adverted to hereinafter in this judgment. Before doing so it is necessary to appreciate the position of law in relation to the power of remand by magistrate during the course of investigation of a case by the police.

5. A person arrested without warrant could not be detained by a police officer for a period exceeding 24 hours as provided in Section 61 of the Old Code. Section 167(1) required the police officer to forward the accused to the nearest magistrate if the investigation could not be completed within the period of 24 hours fixed by Section 61 and if there were grounds for believing that the accusation or information was well-founded. Sub-section (2) provided :

The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be a Magistrate having such jurisdiction :

The Magistrate to whom the accused was forwarded could remand him to police custody or jail custody for a term not exceeding 215 days in the whole under Section 167(2). Even the Magistrate who had jurisdiction to try the case could not remand the accused to any custody beyond the period of 15 days under Section 167(2) of the Old Code. There was no other section which in clear or express language conferred this power of remand on the Magistrate beyond the period of 15 days during the pendency of the investigation and before the taking of cognizance on the submission of charge-sheet. Section 344, however, enabled the Magistrate to postpone the commencement of any enquiry or trial for any reasonable cause. The explanation to Section 344 of the Old Code read as follows:

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.

Various High Courts had taken the view that a magistrate having jurisdiction to try a case could remand an accused to jail custody from time to time during the pendency of the investigation in exercise of the power under section 344 : to with Superintendent and Remembrancer of Legal Affairs, Government of W. B. v. Bidhindra Kumar Roy (AIR 1949 Cal 143 : 50 Cri LJ 231); Chandradip Dubey v. State (1955 BLJR 323); Dukhi v. State (AIR 1955 All 521 : 1955 Cri LJ 1305); Shrilal Nandram v. R. R. Agarwal, S. D. M. First Class, Gwalior (AIR 1960 MP 135 : 1960 Cri LJ 608) and State of Kerala v. Madhavan Kuttan (AIR 1964 Ker 232). A contrary view was taken by the Orissa High court in the case of Artatran Mahasuara v. State of Orissa (AIR 1956 Ori 129 : 1956 Cri LJ 909). It may be emphasised here that the Court will have no inherent power of remand of an accused to any custody unless the power is conferred by law. In the order under appeal the High Court without reference to Section 344 of the Old Code, seems to have assumed that such a power existed. That is not correct.

6. There are two decisions of this Court affirming the view expressed by majority of the High Courts and overruling the one taken by the Orissa High Court in the case referred to above. In A Lakshmanarao v. Judicial Magistrate, First Class, Parvatipuram ((1970) 3 SCC 501 : 1971 SCC (Cri) 107) an argument was advanced that Section 344 falling in Chapter 24 of the Old Code which contained general provisions as to enquiries and trials could not apply to a case which was at the stage of investigation and collection of evidence only. Dua, J. delivering the judgment on behalf of this Court repelled the argument thus at page 506 : [SCC (CRI) p. 122, para 9]

This argument appears to us to be negated by the express language both of sub-section (I-A) and the explanation. Under sub-section (I-A) the commencement of the inquiry or trial can also be postponed. This clearly seems to refer to the stage prior to the commencement of the inquiry. The explanation makes it clear beyond doubts that reasonable cause as mentioned in sub-section (I-A) includes the likelihood of obtaining further evidence during investigation by securing a remand. The language of Section 344 is unambiguous and clear and the fact that this section occurs in chapter 24

which contains general provisions as to inquiries and trials does not justify a strained construction.

In *Gouri Shankar Jha v. State of Bihar* ((1972) 1 SCC 564 : 1972 SCC (Cri) 238) Shelat, J. delivering the judgment on behalf of the Court has said at page 569 : [SCC (CRI) p. 333, para 11]

In cases falling under Section 167, a magistrate undoubtedly can order custody for a period at the most of fifteen days in the whole and such custody can be either police or jail custody. Section 344, on the other hand, appears in Chapter XXIV which deal with inquiries and trials. Further, the custody which it speaks of is not such custody as the magistrate thinks fit as in section 167, but only jail custody, the object being that once an inquiry or trial begins it is not proper to let accused remain under police influence. Under this section, a magistrate can remand an accused remain under police influence. Under this section, a magistrate can remand an accused person to custody for a term not exceeding fifteen days at the a time provided that sufficient evidence has been collected to raise a suspicion that such an accused person may have committed an offence and it appears likely that further evidence may be obtained by granting a remand.

Further says the learned Judge at page 570 : [SCC (CRI) p. 334, para 12]

The fact that Section 344 occurs in the Chapter dealing with inquiries and trials does not mean that it does not apply to cases in which the process of investigation and collection of evidence it still going on.

7. It would thus be seen that under the Old Code the Magistrate was given the power under Section 344 to remand an accused to jail custody as the section was also applicable to cases in which process of investigation and collection of evidence was going on. In other words, the power of remand by the Magistrate during the process of investigation and collection of evidence was an integral part of the process. The power was meant to be exercised, whenever necessary, to aid the investigation and collection of further evidence.

8. Let us now examine the position of law under the New Code, No police officer can detain a person in custody, arrested without a warrant, for a period longer than 24 hours as mentioned in Section 57 corresponding to Section 61 of the Old Code. Section 167 occurring in Chapter XII bearing the heading "Information to the police and their powers to investigate" - the same as in Chapter XIV of the Old Code - has made some drastic departure. Similar is the position in regard to Section 309 of the New Code corresponding to Section 344 of the Old Code. While retaining the provision of forwarding the accused to the nearest Magistrate (of course under the New Code to the Judicial Magistrate), and while authorising the Magistrate to remand the accused to either police or judicial custody for a period not exceeding 15 days, proviso (a) has been added in these terms :

Provided that -

(a) the Magistrate may authorise detention of the accused person, otherwise than in 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 on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail; and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

The expression "the Magistrate" in the proviso would mean the Magistrate having jurisdiction to try

the case. Section 309(2) says :

If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Although the expression 'reasonable cause' occurring in sub-section (1A) of Section 344 is nowhere to be found in Section 309 of the New Code, the explanation to Section 344 of the Old Code has been retained as Explanation 1 to Section 309 in the identical language. The law as engrafted in proviso (a) to Section 167(2) and Section 309(2) of the New Code confers the powers of remand to jail custody during the pendency of the investigation only under the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded. In such a situation what is the purpose of Explanation-I in Section 309 is not quite clear. But then the command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy - murders, dacoities, robberies by inter-State gangs or the like, it may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under Section 167 will be deemed to be so released under the provisions of Chapter XXXIII and for the purposes of that Chapter. That may empower the court releasing him on bail, if it considers necessary so to do, to direct, that such person be arrested and committed to custody as provided in sub-section (5) of Section 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance the power of remand is to be exercised under Section 309 of the New Code. But if it is not possible to complete the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "paradise for the criminals", but surely it would not be so, as sometimes it is supposed to be, because of the courts. It would be so under the command of the Legislature.

9. But the question in this case is whether during the pendency of the investigation which started before coming into force of the New Code the appellants can press into service proviso (a) to Section 167(2) of the Code and claim to be released on bail as a matter of right when they are prepared to furnish bail. The answer to this question depends on the interpretation of Sections 167 and 484 of the New Code. Unlike the wordings of Section 428 the language of Section 167(1) which will govern sub-section (2) also, is - "whenever any person is arrested", suggesting thereby that the section would be attracted when the arrest is made after coming into force of the Act, while the expression used in Section 428 is "where an accused person has, on conviction, been sentenced" Interpreting such a phrase it has been held in the case of *Boucher Pierre Andre v. Superintendent, Central Jail, Tihar, New Delhi* (AIR 1975 SC 164 : (1975) 1 SCC 192 : 1975 SCC (Cri) 70) by Bhagwati, J. delivering the judgment of this Court at page 166; [SCC pp. 194-195 :

SCC (CRI) p. 72, para 2]

This section, on a plain natural construction of its language, posits for its applicability of fact situation which is described by the clause "Where an accused person has, on conviction, been sentenced to imprisonment for a term". There is nothing in this clause which suggests, either expressly or by necessary implication, that the conviction and sentence must be after the coming into force of the New Code of Criminal Procedure.

We may, however, hasten to add that in spite of the phrase "is arrested occurring in Section 167(1), since the Old Code has been repealed by sub-section (1) of Section 484 of the New Code, the provision would have applied, a fortiori, if the savings provided in sub-section (2) would not have applied to the situation with which we are concerned in this case. In our judgment clause (a) of sub-section (2) of Section 484 does apply. It reads as follows :

Notwithstanding such repeal, -

(a) If, immediately, before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898, as in force immediately before such commencement, (hereinafter referred to as the Old Code), as if this Code had not come into force :

Immediately before the first day of April, 1974 the investigation of this case was pending. Saving clause (a) therefore enjoins that the said investigation shall be continued or made in accordance with the provisions of the Old Code. The police officer, therefore, making the investigation has to continue and complete it in accordance with Chapter XIV of the Old Code. Section 167 of that Code could not enable the Magistrate to remand the appellants to jail custody during the pendency of the investigation. The police could seek the help of the Court for exercise of its power of remand under Section 344, bringing it to the notice of the Court that sufficient evidence had been obtained to raise a suspicion that the appellants may have committed an offence and there will be hindrance to the obtaining of further evidence unless an order of remand was made. As we have said above, invoking the power of the court under Section 344 of the Old Code by the investigating officer would be a part of the process of investigation which is to be continued and made in accordance with the Old Code. That being so, we hold that the appellants in this case cannot claim to be released under proviso (a) to Section 167(2) of the New Code.

10. In the result the appeal fails and is dismissed.

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