ORISSA HIGH COURT

Artatran Mahasuara

Vs

State of Orissa

Original Jurisdiction Cases Nos. 45, 46, 49 and 53 to 60 of 1956

(Mohapatra, and P.V.B. Rao, JJ.)

05.03.1956

JUDGMENT

P.V.B. Rao, J.

1. All these applications were posted for hearing to 24-2-1956 by our order dated 2
0-2-1956. They were heard together on the 24th and this judgment covers all the cases.

2. These are eleven applications filed by 39 persons in judicial custody in Puri Jail under Article 226 of the Constitution of India and Sections 496, 497 and 498 Criminal Procedure Code for the issue of a writ in the nature of Habeas Corpus as their detention was illegal. They also prayed for release on bail.

3. The main allegations of the petitioners in all the applications are that the petitioners are respectable citizens of Puri possessed of considerable property both moveable and immoveable; that they were arrested without a warrant; that the bail applications filed before the Sub-Divisional Magistrate of the Sadar Sub-Division, Puri, were not disposed of; that during the hearing of the bail applications, they came to know that they were prosecuted for offences under Sections 148, 149, 438, 188, 379, 332, 395 and 120-B, Penal Code in connection with the recent disturbances at Puri on 22-1-1956 which resulted in setting fire to the police station and the railway station and that their arrest and detention for indefinite period is without jurisdiction and is in violation of their fundamental rights guaranteed under the Constitution and contrary to Article 22(1) of the Constitution and the Code of Criminal Procedure.

4. The five petitioners in O. J.C. 45/56 were arrested on 29-1-1956 and were produced before a Magistrate under Section 61, Criminal Procedure Code on 30-1-1956. They were remanded to custody till 13-2-1956 on which date a further remand was ordered to 27-2-1956. The petitioner in O. J.C. 46/56 was arrested on 23-1-56 and was remanded to custody by the Magistrate on the same date till 4-2-1956 and further remanded on that date to 18-2-1956 and then again remanded to custody till 3-3-1956.
The petitioner in O.J.C. 49/56 was arrested on 31-1-1956 was produced before a Magistrate on 1-2-1956 and by various orders dated 1-2-1956, 14-2-1956 was remanded to custody till 23-2-

1956. The petitioner in O. J.C. 53/56 was arrested on 30-1-1956, produced before the Magistrate on 31-1-1956, and by various successive orders was remanded to custody till 3-3-1956. The fifteen petitioners in O. J.C. 54/56 were arrested on 24-1-1956, 23-1-1956, 26-1-1956, 23-1-1956 and 20-1-1956 and by successive orders were remanded to custody, some to 27-2-1956 and some to 3-3-1956. The petitioner in O.J.C. 55/56 was arrested on 23-1-1956 and by various orders finally remanded to custody till 3-3-1956. The petitioner in O.J.C. 56/56 was arrested on 24-1-1956 and by various orders remanded to custody till 3-3-1956. The petitioner in O.J.C. 57/50 was arrested on 23-1-1956 and produced on the same date before the Magistrate and by various orders was remanded to custody till 3-3-1956. The five petitioners in O.J.C. 58/56 were arrested on 23-1-1956, produced on the same date before the Magistrate, and by successive orders remanded to custody till 3-3-1956. The six petitioners in O.J.C. 59/56 were arrested on 23-1-1956 before the Magistrate on the same date, and by successive orders were remanded to custody till 3-3-1956. The two petitioners in O.J.C. 60/56 were arrested on 23-1-1956, produced before the Magistrate on the same date and were remanded to custody by successive orders till 3-3-1956.

5. O.J.C. 45/56 was filed in this Court on 8-2-195S and of the five petitioners in this petition, three were released on bail on 15-2-1056, and two were released on 20-2-1956. O. J.C. 46/56 was filed in this Court on 9-2-1956 and the petitioner therein was released on bail on 20-2-1956. O. J.C. 49/56 was filed on 13-2-1956 and the petitioner there was released by our order dated 20-2-1956 and the petitioners in O. J.C. 53/56 filed on 13-2-1956 were also released by our order dated 20-2-1956. The petitioner in O. J.Cs. 53, 54, 55, 58, 59 and 60 of 1956 were allowed to be released on bail as per our order dated 20-2-1956 in O. J.C. 53/56. The petitioners in O. J.Cs. 56 and 57/56 were released, on bail by the lower Court. At the time of filing, the applications, notice was served on the Advocate-General or the Government Advocate on all the applications. The State took time in several of these applications for getting information from the police. All these applications finally came up on 20-2-1956, before us as shown in the cause list 'for admission'. Counsel for both parties were heard on that day and the applications were adjourned to 24th for hearing.

6. When they were taken up for hearing, the learned Government Advocate represented to us that he had filed a memo, on the previous date to the effect that the cases had been fixed for the next day for hearing only on the points of law concerned and so no counter-affidavits with reference to the facts alleged by the petitioners had been filed particularly as there was no sufficient time to prepare and file counter-affidavits regarding the facts alleged in the various petitions, and that if the facts were gone into, the State will file counter-affidavits regarding different allegations of facts within such reasonable time as the honourable Court would fix. For the disposal of these applications no additional facts were required as they could be disposed of on the concessions made by the learned Government Advocate and on the point of law. But I cannot help remarking that in these applications for writ in the nature of Habeas Corpus if is surprising that the prosecution is not in a position to instruct the learned Government Advocate about the facts of each case though the applications were filed long ago as noted above and the Government Advocate or the Advocate-General, as the case may be, was served with notice.

7. The learned Government Advocate very fairly admitted that the petitioners in all these applications were in judicial custody from the next day of their respective arrests, and their

detention in every case was for more than 16 days, and that in none of these cases a charge-sheet was filed as required by Section 173. Criminal Procedure Code against the accused, and finally that cognizance of these offences, in any case, was not taken by any Magistrate.

8. The learned Government Advocate concedes that if Section 167, Criminal Procedure Code only applies to these cases, the detention is illegal. But the learned Government Advocate contends that the detention of the petitioners is not illegal under Section 344, Criminal Procedure Code read with the explanation which says that if from the absence of a witness or any other responsible cause, it becomes necessary fro postpone the commencement of enquiry or to adjourn any enquiry or trial, the Court can do so by an order in writing stating the reason therefor and from time to time 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 to custody; and in the explanation to that section it is stated that if sufficient evidence has been obtained to raised suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand, that is a reasonable cause for remand. The Magistrate under Section 344 is entitled to postpone the commencement of the enquiry and remand the accused. According to his contention postponement of the commencement of the enquiry means postponement of taking cognizance also. He, therefore, contends that the Magistrate under Section 344 is entitled to remand the accused to custody for more than 16 days (fifteen days at a time), if he is informed that 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 even before a final report is filed and even before cognizance is taken. His contention amounts to this that Section 344, Criminal Procedure Code gives the Magistrate power to remand the accused to custody for any length of time not exceeding 15 days at a time till the police choose to file a charge-sheet contemplated by Section 173, Criminal Procedure Code or till the Magistrate chooses to take cognizance. The first case relied upon by the Government Advocate in support of his contention is the case of *Supdt. and Remembrancer of Legal Affairs, Government of West Bengal v. Bidhindra Kumar Roy*[1]*',* In this case a Division Bench consisting of Roxburg and Blank, JJ. held that :

> "The accused can be remanded to custody from time to time under Section 344 before submission of charge-sheet, to enable prosecution to obtain further evidence. Section 167 which limits the period of detention to 15 days is applicable both to a Magistrate having jurisdiction to try the case and also to other Magistrates and limits the total period of detention to 15 days. In the case of a Magistrate who has no jurisdiction to try the case he must within the period forward the accused to a Magistrate having jurisdiction.

The section then applicable for further detention is Section 344 and the explanation to that section indicates that further remand may be granted before submission of the charge sheet. The explanation to Section 344 contemplates a stage, prior to submission of the charge-sheet and that time is wanted for further investigation; under it the Court having jurisdiction may grant remands to custody 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.
The learned Judges observed, with great respect, that they were not satisfied1 that the decision in the case of *'Bhola Nath Das v. Emperor*[2]*,* is correct in so far as it appears to hold that action cannot be taken under Section 344 Criminal Procedure Code, unless cognizance has been taken

of the case in the technical meaning of that term. Their Lordships also observed :

> "I personally however feel considerable difficulty in accepting this view which to me seems to be somewhat anomalous. However, it is not necessary to pursue the matter further".

The second case relied upon by the learned government Advocate is the case of *'Dukhi v. State*[3]*',* decided by a Division Bench of the High Court consisting of Desai and Beg, JJ. In that case, it was held :

> "Where a person is arrested by police without a warrant, it is not required that he must be released from custody on the expiry of 15 days mentioned in Section 167(2) if the police are still investigating the matter, and that the Magistrate having jurisdiction to take cognisance of the offence, can avail himself of the provisions of Section 344, without taking cognizance of the offence or while the matter is still under investigation by the police". The applicants before the learned Judges applied for a writ of habeas corpus under Section 491, Criminal Procedure Code and Article 226 of the Constitution, They were arrested on a charge of murder and were being detained in prison under the orders of a Magistrate, and they contended that under Section 167, Criminal Procedure Code, they can be detained in custody under the orders of a Magistrate only for 15 days and that their continued detention after the expiry of 15 days was unlawful and that they should be released at once. The police were still investigating the case and no charge-sheet was filed by the time the application was heard by the High Court. The learned Judges observed that :
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> "The Legislature has expressly divided the period of which a person can be detained in custody prior to the commencement of an enquiry or trial into two stages. The first stage is of the period of 24 hours; and if the investigation cannot be completed within 24 hours, the police must forward the accused to the nearest Magistrate; and the second stage consists of 15 days. The Magistrate to whom the police have forwarded the accused can authorise their detention in such custody as he thinks fit for a term not exceeding 15 days in the whole". The learned Judges also observed that :
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> "This remand is practically automatic as soon as the police report that the investigation cannot be completed within 24 hours and that the accused must be remanded to custody for 15 days, the Magistrate would feel bound to grant
> the remand".

With all respects, I cannot agree with this proposition. At every stage when they obtain a remand, the police must satisfy the Magistrate that there is sufficient evidence against the accused and further evidence might be obtained and it is only when a Magistrate is satisfied, after looking into the case diary, that he should direct a remand. Section 167(2) only prescribes the maximum period of 15 days; but it does not authorize the Magistrate automatically to remand the accused for that period. Though they observed that the Legislature expects investigations to be completed within the period of 15 days, they stated :

"That frequently investigation must go on for more than 15 days on the ground that other persons involved in the commission of the offence may be absconding; identification proceedings in respect of the arrested persons or property may have to be done and a report may have to be obtained from the expert such as the Chemical Examiner or the Imperial Serologist or the Handwriting expert; witnesses may not be available for interrogation on account of illness or being away from their homes, or the investigating officer may be absent on leave or may have more urgent investigations to do in the period".

These reasons, with all respect, in my opinion, are not sufficient to prolong the investigation for more than 15 days and at the same time to detain the accused in custody. On account of these reasons, the learned Judges observed that :

"It could not have contemplated that the arrested persons must be released from custody after the expiry of 15 days regardless of the nature of the accusation or information against him and regardless of the quantity of evidence so far available against him."

So they conclude that the Legislature must have made provision for continuing the arrested persons' detention after 15 days in suitable cases and there is no provision barring that contained in Section 344; and therefore, according to their Lordships :

"It follows that Section 344 is meant to be applied when the investigation cannot be completed within 15 days, and there is reasonable ground to believe that the accusation or information is true" and relied for that conclusion on the explanation to Section 344 that if sufficient evidence has been obtained to raise a suspicion that the accused might have committed the offence and it appears likely that further evidence may be obtained by a remand, it is a reasonable cause for a remand and that this explanation necessarily applies to the stage when the offence is still under investigation by the police; and in coming to this conclusion they overruled a decision of the same High Court reported in - *'Kalicharan v. The State*[4]*',* and doubted the correctness of the decision in 1924 Cal. 614 (AIR V 11) and followed the decision of the Calcutta High Court referred to above and reported in 1949 Gal. 143 (AIR V

36) and a decision of Kendall, J. in the case of - *'Emperor V. Sooba*[5]*',*

With all respects to the learned' Judges who decided the cases in 1949 Cal. 143 (AIR V 36), 1931 All. 617 (AIR V 18), and the learned Judges deciding this case I cannot agree as to the correctness of these three decisions.

9. According to the scheme of the Code of Criminal Procedure, as is observed by the learned Judges of the Allahabad High Court, the Legislature intended that the investigation should be completed at the most within 15 days. Section 61 of the Code expressly enacts that the person

arrested on suspicion of a cognizable offence without a warrant shall be produced before a Magistrate within 24 hours, and Section 167 begins with the statement that whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by Section 61, 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 a Sub-Inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the case diary hereinafter prescribed, relating to the case and at the same time forward the accused to such a Magistrate, and clause (2) provides that the Magistrate to whom the accused person is forwarded under this section may, if he has no jurisdiction to try the case, authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days in whole. Reading Sections 61 and 167, it is clear that the Legislature contemplated that the investigation should be completed in the first instance within 24 hours under Section 61 or if not, under Section 167 within 15 days from the date when he was first produced before the Magistrate. This is in accordance with the principle of Anglo-Saxon Criminal Law on which the Indian Law is based that the accused is entitled to demand, that justice is not delayed,, and the Habeas Corpus Act entitles a person to ask for a writ of Habeas Corpus directing his trial at the next assizes.

10. Part V, Chap. XIV Criminal Procedure Code deals with information to the police and their powers to investigate and it is under this chapter that Section 167 finds a place, and provides for the procedure when investigation cannot be completed in 24 hours. The jurisdiction of the Criminal Courts in inquiries and trials is dealt with in the next Chap. XV which is the next part. Part VI, and Section 190 deals with conditions requisite for initiation of proceedings and cognizance of offence by Magistrates. Chapter XVI deals with complaints to the Magistrates, and Chap. XVII deals with commencement of proceeding before Magistrates which according to Section 204 of that Chapter, commences after the Magistrate takes cognizance of the offences and issues processes or warrant for the attendance or production of the accused. Section 190(b) empowers a Magistrate to take cognizance upon a police report and when cognizance is taken proceedings are initiated. Chapter XVIII deals with enquiries into cases triable by Court of Session. Chapter XX deals with trial of summons cases and Chap. XXI deals with the trial of warrant cases, and Chap. XXII deals with summary trials and Chap. XXIII deals with trials before High Courts and Courts of Session, and then Chap. XXIV deals with the general provisions as to inquiries and trials in which Section 344 occurs and provides for powers to postpone
or adjourn proceedings. It may be noted that the expression : "inquiries and trials" in the heading of this Chapter refers to inquiries contemplated under Chap. XVIII in cases triable by a Court of Session which may include enquiries under Chaps. X and XII and trials in Summons cases, Warrant cases Summary trials and trials by Courts of Session. From this scheme of the Act, in my opinion, it is clear that Section 344 applies only to cases of which the Magistrate has taken cognizance and issued processes or warrant for the attendance of the accused if he is not produced before him. Consequently, the explanation to S.344 contemplates a stage where after the Magistrate takes cognisance of the offence and issues processes for the production of the accused, the accused may be remanded to custody, if it appears likely that further evidence may be obtained. This obtaining of further evidence cannot in the very nature of things be at the stage of investigation. The explanation contemplates the obtaining of further evidence only after the police report is filed. If there is a chance of getting such evidence, that would be a reasonable cause for remand, if there were in existence already sufficient evidence that the accused may

have committed the offence. The marginal note to Section 344 is "power to postpone or adjourn the proceedings" and the power to postpone or adjourn the proceedings cannot arise unless the Magistrate has seisin of the matter. The Magistrate can have seisin of the matter only after he takes cognizance on police report : and this explanation to Section 344 dealing with adjournment of an enquiry or trial cannot by any stretch of imagination be applied to a case where the investigation is still proceeding and a charge-sheet has not been filed and no cognizance has been taken of the offence. The Criminal Procedure Code never contemplates a third stage of investigation. This is the view taken by the Calcutta High Court in the case of 1924 Cal. 614 (AIR V 11). (B) The learned Judges, Greaves and Panton, JJ., held that :

> "On the expiry of the period of 15 days allowed under Sections 61 and 167, the police must either release the accused under Section 167, security being taken if required or the Magistrate must take cognizance on a report under Section 173 if the report according to the Magistrate makes out a prima facie case or the Magistrate must release him, and that powers of postponements or adjustments are regulated by Section 344 after a Magistrate takes cognizance of a case." It was observed at P. 616 :
> "The law as laid down in the sections of the Criminal Procedure Code to which I have referred seems to me to be this that at the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before a Magistrate allowed under Sections 61 and 167, an accused must either be released by the police under Section 169, security for his appearance if and when required being taken or the Magistrate, empowered in that behalf, must either take cognizance if he has before him a report in the form laid down in Sectio 173 which he thinks makes out a prima facie case or he must release him."

11. In the case of 1955 All. 462 (AIR V 42), which was practically overruled by the later Allahabad decision, referred to above, Raghubar Dayal, J. observed at p. 465 as follows :

> "It is to be noted that this section (S. 344) gives the power of remand to the Court and not to any Magistrate as such. This means that the power under this section can be exercised by a Court. This would be in the nature of things after the Court had taken cognizance of the offence. The same should appear from the provision that primarily this section authorizes a Court to postpone commencement of or adjourn any inquiry or trial in certain circumstances, and as a corollary when the Court does any of these things, it was given the power to remand the accused by warrant, if in custody.

The stage of the inquiry or trial will also arrive after the Court had taken cognizance of the offence. It should appear, therefore, that in view of what is laid in Sub-Section (1) of Section 344, Criminal Procedure Code, the power of remanding the accused to custody under this section is to be exercised by a Court after it had taken cognizance of the offence. The explanation to Section 344, Criminal Procedure Code, mentions that a remand, when there be already sufficient evidence against the accused and there would be chances of securing further evidence, would be on a reasonable cause. It is not said in the explanation that during the course of mere police investigation prior to its submitting a report for the purpose of the Court taking cognizance

against the accused remand can be ordered under the provision of Section 344, Criminal Procedure Code Of course the conduct of the police in trying to secure further evidence would be a part of the investigation. There is nothing in the Code to suggest that police cannot investigate an offence after it has submitted a report for the Magistrate to take cognizance of an offence against the accused. It follows, therefore, that submission of such a report and the continuation of the investigation are not inconsistent, and; that both the steps can be taken provided the Court does not pass any final order in the case till the investigation has been completed. If a Magistrate can grant remand under Section 344, Criminal Procedure Code, during the course of police investigation and in the absence of a report by the police for taking cognizance of the offence, I am of opinion that the strict condition of Section 167, Criminal Procedure Code, that the Magistrate to whom the accused is forwarded by the police can remand him to custody for a period not longer than 15 days in the whole, would be nullified. The whole scheme of these sections relating to remands seems to be that for the purpose of investigation the remand should ordinarily be for a period not longer than 15 days and that when remands for a longer period are found to be necessary by the police it should approach the Magistrate having jurisdiction over the case and that the Magistrate on receipt of such report should decide judicially whether further remand be given or not." With all respect to the learned Judge I agree with the reasons given by him as to the construction of Section 344, Criminal Procedure Code See also the decision of the Calcutta High Court in the case of - '*Nagendranath Chakrabarthi v. Emperor', Cal*[6].

12. In the case of - 'In Re Krishnaji Pandurang Joglekar', 23 Bom. 32, a Division Bench of the Bombay High Court held :

> "Now the period for which a Magistrate can authorize the detention of the accused in the police custody is fifteen days on the whole. This is quite clear from the words used in Section 167, and has been so ruled' in the case of –
> '*Queen-Empress v. Engadu'*[7]*,* The Magistrate's order, therefore, of the 14th August was illegal. The Magistrate in his proceedings in the present case says that "remands were given from time to time to complete police investigation - Section 344, Criminal Procedure Code"
> This section, however, relates to proceedings in inquiries or trials, and has nothing to do with police investigation and the contemplated remands to jail and not to police custody. In the present case the reports of the police and the endorsements of the Magistrate show that the detention was asked for and granted under Section 167, so that the reference of the Magistrate to Section 344 is not quite accurate."

13.. In the case of 11 Mad. 98 (H) a Division Bench of the Madras High Court held that :

> "The right construction of Section 167, Criminal Procedure Code is that in the proceedings before the Police under Chap. XIV, the period of remand cannot exceed in all 15 days including one or more remands."

In the reference made by the Acting District Magistrate under Section 438, Criminal Procedure Code, in consequence of which this decision was given, the District Magistrate put forth all the

difficulties of completing the investigation within 15 days and pointed out to the High Court that it was not the intention of the Legislature that the investigation should be completed within 15 days, but taking into serious consideration all these difficulties the learned Judges came to the conclusion that in no case can the accused be detained in custody and if the investigation is not completed within 15 days, the accused must be released Kernan, J. in his judgment observed :

> "The power of remand under Section 167 is given to detain the prisoners in custody while the police make the investigation in and proper case to commence the enquiry. Section 167 gives the Magistrate discretion (recording his reasons) to remand from time to time, but limits the period for exercise of that discretion to 15 days.

During the period of investigation by the police, evidence usually is not brought before the Magistrate as the enquiry has not begun. If the construction of Section 167 is, as is contended for by the Magistrate, the prisoner might find himself in custody for months before any witness is confronted with him or any evidence is recorded by the Magistrate. Such a construction would cause great grievance and would then wholly be unnecessary; for Section 170 authorizes the police officer, if there is evidence or reasonable ground of suspicion, to forward the accused to a Magistrate empowered to take cognizance of the offence on police report. Then under Section 344, an application might be made for cause shown as specified there, to the appropriate Magistrate to postpone the commencement; of the enquiry and remand the person.

14. The learned Government Advocate contends that under Section 170 "if upon an investigation under this Chapter, it appears to the officer in charge of a police station that there is sufficient evidence or reasonable ground, then such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon police report and to try the accused or commit him for trial . . . ." He contends that by virtue of this provision, if the accused is forwarded by the police to a Magistrate empowered to take cognizance, it is enough to take the case under Section 344 when the Magistrate can direct a remand and that Section 173 which occurs later provides for the filing of the charge-sheet. Consequently, his contention is that under Section 170 coupled with Section 344, the Magistrate can remand the accused under Section 344 and the explanation thereto, if the accused is forwarded to him in custody even before the filing of the charge-sheet under Section 173 and before taking cognizance. The only difference, according to him between Section 167 and Section 344 is that in the former the accused can be forwarded to any Magistrate whereas in the latter he should be forwarded to a Magistrate empowered to take cognizance. It is not necessary that he should take cognizance. It is enough if he is empowered1 to take cognizance. Mr. Mohanty submits that his contention is supported by the corresponding sections of the Criminal Procedure Cede of 1872, viz., Sections 190 and 194; but in - '*Manikam Mudali v. The Queen*'[8], which was a case under the Criminal Procedure Code of 1872, in dealing with Section 134, which corresponds to Section 344 of the present Code, the learned Judges observed :

> "Appended to Section 194 is an explanation which gives an illustration of what is such a reasonable cause as is required in the first clause of Section 194 to justify the postponement of the inquiry after it has commenced, viz., that if sufficient evidence has been obtained to raise a suspicion that the person accused may have committed an

> offence, and it appears likely that further evidence may be obtained by a remand, that is a reasonable ground for a remand; but this illustrates what is a reasonable ground for a remand after the inquiry has commenced and does not of course import that evidence must be taken to justify a remand, as the first clause of Section 194 clearly provides for a case in which it may be necessary to defer taking such evidence as may be forthcoming, and authorizes a remand made on the ground that such a course is necessary or advisable or on other reasonable ground."

This is clearly an authority for the position that Section 344. Criminal Procedure Code contemplates a stage when the Magistrate has seisin of the matter after taking cognizance of the offence under Section 190(b) corresponding to Sections 141, 142 of the Code of 1872. It may also be noted that this case does not deal with the state of facts before the commencement of the inquiry as contended for by the learned Government Advocate, but deal with the case of an application for bail after commencement of the enquiry inasmuch as the judgment also deals with the advisability or otherwise of transferring of the cases to another Magistrate. In my opinion, Sections 170, 171 and 173 are to be read together. They contemplate a simultaneous action. After the police officer comes to the conclusion that there is sufficient evidence against the accused, he should be forwarded to the Magistrate competent to take cognizance upon the police report, and Clause (2) provides that the officer in charge of a police station should forward any weapon or other articles
which it may be necessary to produce before him and also requires the complainant, if any ... to execute a bond to appear before the Magistrate as thereby directed or prosecute and give evidence. Section 171 enacts that no complainant or witness on his way to Court shall be required to accompany a police officer. Section 172 deals with the contents of the police report and Section 173 deals with the forwarding the accused to a Magistrate empowered to take cognizance of the offence on a police report, in the form prescribed. The first paragraph of Section 173 also uses the words "Every investigation under this Chapter shall be completed without unnecessary delay." I cannot accept the contention of the learned Government Advocate that it is enough if the accused is forwarded to a Magistrate empowered to take cognizance, to enable the Magistrate to act under Section 344 and remand the accused and that it is not necessary that he should take cognizance of the offence before remanding the accused under Section 344. The wording of Section 170 that he should be forwarded to a Magistrate empowered, to take cognizance is only for the purpose of his so doing.
Clause (1)(a) of Section 173 dearly states that the report forwarded to the Magistrate must set forth amongst other things whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and if so whether with or without sureties. Clause (2) also empowers a superior officer of police to direct the investigating officer to make further investigation after the submission of the report under Section 173. Putting all these sections together, the accused should be forwarded after the officer in charge of a police station comes to the conclusion that there was sufficient evidence and should, also forward a report under Section 173. The Code, thus contemplates a filing of an additional or supplementary charge-sheet as is seen from Section 173, Clause (2) under which a superior officer can order a further investigation. Consequently, if the police are to act according to law, it is imperative that they should file a charge-sheet within 15 days if they want that the accused should be remanded to custody under Section 344, and the Magistrate should take cognizance before he orders a remand under that section. If the police cannot finish the investigation within 15 days, there is nothing to prevent them to go on with the

investigation and get all the evidence necessary; but the law requires only this that the accused should no longer be detained in custody, but should be released, Afterwards if the police can get any evidence, they are at perfect liberty to file a final report and ask for arrest and remand against the accused so released which, they can obtain from the Magistrate who is in seisin of the case, after he takes cognizance of the offence on that report.

15. Even on the assumption that the learned Government Advocate is correct in his contention which contention, finds a support in the case decided by Raghubar Dayal, J. of the Allahabad High Court that Section 170, Criminal Procedure Code contemplates forwarding of the accused to the Magistrate empowered to take cognizance of the offence and to try the accused, if it appears upon an investigation that there is sufficient evidence and reasonable ground for so doing, without submitting a final report under Section 173, even then it is necessary that a report should be sent in so forwarding the accused stating that there is sufficient evidence or reasonable ground that the accused has committed the offence and the Magistrate if he wants to remand the accused for a further period under Section 344 should, and is also then empowered in law to take cognizance at that stage, and then direct a remand as contemplated in the explanation to Section 344 in which case the terms of Section 344 would be completely satisfied. There is nothing in law to prevent the Magistrate from taking cognizance of an offence on a police report not being a report under Section 173 and sent along with the accused. The Magistrate can take cognizance on such report in writing, sent by a police officer in forwarding the accused under Section 170, which will amount to a report on which a Magistrate can take cognizance, though it, is not a report under Section 173. In the case of - *'Tara Singh v. The State'*[9], it was held by the Supreme Court that :

> "All that Section 173(1)(a) requires is that as ,soon as the police investigation under Chap. 14 of the Code is complete, there should be forwarded to the Magistrate a report in the prescribed form, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case.

Where, therefore, the first report made by the police to a Magistrate though called incomplete challan, contains all these particulars and a second report called a supplementary challan 4 is filed subsequently giving the names of certain witnesses who are merely formal witnesses, the first report is in fact, a complete report as required by Section 173(1)(a) and it is not necessarily vitiated by the mere fact that a supplementary challan is subsequently filed." Bose, J. in delivering the judgment of the Supreme Court with which the other learned Judges agreed observed :

> "It is always permissible for the Magistrate to take additional evidence not set out in the challan. Therefore the mere fact that a second challan was put in on 5th October, would not necessarily vitiate the first."

Section 173(1)(a) requires a report in the prescribed form setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case. If the police report contains the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of

the case, it can be construed as the investigation being complete and the Magistrate can take cognizance on such information and such a report though even according to the police, is called a preliminary challan, and if such cognizance is taken by the Magistrate and witnesses are sent up and examined then the commitment proceedings were held in that case not to have been vitiated, on account of the evidence being recorded before the filing of the so called report contemplated under Section 173. Such a report in these cases, was never forwarded to the Magistrate, and the record does not show that the Magistrate has taken cognizance of the offence before ordering remand of the accused in each of the cases. The contention of the learned Government Advocate that the detention was not illegal on the grounds submitted by him would have had some force had the police sent a report stating the names of the accused, the names of witnesses and the evidence till then appearing against the accused and also asked for a remand and had the Magistrate taken cognizance of the offences and then remanded the accused to custody. Taking cognizance of an offence is a judicial act. The Magistrate is said to take cognizance as soon as he as such takes legal notice, and applies his mind to the suspected commission of the offence, with a view to decide whether he should take
such judicial action preliminary to inquiry as is hereinafter mentioned, viz., recording a complaint, issuing processes, or ordering a previous inquiry. The term 'taking cognizance' has been defined as a judicial action permitted by the Code taken with a view eventually to prosecution and preliminary to the commencement of the inquiry or trial have gone through the order-sheets of the Magistrate in these cases. There is nothing in those order-sheets to show that the accused were forwarded under Section 170, with a preliminary report, or that the Magistrate applied his mind and passed any judicial order with a view to take cognizance. The various orders passed are only to the effect that the accused were produced, that they were involved in serious offences, that investigation is still proceeding, that they should be remanded for a further period and that final form should be filed. The mere order for a remand is not, in my opinion, sufficient to constitute taking of cognizance. In my opinion, the investigating police ought to have followed this procedure in this case, especially when the accused were arrested on suspicion of offences of arson and dacoity. Instead of doing so, they are going on with the investigation and obtaining remands from the Magistrate for more than 16 days in all without filing the report contemplated under Section 173, and without even forwarding a preliminary report. The orders of remand passed in these cases by the Magistrate for more than 15 days in all before he took cognizance of the offences against the accused are illegal orders and the detention in consequence of those orders cannot but be an illegal detention.

16. I have, therefore, no hesitation in holding that the detention of the petitioners at present is an illegal detention not sanctioned either by the Constitution or by law as enacted in the Code of Criminal Procedure.

17. The petitioners also challenged the detention on fee ground that the petitioners were not informed of the grounds of their detention as required by Article 22 of the Constitution, In view of my decision that the detention is illegal under the Code of Criminal Procedure, I do not propose to go into this contention raised by the petitioners. Consequently, I think the petitioners who were in jail custody for more than fifteen days and who were ordered to be released by us on bail are in law under illegal detention. On the grant of bail, their custody in jail is, in law, transferred to the custody of the bailors. I, therefore, direct that the petitioners should be released from such custody and their bail bonds cancelled forthwith.

Mohapatra, J.

18. I agree.

Orders accordingly.

Cases Referred.

[1]194Cal 143 (AIR, V36) (A)
[2]1924 Cal 614 (AIR V11)
[3]1955 All 521 ((S) AIR V42)
[4] (1955 All. 462), (AIR V 42)
[5]1931 All. 617 (AIR V 18) (E)
[6]476 (AIR V 11) (F)
[7]11 Mad. 93 (H)
[8]6 Mad. 63
[9]1951 S.C. 441 (AIR V 38)