Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1572 OF 2012
(Arising out of S.L.P. (Criminal) No. 6468 of 2012)

Manubhai Ratilal Patel Tr. Ushaben ... Appellant

Versus

State of Gujarat & Ors. ... Respondents

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J U D G M E N T

Dipak Misra, J.

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Leave granted.

2. The appellant was an accused in FIR No. I-CR No. 56/12 registered at Pethapur Police Station on 20th of June, 2012 for offences punishable under Sections 467, 468, 471, 409 and 114 of the Indian Penal Code (for short 'the IPC'). Challenging

the registration of the FIR and the investigation, the accused-appellant (hereinafter referred to as "the accused") preferred Criminal Miscellaneous Application No. 10303 of 2012 on 11.7.2012 under Section 482 of the Code of Criminal Procedure (for brevity "the Code") in the High Court of Gujarat at Ahmedabad for quashing of the FIR. A prayer was also made for stay of further proceedings in respect of the investigation of I-CR No. 56/12.

3. The unfurling of factual scenario further shows that the matter was taken up on 17.7.2012 and the High Court issued notice and fixed the returnable date on 7.8.2012 and allowed the interim relief in terms of prayer No. (C) which pertained to stay of further proceedings in respect of the investigation.

4. The exposition of facts reveals that the accused was arrested on 16.7.2012 and produced before the learned Judicial Magistrate First Class, Gandhinagar at 4.00 p.m. on 17.7.2012. The police prayed for remand of the accused to police custody which was granted by the learned Magistrate upto 2.00 p.m. on 19.7.2012. On 18.7.2012, it was brought to

the notice of the concerned investigation agency about the stay order passed by the High Court on 17.7.2012 and prayer was made not to proceed further with the investigation in obedience to the order passed by the High Court. It is pertinent to note that an application for regular bail under Section 439 of the Code was filed on 19.7.2012 before the learned Magistrate. Apart from other grounds, it was highlighted that when a petition was pending before the High Court for quashment of the First Information Report and a stay order had been passed pertaining to further investigation, the detention was illegal and hence, the accused was entitled to be admitted to bail.

5. The learned Magistrate dwelled upon the allegations made against the accused and declined to release him on bail regard being had to the nature of offences. Dealing with the order passed by the High Court, he observed that the order passed by the Hon'ble High Court pertained to stay of further investigation although no investigation was required to be carried out during judicial custody and, as the accused was

involved in commission of grievous offences, it would not be just to enlarge him on bail.

6. Being aggrieved by the aforesaid order, the accused preferred Criminal Miscellaneous Application No. 539 of 2012 in the Court of learned Sessions Judge, Gandhinagar and also prayed for grant of interim bail. The learned Sessions Judge rejected the prayer for grant of interim bail and fixed the main application for hearing on 24.7.2012.

7. Dissatisfied with the aforesaid orders, the accused preferred a habeas corpus petition before the High Court of Gujarat forming the subject matter of Special Criminal Application No. 2207 of 2012. It was contended before the High Court that since the investigation was stayed by the High Court in exercise of power under Section 482 of the Code, the learned Magistrate could not have exercised power under Section 167(2) of the Code remanding the accused either to police or judicial custody. It was submitted that the power of the Magistrate remanding the accused to custody during the course of investigation stood eclipsed by the order of stay

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passed by the High Court and, therefore, the detention was absolutely illegal and *non est* in law. It was also urged that as the detention of the accused was unlawful, a writ of habeas corpus would lie and he deserved to be set at liberty forthwith as long as the stay order was operative.

8. The aforesaid stand put forth by the learned counsel was combated by the State contending, inter alia, that it could not be said that there had been no investigation as arrest had already taken place and hence, stay of further investigation would not nullify the order of remand, be it a remand to police custody or judicial custody. Highlighting the said stance, it was propounded that the order of remand could not be treated as impermissible warranting interference by the High Court in exercise of jurisdiction of writ of habeas corpus.

9. The High Court adverted to the chronology of events and held thus: -

> "From the chronology of events as emerging from the petition as well as affidavit-in-reply, it is not in dispute that the arrest of the petitioner was effected on 16/07/2012.

> Whereas the quashing petition came to be filed on 17/07/2012 and the stay order was granted on 17/07/2012 at about 04.30 p.m. and the remand of the accused – petitioner to police custody was granted on 17/07/2012 till 02.00 p.m. of 19/07/2012. It is also required to be noted that order passed by learned JMFC has not been challenged anywhere and has attained finality. Thereafter, the order passed by this Court in CRMA No. 10303 of 2012 has been served on the Police authority on 17/07/2012 at 09.30 p.m. On the next day i.e. on 18/07/2012, the Investigating Officer seems to have informed learned JMFC about the stay granted by the High Court and has attended High Court in connection with anticipatory bail application preferred by the petitioner. It is also not the case of the petitioner that after the service of order of stay, any other investigation has been carried by the Investigating Officer. On 19/07/2012 itself the applicant preferred an application for bail under Section 437 of the Code, which came to be rejected and the accused was remanded to judicial custody and as such the petitioner – accused is in judicial custody as on now. It is pertinent to note that the learned JMFC has rightly observed in his order upon bail application that the High Court has stayed further investigation only."

10. After so stating, the High Court dealt with the issue whether the custody of the accused could be said to be illegal. It was opined by the High Court that it was not possible to

accept the stand that once the investigation was stayed, there could not have been exercise of jurisdiction under Section 167(2) of the Code, for stay of investigation would not eradicate the FIR or the investigation that had been already carried out pursuant to lodging of FIR. It was further opined that it was only an ad-interim order and if the stay order would eventually be vacated or the quashing petition would not be entertained, the investigation would be continued. The High Court further observed that solely because the investigation was stayed, it would not be apposite to say that there was no investigation and the order passed by the learned Magistrate was flawed.

11. Addressing to the issue of remand, the High Court opined that the order of remand of the accused to custody could not be said to be a part of the investigation and hence, the said order was not in conflict with the order passed under Section 482 of the Code of Criminal Procedure in Criminal Miscellaneous Application No. 10303 of 2012. Reference was made to Section 2(h) of the Code which defines 'investigation'

and it was ruled that the order passed by the learned Magistrate could not be termed as a part of the investigation. Eventually, the High Court opined that it could not be held that when the order was passed by the learned JMFC, there was no investigation and, therefore, there was no force in the argument that the learned JMFC could not have remanded the accused in such a situation in exercise of powers under Section 167 of the Code, and secondly, the act of the learned JMFC remanding the accused to custody is a judicial act which cannot be termed as part of the investigation and cannot be considered to have been covered under the stay granted by the High Court in CRMA No. 10303 of 2012. It was further held that illegal or unauthorised detention or confinement is a *sine qua non* for entertaining a petition for writ of habeas corpus and the custody of the petitioner being in pursuance of a judicial act, it could not be termed as illegal.

12. At this juncture, it is seemly to note that the appellant had knocked at the doors of the High Court in a habeas corpus petition. The writ of habeas corpus has always been

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given due signification as an effective method to ensure release of the detained person from prison. In *P. Ramanatha Aiyar's Law Lexicon (1997 edition)*, while defining "habeas corpus", apart from other aspects, the following has been stated: -

> "The ancient prerogative writ of habeas corpus takes its name from the two mandatory words *habeas. corpus,* which it contained at the time when it, in common with all forms of legal process, was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual."

13. In ***Secretary of State for Home Affairs* v. *O'Brien***[1], it has been observed that it is perhaps the most important writ known to the constitutional law of England affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of liege.

[1] (1923) AC 603 (609)

14. In ***Ranjit Singh* v. *The State of Pepsu (now Punjab)***[2], after referring to ***Greene* v. *Secretary of States for Home Affairs***[3], this Court observed that the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible. The Bench quoted Lord Wright who, in ***Greene's*** case, had stated thus:

> "The incalculable value of Habeas Corpus is that it enables the immediate determination of the right to the appellant's freedom."

Emphasis was laid on the satisfaction of the court relating to justifiability and legality of the custody.

15. In ***Kanu Sanyal* v. *District Magistrate, Darjeeling and others***[4], it was laid down that the writ of habeas corpus deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty.

[2] AIR 1959 SC 843
[3] 1942 AC 284
[4] AIR 1973 SC 2684

16. Speaking about the importance of the writ of habeas corpus, a two-Judge Bench, in ***Ummu Sabeena* v. *State of Kerala and others***[5], has observed as follows: -

> "…the writ of habeas corpus is the oldest writ evolved by the common law of England to protect the individual liberty against its invasion in the hands of the executive or may be also at the instance of private persons. This principle of habeas corpus has been incorporated in our constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on fundamental rights, to protect individual liberty the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the Court by issuing a writ of habeas corpus."

In the said case, a reference was made to *Halsbury's Laws of England, 4th Edn. Vol. 11, para 1454* to highlight that a writ of habeas corpus is a writ of highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority.

[5] (2011) 10 SCC 781

17. Having stated about the significance of the writ of habeas corpus as a weapon for protection of individual liberty through judicial process, it is condign to refer to certain authorities to appreciate how this Court has dwelled upon and expressed its views pertaining to the legality of the order of detention, especially that ensuing from the order of the court when an accused is produced in custody before a Magistrate after arrest. It is also worthy to note that the opinion of this Court relating to the relevant stage of delineation for the purpose of adjudicating the legality of the order of detention is of immense importance for the present case.

18. In ***Col. Dr. B. Ramachandra Rao*** **v.** ***The State of Orissa and others***[6], it was opined that a writ of habeas corpus is not granted where a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal.

[6] AIR 1971 SC 2197

19. In ***Re. Madhu Limaye and others***[7], the Court referred to the decision in ***Ram Narayan Singh*** **v.** ***State of Delhi***[8] and opined that the court must have regard to the legality or otherwise of the detention at the time of return.

20. In ***Kanu Sanyal*** **v.** ***Dist. Magistrate, Darjeeling and others***[9], contentions were raised to the effect that the initial detention of the petitioner in District Jail, Darjeeling was illegal because he was detained without being informed of the grounds for his arrest as required under clause (i) of Article 22 of the Constitution and that the Sub-Divisional Magistrate, Darjeeling had no jurisdiction to try and, therefore, he could not authorise the detention of the petitioner under Section 167 of the Code. The two-Judge Bench adverted to the aforesaid aspects and referred to the earlier decisions in ***Naranjan Singh*** **v.** ***State of Punjab***[10], ***Ram Narain Singh*** (supra), ***B.R. Rao*** (Supra) and ***Talib Hussain*** **v.** ***State of Jammu and Kashmir***[11] and noted that three views had been taken by this

[7] AIR 1969 SC 1014
[8] AIR 1953 SC 277
[9] AIR 1974 SC 510
[10] AIR 1952 SC 106
[11] AIR 1971 SC 62

Court at various times pertaining to the relevant date to determine the justifiability of the detention and opined as follows:-

> "This Court speaking through Wanchoo, J. (as he then was) said in A.K. Gopalan v. Government of India; [(1966) 2 SCR 427 = (AIR 1966 SC 816)]. "It is well settled that in dealing with the petition for habeas corpus the Court is to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the date of the hearing". In two early decisions of this Court, however, namely, Naranjan Singh v. State of Punjab, [(1952 SCR 395) = AIR 1952 SC 106)] and Ram Narain Singh v. State of Delhi, [(1953 SCR 652) = (AIR 1953 SC 277)] a slightly different view was expressed and that view was reiterated by this Court in B.R. Rao v. State of Orissa (AIR 1971 SC 2197) where it was said; "In habeas corpus the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings." And yet in another decision of this Court in Talib Husain v. State of Jammu & Kashmir (AIR 1971 SC 62) Mr. Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that "in habeas corpus proceedings the Court has to consider the legality of the detention on the date of the hearing." Of these three views taken by the Court at different times,

> the second appears to be more in consonance with the law and practice in England and may be taken as having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the Court cannot order release of the person detained by issuing a writ of habeas corpus. But, for the purpose of the present case, it is immaterial which of these three views is accepted as correct, for it is clear that, whichever be the correct view, the earliest date with reference to which the legality of detention may be examined is the date of filing of the application for habeas corpus and the Court is not, to quote the words of Mr. Justice Dua in AIR 1971 SC 2197 "concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus"."
>
> (emphasis supplied)

After so stating, the Bench opined that for adjudication in the said case, it was immaterial which of the three views was accepted as correct but eventually referred to paragraph 7 in the case of ***B.R. Rao*** (supra) wherein the Court had expressed the view in the following manner: -

> "....in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings."

Eventually, the Bench ruled thus: -

> "The production of the petitioner before the Special Judge, Vizakhapatnam, could not, therefore, be said to be illegal and his subsequent detention in the Central Jail, Vizakhapatnam, pursuant to the orders made by the Special Judge, Vizakhapatnam, pending trial must be held to be valid. This Court pointed out in AIR 1971 SC 2197 that a writ of habeas corpus cannot be granted "where a person is committed to Jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal"."

21. The principle laid down in ***Kanu Sanyal*** (supra), thus, is that any infirmity in the detention of the petitioner at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits.

22. At this juncture, we may profitably refer to the Constitution Bench decision in ***Sanjay Dutt* v. *State***

through C.B.I., Bombay (II)[12] wherein it has been opined thus: -

> "It is settled by Constitution Bench decisions that a petition seeking the writ of *habeas corpus* on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order."

23. Keeping in view the aforesaid concepts with regard to the writ of habeas corpus, especially pertaining to an order passed by the learned Magistrate at the time of production of the accused, it is necessary to advert to the schematic postulates under the Code relating to remand. There are two provisions in the Code which provide for remand, i.e., Sections 167 and 309. The Magistrate has the authority under Section 167(2) of the Code to direct for detention of the accused in such custody, i.e., police or judicial, if he thinks that further detention is necessary.

24. The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act

[12] (1994) 5 SCC 410

in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner. It is apt to note that in ***Madhu Limaye*** (supra), it has been stated that once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to

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establish that at the stage of remand, the Magistrate directed detention in jail custody after applying his mind to all relevant matters.

25. In ***Central Bureau of Investigation, Special Investigation Cell-I, New Delhi*** **v.** ***Anupam J. Kulkarni***[13], it has been stated that where an accused is placed in police custody for the maximum period of fifteen days allowed under law either pursuant to a single order of remand or more than one order, when the remand is restricted on each occasion to a lesser number of days, the further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. Thus, the exercise of jurisdiction clearly shows that the Magistrate performs a judicial act.

26. Presently, we shall advert to the concept of investigation. The term "investigation" has been defined in Section 2(h) of the Code. It reads as follows: -

> "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person

[13] AIR 1992 SC 1768

(other than a Magistrate) who is authorised by a Magistrate in this behalf;"

27. A three-Judge Bench in ***H.N. Rishbud and another* v. *State of Delhi***[14], while dealing with "investigation", has stated that under the Code, investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected, there is a case to place the accused before a Magistrate for trial and, if so, taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

[14] AIR 1955 SC 196

28. In ***Adri Dharan Das* v. *State of West Bengal***[15], it has been opined that arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding the various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime.

29. In ***Niranjan Singh* v. *State of Uttar Pradesh***[16], it has been laid down that investigation is not an inquiry or trial before the court and that is why the legislature did not contemplate any irregularity in investigation as of sufficient importance to vitiate or otherwise form any infirmity in the inquiry or trial.

30. In ***S.N. Sharma* v. *Bipen Kumar Tiwari***[17], it has been observed that the power of police to investigate is independent of any control by the Magistrate.

31. In ***State of Bihar* v. *J.A.C. Saldanha and others***[18], it has been observed that there is a clear cut and well

[15] AIR 2005 SC 1057
[16] AIR 1957 SC 142
[17] (1970) 1 SCC 653
[18] (1980) 1 SCC 554

demarcated sphere of activity in the field of crime detection and crime punishment and further investigation of an offence is the field exclusively reserved for the executive in the police department.

32. Coming to the case at hand, it is evincible that the arrest had taken place a day prior to the passing of order of stay. It is also manifest that the order of remand was passed by the learned Magistrate after considering the allegations in the FIR but not in a routine or mechanical manner. It has to be borne in mind that the effect of the order of the High Court regarding stay of investigation could only have bearing on the action of the investigating agency. The order of remand which is a judicial act, as we perceive, does not suffer from any infirmity. The only ground that was highlighted before the High Court as well as before this Court is that once there is stay of investigation, the order of remand is sensitively susceptible and, therefore, as a logical corollary, the detention is unsustainable. It is worthy to note that the investigation had already commenced and as a resultant consequence, the

accused was arrested. Thus, we are disposed to think that the order of remand cannot be regarded as untenable in law. It is well accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in the cases of ***B.R. Rao*** (supra) and ***Kanu Sanyal*** (supra), the court is required to scrutinize the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate. The sphere of activity is clear cut and well demarcated. Thus viewed, we do

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not perceive any error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law.

33. Though we have not interfered with the order passed by the High Court, yet we would request the High Court to dispose of the Criminal Miscellaneous Application No. 10303 of 2012 within a period of six weeks. Liberty is granted to the appellant to move the appropriate court for grant of bail, if so advised.

34. Consequently, with the aforesaid observations mentioned hereinabove, the appeal, being sans merit, stands dismissed.

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.....J.
[K. S. Radhakrishnan]

.....J.
[Dipak Misra]

New Delhi;
September 28, 2012.