

State of Orissa Vs. Surendra Kumar Das Alias Surendra Alias Belu

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Court : Orissa

Decided On : Aug-30-1993

Reported in : 76(1993)CLT806; 1993(II)OLR326

Judge : D.P. Mohapatra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 167, 167(2), 167(5), 349, 436, 437, 439 and 482

Appeal No. : Criminal Misc. Case Nos. 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811 and 1812 o

Appellant : State of Orissa

Respondent : Surendra Kumar Das Alias Surendra Alias Belu

Advocate for Def. : Manoj Misra and ;Debasis Panda, Advs.

Advocate for Pet/Ap. : Government Adv.

Disposition : Petition dismissed

Judgement :

D.P. Mohapatra, J.

1. The question that falls for determination in these cases is whether on facts and in the circumstances of the case the learned Sub-divisional Judicial Magistrate

(Sadar), Cuttack was right in releasing the opp. party-accused Under Section 167(2) of the Code of Criminal Procedure The facts involved and the points of law raised in all the cases being similar, the cases were heard together with consent of the learned counsel for the parties and they are being disposed of by this common order.

2. Opp. party Surendra Kumar Das alias Surendra Das alias Belu, is shown as an accused in the following twelve cases, i. e. , G. R, Case No. 643 of 1992 (Chauliaganj P. S. Case No. 88/92), G. R. Case No. 644 of 1992(Chauliaganj P. S. Case No. 92 of 1992), G. R. Case No. 646 of 1992 (Lalbag P. S. Case No. 88 of 1992), G. R. Case No. 647 of 1992 (Lalbag P. S Case No. 89 of 1992), G. R. Case No. 649 of 1992 (Mangatabag P. S. Case No. 97 of 1992). G. R. Case No. 651 of 1992(Bidanashi P. S. Case No. 50 of 1992), G. R. Case No. 652 of 1992 (Bidanashi P. S. Case No. 51 of 1992), G.R. Case No. 654 of 1992 (Purighat P. S. Case No. 94 of 1992), G. R. Case No. 655 of 1992 (Mangalabag P, S. Case No. 99 of 1992), G. R. Case No. 662 of 1992 (Malgodown P. S. Case No. 64 of 1992), G. R. Case No. 663 of 1992 (Malgodown P. S. Case No. 65 of 1992) and G. R. Case No. 665 of 1992 (Madhupatna P. S. Case No. 122 of 1992), which are pending in the Court of the S. D. J. M.) (Sadar), Cuttack. All the aforementioned cases were registered Under Sections 272, 273, 302, 284/34, IPC, and the opposite party was cited as an accused in the first information reports.

3. The main allegations in all the cases is that spurious country liquor was supplied by the opposite party on consumption of which a large number of persons died in Cuttack city and its suburbs, The FIRs were filed in different police stations in Cuttack City on 8/9-5-1992. On 14-5-1992 an order Under Section 3(2) of the National Security Act was passed by the Collector, Cuttack for detention of the opposite party. In pursuance of the said order, he was taken into custody on 15-5-1992 and lodged in Chaudwar Jail. On the application filed by the Inspector-in-charge of Lalbag Police Station seeking production of the opposite party in Court in connection with Lalbag Police Station Case Nos. 88 and 89 of 1992 Corresponding to G.R. Case Nos. 646 and 647 of 1992 respectively and for his remand to police custody, the learned S. D. J. M. issued a warrant for production of the opp, party in pursuance of which the opp party was produced by the

concerned jail authority in Court on 5-6-1992 in G. R Case Nos. 646 and 647 of 1992. The learned Magistrate rejected the prayer of the opp. party for being released him on bail and remanded him to custody, On that day the opp. party being present in Court prayed to the learned Magistrate to accept his surrender in the remaining ten cases in which he was arraigned as accused and to release him on bail. The learned Magistrate passed similar orders rejecting his prayer for bail and remanded him to custody in the other ten cases also. On 3-9-1992 the bail petitions were filed on behalf of the opp. party Under Section 167(2), Cr PC, since no charge-sheet was submitted and the statutory period of 90 days from the date of remand had elapsed. The learned S. D. J. M. passed orders on 3-9-1992 granting bail to the opp. party subject to certain conditions On 26-11-1992 the bail bonds were furnished, accepted by the learned Magistrate and release orders were issued. The opp, party was released from custody on 14-5-1993 on completion of the period of detention under the National Security Act. In the meantime the State had filed the present applications Under Section 482, Cr PC, on 20-10-1992 challenging the bail orders passed by the learned S. D. J. M., Cuttack on 3-9-1992.

4. The main ground of challenge against the impugned orders is that the learned Magistrate was in error in passing the bail orders under the proviso to Section 167(2) Cr PC, since the opp. party had never been arrested in any of the criminal cases. During the entire period he was in detention under National Security act.

5. On the factual backdrop discussed above, the question which has been formulated earlier arises for determination. At the outset the learned Govt. Advocate fairly stated that the two cases, G. R. Case Nos. 646 and 647 of 1992 stand on a different footing from the other ten cases since in those cases on the application tiled by the Inspector-in-charge, Lalbag Police Station seeking remand of the opp. party, the learned Magistrate passed the order of remand. So far as the other cases are concerned, the learned Govt. Advocate contended that the remand order and the bail order Under Section 167(2) passed by the learned Magistrate are misconceived. According to him, in none of the twelve cases the opp. party had been arrested by the police ; therefore the question of seeking his remand by the Magistrate Under Section 167, Cr PC, did not arise. it is his further

contention that in the ten cases in which the opp. party taking advantage of his presence in Court volunteered to surrender the learned Magistrate should not. have accepted the surrender and should not have passed the. order of remand,

6. Shri Manoj Misra appearing for the opp. party, on the other hand, contended that it was open to the accused-opp. party to voluntarily submit himself to the jurisdiction of the Court of the learned S. D. J. M. before whom all the criminal cases were then pending and such surrender amounts to 'custody' for the purpose of remand Under Section 167, Cr PC. Therefore there was no illegality or infirmity in the order of remand passed on 5-6-1992 and the order granting bail under the proviso to Sub-section (2) of Sec. 167, Cr PC. on 8.9-1992-

7. Since adjudication of the point in issue depends on interpretation of the provisions of Section 167(2) Cr PC, and its interplay with other provisions of the Criminal Procedure; Code, it will be convenient to quote Section 167, Cr PC.

'167. 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 forthwith 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 time 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 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 on 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 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 or 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 on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXX III for the 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 I- 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 II- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

(2A). Notwithstanding anything contained in Sub-section (1) or Sub-sec (2), 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, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of Judicial Magistrate or Metropolitan Magistrate, have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and snail, at- the

same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate may, for reasons to be recorded in writing, authorise the detention of the accused persons in such custody as he may think fit for a term not exceeding seven days in the aggregate ; and on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused persons has been made by a Magistrate competent to make such order ; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to Sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the Officer-in-charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary,

(6) Where any order stopping further investigation into an offence has been made under Sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise that further investigation into the offence ought to be

made, vacate the order made under Sub-section (6) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.'

8. On a plain reading of the section, it is manifest that before an order of remand is passed by the Magistrate under the section the accused must have been arrested and detained in custody and if it appears that the investigation cannot be completed by the police within the period of twenty-four hours fixed by Section 57 in such circumstance a Magistrate whether he has or has not jurisdiction to try the case may authorise detention of the accused from time to time in such custody (police custody or judicial custody) as he thinks fit, for a term not exceeding fifteen days on the whole in police custody and not more than total period of sixty days or ninety days, as the case may be, depending upon the gravity of offence alleged in the case. The condition precedent for passing an order of remand authorising detention in custody is that the accused must be produced before the Magistrate.

Under Section 167(2) Proviso (a) (i) (ii), Cr PC it is mandated that if the investigation is not completed within 60 to 90 days as applicable to the case, the accused person should be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII of Cr PC.

9. Interpreting the term 'custody' in Section 439, Cr PC, the Apex Court in the case of *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.*, reported in AIR 1980 SC 785 ruled that no person accused of an offence can move the Court for bail Under Section 439 unless he is in custody and custody, in the context of Section 439 is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court. The Court held that the accused can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.

Relying on the aforementioned decision of the Apex Court and other decisions, a Division Bench of this Court in the case of *State v. Maguni Charan Sahu and Ors.*

reported in 1983 Cr LJ 1212 held that where the Magistrate released the accused on bail when they voluntarily surrendered before him, it could not be said that bail had been granted without jurisdiction as when the accused persons surrendered to the jurisdiction of the Court and agreed to abide by the judicial direction, the Magistrate had full jurisdiction to deal with their case for bail under Sec, 437 and their release on bail was, therefore, not open to objection. A contrary view taken by this Court in the case of *Bhramar and Anr. v. State of Orissa* reported in 1981 Cr LJ 1057 (Orissa) was overruled. This Court placed reliance on the decisions of the Calcutta High Court in the case of *In Re: Digendr Sarkara*, reported in 1982 Cr LJ 2197 (Calcutta), of the Assam High Court, reported in 1982 Cr LJ 1816 *State of Assam v. Mobarak Ali and Ors.* and of the Karnataka High Court, 1982 Cr LJ 1334, *B. Narayanappa and Ors. v. State of Karnataka*.

In 1983 Cr LJ 1748 (Madras), *Jagannathan and Ors. v. The State* construing Section 167(5) Cr PC the Madras High Court held that the section does not speak only of the arrest by the police ; therefore an arrest made by any one, a police officer private person of a Magistrate, as provided for under Sees. 41 to 44 of the Code--will come within the meaning of the term 'arrest' occurring in Section 167(5); once a person is arrested, for the purpose of investigations, the remand is made Under Section 167. The Court relied on the Division Bench decision of Kerala High Court in *V. Vishwanathan v. State of Kerala*, 1971 Madras L. Journal (Criminal) 13(sic) and the decision of Apex Court in *Niranjan Singh v. Prabhakar* AIR 1980 SC 785 (supra).

The Kerala High Court in the case of *C. Bhaskaran Nair v. State of Kerala and Ors.*, (1987 Cr LJ 170) construing the provisions in Section 167 (6) Cr PC held that the arrest under that provision includes surrender before Court also ; that Section 167(5) does not speak of arrest made by the police alone; when the accused surrenders before the Magistrate he is either released on bail or taken to custody and remanded ; that such taking into custody is also Under Section 167; that when the accused has appeared and surrendered before the Judge or the Magistrate he will be treated as in custody for the purpose of considering his bail applications ; that that is physical custody and submission to the jurisdiction of the Court and there is no distinction between arrest and appearance before Court direct except

that in the former case the additional process of production by the arresting officer before the Magistrate is also there. The Court further held that Section 167 equally applies both to arrest and surrender before Court; that taking into custody by the Magistrate on surrender will also come within the ambit of 'arrest' and that the period of six months will have to be reckoned from the date of arrest or surrender, as the case may be.

The Calcutta High Court in the case of Sushil Kumar Dey and Ors. v. State of West Bengal, 1987 Cr.LJ 1571 (Calcutta) held that the principle behind Section 167(5) is that the investigating agency may not harass a person for long by binding him over in less serious cases. This consideration obviously does not apply if a person volunteers to surrender before a Magistrate and consequently the investigating agency cannot be under a mandate to conclude the investigation within a specified period. Therefore, the provisions of Section 167(5) have no application when an accused is not arrested by the police but surrenders before a Magistrate. , Consequently, the investigation beyond six months from the date of surrender of the accused without complying with the requirement of Section 167(5) is not illegal or irregular even though the case is triable as a summons case.

The Apex Court in the case of Chaganti Satyanarayana and Ors. v. State of Andhra Pradesh reported in AIR 1986 Supreme Court. 2130 interpreting the provision in Section 167(2), Cr PC held as follows :

'As Sub-section (2) of Section 167 as well as proviso (1) of Sub-section (2) of Section 309 relate to the powers of remand of a Magistrate, though under different situations, the two provisions call for a harmonious reading in so far as the periods of remand are concerned. It would, therefore, follow that the words '15 days in the whole' occurring in Sub-section (2) of Section 167 would be tantamount to a period of '15 days at a time' but subject to the condition that if the accused is to be remanded to police custody the remand should be for such period as is commensurate with the requirements of a case with provision for further extensions for restricted periods, if need be, but in no case should be total period of remand to police custody exceed 15 days.

Construing proviso (a) either in conjunction with Sub-sec, (2) of Section 167 or as an independent paragraph, it is clear that the total period of 90 days under Clause (i) and the total period of 60 days under Clause (ii) has to be calculated only from the date of remand and not from the date of arrest.'

The Apex Court in the case of Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni, reported in AIR 1992 SC 1768 construing Section 167(2) in the peculiar facts and circumstances of the case observed thus.

'In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen days, if that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. However this limitation shall not apply to a different occurrence in which the complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody. If best must be made in this connection explicit, that such re-arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Sec. 167(2) to the effect that a fresh remand for police custody of a person already in judicial custody during investigation of a specific case cannot under any circumstances be issued would seriously hamper the very investigation or the other case the importance of which needs no special emphasis. The procedural law is meant to

further the ends of justice and not to frustrate the same.

10. From the conspectus of the views taken in the aforementioned decisions, it is clear that an accused can apply for bail Under Sections 436, 437 and 439, Cr PC not only when he is arrested by the police but also if he is arrested under orders of a Magistrate or voluntarily surrenders in Court and subject himself to its jurisdiction. In all these cases the accused can be said to be 'under arrest' or 'in custody' and the Magistrate can either release him on bail or remand him to custody. Remand of an accused by the Magistrate can be made Under Section 167 or Sections 209 and 309, Cr PC. While Section 167, Cr PC provides for remand when the case is under investigation. Section 209 deals with remand when the Magistrate commits the case to the Court of Session and Section 309 deals with remand during the enquiry or trial. From the provisions of these sections and interpretation thereof by the Apex Court in AIR 1986 SC 2130 (supra) it is clear that the maximum period of remand to police custody in a case is 15 days. The position is also clear that for the purpose of bail or remand Under Section 167(2), the arrest of the accused by the police or arrest under order of the Magistrate or voluntary surrender to the Court and subjecting himself to its jurisdiction have been considered to be at par and the consequence similar. It follows therefore that when any accused voluntarily surrenders and submits himself to the jurisdiction of the Court and the Magistrate passes an order remanding him to custody of the police or judicial custody, as the case may be, then Section 167(2) Cr PC, is attracted.

11. Testing the present case on the touch-stone of the principles enunciated above, what I find is that in two of the cases the Investigating Officer himself sought for production and remand of the accused and on acceptance of his request the Magistrate directed for production of the accused and passed order rejecting his prayer for bail and remanded him to custody. In the remaining ten cases, the accused voluntarily surrendered in the Court and prayed for bail ; his prayer for bail was refused and the order remanding him to custody was passed by the learned Magistrate. No doubt, during this period he was in detention under the National Security Act. The prosecution did not challenge the orders of remand passed by the Magistrate. The period of detention under the National Security Act

expired. On the application filed by the accused for being released on bail under Sec 167(2) proviso, since no charge sheet was submitted in any of the cases during the period of 90 days from the date of remand the learned Magistrate directed his release on bail on 3-9-1992. Nearly three months thereafter the present applications Under Section 432, Cr PC, were filed on 20-12-1992 for setting aside the bail orders. In the meantime about one year has elapsed since the accused was released on bail. On the legal position as enunciated by the Apex Court and different High Courts discussed above, it cannot be said that the remand order passed by the learned Magistrate was without jurisdiction. It is relevant to note here that an order of remand to police custody is for the purpose facilitating investigation by the police. For that purpose the Investigating Officer sought for remand of the accused in two of the cases. It is not the case of the State and it was not contended by the learned Govt. Advocate that the Investigating Officer faced any difficulty in investigating the case despite the remand order passed by the learned Magistrate because the accused was under detention under the National Security Act. If that was the case the State would have moved for setting aside the remand order and would have preferred to wait till expiry of the detention period under the National Security Act. Therefore viewed from any angle in the light of the legal position as well as the factual position, it cannot be said that there was any serious illegality or infirmity in the remand order passed by the learned Magistrate. The consequential position that follows is that Section 167(2), Cr PC, is attracted to the cases and the accused is entitled to the benefit of the proviso therein if the charge-sheet in the cases is not filed within the statutory specified period, i, e. 90 days in this case.

12. Before concluding the judgment, I would like to discuss another point which, in my opinion, is pertinent. Though the applications were filed by the State purportedly Under Section 482, Cr PC, in essence they are applications for cancellation of the bail granted to the accused-opp. party. The position is well-settled that the order of cancellation of bail which results in denial of liberty to accused can be made only if there are strong reasons and pressing circumstances for such cancellation. It is also well-settled that there is no difference between the bail granted Under Section 167(2), Cr PC, which is called bail by default and bail granted Under Sections 437 and 439, Cr PC. Liberty of a citizen which is a

precious right cannot be lightly frittered away. Indeed it has been observed by the Apex Court and also different High Courts that it is one thing to refuse bail and another to cancel bail. Except the technical pleas discussed in the foregoing paragraphs the State has neither pleaded in the petitions nor placed any material in course of hearing of the cases that any special difficulty is experienced due to release of the opp. party on bail. It is also not the case of the State that the opp. party has misutilised the liberty granted to him in pursuance of the bail orders.

13. On careful consideration of the entire matter, I am unable to persuade myself to accept the contention of the learned Govt. Advocate that the impugned orders passed by the learned Subdivisional Judicial Magistrate (Sadar), Cuttack on 3-9-1992 granting bail to the opp. party Under Section 167(2) proviso should be quashed in exercise of inherent power of this Court Under Section 482. Cr PC. Therefore the petitions are dismissed.

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