

In Re: 122 Prisoners

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Court : Kerala

Decided On : Oct-10-2006

Reported in : 2007CriLJ3241; 2006(4)KLT597

Judge : K. Hema, J.

Acts : Criminal Law (Amendment) Act, 2005; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 436A and 437(6);

Appeal No. : CrI. M.C. No. 3179 of 1998

Appellant : In Re: 122 Prisoners

Advocate for Def. : P.G. Thampi, Director General of Prosecution and; C.M. Nazar, Public Prosecutor

Advocate for Pet/Ap. : C.S. Dias, Amicus Curiae

Judgement :

ORDER

K. Hema, J.

1. In a petition filed by 122 under-trial prisoners voicing several grievances, Advocate C.S. Dias, who was appointed by this Court as Amicus Curiae, brought to the notice of this Court that there are huge number of under-trial prisoners languishing in different jails in the State, undergoing detention for more than even

the maximum period of sentence prescribed for the offence or offences alleged against them. It was also submitted that this was mainly due to non-production of such prisoners in court for want of sufficient police escort.

2. Sensing the immediate need for an urgent intervention at the hands of this Court, a direction was issued to the Director General of Police (Prisons) to file a statement whether there are any such prisoners in the jails. A shocking statement dated 20.9.2006 was filed by the D.G.P. (Prisons), in response to the direction of this Court. The statement revealed that there are as many as 109 under-trial prisoners in the various jails of Kerala who suffer detention for more than half of or the maximum period of imprisonment which they have to undergo for the respective offences alleged against them. (The number, indeed, is alarming). The names of the respective Jails and the number of prisoners undergoing such detention in those jails have been furnished in the said statement.

3. On hearing both sides, it appears that the main cause for the unwarranted detention of the under-trial prisoners is their non-production in court, due to want of sufficient police escort, as alleged by the prisoners. It is also an admitted fact that there is difficulty in providing adequate police escort on all occasions, for want of sufficient police men. The continued existence of the deplorable state of affair has thus, become not merely imaginary now, but very real, as inferable from the statement of the D.G.P. (Prisons). As a remedial measure, this Court issued directions, as early as in March 2005, to implement video-conferencing at least in the three District Jails, in the State as suggested by the State itself. But, the said order remains in papers, without compliance. The State prays for further extension of time for implementation of video conferencing.

4. Resultantly, prisoners continue to remain within the four walls of different Jails in despair, awaiting their long-over-due production before the court, for want of police escort from Jail to court. The voice of the several Magistrate Courts in the State in this regard also seems to be unheard by the State machinery. No one seems to be prepared to take up the burden for the failure, except shirking the responsibility from shoulder to shoulder. This shall not continue any longer, especially since serious violation of the fundamental rights of the citizens are involved in the

matter. No Fundamental Right shall ever be denied to any prisoner, except to the extent deprived of by law, for the mere reason that he is a prisoner.

5. 'A prisoner does not cease to have his constitutional right except to the extent he has been deprived of it in accordance with law'. vide *Kewal Pati v. State of U.P.* : 1995 CriLJ2920 . The Supreme Court in *Nilabati Behera v. State of Orissa* : 1993 CriLJ2899 observed that the wrongdoer is accountable and the State is responsible if the person in custody is deprived of his life except according to the procedure established by law.

6. The Supreme Court, in *R.D. Upadhyay v. State of A.P* : (2001)1SCC437 , observed in a case of violation of fundamental rights of the prisoners at the hands of the State, as follows:

All that the courts can do in such cases is to award such sums of money, which may appear to be giving of some reasonable compensation, assessed with moderation, to express the court's condemnation of the tortuous act committed by the State.

7. The Supreme Court continued to observe thus:

the compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.

8. Ordering costs and damages against the State is only one of the solutions to compel the State to discharge its duty. As pointed out by learned Amicus Curiae, Mr. C.S. Dias, there are provisions in the Code itself to prevent such sad state of affairs to certain extent. There are also machineries in the State to check unnecessary overcrowding of the under-trial prisoners in the jails. District Level Jail Committees are formed in every District for the purpose of monitoring the difficulties and grievances of the under-trial prisoners in the jail and also to check the over-crowding of jails by under-trial prisoners. Therefore, it sounded like a

myth when submissions were made by the Amicus Curiae that even now there are several under-trial prisoners who have been in custody for more than the maximum period prescribed under Section 436A of the Code. But, the myth is an awful reality now, as per the statement of the D.G.P.(Prisons).

9. As pointed out by learned Amicus Curiae, application of Section 436A of the Code by the criminal courts will be one of the remedies for this evil. Section 436A provides for the maximum period for which an under-trial prisoner can be detained. Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law, (excluding offence for which punishment of death has been specified as one of the punishments under that law), undergone detention for a period extending upto one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties.

10. It is also provided under Section 436A of the Code that no person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law. In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded. Yet, as per the first proviso to Section 436A, the court may order continued detention of a person for a period longer than one-half of the said period or release him on bail, instead of the personal bond with or without sureties, after hearing the Public Prosecutor, and for reason to be recorded by the court in writing.

11. It is also relevant to make reference to Section 437(6) of the Code, in this context. As per Sub-section (6) of Section 437 of the Code, in any case triable by a Magistrate, if the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. So, the normal rule is to release a prisoner on bail, who has completed such sixty days of detention as

specified above unless the court otherwise directs. The rule is mandatory in nature, as indicated by the expression 'shall' in the provision itself.

12. But, if any such prisoner is to be detained any further in prison, it shall be done only as per a specific order passed by the Magistrate in writing, recording reasons for the continued detention. Thus, it follows that if any prisoner is detained in any of the prisons in the State for more than the period stated in Section 437(6) of the Code, without any reasoned order in writing for the continued detention, such detention is unauthorised and illegal. Such prisoner deserves immediate release from prison, subject to what has been laid down in Section 437(6) of the Code.

13. It is also to be mentioned here that admittedly, there are no sufficient Magistrate Courts in the State and the working conditions and infrastructure provided in the criminal courts are deplorable and in bad shape. The number of cases pending before most of the Magistrate Courts is quite huge. Pendency of cases shoots up, despite all the efforts taken up by the Criminal Courts to wipe out the pendency, under guidance and strict directions of the High Court from time to time. There can be no doubt that the State must be alert to this state of affairs, as well. Still, no court can wait until sufficient courts are established for clearing up the pendency.

14. Therefore, I take this as an occasion to remind the Magistrates Court about the important amendments introduced into the Code by which 'plea-bargaining' has become possible now which can, to a certain extent, check the evil of a long period of detention of prisoners during trial. (Vide ' The Criminal Law (Amendment Act) 2005 (2 of 2006) brought into force on 05.07.2006 vide S.O. 990(E) dated 3.7.2006). This may help the courts to reach a finality of the proceedings in appropriate cases, without going through the ordinary time-consuming procedure in a trial. The Criminal Courts of the State shall therefore, consider the possibility of invoking provisions laid down for 'plea-bargaining', in appropriate cases, especially in cases in which prisoners are involved. The courts may, for this purpose, get list of cases from the police stations concerned in which the accused are in custody and do the needful in accordance with law.

15. Learned Director General of Prosecutions, Mr. P.G. Thampi at this juncture submitted that he is fully conscious of the seriousness of the problem and hence, in all fairness, he voluntarily undertook to give necessary directions to all the Public Prosecutors, Deputy Directors of Prosecutions and Assistant Public Prosecutors in the State to do all what is necessary from their part, to take up fruitful steps for the application of the provisions contained in the Amendment Act relating to 'plea-bargaining' in appropriate cases in which prisoners are involved.

16. Learned Director General of Prosecution also brought to my notice that he has promptly conveyed the earlier directions issued by this Court to the Director General of Police as per the order of this Court dated 28.09.2006 in this Cr. M.C. In obedience to the direction issued, a statement from the Director General of Police is also prepared and kept ready to be filed before this Court. It is submitted that steps are initiated to ensure prompt production of under-trial prisoners in court without fail. It is also reported that in order to avoid any laxity in future in this regard, mandatory instructions have been issued to all the Superintendents of Police and Commissioner of Police as per an official circular and they are also informed that stringent action will be initiated against the erring officer for any lapses in future.

17. But none of these promises gives any hope to this Court. There were similar undertakings from top officials of the Police Department in these lines on earlier occasions also, during the pendency of this proceedings itself. As per a statement made by the Assistant Inspector General of Police (PG), Police Headquarters, Thiruvananthapuram dated 21.02.2005, it was undertaken that there will not be any lapse from the part of the Police Department in providing sufficient police personnel for escorting the under-trial prisoners to the courts, at the request of the jail authorities in future. But, it appears from what transpired subsequently that those undertakings are mere paper promises.

18. It can be reasonably inferred from the last statement of the D.G.P. (Prisons) referred to in this order that things have not been improved at all. The statement reveals that 109 under-trial prisoners are still in custody in the various prisons in the State having completed either one half of or more than the period of sentence

which is prescribed for the offence alleged against them. There are 72 such prisoners in Central Prison, Trivandrum and 17 such prisoners in Central Prison, Kannur. In the like manner, there are various other such prisoners in other different jails in the State. As the Amicus Curiae pointed out, there are still laches in producing the prisoners from jail to court. Therefore, despite all the submissions made by learned Director General of Prosecutions, I am constrained to pass such orders as are necessary to solve a major issue under discussion.

19. Before parting, I may remind the State of the famous words of Mr. Justice Brennan:

Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down.

20. If ever a time shall come when the prisoners have to wait indefinitely, at the mercy of the State, until a golden key unlocks the doors of the prisons to the courtrooms, the seeds of revolution may be sown. Better, such probable calamities or complications are avoided. Something must be done urgently.

Keeping in mind, all the above facts, I hereby pass the following order:

1) The State shall show cause why heavy cost or exemplary compensation shall not be ordered against it for not providing adequate machinery for producing prisoners before the respective courts, which leads to violation of Fundamental Rights of the various prisoners detained in different jails in the State as seen from the statement of the D.G.P.(Prisons). The explanation shall be filed within two weeks from today.

2) The State is directed to make available suitable and adequate arrangements for production of the under-trial prisoners before court, without any further delay and also report to this Court about the steps taken by it for ensuring such production without fail.

3) The Registrar General of this Court shall issue necessary directions to all the Criminal Courts in the State, alerting them to invoke provisions laid down in the Criminal Law (Amendment) Act, 2005 relating to 'plea-bargaining' in appropriate

cases, especially in cases involving prisoners and also application of Section 437(6) of the Code, in the light of the observations made in this order.

4) The Principal Sessions Judges and the Chief Judicial Magistrates of all the Districts in the State shall take immediate and effective steps to see that no under-trial prisoner remains in any jail in the State for more than one half of, or the maximum period prescribed as the punishment for the offence alleged against the prisoner, subject to the provision contained in Section 436A of the Code, and also for application of Section 437(6) of the Code, in appropriate cases in the light of the observations made in this order.

5) The Registrar General of this Court shall also send copy of the statement dated 20.09.06 filed by the D.G.P. (Prisons), referred to in this order, to all the Principal Sessions Judges and the Chief Judicial Magistrates forthwith, to enable them to take appropriate steps in the matter, without delay.

6) The Principal Sessions Judges and the Chief Judicial Magistrates shall also file reports before this Court, within two weeks from today, about the steps taken by them, pursuant to the above directions.

7) The time granted for implementation of videoconferencing in the District jail in Thiruvananthapuram is extended till 18.12.2006.

8) As far as the other Districts Jails are concerned, video conferencing shall be implemented, as expeditiously as possible and not later than 31.03.2007.

Post this case on 25.10.2006.

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