

**Khinvdan Vs. the State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** May-08-1975

**Reported in :** 1975CriLJ1984; 1975()WLN132

**Judge :** Kalyan Dutta, J.

**Appellant :** Khinvdan

**Respondent :** The State of Rajasthan

**Judgement :**

ORDER

**Kalyan Dutta, J.**

1. Khinvdan alias Khiny Singh has applied for bail under Section 439(1) of the new Criminal Procedure Code.
2. The Prosecution case against him is that he committed the murder of his wife Kalyan Kanwar alias Nen Kanwar by strangulating her while she was sleeping in a room of his house in the night between 16th and 17th November, 1974. His bail application was rejected by the learned Munsiff and Judicial Magistrate, Desuri, on 24th February, 1975 and thereafter by the learned Sessions Judge, Pali, on 17th March, 1975,

3. The petitioner was arrested by the local police on 2-12-1974. Thereafter he was kept in detention by a series of orders of remand obtained by the investigating agency from the learned Judicial Magistrate during the course of investigation. The investigation, however, could not be completed within a total period of 60 days from the date of the arrest of the petitioner. The learned Magistrate did not release the petitioner on bail even after the expiry of 60 days, although it is alleged that the petitioner requested the Court that he was prepared to furnish bail bonds. Thereupon, the petitioner filed an application before the learned Magistrate on 22-1-1975 that he was entitled to be released on bail after a total period of 60 days under proviso (a) to Sub-section (2) of Section 167 of the Criminal Procedure Code, 1973. The learned Magistrate passed no order on the application of the petitioner and kept it pending till 24th February, 1975, on which date the police submitted an incomplete charge-sheet under Section 173, Criminal P. G. against him for the offence of murder. The learned Magistrate took cognizance of the offence of murder upon police report and remanded the petitioner to judicial custody under Sub-section (2) of Section 309, Criminal P. C. The petitioner, therefore, contends that under Section 167, Criminal P.C. he can be detained in custody under the orders of a Magistrate only for a total period of 60 days from the date of his arrest and that his further detention after the expiry of 60 days is unlawful and he should be admitted to bail at once. In support of the above contention, the petitioner's counsel has placed reliance upon *Gopalan v. State of Madras* : 1950 CriLJ1383 , *Bir Bhadra Pratap Singh v. D. M. Azamgarh* : AIR1959 All384 .

4. Notice of this application was given to the Public Prosecutor, Mr. G. A. Khan appeared on behalf of the State and hotly contested the application for bail on the following grounds:

1) Even if the continued detention of the petitioner after the expiry of 60 days was illegal, it could not affect the powers of the Magistrate to act under Sub-section (2) of Section 309, Criminal P. C. as he had jurisdiction to take cognizance of the offence on police report and to remand the petitioner who was brought up in custody before him;

2) The Magistrate could not direct the release of the petitioner merely on the ground that at some stage prior to the taking of cognizance of the offence the petitioner's detention was unlawful. During the course of arguments Mr. G. A Khan cited *Naranjan Singh v. State of Punjab* : 1952 CriLJ656 , *Dukhi v. State* : AIR1955 All521 , *Arif v. State* AIR 1964 Tripura 57 : 1964-2 Cri LJ 588 and *Gauri Shankar v. State of Bihar* : 1972 CriLJ505 in support of his above contention.

5. I have given my anxious consideration to the rival contentions, It may be observed at the outset that it is a settled principle that before a person is deprived of his liberty, the procedure established by law must be strictly and rigidly adhered to or followed and must not be departed from to the prejudice of the person affected. This Court, therefore, has to see whether the requirements of law and of procedure have been satisfied in this case and whether the deprivation of the personal liberty is according to the procedure established by law. The scheme of the new Criminal Procedure Code as to the detention of the accused person in custody is as follows:

Under Section 56 of the Code of Criminal Procedure, 1973, a person arrested without a warrant shall be taken or sent before a Magistrate having jurisdiction in the case or before the officer incharge of a police station without unnecessary delay subject to the provisions contained as to bail. Section 57, Criminal P.C. further lays down that the Maximum period for which a person arrested without warrant shall be detained in police custody is 24 hours exclusive of the time necessary for the journey from the place of arrest to the court of the Magistrate unless there is a special order of a Magistrate under Section 167, Criminal P. C. for further detention in police custody. Then comes the second stage. The Magistrate, to whom the accused has been forwarded by the police, may whether he has or has not jurisdiction to try the case, authorise his detention from time to time in such custody as he thinks fit for a term not exceeding 15 days in the whole under Sub-section (2) of Section 167, Criminal P.C. and if the Magistrate has no jurisdiction to hold the trial or to commit for trial and considers further detention unnecessary, he may pass an order that the accused e forwarded to a Magistrate having such jurisdiction. If within the period of 15 days the investigation is not completed and the Magistrate is satisfied that there are adequate grounds for

authorising further detention of the accused person otherwise than in custody of the police, he may pass an order for further detention of the accused person beyond 15 days, but he shall not authorise detention of the accused person in custody under Section 167, Criminal P. C. beyond a total period exceeding 60 days and on the expiry of the said period of 60 days, the accused person shall be admitted to bail if he is prepared to and does furnish bail. The person so released on bail under proviso (a) to Sub-section (2) of Section 167, Criminal P. C. shall be deemed to be so enlarged under the provisions of Chapter XXXIII of the Code of Criminal Procedure for the purposes of that Chapter. The provisions contained in proviso (a) to Sub-section (2) of Section 167, Criminal P. C. are clearly of a mandatory nature and are added as new provisions to provide a satisfactory solution of the problem of delayed investigation and to avoid unnecessary detention of the accused persons for very long periods causing great hardship and misery to them. In view of the aforesaid clear provisions of law, the learned Magistrate was not justified in ordering the detention of the petitioner beyond a total period of 60 days which expired on 2-2-1975, It appears from the certified copies of the remand orders that after the expiry of the total period of 60 days the investigation could not be completed by the police in the present case and the learned Magistrate authorised further detention of the petitioner on 7-2-1975, otherwise than in police custody, for a period of 15 days in spite of the fact that the learned Magistrate was not authorised to detain the accused in custody under Section 167, Criminal P, C. after 2-2-1975 and the petitioner was entitled to be released on bail on the expiry of the total period of 60 days from the date of his arrest. The order of remand reads as follows : --Presented by A. P. P. The accused under judicial custody present. The I. O, (Investigating Officer) is directed to complete the investigation and put up the case diary on 22-2-1975.

On 22-2-1975 the Police again applied for further remand of the petitioner to judicial custody. The learned Magistrate thereupon passed the following order : --

Presented by Shri A. P. P. The accused in judicial custody. C D, (case diary) seen. The result be put up on 8-3-1975.

Thereafter on 24-2-1975 the police submitted an incomplete challan against the petitioner for the offence punishable under Section 302, I. P. C. The learned Magistrate took cognizance of the aforesaid offence against the petitioner and adjourned the case to 8-3-1975, as is evident from the certified copy of his order dated 24-2-1975. In this manner, the aforesaid orders of remand, which were given presumably under Section 167, Criminal P. C., were wholly unjustified on account of failure on the part of the learned Magistrate to comply with the mandatory provisions contained in proviso (a) to Sub-section (2) of Section 167, Criminal P, C. The learned Magistrate ought to have released the petitioner on bail on the expiry of the total period of 60 days as the petitioner was prepared to furnish bail and had applied for the same.

6. The next pertinent question that arises for determination is whether the illegal detention does not affect the power of the learned Magistrate to act under Section 309, Criminal P. G. when the petitioner was produced before him to be dealt with under that section. Before coming into force of the new Criminal Procedure Code, the petitioner could be remanded under Section 344, Criminal P. C. even where the police report was not submitted under Section 173, Criminal P.C., because the explanation appended to Section 344, Criminal P. C. 1898, contemplated such a stage prior to the submission of the final charge-sheet, provided it appeared to the Magistrate that sufficient evidence had been procured to raise a suspicion that the accused might have committed the offence. But after the commencement of the new Code of Criminal Procedure the filing of the report under Section 173, Criminal P. C. by the police within a total period of 60 days from the date of arrest of the accused and taking of cognizance by the learned Magistrate thereupon are necessary before an order of remand can be passed under Section 309, Criminal P, C. which corresponds to old Section 344, Criminal P. C. There is no doubt that Sub-section (2) of Section 309, Criminal P. C. empowers a Magistrate, having jurisdiction, to postpone the commencement of or to adjourn any inquiry or trial from time to time, for reasons to be recorded on such terms as he thinks fit and for such time as he considers reasonable and to remand the accused if in custody, if after taking cognizance of an offence or commencement of a trial, he thinks it necessary or advisable to do so. In the present ease when the Magistrate took cognizance of the offence of murder upon a police report on 24-2-1975. the

petitioner's detention was illegal being in direct contravention of the mandatory provisions contained in proviso (a) to Sub-section (2) of Section 167, Criminal P. C, as discussed above, On that date the petitioner was entitled to be released on bail as he was prepared to furnish bail bonds and had applied for the same. Hence, in these circumstances, it cannot be safely held that the accused-petitioner was in lawful custody at the time when cognizance was taken by the learned Magistrate on the police report. In my humble opinion the learned Magistrate could by a warrant remand the accused in custody under Sub-section (2) of Section 309 only if the police report under Section 173, Criminal P. C. was filed before him within 60 days from the date of arrest of the accused and if after taking cognizance of the offence or commencement of the trial he considered it necessary or advisable to postpone the commencement of, or adjourn, the inquiry or the trial. Apart from this, the words 'may by a warrant remand the accused if in custody' used in Sub-section (2) of Section 309 clearly indicate that a person who has been brought before a Magistrate in lawful custody may be recommitted to custody by an order of the Magistrate provided the requirements contained in Sub-section (2) of Section 309, Criminal P. C. are satisfied. The words 'in custody' may reasonably be construed to mean custody authorised by law or in pursuance of a valid order directing detention of an accused person. If the custody or detention of a person is illegal, as it was in the instant case, and if the person in custody is entitled to be released on bail immediately before the taking of cognizance of an offence by a Magistrate on police report and is ready to furnish bail, he cannot be recommitted to custody under Sub-section (2) of Section 309 of the Code, although the other conditions laid down in the said sub-section are fulfilled. If the Magistrate is permitted to avail himself of the provisions of Sub-section (2) of Section 309 of the Code of Criminal Procedure for remanding the accused to custody in spite of the fact that the custody or detention has already become illegal prior to his taking cognizance of an offence upon police report, the accused would be deprived of a valuable right to be enlarged on bail beyond a period of 80 days from the date of his arrest which does not appear to be the real intention of the Legislature while inserting new provisions contained in proviso (a) to Sub-section (2) of Section 167, Criminal P. C. The real intention of the Legislature was that the chronic malady of protracted investigation should come to an end and that the accused persons

should not be kept under detention for a considerably long period causing hardship and misery to them.

7. Looked from another angle also, the legal position appears to be the same, as indicated above. If immediately before the taking of cognizance on a police report by a Magistrate the accused is in continued illegal detention beyond a total period of 60 days on account of the investigation having not been completed within that period, he, being entitled to be released on bail under proviso (a) to Sub-section (2) of Section 167, Criminal P. C. can move for bail as of right and the Magistrate is bound, under the law, to admit him to bail. In these circumstances if bail is granted to him, before taking cognizance (which must be granted), he is no more in custody and cannot be remanded to judicial custody under Sub-section (2) of Section 309, Criminal P. C. because Sub-section (2) of Section 309 empowers the Magistrate to remand an accused to judicial custody only, if he is in custody. Hence in my humble opinion, the earlier continued illegal detention of the petitioner could not be validated by the order of remand passed by the learned Magistrate in the instant case after taking cognizance of an offence, because the petitioner would not have been in custody at the time of taking cognizance if the learned Magistrate, who was bound under the law to release him, had bailed him out. It is surprising to note that what was done by the learned Magistrate in this case was that he did not pass any order on the application for bail filed by the petitioner on 22-1-1975 and ordered the petitioner's further detention for a period of 15 days in direct contravention of the provisions contained in proviso (a) to Sub-section (2) of Section 167, Criminal P. C. and thereafter when a police report was filed on 24-2-1975, he took cognizance of the offence and remanded the petitioner to judicial custody under Sub-section (2) of Section 309, Criminal P. C. knowing it well that no Magistrate could authorise the detention of the accused person in custody for a total period exceeding 60 days and that on the expiry of the said period of 60 days the petitioner ought to have been released on bail, provided he was prepared to and did furnish bail.

8. Consequently, I pass an order that the petitioner Khinvdan alias Khiny Singh be released on bail, provided he furnishes a personal bond in the amount of Rs. 10,000/- together with two sureties in the amount of Rs. 5000/-, each for his

appearance in the Court of the Sessions Judge, Pali, on each and every date of hearing or whenever called upon to do so, until the conclusion of the trial.

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