

The State Vs. Mathivanan and Others

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Court : Chennai

Decided On : May-24-1994

Reported in : 1994CriLJ2795

Judge : S.M. Ali Mohamed, J.

Appeal No. : Cri. O.P. No. 3928 of 1994

Appellant : The State

Respondent : Mathivanan and Others

Advocate for Def. : N. Natarajan, ;Sr. Advocate for R. Shanmugha Sundaram

Advocate for Pet/Ap. : I. Subramaniam, Addl. Public Prosecutor

Judgement :

ORDER

1. This petition is filed under section 482 Criminal Procedure Code to set aside the order dated 17-5-1994 hearing Ref. No. A, FIR No. 307/94 in N. 1 Cr. No. 745 of 1994 on the file of the learned VII Metropolitan Magistrate, George Town, Madras-1. The petition is filed by the State. It is averred in the petition as follows :-

'1. The petitioner states that in respect of a murder which took place on 18-4-1994 a case in N. 1 Royapuram Police Station Crime No. 745/94 for offences under sections 147, 148, 149, 341, 302 read with 109 I.P.C. had been registered and the

investigation is in progress.

2. The investigation in the case conducted so far discloses the involvement of the 12 accused besides the respondents 1 to 4 in this petition. In the First Information Report lodged with the petitioner in respect of the abovesaid occurrence, the respondents 1 to 4 herein are alleged to have attacked the deceased with lethal weapons causing multiple injuries on the body of the deceased. Further investigation done in the case had so far revealed the involvement of 12 more persons.

3. The petitioner respectfully states that respondents 1 to 4 were arrested on 19-4-1994 and were produced for remand before the VII Metropolitan Magistrate, George Town, Madras on 19-4-94. The learned Magistrate was initially pleased to remand the respondents till 3-5-94 and this remand was subsequently extended till 17-5-94. In this connection, it is respectfully submitted that besides the four persons in this petition, 12 other persons who figured as accused in the case have also remanded till 17-5-94.

4. The petitioner respectfully states that all the 16 accused so far disclosed in the investigation as alleged to have been concerned in the above offences are lodged in the Central Prison, Madras. In the usual course, prisoners concerned in a case are transported in one lot from the Central Prison for production before the Magistrate and for obtaining of further orders of remand in case where the investigation is not yet completed.

5. The petitioner respectfully states that on 17-5-1994 he had to attend the learned Principal Sessions Court, Madras in connection with CMP No. 2911/94 which is an application for bail moved on behalf of the respondents 1 to 4 hereinabove.

6. The petitioner respectfully states that in the mean while the respondents 1 to 4 alone were taken from the Central Prison by the concerned jail authorities and were produced for remand before the GT Court at about 10.45 a.m. The court orderly, viz., Gr. 1 PC 3460 Thiru Abdul Rahman, in charge of GT Court was present at the time when these four respondents were produced for remand. At the time of production of these respondents before the learned Magistrate, the

aforesaid Gr. 1 PC informed the learned VII Metropolitan Magistrate that the petitioner herein was attending the Sessions Court and that the remand requisition in respect of the 16 accused will be filed in Court before the Forenoon and that 12 more accused concerned in this case have also been produced and extension of remand was to be obtained for all of them.

7. The petitioner states that although by order dated 3-5-94 the learned Magistrate had extended the period of remand for these four respondents as well as the other 12 accused in the case till 17-5-94, strangely enough at 10.55 a.m. in the midst of other calling work, these four accused alone were directed to be produced and orders were passed releasing them on bail on execution of their own bond on the premise that no request for extension of remand for these respondents was sought for by the prosecution.

8. The petitioner respectfully states that the order of the learned Magistrate in taking of the case at 10.55 a.m. and releasing the respondents herein on execution of their own bond is contrary to law and the same is liable to be set aside'.

2. The affidavit of Abdul Rehman, who is attached to the Crime Branch has also been filed along with the petition to set aside the impugned order. The averments in the said affidavit are as follows :-

'1. I am Grade 1 Police Constable 3460 attached to Central Crime Branch, Egmore, Madras-8. I respectfully state that at about 10.45 a.m. on 17-5-94 the respondents 1 to 4 herein were produced before the VII Metropolitan Magistrate, George Town, Madras-1. I respectfully state that in N. 1. Royapuram Police Station Crime No. 745/94, there are totally 16 accused, out of whom, these respondents alone were so produced before the court.

2. I respectfully state that when the above persons were produced by the jail authorities before the learned VII Metropolitan Magistrate, George Town, Madras, I represented to the court that a joint requisition seeking extension of remand for all the 16 accused in the case will be filed before the Forenoon and by which time the other accused also will be produced.

3. I further informed the learned Magistrate that the Inspector of Police, Central Crime Branch, Egmore, Madras-8 has gone to the learned Principal Sessions Court, Madras in respect of CMP No. 2911/94, a bail application filed on behalf of the 4 respondents hereinabove.

4. I most respectfully submit that inspite of my specifically, informing the learned Magistrate that a joint requisition will be filed for all the 16 accused, the case was taken up at about 10.55 a.m. in the midst of other calling work and orders were passed releasing the respondents herein on bail on their execution of their own bonds for Rs. 5000/- each.

5. I respectfully submit that the foregoing facts are true'.

3. In reply the respondents have filed affidavit of S.A.A. Jinnah wherein it is stated as follows :-

'1. I submit that I am the counsel for the respondents herein before the court of the learned VII Metropolitan Magistrate, George Town, Madras and as such I am well acquainted with the facts and circumstances of this case.

2. I submit I was present in Court along with my colleagues and junior Advocate Tvl. S. Rajavelu, M. Haja Mohideen and K. Sampathkumar before the learned VII Metropolitan Magistrate George Town Madras on both the occasions 3-5-1994 and 17-5-1994 when the respondents herein were produced before the Hon'ble Court for extension of their Judicial remands, we have filed the requisite Memorandum of Appearance to represent the respondents herein before the learned Magistrate.

3. I deny all the averments contained in the main petition filed by the petitioner in CrI. O.P. No. 3928 of 1994 and the supporting affidavit filed by one Thiru Abdul Rehaman Grade I police Constable 3460.

4. I state that the respondents 1 to 4 were arrested on 19-4-1994 in connection with N1 Royapuram Police Station Crime No. 745 of 1994 and were produced for remand before the Learned Magistrate. It is true that they were initially remanded up to 3-5-1994 and thereafter their remand was extended till 17-5-1994. On 19-4-

1994 and on 3-5-94 the respondents were produced together as a group and they were remanded to Judicial custody by a common order. I state no other accused connected with the same case was either produced or the remand extended along with the respondents. The 12 other persons who are stated to have been involved in the same case were not arrested along with the respondents. I understand that they surrendered to Judicial Custody on different dates before different courts.

5. I state when the respondents were remanded as a separate group on 3-5-1994 they were produced as a separate group in the usual course by the jail authorities on 17-5-1994 also. The names of the respondents were called at a time and no other accused connected in the same case was called along with them. I represented the respondents before the learned Magistrate on all the abovesaid hearing dates and I was assisted by my colleague and junior Advocates.

6. I deny the averments contained in para 4 of the petition, that the prisoners concerned in a case are transported in one lot from the Central Prison for production before the learned Magistrate. It is only when all the accused are either remanded initially or their remand extended by way of a common order of remand they are produced by the jail authorities together as one lot. I submit that the respondents were brought to court by the jail authorities at about 10.30 a.m. on the dates of hearing like any other remand prisoner. As every remand prisoner is expected to be produced before a remand court any time during the sitting hours of the court from 10.30 a.m. I state there is nothing strange in producing a remand prisoner at 10.30 a.m. as they are produced from the prison by the jail authorities during their regular course of official duty.

7. I submit that it is true that a bail application in Crl. M.P. No. 2911 of 1994 was filed on behalf of the respondents before the learned Principal Sessions Judge, Madras on 12-5-1994. The bail application was called on 13-5-1994 was posted for hearing before the vacation sitting on 17-5-1994.

8. I deny the averments contained in para 6 of the petition. I state that there was no one to represent the prosecution at the time when the respondents were produced by the jail authorities before the learned magistrate at 10.45 a.m. on 17-5-1994. I deny the averment that the court orderly informed the court that some

other accused were also to be produced on the same day. I state that neither I nor my colleagues who are the counsel for the respondents 1 to 4 were aware that some other accused were also to be produced during the course of the same day for extension of their remands. I state that neither the Assistant Public Prosecutor in charge of the court nor the petitioner was present in court at the time of the calling of the case. None of the subordinate Police Officers of the petitioner was present in court at that time to present the prosecution.

9. I deny the averments that a court orderly by name Thiru Abdul Rehman incharge of George Town Court was present at that time when the 4 respondents were produced for remand. There are 5 courts of Metropolitan Magistrates which are functioning at the entires George Town Metropolitan Court Complex. It is not correct to say that the court orderly incharge of the George Town Court Complex was present before the learned VII Metropolitan Magistrate when the respondents were produced. The fact that he was not present is established by the following facts. Had he been present at the Court hall he would have definitely filed the application for extension of the remand for all the accused before the FIR clerk and would have put up the requisition along with the case file. It is submitted that a Court orderly has no authority to represent the prosecution at any state of inquiry or trial.

10. I deny the averments of the said Thiru Abdul Rehman in his supporting affidavit that he informed the learned Magistrate about the fact that the petitioner was attending the Sessions Court. I deny his further claim that he informed that the remand requisition would be filed before the forenoon and that 12 more accused concerned in the same case would also to be produced for extension of their remand. If the orderly was present at the time of the calling of the case he would have definitely brought the concerned Assistant Public Prosecutor or any other Assistant Public Prosecutor from the nearby Court or from the Chamber of the Prosecutors near the Court hall. At least he would have sought the help or assistance of any other counsel with a request to pass over the case. I submit further that a Police Constable cannot represent the prosecution before a Magistrate as it has been specifically prohibited by Section 302 Cr.P.C.

11. I deny the averments in para 8(E) of the petition that Thiru Abdul Rehman informed the Learned Magistrate that a combined requisition for remand for all the accused in the case would be filed for their remand extension. There was no such representation made by anybody at the time when the respondents were produced in Court on 17-5-1994.

12. I deny all the averments made in the affidavit filed by Thiru Abdul Rehman, Grade-I Police Constable 3460 Central Crime Branch, Egmore, Madras-8. I deny all the averments in para 2 of his affidavit that he represented to the Court at the time when the respondents were produced. The averments in his affidavit are false and have been made at the instance of the petitioner to whom he is subordinate. A Police Constable cannot conduct prosecution as there is a specific bar under section 302 Cr.P.C. I submit all the averments in paras 3 and 4 of the affidavit are false and there is no truth in them.'

4. Both the counsel for the petitioner and the respondents consented that the main quashing petition itself be taken up by this Court for final hearing.

5. It is contended by Mr. I. Subramaniam, Learned Additional Public Prosecutor that the impugned order of the Learned Magistrate is contrary to law and without jurisdiction and ought to be quashed by this Court. In this connection, the learned counsel mentioned certain relevant facts as follows :

1. Date and time of incident : 18-4-94 at 23.00 hrs.

2. Date and time of report : 18-4-94 at 23.00 hrs.

3. Place of incident, distance

from the P.S. : Thoppai Mudali Street, in front

of Samuthya Koodam, about 1

km. south east direction.

4. Date and time of despatch

of FIR to the Court and to

the Higher Officials : 18-4-1994

5. Details of complainant : Kennedy, aged 30, S/o. Munusamy,

No. 74, Rama Naicken Street,

Royapuram, Madras.

6. Details of accused : Ex. M. A. Mathivanan, C. K.

Radhakrishnan, M. Doss, S. Sekar

and some others.

7. If there is any delay in

sending the FIR, state the

reasons : No delay

8. On 19-4-1994 respondents 1 to 4 were arrested at 1.15 p.m.

9. On 19-4-1994 respondents 1 to 4 produced before the VII Metropolitan Magistrate, George Town, Madras and they were remanded to judicial custody for 15 days till 3-5-1994.

10. On 3-5-1994 remand of respondents 1 to 4 was extended till 17-5-1994 by VII Metropolitan Magistrate, George Town, Madras.

In the meantime, the order accused were arrested on 26-4-1994. A. 1 to A. 10 were produced before the Magistrate and remanded up to 10-5-1994 and their remand was extended up to 17-5-1994 and the investigation was not completed. Respondents 1 to 4 filed bail applications before the Principal Sessions Judge, Madras in C.M.P. No. 2911 of 1994 on 17-5-1994. While so on 17-5-1994 at 10.45 a.m. the respondents were produced before the VII Metropolitan Magistrate, Madras who released the respondents 1 to 4 on their own bond and passed the

following order :- 'Accused 1 to accused 4 produced. Remand extension report not received. Learned Counsel representing the accused prays that the accused be released on their own bond. Accused 1 to accused 4 released on their own bond for Rs. 5000/- and to appear on summons'.

6. It is contended by the learned Additional Public Prosecutor that as the Investigating Officer went to the Principal Sessions Court, Madras in connection with the bail application No. C.M.P. No. 2911 of 1994 filed on behalf of the respondents 1 to 4 and only orderly was present viz., Abdul Rehman on 17-4-1994 at 10.45 a.m. when respondents 1 to 4 were produced before the VII Metropolitan Magistrate, George Town Madras and that a representation was made to the court by the said orderly that a joint requisition seeking extension of remand for all the 16 accused in the case will be filed in the forenoon and by which time, the other accused will be produced. It was also brought to the notice of the Learned Magistrate that the Investigating Officer had gone to the Principal Sessions Court, Madras in connection with the bail application filed on behalf of the respondents in C.M.P. No. 2911 of 1994. In view of the above, it was submitted that the Learned Magistrate was in great hurry to release the respondents on their own bonds without waiting for the joint requisition seeking extension of remand for all the 16 persons.

7. On the other hand, the affidavit of S.A.A. Jinnah, the Advocate for the respondents before the VII Metropolitan Magistrate, Madras has specifically denied that any such representation was made to the court by the orderly to the effect that a joint requisition for remand for all the accused will be filed in the forenoon and that the Investigating Officer had actually gone to the Principal Sessions Court, Madras in connection with the Bail Application filed by the respondents. In view of the above denial, the learned Additional Public Prosecutor submitted that even assuming that no written requisition was made on behalf of the prosecution at that point of time, to extend the remand, it was the duty of the learned Magistrate to extend the remand in the interests of justice on the available materials already placed before him and the learned Magistrate has not applied his mind as per Section 167(2) proviso (a) of the Cr.P.C. It was submitted that there were sufficient materials already produced before the Learned Magistrate in

the form of FIR, 161 Cr.P.C. Statement and other documents connecting the accused/respondents to the crime. At that point of time, it is not the truth or credibility of the allegations against the accused/respondents that must be considered but a mere suspicion is enough connecting the accused to crime and the gravity of the offence and the instant case was one of murder. In support of the above contention, the learned counsel referred to the ruling of this Court in Syed Kaleemullah v. Appraising Officer, 1993 Mad LJ (Cri.) 644, wherein it is observed as follows :-

'It will not only be better, but it will almost always be necessary, that if extension of remand is required, an application is filed setting out the reasons for judicial scrutiny. However, merely because extension of remand has not been asked for by the prosecuting agency, it cannot be concluded, that the remanding Magistrate has no power to order extension of remand, if on the available material, he was of the opinion that extension of remand was necessary in the interest of justice. If it were to be held, that without a plea for extension of remand, the remanding Magistrate cannot act and that he has to necessarily set at liberty the concerned accused, even if the crime was grave enough, it is then possible to comprehend a court becoming a mere powerless figure head if either due to negligence or collusion remand extension applications are not presented, even in grave crimes. The ultimate authority is the remanding court and the discretion to extend the remand cannot be bartered away to the whims of the prosecuting agency, who for reasons best known to them, omit to plea for extension of remand. It cannot be gainsaid, that if the remanding Magistrate on the available facts before him, felt, that extension of remand was not called for, he will be entitled to release the concerned accused and at the same time if his view is vice versa, order extension of remand. I agree with the observations of the Full Bench of the Patna High Court in Ramesh Kumar Ravi v. State of Bihar, 1987 Cri LJ 1489, that a Magistrate has jurisdiction to pass an order of remand despite the absence of any formal written application or a request for such remand being made by the police or the prosecution and that it would be doing violence to the plain language of Sections 167(2) and 309(2) of the Code by reading into them a requirement of a formal application for remand, or in any case, an insistent request therefor. The view expressed by me is eschewed in the following observations of the Patna High

Court.

'By no stretch of imagination can this power of the court be whittled down and be indeed passed on to the mere discretion of the investigating agency alone.' He also cited the ruling of the Gujarat High Court in *State of Gujarat v. Velo Alias Kasam Jusab*, 1986 1 Cri LC 622 wherein it is observed as follows :

'Proviso to the aforesaid sub-section (2) of Section 167 of the Code carves but an exception. It empowers the Magistrate to authorise the detention of the accused person, otherwise than in the custody of the police beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so. It also prescribes maximum period of such detention. It states that where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, then the Magistrate is empowered to authorise to detain the accused-person in the judicial custody for a total period not exceeding ninety days and when the investigation relates to any other offence, the total period for which the accused can be detained is sixty days. After the aforesaid period of ninety days or sixty days as the case may be is over, the accused-person is entitled to be released on bail, if he is prepared to and does furnish the bail. Explanation I clarifies that the accused person shall be detained in the custody so long as he does not furnish bail. This would indicate that his further detention would be illegal and he can be detained in judicial custody, till he furnishes bail.

This sub-section (2) of Section 167 nowhere provides that the investigating officer is required to file an application or that the Magistrate is required to pass any speaking order stating that such accused should be detained in the judicial custody. It only provides that when the accused is produced before the Magistrate, the Magistrate may authorise the detention of the accused if he is satisfied that adequate grounds exist for detaining him in the judicial custody. He is not required to pass any speaking order that from the material which was produced before him or from the F.I.R. which was sent to him he was satisfied that the adequate grounds exist. This becomes clear by referring to sub-section (2A) of Section 167 of the Code. It provides that where a judicial Magistrate is not available the accused can be produced before the nearest Executive Magistrate on whom the

powers of Judicial Magistrate or a Metropolitan Magistrate have been conferred in writing authorise the detention of the accused-person in such custody as he may think fit for a term not exceeding seven days in the aggregate. This sub-section (2A) in terms provides that such Executive Magistrate is bound to record reasons in writing that the accused is required to be detained in such custody. So far as the Executive Magistrate is concerned there is specific provision that he is required to pass speaking order. Further sub-section (3) of Section 167 of the Code provides that a Magistrate authorising under this section the detention in the custody of the police shall record his reasons for so doing. From sub-section (2A) and sub-section (3) the legislative intent is abundantly clear that whenever it wanted to provide for the reasoned order it had in express terms provided for it. Hence when Magistrate is authorising the detention of the accused in the judicial custody under section 167(2) he is not required to pass any speaking order.

Further sub-section (2) of Section 167 of the Code does not provide that the concerned Investigating Officer or Public Prosecutor should file an application submitting that the accused should be detained in the judicial custody. The Magistrate is required to see whether adequate grounds exist for detaining the accused or not. That he can consider from the F.I.R. that is copy of the entries in the diary of the case or any such other material which might have been forwarded by the Investigating Officer. At this Stage, that Magistrate is concerned with the existence of the materials against the accused and not as to whether these materials are credible or not. He may either release the accused-person on bail or grant police custody if prayed for. If neither of these orders are passed of necessity accused would be required to be sent to judicial custody.'

It was submitted that on the face of the impugned order, it is clear that the Learned Magistrate has not applied his mind to satisfy himself whether the accused/respondents should be further remanded, even though at that point of time, the requisition for extension of remand was not filed before the Learned Magistrate. Therefore on the only ground, that the remand extension was not received by the Court, the learned Magistrate erred in law in releasing the accused on their own bond. Further the Learned Magistrate was in an undue hurry to release the respondents/accused on the sole ground that the remand extension

report was not received. He further submitted that it was the duty of the counsel for the accused to bring to the notice of the learned Magistrate that at that very point of time the bail application on behalf of the respondents was moved before the principal Sessions Judge. As no such representation was made and the impugned order was passed by the learned Magistrate.

8. On the other hand, Mr. N. Natarajan, learned senior counsel appearing for the respondents vehemently contended that there is gross negligence on the part of the prosecution by not being present before the learned Magistrate either by a counsel or by responsible officer of a rank of Inspector when the respondents 1 to 4 were brought before the Magistrate on 17-5-1994. He also contended that no reliance could be placed upon the affidavit of Abdul Rehman an orderly to the effect that he represented to the learned Magistrate when the respondents are produced before the court that a joint requisition of remand for all the 16 accused will be filed in court before the forenoon and that the Investigating Officer had actually gone to the principal Sessions Court, Madras in respect of bail application filed by the respondents. In view of the specific denial made in the affidavit of S.A.A. Jinnah, the counsel for the respondents before the VII Metropolitan Magistrate, George Town, Madras Mr. N. Natarajan, learned Senior Counsel submitted that the court has to presume that no such representation was made to the learned Magistrate as alleged by the orderly Abdul Rehman in his affidavit. Therefore the learned Magistrate was perfectly within his jurisdiction to release the respondent 1 to 4 at that point of time as there was no requisition to extend the remand. In this connection, the learned counsel submitted that the personal liberty of an individual was much more important at that point of time, and there are constitutional and statutory safeguards for the same. The statutory safeguard is mentioned in Section 167, Cr.P.C. As no representation was made by the prosecution for extension of remand, the learned Magistrate was within his jurisdiction to set the respondents 1 to 4 free by releasing them on their own bond. He further submitted that the order of remand cannot be extended further unless there are special or adequate grounds for the same. In support of this contention, the learned Senior Counsel referred to decision in G. K. Moopanar v. State of Tamil Nadu, , wherein a Division Bench of this Court has observed as follows (para 18) :-

'The Scheme of the Act clearly establishes that the consideration that would weigh with the Magistrate at the time of remanding an accused person for a period of 15 days at the first instance is different from the ground on which the period of remand is extended beyond the period of 15 days as per the proviso to S. 167(2). The proviso categorically states that the Magistrate may authorise the detention of the accused person, otherwise than in the 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 more total period exceeding 90 days or 60 days as the case may be, depending upon the nature of offence with which he is charged. As already noticed, the Magistrate remands an accused person to judicial custody for a term not exceeding 15 days at the first instance solely with a view to enable the police to complete the investigation if they are able to satisfy that such time is required for investigation. But once the period of 15 days is over, the prosecution must show adequate grounds for extending the period of remand for a further period of 60 days or 90 days, as the case may be. The language of the section to the effect that the Magistrate may authorise the detention beyond the period of 15 days if he is satisfied that adequate grounds exist for doing so, makes this petition amply clear that an order of remand cannot be extended unless there are special grounds for doing so. At this stage, the Magistrate to apply his mind in the nature of investigation that has been done until then and the necessity for extending the remand to enable further investigation. For this purpose, the Magistrate must have sufficient materials before him for exercising such a power under this proviso. Therefore, we are unable to accept the contention of the learned Advocate-General that the Magistrate can order remand for any period exceeding 15 days even at the first instance.'

9. The learned Senior Counsel, Mr. N. Natarajan, also referred to a judgment of the learned single Judge of this Court in Sankar alias Gouri Shankar v. State of Tamil Nadu, wherein it is observed as follows :

'In the light of the discussion as made above, legal position obtaining as on date regarding the right of the person accused of a non-bailable offence to be enlarged on bail under the benevolent provision of Section 167(2), Cr.P.C. may succinctly

be summarised as follows. An order for release on bail under proviso (a) to Section 167(2) is an order on default. The accused is entitled to be released on bail on account of default on the part of the prosecution to file charge sheet within the prescribed period if he is prepared to and does furnish bail. It is a legislative command and not Court's discretion. In other words, if the investigating agency fails to file charge-sheet before the expiry of 90/60 days as the case may be, the accused in custody should be released on bail, but at that stage merits of the case are not to be examined. The Magistrate has no power to remand the accused beyond the stipulated period of 90/60 days, and he should be released on bail if he is prepared to and furnishes bail. The accused cannot claim any special right to remain on bail. In other words, the accused cannot claim that his right to remain on bail can, under no circumstances, be defeated. If the investigation reveals that (i) the accused has committed a serious offence; and (ii) charge-sheet is filed, the bail granted under proviso (a) to S. 167(2) could be cancelled. If the accused has not made application for his release on bail, after expiry of the period prescribed by the proviso (a) to Section 167(2) and before filing of the charge-sheet, he has no right to claim his release on bail after filing of the charge-sheet/final report, solely on the ground that the charge-sheet/final report was not submitted within the prescribed period. The Magistrate who is not otherwise having the power to release a person accused of a non-bailable offence acquires such a power in the contingency of the investigating agency not filing the final report with the prescribed statutory period, and such released on bail, if the person is prepared to and does furnish bail, shall be deemed to be a release under Chapter of the Code of Criminal Procedure and there is no warrant for the inference or deduction that the accused shall be deemed to have been released on bail on the expiry of 90/60 days, thereby making the further detention illegal'.

Even though the ground of mala fide was alleged in the petition, no submissions were made on this aspect. Both the counsel for the petitioner and the respondents submitted that the impugned order is not an order granting bail to the respondents.

10. I have carefully considered the contentions made on behalf of the prosecution and the respondents and I am of the view that there are infirmities in the impugned order.

11. It is the case of the prosecution that in respect of the murder which took place on 18-4-1994 a case in N. 1 Royapuram Police Station Crime No. 745 of 1994 was registered for offences under Sections 147, 148, 149, 341, 302 read with 109, I.P.C. and investigation in the matter was taken up by the Police. Respondents 1 to 4 were arrested on 19-4-1994 at 1.15 p.m. and they were produced before the VII Metropolitan Magistrate, George Town, Madras and the Magistrate initially remanded the respondents 1 to 4 under judicial custody till 3-5-1994 and this remand was subsequently extended till 17-5-1994. On 17-5-1994 at 10.55 a.m. the respondents 1 to 4 were brought before the VII Metropolitan Magistrate, George Town, Madras by the Prison Authorities and the learned Magistrate released the respondents 1 to 4 on their own bond on the ground that the remand extension report was not received. With regard to the aspect whether any representation was made before the VII Metropolitan Magistrate, George Town, Madras on behalf of the prosecution there is a controversy. According to the prosecution, a representation was made by the orderly Abdul Rehman to the learned Magistrate to the effect that Investigating Officer had gone to attend the Principal Sessions Court, Madras on that very day in respect of C.M.P. No. 2911 of 1994 in connection with the bail application filed on behalf of the respondents 1 to 4 and that a joint requisition seeking extension of remand for all the 16 accused in the case will be filed before forenoon in the Court. The said averment is denied by the counsel for the respondents before the Court of Learned VII Metropolitan Magistrate, George Town, Madras. S.A.A. Jinnah, who has filed an affidavit denying the aforesaid averments of Abdul Rehman, made in his affidavit. In view of the above, it has to be taken for the purpose of this case that no representation was made on behalf of the prosecution when the respondents 1 to 4 were produced before the learned VII Metropolitan Magistrate, George Town, Madras on 17-5-1994 at 10.55 a.m. There is force in the contention of Mr. N. Natarajan, learned Senior Counsel that in the instant case there is gross negligence on the part of the prosecution in not deputing a counsel or a responsible officer of the rank of Inspector to represent the case of the prosecution when the respondents 1 to 4 were produced before the learned Magistrate, even though the Investigating Officer was away i.e. to the Principal Sessions Court with regard to

bail application of respondents 1 to 4 and the fate of the case was left in the hands of a constable. The investigating agency ought to have made necessary arrangements for effective representation of the case before the Court by deputing a counsel or an officer of the rank of an Inspector of Police.

12. The cardinal point for consideration in this case is whether the impugned order is vitiated as the learned Magistrate has not applied his mind to the facts of the case and satisfied himself that adequate grounds existed to release the respondents 1 to 4 on their own bond in terms of Section Section 167(2) proviso (a) of Criminal Procedure Code. Section 167, Cr.P.C. reads as follows :

'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 no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody to such Magistrate thinks fit, for a term not exceeding fifteen days in the whole, and if he has no jurisdiction to try the case or commit 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, then in the 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, imprisonment for a term 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 XXXIII for the purpose of that Chapter.'

It is clear from a reading of the above provisions that there is no mention of any written requisition to extend the remand, but it refers to the satisfaction of the Magistrate that adequate grounds exist for detention of the accused person otherwise than in custody of the police beyond the period of fifteen days. It is clear that this satisfaction referred to in the proviso is not an arbitrary, personal satisfaction of the Magistrate but a satisfaction based upon adequate grounds existing. A full bench of the Patna High Court in *Ramesh Kumar Ravi v. State of Bihar*, 1987 Cri LJ 1489 has taken the view that a Magistrate has jurisdiction to pass an order of remand despite the absence of any formal written application or a request for such remand being made by the prosecution and that it would be violence to the plain language of Sections 167(2) and 309(2) of the Code by reading into them a requirement of formal application for remand. The above Full Bench decision of the Patna High Court was followed by this Court by *Arunachalam, J. in Syed Kaleemullah v. Appraising Officer*, 1993 MLJ (Cri) 644. In view of the above rulings, it is clear that any formal written application or a request for further remand is not necessary, but it will be better if it is filed by the prosecution. In any event, whether a request for further remand is filed by the prosecution or not, it is the duty of the Magistrate to satisfy himself that adequate grounds exist to extend the remand. The existence of adequate grounds, will depend upon the peculiar facts in circumstances of the case, the gravity of the offence and the documents in the form of FIR, 161, Cr.P.C. Statement and other documents available before the Magistrate connecting the accused to the crime. At this point of time, the Magistrate is not concerned with the truth or otherwise of the allegations contained in the said documents but he has to satisfy himself that adequate grounds exists to connect the accused in the commission of the crime

alleged. No doubt, personal liberty of the individual is involved on the one hand and on the other the right of the State to prosecute and punish a crime against the society is also involved and a fine balance and safeguard is inbuilt in Section 167 of the Criminal Procedure Code. The question of the grant of bail to accused persons and the cancellation of bail has been dealt with considerable detail by the Supreme Court in *Gurcharan Singh v. State of (Delhi Administration)*, AIR 1978 SC 179 : 1978 Cri LJ 1129, wherein it is observed as follows (Paras 20 to 29)

'Under the first proviso to S. 167(2) no Magistrate shall authorise the detention of an accused in custody under that section for a total period exceeding 60 days on the expiry of which the accused shall be released on bail if he is prepared to furnish the same. This type of release under the proviso shall be deemed to be a release under the provisions of Chapter XXXIII relating to bail. This proviso is an innovation in the new Code and is intended to speed up investigation by the police so that a person does not have to languish unnecessarily in prison facing a trial. There is a similar provision under sub-section (6) of Section 437, Cr.P.C. which corresponds to Section 497(3A) of the old Code. This provision is again intended to speed up trial without unnecessarily detaining a person as an undertrial prisoner, unless for reasons to be recorded in writing, the Magistrate otherwise directs. We may also notice in this connection sub-section (7) of Section 437 which provides that if at any time after the conclusion of a trial of any person accused of non-bailable offence and before the judgment is delivered the court is of opinion that there are reasonable grounds for believing that the accused is not guilty of such an offence, it shall release the accused, if he is in custody on the execution by him of a bond without sureties for his appearance to hear the judgment. The principle underlying S. 437 is therefore, towards granting of bail except in a cases where there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life and also when there are other valid reasons to justify the refusal of bail.

Section 437, Cr.P.C. is concerned only with the Court of Magistrate. It expressly excluded the High Court and the Court of Session. The language of Section 437(1) may be contrasted with S. 437(7) to which we have already made a reference. While under sub-section (1) of Section 437, Cr.P.C. the words are if there appear

to be reasonable grounds for believing that he has been guilty. Sub-section (7) says : 'that there are reasonable grounds for believing that the accused is not guilty of such an offence.' This difference in language occurs on account of the stage at which the two sub-sections operate. During the initial investigation of a case in order to confine a person in detention, there should only appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life, whereas after submission of charge-sheet or during trial for such an offence the court has an opportunity to form somewhat clear opinion as to whether there are reasonable grounds for believing that the accused is not guilty of such an offence. At that stage the degree of certainty of opinion in that behalf is more after the trial is over and judgment is deferred than at a pre-trial stage even after the charge sheet. There is a noticeable trend in the above provisions of law that even in case of such non-bailable offence a person need not be detained in custody for any period more than it is absolutely necessary, if there are no reasonable grounds for believing that he is guilty of such an offence. There will be, however, certain overriding considerations to which we shall refer hereafter. Whenever a person is arrested by the police for such an offence, there should be material produced before the court to come to a conclusions of the nature of the case he is involved in or he is suspected of. It at that stage from the materials available there appear reasonable grounds of believing that the person has been guilty of an offence punishable with death or imprisonment for life, the court has no other option than to commit him to custody. At that stage, the court is concerned with the existence of the materials against the accused and not as to whether those materials are credible or not on the merits

By an amendment in 1955 in Section 497, Cr.P.C. of the old Code the words 'or suspected of the commission of' were for the first time introduced. These words were continued in that new Code in Section 437(1), Cr.P.C. It is difficult to conceive how if a police officer arrest a person on a reasonable suspicion of commission of an offence punishable with death or imprisonment for life (S. 41, Cr.P.C. of the New Code) and forwards him to a Magistrate (Section 167(1), Cr.P.C. of the New Code) the Magistrate at that stage will have reasons to hold that there are no reasonable grounds for believing that he has not been guilty of such an offence. At that stage unless the Magistrate is able to act under the

proviso to S. 437(1), Cr.P.C. bail appear to be out of the question. The only limited inquiry may then related to the materials for the suspicion. The position will naturally change as investigation progresses and more facts and circumstances come to light.

Section 439(1), Cr.P.C. of the new Code, on the other hand, confers special powers on the High Court or the court of Session in respect of bail. Unlike under section 437(1) there is no ban imposed under section 439(1), Cr.P.C. against granting of bail by High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to support that the High Court or the Court of session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the court of Sessions will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr.P.C. of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of S. 437(1) and Section 439(1), Cr.P.C. of the new Code are the nature and gravity of the circumstances which the offence is committed, the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in case; or tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors cannot be exhaustively set out We may repeat the two paramount considerations, viz., likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a court of justice.'

13. In the instance case, the learned Magistrate has not complied with provisions of Section 167(2) proviso (a) of Code of Criminal Procedure and has not satisfied himself with regard to the existence of adequate grounds on the basis of the materials available before him and the release of the respondents 1 to 4 on the sole ground that 'remand extension report not received' is not sustainable in law. It is well settled that a formal written application of extension of remand is not

necessary. Further in the instant case, the accused were arrested on 19-4-1994 and remanded to judicial custody for a total period of 29 days and the statutory period of 90 days to complete investigation was not yet over and investigation is not yet completed. The impugned order of the Magistrate is vitiated as the sole ground for releasing the respondents 1 to 4 on their own bond is based upon the fact that no 'remand extension report' was filed at that point of time on 17-5-1994 at 10.55 a.m. It is clear that the Magistrate has not applied his mind and satisfied whether adequate ground existed for extending the remand for a further period of 15 days. I am unable to accept the contention of Mr. N. Natrajan, learned Senior Counsel appearing for the respondents to the effect that unless special or additional grounds are made out by the prosecution in the request for further remand the Magistrate is bound to release the accused on their own bond as the personal liberty of the individual is involved. As already pointed out even though the personal liberty of an individual is involved at that point of time, at the time there has to be fair balance with the right of the state to prosecute and punish the crimes against the society and in the instant case when investigation is still pending and not yet completed and the statutory period of 90 days were not over on 17-5-1994, it was the duty of the Magistrate to apply his mind and satisfy himself whether adequate grounds existed for detention of the accused person i.e., materials available in the form of F.I.R. 161 Statement and other documents and the gravity of offence and the involvement of the accused persons. At this point of time, as pointed out by the Supreme Court 'at that stage, the court is concerned with existence of materials against the accused and not as to whether these materials are credible or not on the merits.'

14. There is force in the contention of the learned Additional Public Prosecutor to the effect that there was undue, haste in releasing the respondents 1 to 4 on their own bond and the counsel for the petitioners before the court below failed to inform the Learned Magistrate that at the very same day bail application filed on behalf of the respondents 1 to 4 were posted for hearing before the Principal Sessions Judge, Madras. I am of the view that it is not open to the Magistrate to release the accused persons on their own bond on the sole ground that remand extension report was not received by the Magistrate. The case referred to by Mr. N. Natarajan, learned Senior Counsel appearing for the respondents in G. K.

Moopanar v. State of Tamil Nadu, 1990 Cri LJ 268 , relates to a minor offence of political agitation and not a serious offence like murder as in the instant case.

15. The ruling of the learned single Judge of this Court in Sankar alias Gouri Sankar v. State, will not apply to the facts and circumstances of the instant case. The above ruling of the learned single Judge deals with default on the part of the prosecution to file charge-sheet within the prescribed statutory period and it does not apply to the fact and circumstances of the present case.

16. For the reasons stated above there are grave infirmities in the impugned order and it is not sustainable in law. In view of the above the impugned order dated 17-5-1994 in Ref. No. A FIR No. 307 of 1994 in N. 1 Crime No. 745 of 1994 on the file of the learned VII Metropolitan Magistrate, George Town, Madras 1 is set aside and quashed. It is hereby ordered as follows :

1. The impugned order is set aside and quashed.
2. Respondents 1 to 4 must surrender before VII Metropolitan Magistrate, George Town, Madras-1 on 24-5-1994 at 4.30 p.m.
3. The VII Metropolitan Magistrate, George Town, Madras-1 shall pass orders remanding the respondents 1 to 4 judicial custody in accordance with law.

Accordingly, this petition is allowed.

17. Petition allowed.

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