

**Mohammad Yousuf and ors. Vs. State of J. and K. and ors.**

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**Court :** Jammu and Kashmir

**Decided On :** Jul-22-1997

**Reported in :** 1998CriLJ519

**Judge :** A.B. Quadir Parray,; G.D. Sharma and; M.Y. Kawoosa, JJ.

**Acts :** Jammu and Kashmir Code of Criminal Procedure (CrPC) (Smt.), 1989 - Sections 6, 12(1), 13, 14(2), 17, 17A, 17A(1), 17A(2), 17B, 17(4), 18(2A), 54, 55, 56, 57, 62, 107 and 167; ;Jammu and Kashmir Code of Criminal Procedure (CrPC) , 1966

**Appeal No. :** L.P.A. No. 168 of 1996

**Appellant :** Mohammad Yousuf and ors.

**Respondent :** State of J. and K. and ors.

**Advocate for Def. :** B.M. Sadiq,; Gazanfar Ali,; Mohammad Amin and;

**Advocate for Pet/Ap. :** A.M. Dar, Adv.

**Judgement :**

**A. Quadir Parray, J.**

1. On 5-9-1996, an order came to be passed by District Magistrate, Baramulla, in exercise of the powers vested in him under Sub-section (2) of Section 17-A of

Criminal Procedure Code namely Distribution of business among subordinate Magistrates of the District. In the said order, the District Magistrate, Baramulla has ordered that remand shall be granted by no other Magistrate except the Senior most Magistrate available at a station with the following further clarification and elucidation :-

(i) In respect of Baramulla tehsil, remand shall be granted by District Magistrate only. AC(R) shall grant remand only if District Magistrate is not available. Territorial Tehsildar shall grant remand if and only if both District Magistrate and AC(R) are not available. Nonavailability of any Magistrate shall be deemed if and only if the Magistrate is on leave/outside headquarter as per their movement register.

(ii) At Sopore, remand shall be granted by Sub-Divisional Magistrate, Territorial Tehsildars shall grant remand only during non-availability of SDM, if he is on leave/outside his headquarter.

(iii) At Uri, Pattan Gurez, Tangmarg, Sonawari and Vandipora only Territorial Tehsildars shall grant remand Naib Tehsildars shall grant remands only during period of leave of Tehsildars.

2. It shall have to be ensured that the accused is produced before the Magistrate in the Court properly by the police officer of the authorised rank as per law.

3. The Magistrate shall invariably apply mind and ascertain the physical well being/health conditions of the accused so produced through examination of the accused by the local Medical Officer authorised under law before granting any remand. A copy of the remand/Medical report shall be forwarded to the District Magistrate immediately.

4. The remand order so passed shall be read out to the accused in his/her mother tongue so as to keep him informed about his period of detention under this order.

5. All the Naib Tehsildars in the District shall normally refrain from granting any remand or bail unless it becomes inevitable during absence of senior officers as adjudged by leave sometimes by District Magistrate Baramulla and no other evidence and is specially permitted by the DM.

6. Due care shall be paid to the period for which remand is granted and also to nature of (police/judicial) custody. Reasons shall be clearly specified.
  7. It has been noted with great seriousness that Magistrates are not even maintaining' records about remands granted. All Magistrates shall maintain comprehensive records of all remands granted by them.
  8. The fact of remand having been granted shall be immediately reported by all Magistrates with complete detail to District Magistrate so as to enable this office to ascertain legality of exercise of authority.
  9. All Magistrates shall confirm whether the accused has been produced before them within 24 hours of apprehension excluding reasonable travel time;
  10. Cases under Section 107 Cr. P.C. shall be heard by the SDM/ACR/Tehsildars.
2. Aggrieved by this order, which in fact has been issued by the District Magistrate, Baramulla just to stream-line the issuance of remand orders of the Executive Magistrates and to restrict in his exercise in the hierarchy, the order has been objected to by the appellants who are officers incharge of certain police stations in the District. The matter came up for consideration before a learned single Bench of this Court, who while hearing the motion of the petition, has disposed of the matter in light of the fact that the Advocate General whose assistance was sought, has assured that the Government be allowed to resolve the matter at their own level.
3. It seems that the Government has not resolved the matter. The matter seems to have been disposed of by learned single Judge with the direction to the Government to constitute a Committee to review and resolve the matter within a reasonable time.
4. Aggrieved by the order of learned single Judge dated 4-10-1996, the appellants have challenged the same by way of this Latters Patent Appeal No. 168 of 1996. The said LPA came up for consideration before a Division Bench of this Court on 11-10-1996, when it was pleased to admit the same and ordered issuance of notices to the respondents through Advocate General of the State. However, while admitting the appeal, the Division Bench was pleased to observe as under:-.

Looking to the nature of the case, it is desirable that the matter is decided finally by a Full Bench to be constituted by the Chief Justice....

5. Further-more the Division Bench passed the interim direction, directing the State Government to take the decision as per the direction of the single Judge, before the date fixed for hearing of this case. It is in light of these directions, that the matter has come up before Full Bench of this Court, which was constituted by Hon'ble Chief Justice.

6. Heard learned counsel for the parties and perused the records.

7. After hearing learned counsel for the parties and perusal of the records, we do find that as per the scheme of the Criminal Procedure Code as provided under Part-II Chapter II. there are two kinds of Criminal Courts in the State of Jammu and Kashmir, besides the High Court, as envisaged under Section 6 of the Code, which reads :

6. Classes of Criminal Courts :- Besides the High Court and the Courts constituted under any law other than this Code for the time being in force, there shall be two classes of Criminal Courts in the Jammu and Kashmir State, namely :-

I. Courts of Session.

II. Courts of Magistrates.

A-1. CLASSES OF MAGISTRATES.

6- A, Classes of Magistrates. There shall be the following classes of Magistrates, namely :-

I. JUDICIAL MAGISTRATES

(1) Chief Judicial Magistrate.

(2) Judicial Magistrate of the first class.

(3) Judicial Magistrates of the second class.

(4) Special Judicial Magistrates.

## II. EXECUTIVE MAGISTRATES

(1) District Magistrates.

(2) Addl. District Magistrates.

(3) Sub-Divisional Magistrates.

(4) Executive Magistrates of the first class.

(5) Executive Magistrates of the second class.

(6) Special Executive Magistrates.

8. Under Section 17 of the Code, subordination of Assistant Sessions Judges, Judicial Magistrates to Sessions Judges and Chief Judicial Magistrates is provided.

Section 17(4) of the Code provides as under:-

17(4) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and such Judge, or Magistrate shall have jurisdiction to deal with any such application.

Section 17(A) of the Code provides subordination of Executive Magistrates, which reads :-

47-A. Subordination of Executive Magistrates.- (1) All Executive Magistrates appointed under Sub-section (1) of Section 12, Section 13 and Sub-section (2) of Section 14, shall be subordinate in the District Magistrate and every Executive .Magistrate (other than a Sub-Divisional Magistrate) exercising powers in a sub-divisional also be subordinate to the sub-Divisional Magistrate, subject, however to the general control of the District Magistrates.

Sub-section (2) of Section 17-A of the Code reads :

(2) The District Magistrate may, from time to time make rules or give special orders consistent with this Code as to the distribution of business among the Executive magistrates subordinate to him and as to allocation of business to an Additional District Magistrate. Section 17-B of the Code provides :

17-B. Courts inferior to the High Court and Court of Session. - -Courts of Session and Courts of Judicial and Executive Magistrates shall be Criminal Courts inferior to the High Court and Courts of Judicial and Executive Magistrates shall be Criminal Courts inferior to the Courts of Session. 9. Now in light of the provisions of Section 17-A(1) and (2) of the Code, which is considered to be the source by learned District Magistrate in issuing the impugned order just to have distribution of work/business of Criminal Courts under his subordination in the District, amongst different Executive Magistrates. It is an admitted fact that in the State of Jammu and Kashmir, under the provisions of Section 167 of the Code of Criminal Procedure, it is provided as under :-

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 61, and there are grounds for believing that the accusation or information is well founded, the officer-in-charge of the police station or (he police officer making the investigation if he is not below the rank of sub-inspector shall forth-with transmit to the nearest Executive or 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 in the whole, 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 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 section for a total period exceeding sixty days and on the expiry of said period of sixty days 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 section shall be deemed to be so released under the provisions of Chapter XXXIX for the purpose of that. 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 Government or the High Court, as the case may be, shall authorise the detention in the custody of the police.

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

(4) If such order is given by an Executive Magistrate other than the District Magistrate or Sub-Divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate, and if such order is given by a Judicial Magistrate, he 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 (5) 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.

10. So undoubtedly, under the provisions of Section 167 Cr. P.C. in the State of Jammu & Kashmir, it is not only the Judicial Magistrate who has the powers of remand, but it is the Executive Magistrates also who have powers of remand, unlike provisions of law in other parts of the country.

11. The purpose of remand is that when a person who has been arrested under any provisions of Criminal Procedure Code namely Sections 54, 55, 56, 57 etc. etc. he is to be produced before the nearest Magistrate within 24 hours. The purpose for incorporating such a section in the Criminal Procedure Code is only to ensure that the liberty of a person should not be curtailed by putting him in jail or in detention longer than is necessary and the object of the provision of law is to see that the person arrested by the police or brought before the Magistrate within the least possible delay, in order to enable the latter to judge, if such person is to be further kept in police custody and whether there is any necessity of keeping him in custody/ arrest for any more longer period. Thus the purpose and spirit of the Section is to ensure constitutional guarantees extended for the liberty of accused, which cannot be allowed to be jeopardised in view of the constitutional mandates and the statutory provisions. The intent of this provision further is to prevent possible abuse of their powers by the police while trying to make discoveries of crime and wrongful confinement etc.

12. The Courts feel envious about the liberties of the individual and the citizens. The Magistrate, whether Judicial or Executive while remanding a person or passing extensions of remand should be very careful and watchful to see and ensure that the liberty of the citizen/individual is not violated by the police arbitrarily and unreasonable as also unnecessarily. So in order to ensure that a person accused of any offence who has been arrested and the investigations against the said person regarding the allegations is not or could not be completed within 24 hours, is to be produced by the officer incharge investigation before the

nearest Magistrate, whether executive or Judicial, for purposes of remand, specifying the reasons for such remand. As and when the accused/person arrested is produced before the Magistrate, the Magistrate is called upon to exercise its powers judiciously, irrespective of his rank and has to give reasons to justify such remand. If the Magistrate is remanding the accused to the police custody, he has to give more cogent reasons in that aspect. He has not only to ensure that the person of the accused is informed that he has a liberty to consult a lawyer of his choice, but is also at liberty to represent as to what he has to say in the matter. The Magistrate has also to ensure that the person of the accused is not subjected to atrocities or any physical torture at the hands of the investigating agency and to get him medically examined. These and other mandates which have now assumed virtually statutory recognition and day in and day out, directions issued by the High Courts of the country in general and by the apex Court in particular has drawn the attention of all citizens and Human right activists to this aspect and as such, has assumed its role magnificently.

13. Thus the Magistrate who is to pass remand orders has to be reasoned one. No doubt the Executive Magistrates or the Judicial Magistrates of the 1st Class have statutory powers to pass such orders, but passing of such orders are to be forwarded to their controlling officer/superior Magistrates. In the case of Executive Magistrates, they have to pass the same to the District Magistrate and in the case of Judicial Magistrates, to the Chief Judicial Magistrates as per statutory provisions in this behalf.

14. In the impugned order, learned District Magistrate has not curtailed the powers of the Judicial Magistrates as was being argued. Learned District Magistrate has in fact tried to impress upon the Executive Magistrates and try to maintain hierarchy in passing remand orders and has reiterated provisions of law in the statute and also in the light of the judgments and directions passed from time to time by the High Courts of the country in general and of the apex Court in particular.

15. From the careful perusal of the impugned order, we do find that the learned District Magistrate has tried to impress upon the Executive Magistrates of his District that remand orders should be passed by senior-most Magistrates available

at the Station. He has also tried to spell out it by describing each zone of his district. In the district of Baramulla tehsil, he has asked that it is the District Magistrate alone who shall be passing the remand orders. The Assistant Commissioner (A) who is in fact Additional District Magistrate shall grant remand only if the District Magistrate is not available and Territorial Tehsildars shall grant remand if and only if both District Magistrate and Assistant Commissioner (R) are not available. By non-availability of Magistrates, the learned District Magistrate has qualified it that there should be no ruse/excuse that Senior Magistrate was not available, so the matter was taken to the next available Magistrate. By non-availability of Magistrate, the learned District Magistrate means that when senior-most Magistrate shall be either on leave or outside the headquarter as per their movement register.

16. So all the clauses which in fact are riders of powers envisaged under the Criminal Procedure Code have been reiterated and the directions are in no way contradictory to the provisions of the Criminal Procedure Code.

17. Now whether it comes within the strict parlance of distribution of business or is only mode of conveying the intention of the learned District Magistrate. In the towns of Srinagar and Jammu. we have seen that Courts of Chief Judicial Magistrates fix a day or week to each subordinate Magistrate to act as a duty Magistrate and such duty Magistrates have to attend to all the remand applications, bail matters and other allied matters which are assigned to him which arise during that week in the territorial limits of the Chief Judicial Magistrate/Judicial Magistrate of that area.

18. So when executive order is being issued by Chief Judicial Magistrate asking that all the remand applications in the local areas of Jammu or Srinagar, as the case may be, shall be made before a particular Magistrate in a week, that does not mean that the other Magistrates have been divested of the powers. They continue with ' the powers, but it is only to stream-line and make it known to the police agencies and other people seeking appropriate orders and to get uniformity in the matters of remand/bail which arise in that area during the week or a fortnight, as the case may, depends upon the availability of the Magistrate and this practice

is being followed for more than two decades in the Judicial Courts. So the District Magistrate of the Baramulla also wants to stream-line the functioning of his Magistracy and to make them answerable for their omissions and commissions, immediately before the District Magistrate, he is within his powers under the provisions of law to do so. Not only that, the District Magistrate as head of the Executive Magistrates in the District has powers under Section 62 of the Criminal Procedure Code to ask the Officer Incharge of police stations to report and in fact the Officer Incharge is also bound to report to the District Magistrate or if the District Magistrate so directs, to the Sub-Divisional Magistrate, cases of all persons arrested without warrant within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

19. The eventualities which have been apprehended by the persons of the officer Incharge, police stations, namely the appellants that in far far flung areas of Tangdar and Gurez etc. where the accused are being arrested are to be produced before the nearest Magistrate as per provisions of law. They shall I be constrained to do so because nearest Magistrates may be in certain places second class Magistrates or any other Magistrate before whom the person of the accused is to be produced for remand, as per the directions of the District Magistrate. This excuse is not lawful. They have option to produce the accused within 24 hours before Judicial Magistrate of the 1st class or the Executive Magistrate of the 1st class. We have almost Judicial Magistrate of 1st class available at every place including Baramulla town, Sopore, Bandipora, Surbal, Pattan, Uri, Tangmarg and Tangdar. Thus there is only place like Gurez which is not provided with the Judicial Magistrate, but nevertheless Territorial Tehsildar is available and at such places the Officer Incharge, Investigation can produce accused for remand before the Territorial Tehsildars, which is also provided in the directions issued by the District Magistrate, Baramulla in the order impugned.

20. Though the directions 1 to 9 issued by the District Magistrate Baramulla do not fall under the provisions of Sub-section (2-A) of Section 18 Cr. P.C. 'as to the distribution of business' in the Executive subordinate Magistrates, but nevertheless the directions are in consonance and not inconsistent with the provisions of the Code to achieve the purpose of presenting remand petition before a Senior

Magistrate and in his absence to the next senior available Magistrate. In case the remand petitions are presented before the next senior Magistrate available, he is under statutory obligation as laid down under Section 167 of the Cr. P.C. to follow the instructions laid down therein which read :-

If such order is given by an Executive Magistrate other than the District Magistrate or Sub-Divisional Magistrate, he shall forward a copy of his order with his reasons for making it, to the Magistrate to whom he is immediately subordinate and if such order is given by a Judicial Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

21. This amendment has been incorporated by substitution of the relevant subsection vide amendment Act of XL of 1966. So there is nothing bad in it when the Magistrate calls upon and enjoins upon the Executive Magistrates, subordinate to it, to abide by the statutory directions. It also does not amount to divesting of powers by the District Magistrate, of the Executive Magistrates regarding passing of remand orders. The option is initially with the Investigating Officer to forward the accused along with the application for remand, accompanied with the case diaries to the nearest Magistrate for remand. The Investigating Officer has been called upon by the District Magistrate to present it before a senior Executive Magistrate and he has not been divested or precluded not to present remand form before the Judicial Magistrate as available in the Allaqa. While doing so, he has to comply strictly with the provisions of law and the mandates of law as enshrined by the Constitution, statute and judgments passed by the Courts, of the country including the apex Court. So the challenge put by the petitioners, we find as not warranted under law and is misconceived.

22. Asking that the person of the accused should be got medically examined should not cause anything hard under the colours of the investigating agency and they should not feel in any way indiscomfort. The statute also provides that the person of the accused, in case he sustains any injury in the custody of the police should be got medically examined. In order to ensure that the issue is not being joined by the accused subsequently that injuries found on the person or any part of the body of the accused were inflicted during custody in the police, he is to be got

medically examined by the investigating agency and in all cases of remand, person of the accused has been asked to be produced before the Magistrate. This should also cause no concern to the implementing agencies. Why they joined the issue is not known?

23. So in order to give it now authoritative shape to these legal directions which are enshrined in the Code and which have been evolved till date by different agencies and have been also voiced by the District Magistrate, Baramulla, we after-thoughtful considerations direct as under :-

(i) That all the applications for remand should be made before the Judicial Magistrate 1st class in the first instance and in case of non -availability of the Judicial Magistrate, the remand application should be made before senior-most Executive Magistrate of the Area available and in case of Senior Magistrate being not available, then to next senior.

(ii) The application for remand should be in duplicate form, one copy of the application should be retained by the Magistrate who is passing the remand orders and he shall maintain a register of these remand orders and shall report to the next higher Magistrate, as the case may be. In case of Judicial Magistrate 1st class, he shall inform Chief Judicial Magistrate of the area and in case of Executive Magistrate, to the District Magistrate of the area.

(iii) The file of remand orders passed and retained by the respective Magistrates shall be available for inspection to the District Magistrate in case of Executive Magistrate and to Sessions Judge in case of the Executive/Judicial Magistrates of the Allaqa and also subject to inspection of the Administrative Judges of the respective areas, as and when their Lordships deem proper.

(iv) Certificates of the medical examination of the accused forwarded before the remanding Magistrate shall also be endorsed and recorded in the application for remand, if such need has been felt;

(v) When the remand is to be passed beyond 15 days, no Executive Magistrate shall pass orders of remand, but shall in fact forward it to the Judicial Magistrate

having jurisdiction to pass such orders.

(vi) Respective CJMS/District Magistrates shall maintain separate files of all the remand orders received by them from the subordinate Judicial/Executive Magistrates, as the case may be, for inspection.

(vii) No Magistrate of the 2nd class, unless not specifically empowered in this behalf by the Government or High Court, as the case may be shall authorise detention of an accused in custody of the police and in all cases of application for remand, the application shall be accompanied by the case diaries and the Magistrates, executive or Judicial, who are passing orders of remand or extension of remand shall also endorse under their seal and signatures on the case diaries an authentication that they have perused the case diaries and the application for remand and after perusal of the same have passed remand order, as was warranted and the case diaries after perusal and endorsement shall be forthwith handed-over to the Investigating Officer/officer who had presented the application for remand.

24. With the above observations and directions, this LPA is accordingly disposed of. This also disposes of OWP No. 4320 of 1996 titled Fareed Ahmad Khan versus Stale and others as this petition also raises identical questions of law and facts and is covered by the judgment/ directions passed hereinabove.

25. The authoritative directions passed at the close of the judgment by duly circulated amongst all the subordinate Courts, Judicial/Executive and also to the investigating agencies and all District Superintendents of police/Deputy Inspector Generals of police, who shall circulate the same amongst all the police stations/police p6sts etc. for due implementation/publication and compliance.

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