

HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

**+ CRIMINAL PETITION Nos.10318, 10319, 10320, 10330, 10331,
10410, 10411, 10466, 10468, 10489, 10490 and 10491 of 2018**

% Dated 21.12.2018

Viswanathan S/o.late Subramanian
Aged about 43 years, R/o.D.No.2-243,
Mel Street, Kettavaarampalem Village,
Thiruvannamalai District, Tamil Nadu State.

....Petitioner

VERSUS

\$ The State of Andhra Pradesh,
Rep. by its Public Prosecutor,
High Court at Hyderabad,
Hyderabad and another

... Respondents

! Counsel for Petitioners : Sri S. Dushyanth Reddy

^ Counsel for Respondent : Public Prosecutor

< GIST:

> HEAD NOTE:

? CITATIONS:

1. 1980(2) SCC 559
2. 2014 (16) SCC 623
3. 2002 (a) ALD (CrI.) 67 (AP)
4. 1984 (4) SCC 348
5. 2001 (6) SCC 311
6. AIR 1987 SC 1096
7. 1982 CrI.J 1757
8. (2000) 10 SCC 438
9. AIR 1977 SC 1096
10. (1980) 1 SCC 554
11. (2008) 2 SCC 383
12. (2015) 4 SCC 302
13. 2014 (2) ALD (CrI.) 684
14. (2000) 3 SCC 409
- 15.(1994) 3 SCC 440
16. (1989) 2 SCC 754
17. (2002) 4 SCC 234
18. (2002) 1 SCC 1
19. (1980) 2 SCC 565
20. (2008) 3 SCC 222
21. (1980) 3 SCC 141
22. (1978) 1 SCC 248
23. (2002) 4 SCC 578
24. (2016) 3 SCC 700
25. (2017) 15 SCC 67

HON' BLE DR. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION Nos.10318, 10319, 10320, 10330, 10331, 10410, 10411, 10466, 10468, 10489, 10490 and 10491 of 2018

COMMON ORDER:

1. The common Question involved in all matters is whether the person accused in several crimes, having been arrested during investigation by police according to law in one crime and produced therein within 24 hours and taken to Judicial custody and is in Jail as pre-trial prisoner, subject to Sections 167, 437 to 439 Cr.P.C, having been not asked by him or by the police concerned to issue P.T. Warrant for taking to judicial custody in all other crimes, is entitled to claim set-off of the period under section 428 Cr.P.C., in other crimes and when ? Further whether he is in deemed custody for purposes of Sections 437 to 439 Cr.P.C ?

2. The self-same accused by name Viswanathan of Thiruvannamalai District, Tamil Nadu State, moved all these petitions by showing the State of Andhra Pradesh, represented by its Public Prosecutor and the Superintendent of Police, YSR Kadapa District as respondents with self-same prayer in all the petitions to quash the endorsement dated 06.09.2018 returning the bail application of the petitioner and direct the learned District Judge, Kadapa to entertain the applications for bail treating the petitioner in deemed custody in the respective crimes viz.

(i) Crime No.117 of 2015 on the file of Chennur Police Station, (ii) Crime No.87 of 2017 on the file of Khajipet Police Station, (iii) Crime No.12 of 2017 of Veerapalli Police Station, (iv) Crime No.169 of 2016 of T.Sundupalli Police Station, (v) Crime No.127 of 2016 of Khajipet Police Station, (vi) Crime No.72 of 2016 of Khajipet Police Station, (vii) Crime No.107 of 2016 on the file of T.Sundupalli Police Station, (viii) Crime No.8 of 2016 on the file of Duvvur Police Station, (ix) Crime No.149 of 2017 of Nandalur Police Station, (x) Crime No.254 of 2015 of Duvvur Police Station, (xi) Crime No.180 of 2016 of Railway Kodur Police Station, (xii) Crime No.24 of 2017 of Nandalur Police Station and (xiii) Crime No.34 of 2017 of Nandalur Police Station.

3. The factual matrix almost similar in all cases in nutshell are that the petitioner was originally arrested on 31.10.2017 in Crime No.148 of 2017 of Chitvel Police Station and subsequently on 02.01.2018 while in the judicial custody sent to the prison, he was granted regular bail on 02.01.2018. On 15.11.2017, the investigating officer of Chitvel Police Station was granted police custody in Crime No.148 of 2017 and based on the so called confession of the petitioner, he was implicated in other cases supra. Though he is in judicial custody in prison from arrest and remand within 24 hours from the time of arrest on 31.10.2017, but for interchangeable police custody supra, he was not produced before the concerned Magistrate by seeking prisoner transit

warrants under Section 267 Cr.P.C. It is also alleged that based on the alleged confession statements of co-accused, he was added as accused in some more crimes making 21 in all where he was implicated as accused. Out of those, in 6 cases covered by crime No.28 of 2016 of Kodur Police Station, Crime No.378 of 2017 of Nandalur Police Station, Crime No.130 of 2017 of Chitvel Police Station, Crime No.148 of 2017 supra of Chitvel Police Station, Crime No.414 of 2017 of Kodur Police Station and Crime No.201 of 2017 of Obulavari Police Station he was granted bail, but for in other 15 cases viz Crime No.117 of 2015 of Chennur Police Station, Crime Nos.254 of 2015 and 8 of 2016 of Duvvur Police Station, Crime Nos.72 of 2016, 127 of 2016, 87 of 2017 of Khajipet Police Station, Crime No.27 of 2017 of Mydukur Police Station, Crime No.28 of 2016 of Kodur Police Station, Crime Nos.169 of 2016, 107 of 2016 of T.Sundupalli Police Station, Crime No.12 of 2017 of Veerapalli Police Station, Crime Nos.34 of 2017 and 149 of 2017 of Nandaluru Police Station, Crime No.186 of 2017 of Obulavaripalli Police Station and Crime No.180 of 2017 of Railway Kodur Police Station.

4. It is his contention in support of the further averments that even the petitioner moved bail applications before the learned Sessions Judge, Kadapa under Section 439 Cr.P.C. in those above 15 cases, where bail was not so far granted, all those applications for bail are returned with endorsement of P.T. warrants and

remand reports not filed. Infact, as per his version the concerned police officials are not producing him from prison by seeking remand to Judicial custody in those cases before the concerned Magistrate, though they have knowledge of the fact that the petitioner was arrayed as accused and it is because of said action of the police, he is unable to file bail applications. It is as per him nothing but curtailing his right to life enshrined by Article 21 of the Constitution of India, as part of right to life and personal liberty which include speedy and fair investigation and fair trial. It is further averred that the police officials are filing P.T. warrants in the respective crimes one after other and only selectively after his getting of bail in such of those cases so as to keep him in custody as long as possible, instead of producing for judicial remand and same is contrary to the police standing orders.

5. It is also the contention in support of his averments in all the petitions that in the review of the progress of investigations by the Superintendent of Police, Kadapa, which even conducting every month and even well within the knowledge of Superintendent of Police of all said crimes are pending.

6. It is averred further that though custody is not defined in the Code, there are judicial interpretations holding that it need not essentially be a physical custody but otherwise as laid down by the Apex Court in this regard that in *Niranjan Singh v. Prabhakar*

Rajaram Kharote¹ that it includes deemed custody and same proposition is reiterated by the recent past expression of the Apex Court in Sundeep Kumar Bafna v. State of Maharashtra², holding that the deemed custody extends not only for the cases before the Magistrate Courts but also before the Session Courts concerned and for that matter, even before High Court to move for bail.

7. It is further averred and contended that the Superintendent of Police being the sponsoring authority under the Preventive Detention Act informed to the detaining authority-the District Magistrate about the involvement of the petitioner in more than 10 crimes registered by police besides the one pending at Proddutur Forest Ranger viz., Crime No.117 of 2015 of Chennur Police Station, Crime No.254 of 2015 of Duvvur Police Station, Crime No.28 of 2016 of Kodur Police station, crime No.72 of 2016 of Khajipet Police Station, Crime No.127 of Khajipet Police Station, Crime No.169 of 2016 of T.Sundupalli Police Station, Crime No.12 of 2017 of Veeraballi Police Station, Forest offence OR 75/ 16-17 of Proddutur Forest Range, crime No.87 of 2017 of Khajipet Police Station, Crime No.378 of 2017 of R.Kodur Police Station and Crime No.148 of 2017 of Chitvel Police Station, which are referred and covered by the preventive detention order of the Collector-cum-District Magistrate in the Reference No.C1/ 227/ M/ 18, dated 24.04.2018. The order of the Collector speaks from the first line itself of the Superintendent of Police YSR Kadapa has placed

¹ 1980(2) SCC 559

² 2014(16) SCC 623

before the District Magistrate about the information supra. It is further contended that though section 267 Cr.P.C. is an enabling Provision, the power is vested in the criminal court to issue production warrant where accused is involved in other crimes and for that purpose the investigating agency not filed memos before the competent court to issue P.T.warrant for production of the pre-trial prisoner supra in all other cases and the investigating agencies have been deliberately adopting the *modus operandi* of filing applications under Section 267 Cr.P.C. selectively only after bail granted in such crimes.

8. The said contention of accused may not fully correct as pointed out by the learned Public Prosecutor, for accused also can file such memos or petitions so to ask for any entitlement to the period of set-off under Section 428(2) Cr.P.C. for the period of detention. His contention is had the Superintendent of Police, Kadapa cause filed memos accordingly by showing for his remand to judicial custody in all other cases for the purposes of the set-off he can get the benefit and for this not done so far he is deprived of the benefit of set-off under Section 428 Cr.P.C.

9. It is also contended that the accused is entitled to the statutory default bail otherwise under Section 167(2) Cr.P.C. had he been produced in all other cases on P.T.warrant rather than not filing P.T.warrants despite shown involved in other crimes by its registration.

10. The action of the investigating agency supra respectively is hereby contended as unfair and illegal in depriving the statutory benefits with no reason and also in depriving the fundamental right to life guaranteed by Article 21 of the Constitution of India.

11. It is also averred and contended that there is no basis for the implication of the petitioner but for reasons better known on the so called disclosure statements of the accused or that of the co-accused alleged which is a weak piece of material to implicate and involve in several cases by registration of the crimes for the alleged grave offences and the sole intention of the police as seems above is to keep the petitioner in the custody continuously by denying the right to appear with video linkage facility for remand extensions even he is in judicial custody one way or the other since 31.10.2017. It is because of the said action of the investigation agency and police officials supra, there is no any coming out of the petitioner from jail as a pre-trial prisoner in near future on bail despite in custody since long time supra.

12. The learned Senior counsel Sri T.Niranjan Reddy for petitioner while reiterating the above contentions in the course of hearing arguments, drawn various provisions particularly Sections 31, 428, 167, 42, 46, 436 to 439 and 267 of Cr.P.C. and placed reliance on the expression referred supra among others of this Court and of the Apex Court.

13. Whereas in opposing the petitions, it is the submission of the learned Public Prosecutor that the custody contemplated even for

the purpose of regular bail is only under what is provided by physical production as per Section 167 Cr.P.C. and otherwise there is a remedy for anticipatory bail if any and having filed the non-sustainable regular bail application before the learned Sessions Judge and even returned, instead of representing, hastily came to this Court in filing the petitions, that too having knowledge of he is in several crimes involved, for nothing even prevented him being accused in the crimes to ask the learned Magistrate by filing petitions or memos as contemplated by Section 267 Cr.P.C. and having not resorted to do so, he is not justified in making a blame on the police officials including on the Superintendent of Police who is only the monitoring authority and not the investigating officer practically as can be seen and from mere furnishing of information he collected from all police stating to submit to the District Magistrate is different to attribution of knowledge to cause file memos by concerned investigating officers and thereby sought for dismissal of the petitions and else to pass any other appropriate orders.

14. Heard both sides at length and perused the penal provisions and the propositions with reference to the facts borne by the record.

15. The factual matrix no way requires repetition. The whole contention of the petitioner in the facts referred supra mainly with reference to section 439 Cr.P.C., is by placing reliance on the two-Judge Bench expression of the Apex Court in Niranjana Singh

(supra) of 1980, which was quoted with approval by the Apex Court in several later expressions.

16. The expression of the Apex Court in *Niranjan Singh* (supra) relevant portion for more clarity to reproduce, reads as follows:

“Let us now get to grips with the two legal submissions made by the petitioner. The first jurisdictional hurdle in the grant of bail argues the petitioner is that the accused must fulfil the two conditions specified in [s. 439](#) Cr. P.C. before they can seek bail justice. That provision reads:

439. (1) A High Court or Court of Session may direct-

(a) that any person accused of an offence, and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of [section 437](#), may impose any condition which it considers necessary for the purposes mentioned in that sub-section, (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified.

Here the respondents were accused of offences but were not in custody, argues the petitioner. So no bail, since this basic condition of being in jail is not fulfilled. This submission has been rightly rejected by the courts below. We agree that, in our view, an outlaw cannot ask for the benefit of law and he who flees justice cannot claim justice. But here the position is different. The accused were not absconding but had appeared and surrendered before the Sessions Judge. Judicial jurisdiction arises only when persons are already in custody and seek the process of the court to be enlarged. We agree that no person accused of an offence can move the court for bail under [s. 439](#) Cr. P.C. unless he is in custody.

When is a person in custody, within the meaning of s.439 Cr. P.C. ? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of [s. 439](#). This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused

did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

Custody, in the context of [s. 439](#), (we are not, be it noted, dealing with anticipatory bail under s.438) is physical control or an least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can, be stated to be in judicial custody when he surrenders before the court and submits to its directions. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and maybe, enabled the accused persons to circumvent the principle of [s. 439](#) Cr.P.C. We might have taken a serious view of such a course, indifferent to mandatory provisions by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but sitting under [Art. 136](#) do not feel that we should interfere with a discretion exercised by the two courts below.

We are apprehensive that the accused being police officers should not abuse their freedom and emphasise that the Inspector General of Police of the State of Maharashtra will take particular care to take two steps. He should have a close watch on the functioning of the concerned police officers lest the rule of law be brought into discredit by officers of the law being allowed a larger liberty than other people especially because the allegations in the present case are grave and even if a fragment of it be true, does little credit to the police force. It must be remembered that the allegations are that the deceased was dragged out of a truck to a secluded place later tied to a tree and shot and killed by the police officers concerned.

We hasten to make it clear that these are one-sided allegations and the accused have a counter-version of their own and we do not wish to make any implications for or against either version. The accused policemen are entitled to an unprejudiced trial without any bias against the 'uniformed' force which has difficult tasks to perform.

We conclude this order on a note of anguish. The complainant has been protesting against the State's bias and police threats. We must remember that a democratic state is the custodian of people's interests and not only police interests. Then how come this that the team of ten policemen against whom a magistrate after due enquiry found a case to be proceeded with and grave charges including for murder were framed continue on duty without so much as being suspended from service until disposal of the pending sessions trial? On whose side is the State? The rule of law is not a one-way traffic and the authority of the State is not for the police and against the people. A responsible Government responsive to appearances of justice, would have placed police officers against whom serious charges had been framed by a criminal court under suspension unless exceptional circumstances suggesting a contrary course exist. After all a gesture of justice to courts of justice is the least that a government owes to the governed. We are confident that this inadvertence will be made good and the State of Maharashtra will disprove by deeds Henry Clay's famous censure :

"The arts of power and its minions are the same in all countries and in all ages. It marks its victim denounces it; and excites the public odium and the public hatred to conceal its own abuses and encroachments.

The observations that we have made in the concluding portion of the order are of such moment, not merely to the State of Maharashtra but also to the other States in the country and to the Union of India, that we deem it necessary to direct that a copy of this judgment be sent to the Home Ministry in the Government of India for suitable sensitized measures to pre-empt recurrence of the error we have highlighted."

16. The whole reading of the judgment no way referred either Section 167 or 267 Cr.P.C., but considered for the purpose of bail what is meant by arrest and custody by referring to Section 439 Cr.P.C. supra. It is in this context from what is reproduced above observed that judicial jurisdiction arises only when persons are already in custody and seek the process of the court to be enlarged and no accused of an offence can move the court for bail under Section 439 Cr.P.C. unless he is in custody within the meaning of Section 439 Cr.P.C. When a person is said to be in custody

concerned, custody in the context of Section 439, (we are not dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court. He can be in custody not only when police arrests him, produced him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.

17. Referring to it, a Single Judge of this Court in *Tupakula Appa Rao vs. State of A.P.*³ in the context of, what is meant by custody, else to entertain anticipatory bail, by referring to *Niranjan Singh (supra)* particularly at para-7, and another expression of the Apex Court subsequent to it in *Raghubir Singh v. State of Haryana*⁴ in relation to the period of set off under Section 428 Cr.P.C, besides that of *State of Maharashtra & another. v. Najakat Alia Mubarak Ali*⁵ that is also in relation to any entitlement to set off under Section 428 Cr.P.C. referring also to *Raghubir Singh(supra)*, besides that of *Government of Andhra Pradesh v. A.V.Rao*⁶ and the Full Bench expression of Allahabad High Court in *Shabbu v State of Uttar Pradesh*⁷ among other in its observing by this Court in *Tupakula Appara Rao (supra)*, from para 'b' onwards that *Niranjan Singh(supra)* dealt with the meaning of

³ 2002 (1) ALD (CrI.) 67 (AP)

⁴ 1984(4) SCC 348

⁵ 2001 (6) SCC 311

⁶ AIR 1987 SC 1096

⁷ 1982 CrI.J. 1757

custody appearing only in Section 439 Cr.P.C. in its paras 7 to 9 and State through Central Bureau Investigation v. Dawood Ibrahim Kaskar⁸ dealt with custody appearing in Sections 309(2) and 167 Cr.P.C. in its saying accused in custody appearing in Section 309(2) Cr.P.C. refers and relates to accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him, but not an accused who is subsequently arrested in course of further investigation as in first category of cases he can be remanded to judicial custody only in view of Section 309(2) Cr.P.C. and he who comes under second category will be governed only by Section 167 Cr.P.C., so long as further investigation continues and in respect of the scope of Section 167 Cr.P.C. Court which had taken cognizance of the offence may exercise its power in respect of the offences to detain the accused in police custody, subject to fulfillment of the requirements and the limitation of Section 167 Cr.P.C. From Niranjn Singh and Dawood Ibrahim Kaskar (supra) it is obvious that one need not be arrested and produced before the Court for the purpose of remand and to judicial custody of the Court. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions. However, his physical control or atleast physical presence coupled with submission to the jurisdiction and orders of Court is a *sine qua non*. Be it on the production by the investigating agency or on his own volition of the

⁸ (2000) 10 SCC 438

accused surrendering himself to the custody of the Court, unless one is in custody, his request for bail cannot be considered in terms of Section 439 Cr.P.C.

18. On facts, the learned Single Judge in Tupakula Appa Rao (supra) further observed at para-10 that the accused was arrested in connection with only one crime and sent to judicial remand and his arrest has not been shown in the other crimes either purposefully or negligently or otherwise. Therefore he cannot surrender himself before the Court in as much as his physical presence is necessary, unless he is produced before the Court. In such circumstances can his custody in one crime be deemed to be in custody another crimes is the moot question.

19. In Tupakula Appa Rao (supra) at paras 11 and 12 having referred para 8 of the expression in Government of Andhra Pradesh v. A.V.Rao⁹ of the Apex Court in connection with the possibility of production before a Magistrate arises after period of Preventive Detention and of the Allahabad High Court Full Bench expression in Shabbu (supra), where it is held that each case depends upon own facts as to detention of a person in one case should be treated to be his detention for the purpose of any other case for no set formula can be laid down in that behalf. If it is on the negligence of the concerned authorities' and for no fault of his, he can with all justification claim that his detention in earlier case so also deemed to be his detention for the purpose of second

⁹ AIR 1987 SC 1096

case and in that event, the benefit of Section 428 Cr.P.C. can be extended.

20. In Tupakula Appa Rao (supra) at paras 13 and 14 having referred to the expression of the Apex Court in State of Maharashtra v. Najakat Alia Mubarak Ali¹⁰ which quoted on the scope of Section 428 Cr.P.C. Raghbir Singh (supra) particularly at para 18 of it that reading of section 428 of the Code in the above perspective, the words “of the same case” are not to be understood as suggesting that the set-off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which accused in prison subsequent to the inception of particular case, should be credited towards period of imprisonment awarded as sentence in that particular case. It is immaterial that petitioner was undergoing sentence of imprisonment in another case also during said period. The words “of the same case” were used to refer to the presentence period of detention undergone by him. Nothing more can be made out of collocation of these words.

21. By so referring, the learned Single Judge in Tupakula Appa Rao (supra) observed at para 14 by referring to Najakat Alia Mubarak Ali and by also referring to Raghbir Singh that, the fall out of the interpretation giving benefit of detention during investigation, enquiry and trial in one case, in that other case, may also demand the investigating agency not to arrest the

¹⁰ 2001(6) SCC 311

accused for commission of the second offence pending conclusion of the trial and passing of sentence in the first case. Therefore, benefit of Section 428 of the Code cannot be extended to second case as it amounts to double benefit in the descending view.

22. It is there from observed by the learned single Judge in paras 17 to 19 that the problem would arises only in cases only accused in concerned in different cases pertaining to different police stations and pending before the different courts where no negligence on the part of the authorities can legitimately be shown. In view of the judgment of the Apex Court in Niranjana Singh, no person accused of an offence can move the Court for bail under Section 439 of the Code unless he is in custody. In such cases, he cannot surrender himself before another court on account of the fact that he has been in judicial custody in the former case. The situation would not arise when he was involved in series of cases pertaining to self same police station and within the territorial jurisdiction of the same Court where negligence on the part of the authorities can validly be attributed. Even if no negligence can be validly be attributed to police, accused can himself offer to surrender before the Court on his production before the Court in connection with one case when he is remanded to judicial custody, and as a result whereof he can be in custody in all cases. To surmount such contingency, an application seeking his production in connection with the case before it can be mooted in the other court in which case that court after issuing notice to

the concerned police can pass appropriate orders. The investigating agency can also seek police custody of the accused for the purpose of interrogation in that case or cases as the case may be. Turning to the instant cases, having regard to the fact all the cases registered against petitioner pertain to the same petitioners and the fact that his arrest could have been shown in other cases also simultaneously but not shown the facts warrant a conclusion that he is deemed to have been in custody in respect of other crimes also although formal arrest is not shown in the other cases also. However, it is needless to say whether the bail can be granted or not, depends upon the facts of each case and would be left to the discretion of the Court to exercise the same on merits of each case. It is therefrom observed the Criminal Petitions filed for anticipatory bail cannot be sustained as petitioner is deemed to be in custody in these cases also and are dismissed pending of the same police station for the purpose of bail referring to custody concerned.

23. Thus, the expression of the learned single Judge in Tupakula Appa Rao (supra) referring to more than 5 expressions of the Apex Court besides a Full Bench of Allahabad among other is very clear that custody for the purpose of regular bail or anticipatory bail under Sections 436 to 439 Cr.P.C is different from custody for the purpose of set off to count the period of remand under section 428 and for first remand of 14 days for police custody or for default bail under Section 167 Cr.P.C.

24. For more clarity coming to the wording of section 167 Cr.P.C with no need of reproduction but for in gist, whenever any person is arrested and detained in custody is the commencement of sub-section (1) of the second so physical presence is required in such cases is settled expression of the Apex Court in Kulkarni. The said judgment also was discussed by this Court in CrI.P.No.12687 dated 19.12.2018.

25. As referred supra, once physical presence of the accused for purpose of accepting the remand to judicial custody is a pre-requisite for the first remand of the first 7/ 15 days viz., if it is by Executive Magistrate having no jurisdiction for the 7 days and if it is a Judicial Magistrate or the Designated Court of original jurisdiction first 15 days with interchangeable either judicial custody or police custody only within that period as well laid down in Anupam J. Kulkarni supra. Thus, the custody for the purpose of bail application of even without physical custody from the interpretation given in Niranajan Singh no way available for purpose of taking to judicial remand under Section 167 Cr.P.C. and equally for purpose of set off under Section 428 Cr.P.C., but for as observed by the learned Single Judge in Tupakula Appa Rao (supra) referring to the Full Bench judgment of the Allahabad High Court in Shabbu supra if at all any benefit of set off under Section 428 Cr.P.C. available and if so when from that too on showing deliberate negligence of the part of the police officials.

26. Before coming to the facts, how far that benefit sought, if at all applicable to the petitioner, now coming to the argument that it is the duty of the investigating police where crime is pending and also of the Superintendent of Police also of the District concerned under Section 36 Cr.P.C., this Court in *K. Krishna Reddy vs. State of Andhra Pradesh*, represented by its Principal Secretary, Home Department, Amaravathi, and others in W.P.No.42627 of 2017, dated 24.04.2018, referring to Section 36 Cr.P.C. among other provisions, in a case under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Section 20 with reference to Sections 4 and 5 Cr.P.C. and Rule 7 of the Rules framed in 1995 under the Act that, it provides for review of every investigation of every quarter and by referring to Sections 154 to 158 Cr.P.C. and 173 Cr.P.C. to read with Section 36 Cr.P.C., observed that the police officer superior in rank to the officer in-charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station and the law is also fairly settled in this regard from the expression of the Apex Court in *State of Bihar vs. J.A.C. Saldanha*¹¹, same is quoted with approval by subsequent expression of the Apex Court in *State of A.P. vs. A.S. Peter*¹² as an enabling provision. Thus, the Superintendent of Police can exercise the same powers of the Investigating Officer is different from really exercised the same power or not in any particular case,

¹¹ (1980) 1 SCC 554

¹² (2008) 2 SCC 383

among several cases pending against a particular accused within the district at different police stations of the district.

27. The decision referred of Nagaraja Rao vs. Central Bureau of Investigation¹³ is a case on the scope of concurrent running of the sentence rather than consecutive running with specific order of the judge concerned required in delivering the judgment from the scope of Section 31 Cr.P.C., and thus it is no way necessary to discuss herein for the purpose of the petition, said Section 31 Cr.P.C. with reference to Sections 427 and 428 Cr.P.C. and 71 I.P.C.

28. Coming to the expression of this Court in State of A.P. vs. Kollam Gangi Reddy¹⁴, which is a case in relation to cancellation of the bail, this Court referring to the expression of the Apex Court in Sunil F. Shaw vs. Union of India¹⁵ of what is meant by bail even as per Cr.P.C. is to release the accused from internment through Court, would still retain constructive control over him by the Court through the sureties, through the conditions of the bond given by the accused and sureties. It also referred the Halsbury's Laws of England, on the effect of granting bail is not to set the accused at liberty, but to release him from the custody of the law and to entrust him to the custody of his sureties and under the control of Court for the sureties are bound to produce him in the Court of Law, for his appearance during enquiry and trial at specific times

¹³ (2015) 4 SCC 302

¹⁴ 2014 (2) ALD (CrI.) 684

¹⁵ (2000) 3 SCC 409

and places and the sureties may seize their principal at any time by handing him over to custody of law to discharge them. Even in case accused was released on his own bond, such constructive control could still be exercised through the conditions of the bond secured from him. The principle laid down thereby is that grant of bail is not parting from the judicial control over the accused basing the accusation either pending investigation or at post cognizance and pending pre-trial enquiry or trial and till end of trial, that too the bail concession once granted continues until it is cancelled either under Section 437(4) or Section 439 (2) Cr.P.C., as the case may be.

29. One of the judgments mainly placed reliance of the Apex Court Two-Judge Bench by the counsel for the petitioner, that also referred in their petition averments is Sundeep Kumar Bafna (supra). There the real question arises is what was laid down in Niranjjan Singh supra of the Apex Court as to for the purpose of bail even a deemed custody is sufficient. In that context referring to Sections 437 and 439 Cr.P.C. and Article 21 of the Constitution of India it was observed by the Apex Court at para 9 of the word 'custody' is not defined in the Code, equally the words 'detention and arrest', thereby to be appreciated with reference to dictionary meanings, which provide in different context differently, as to detention or confinement or incarceration or internment or captivity or remand or duress or durance or imprisonment or

keeping in prison, until they go to Court or otherwise or detained/ held by police or by some one; in respect of any crime committed or to prevent by arrest and detention or the like. It refers in Black's Law Dictionary and observed that the term custody is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. It is also extended in saying synonyms with restraint of liberty and so far as the arrest concerned, by referring to Halsbury's Laws of England in saying actual seizure or touching of a person's body with a view to his detention and mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer.

30. Referring to the expression in the Directorate of Enforcement vs. Deepak Mahajan¹⁶, particularly of 48 at Page 460, it is observed that the Code gives power of arrest not only to a police officer and a Magistrate, but also under certain circumstances or given situations to private persons (Sections 44 and 72 Cr.P.C. etc.,). It observed further that an accused person when appears before a Magistrate by surrender voluntarily or brought before the Magistrate, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Arrest of a person is a condition precedent for taking him to judicial custody thereof. Taking into judicial custody

¹⁶ (1994) 3 SCC 440

of a person is followed after the arrest of the person concerned by the Magistrate on produced/brought before or appearance/surrender. In every arrest, there is custody but not vice versa and both words custody and arrest are not thereby synonymous terms. Though custody may amount to an arrest in certain circumstances, but not under all circumstances.

31. It is therefrom quoted the expression in Niranjan Singh supra of what is meant by custody under Section 439 Cr.P.C. particularly at para 9 of the accused can be in custody, not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions. It later dealt with in Sundeep Kumar Bafna on the doctrine of precedents of the Constitution Bench expression in referring to Union of India v. Raghubir Singh¹⁷ and Chandra Prakash v. State of U.P.¹⁸ including on judicial propriety in Pradip Chandra Parija vs. Pramod Chandra Patnaik¹⁹ and concluded in saying in the factual matrix in Sundeep Kumar Bafna, Niranjan Singh is the precedent of relavance and not the constitution bench expression earlier of the Apex Court in Gurubaksh Singh Sibbia vs. State of Punjab²⁰. It referred Gurubaksh Singh Sibbia on the scope of the consideration of bail particularly anticipatory bail therein in

¹⁷ (1989) 2 SCC 754

¹⁸ (2002) 4 SCC 234

¹⁹ (2002) 1 SCC 1

²⁰ (1980) 2 SCC 565

saying Niranjan Singh cannot be stated per incuriam as a later judgment to Gurubaksh Singh Sibbia for the reasons it dealt with anticipatory bail under Section 438 Cr.P.C. and only tangentially with Sections 437 and 439 Cr.P.C. and while deliberations and observations found in that, this clutch of cases may not be circumscribed by the term obiter dicta, it must concede to any judgment directly on point.

32. It also referred *State of Haryana vs. Dinesh Kumar*²¹ referring to *Niranjan Singh* that a person can be stated to be in judicial custody when he surrendered before the Court and submits to its directions. In *Sundeep Kumar Bafna*, no doubt, the Court discussed on the scope of Article 21 of the Constitution of India of the personal liberty of accused in saying, no person shall be deprived of his life or personal liberty, except according to procedure established by law. The Constitution Bench in *P.S.R. Sadhanantham vs. Arunachalam*²² at para 3 observed that, Article 21 of the Constitution of India in its sublime brevity, guardians human liberty by insisting on the prescription of procedure established by law, not fiat as sine qua non for deprivation of personal freedom and those procedure so established must be fair, not fanciful, nor formal nor flimsy, as laid down in *Maneka Gandhi vs. Union of India*²³. So it is axiomatic that our constitution jurisprudence mandates the state not to deprive a person of his

²¹ (2008) 3 SCC 222

²² (1980) 3 SCC 141

²³ (1978) 1 SCC 248

personal liberty without adherence to fair procedure laid down by law.

33. Coming to the expression of the Constitution Bench of Seven Judges of the Apex Court in P. Ramachandra Rao vs. State of Karnataka²⁴ referring to Article 21 of the Constitution of India, an accused who is subjected to the process of law cannot be acquitted on ground of delay by fixing any time limit as a bar beyond which criminal proceeding or trial cannot continue and by set aside the earlier expressions laying down such conditions right from common clause (I) and (II) of 1996, Raj Deo Sharma (I) and (II) of 1998, 1999 and by holding those cases run counter to the Constitution Bench expression in A.R. Anthulay of 1992 in saying directions given in the judgments in respect of enlargement of the accused on bail being not subject matter of the present case. It is observed by the Constitution Bench in P. Ramachandra Rao supra that question of delay has to be decided by Court having regard to the totality of circumstances of an individual case, the test is whether the delay is such that it cannot be called oppressive or unwarranted and if so it would be violative of Article 21 of the Constitution of India and as such trial or proceeding would be liable to be terminated.

34. From the expressions, no doubt, Article 21 of the Constitution of India is not an absolute fundamental right to life,

²⁴ (2002) 4 SCC 578

but qualified, which is subject to any procedure established by law, which must be undoubtedly fair and reasonable and the actions also must be fair and reasonable by the investigating agency during the investigation besides during the trial enquiry and during trial process before the Court concerned. The other expression placed reliance of the Two Judge Bench of the Apex Court is in *Inhuman Conditions in 1382 Prisons*, in Reference²⁵ where from mainly we are concerned with the guidelines given in para 56 with a view to transform prisons and prison culture for the reason treating prisoners not as objects, but as the human beings they are, no matter how despicable their prison actions, will demonstrate on unflagging commitment to human dignity and it is that commitment to human dignity that will in the end, be the essential under pinning of any endeavour to transform prison culture.

35. The guidelines in the expression *supra* from para 56, 56.1 to 56.9 speak as follows:

56. The sum and substance of the aforesaid discussion is that prisoners, like all human beings, deserve to be treated with dignity. To give effect to this, some positive directions need to be issued by this Court and these are as follows:

56.1. The Under Trial Review Committee in every district should meet every quarter and the first such meeting should take place on or before 31st March, 2016. The Secretary of the District Legal Services Committee should attend each meeting

²⁵ (2016) 3 SCC 700

of the Under Trial Review Committee and follow up the discussions with appropriate steps for the release of undertrial prisoners and convicts who have undergone their sentence or are entitled to release because of remission granted to them.

56.2. The Under Trial Review Committee should specifically look into aspects pertaining to effective implementation of Section 436 of the Cr.P.C. and Section 436A of the Cr.P.C. so that undertrial prisoners are released at the earliest and those who cannot furnish bail bonds due to their poverty are not subjected to incarceration only for that reason. The Under Trial Review Committee will also look into issue of implementation of the Probation of Offenders Act, 1958 particularly with regard to first-time offenders so that they have a chance of being restored and rehabilitated in society.

56.3 The Member Secretary of the State Legal Services Authority of every State will ensure, in coordination with the Secretary of the District Legal Services Committee in every district, that an adequate number of competent lawyers are empanelled to assist undertrial prisoners and convicts, particularly the poor and indigent, and that legal aid for the poor does not become poor legal aid.

56.4. The Secretary of the District Legal Services Committee will also look into the issue of the release of undertrial prisoners in compoundable offences, the effort being to effectively explore the possibility of compounding offences rather than requiring a trial to take place.

56.5. The Director General of Police/ Inspector General of Police in-charge of prisons should ensure that there is proper and effective utilization of available funds so that the living conditions of the prisoners is commensurate with human dignity. This also includes the issue of their health, hygiene, food, clothing, rehabilitation etc.

56.6. The Ministry of Home Affairs will ensure that the Management Information System is in place at the earliest in all the Central and District Jails as well as jails for women so that there is better and effective management of the prison and prisoners.

56.7. The Ministry of Home Affairs will conduct an annual review of the implementation of the Model Prison Manual 2016 for which considerable efforts have been made not only by senior officers of the Ministry of Home Affairs but also persons from civil society. The Model Prison Manual 2016 should not be reduced to yet another document that might be reviewed only decades later, if at all. The annual review will also take into consideration the need, if any, of making changes therein.

56.8. The Under Trial Review Committee will also look into the issues raised in the Model Prison Manual 2016 including regular jail visits as suggested in the said Manual.

56.9. We direct accordingly."

36. Above expression from paras 57 to 60 read as follows:

57. A word about the Model Prison Manual is necessary. It is a detailed document consisting of as many as 32 chapters that deal with a variety of issues including custodial management, medical care, education of prisoners, vocational training and skill development programmes, legal aid, welfare of prisoners, after care and rehabilitation, Board of Visitors, prison computerization and so on and so forth. It is a composite document that needs to be implemented with due seriousness and dispatch.

58. Taking a cue from the efforts of the Ministry of Home Affairs in preparing the Model Prison Manual, it appears advisable and necessary to ensure that a similar manual is prepared in respect of juveniles who are in custody either in

Observation Homes or Special Homes or Places of Safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.

59. Accordingly, we issue notice to the Secretary, Ministry of Women and Child Development, Government of India, returnable on 14th March, 2016. The purpose of issuance of notice to the said Ministry is to require a manual to be prepared by the said Ministry that will take into consideration the living conditions and other issues pertaining to juveniles who are in Observation Homes or Special Homes or Places of Safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.

60. The remaining issues raised before us particularly those relating to unnatural deaths in jails, inadequacy of staff and training of staff will be considered on the next date of hearing.

37. From the guidelines supra, no doubt, the Member-Secretary of the Legal Services Authority of every State will ensure, in coordination with the Secretary of the District Legal Services Committee in every district, that an adequate number of competent lawyers are empanelled to assist undertrial prisoners and convicts, particularly the poor and indigent, that legal aid for the poor does not become poor legal aid, that the Secretary of the District Legal Services Committee will also look into the issue of the release of undertrial prisoners in compoundable offences and the effort being to effectively explore the possibility of compounding offences rather than requiring a trial to take place.

38. From this it can be concluded from the catena of expressions supra that the custody for the purpose of bail is entirely different to the custody for the purpose of judicial remand with police custody and judicial custody interchangeable if any for first remand under Section 167 Cr.P.C. and equally for the purposes of any set off contemplated by Section 428 Cr.P.C. from the notable differences pointed out supra; so far as Section 167 Cr.P.C., concerned, without physical production of the arrested person within 24 hours from the time of arrest by police, excluding the journey as contemplated by Section 57 read with 167 Cr.P.C., the judicial remand cannot be accepted and it is only for the further custody extension up to the outer limit of 60/90 days depending upon the gravity of the offence punishable up to 10 years, which inclusive of 10 years or above, as the case may be, within which the investigation to be completed that can be extended from time to time without even physical production and that can be included by video linkage facility. Thereby it cannot be accepted of the contention of accused that for the purposes of the remand also he is deemed in judicial custody under Section 167 Cr.P.C.

39. Now coming to consider whether the accused is entitled to any period of set off under Section 428 Cr.P.C.?

Even so far as the entitlement of benefit under Section 428 Cr.P.C., it is not automatic without actual remand to the case on hand from the physical production under Section 167 Cr.P.C. or on

production as per P.T. Warrant under Section 267 Cr.P.C. However, the officers if deliberately withheld from production knowingly, then only depending upon the facts as observed in Tupakula Appa Rao referring to the Full Bench of Allahabad High Court in Shabhu of 1982 (supra), from each case to consider depending upon its own facts.

40. From that now coming to the facts, merely because the Superintendent of Police got the powers of Investigating Officer of any of the police stations within the District, in the absence of showing he has taken up the investigation within the power conferred under such power conferred from Section 36 Cr.P.C. as a prerogative or otherwise, it cannot be said that Superintendent is bound to see that all the accused who involved in more than one crime even in different police stations within the district, must be directed to be produced by filing applications for P.T. warrant under Section 267 Cr.P.C. before the concerned Court, where he was in judicial remand for taking into judicial custody and remand in the other crimes or other cases within the District. However, it may be remembered that once the Superintendent of Police got knowledge either because of the monthly review meetings or otherwise, being the head of the District police, including as per the police manual, particularly from the Standing Order No.45, that too to see that there shall be prompt registration and investigation of all cases and supervise and coordinate various

wings of the police in the district and neighbouring districts and other organizations as per the Guideline Nos.2 and 4 thereunder.

41. From the above, coming to the facts on hand, having mentioned, being the Sponsoring Authority under the Preventive Detention to issue proceedings by the District Magistrate on 24.04.2018 by referring the facts of the petitioner is involved in 9 cases, excluding the forest offence detailed supra, he should have been from that knowledge, that too having the equal powers of the SHO as per Section 36 Cr.P.C. and as also held of his obligation and duty in this regard by the expression of this Court in K. Krishna Reddy supra, should have been atleast directed the S.H.O. concerned in those cases to obtain P.T. warrants under Section 267 Cr.P.C. and produce the accused in the concerned crimes before concerned Magistrate Court for judicial remand, so that the accused/petitioner should not loose the benefit of getting the remand period to be counted under Section 167 Cr.P.C. and equally for any future set off of the period of remand in the event of finding guilty and from conviction and sentence of imprisonment, leave about any claim of entitlement or not of concurrent running or consecutive running as the case may be under Section 31 Cr.P.C.

42. Having regard to the above and from the factual matrix supra, in the said 9 cases covered by the preventive detention order of the District Executive Magistrate-cum-Collector, dated

24.04.2018, which shows the Superintendent as the Sponsoring Authority furnished the case details on 19.04.2018, the petitioner/ accused is thus entitled to the benefit of set off under Section 428 Cr.P.C. in future and in the event of completion of investigation and filing of charge sheet from any framing of charges and conducting trial with conviction and sentence of imprisonment from finding of guilty if any and as the case may be. It is made clear that besides the above, the Superintendent of Police and the concerned S.H.Os. among the respondents and for that matter, the Director General of Police, State of A.P., by virtue of this order, shall see that the petitioner is to be produced on P.T. warrants immediately after receipt of the warrant in all the crimes where so far he was not produced irrespective of he is entitled to bail or not and granted bail or not, unless released on bail and not in judicial custody.

43. It is not end of the matter herein for the reason that in similar cases umpty in number, the inaction of the police since resulting grave injustice and curtailment of the personal liberty and right to life of the accused persons languishing in jails without even entitlement to the period of remand for set off or to count for the default bail, irrespective of entitlement to claim anticipatory bail or regular bail, for such an injustice to be arrested; it is necessary to direct following the expression of the Apex Court Constitution Bench in Ramchandra Rao supra and the

importance of right to life under Article 21 of the Constitution of India including for the speedy investigation and production of the accused to face the enquiry/ trial and from the expression of the Apex Court in Inhuman Conditions in 1382 Prisons, in Reference case, particularly from para 56 imposing liability on the State Legal Services Authority and Member Secretary of the State Legal Services Authority of every state in coordination with the Secretary, District Legal Services Authority of every District including each of the Mandal Legal Services Committees in both the States of Andhra Pradesh and Telangana are by virtue of the expression of the Apex Court in Guideline No.56.3 supra hereby required as specifically shall see that where the accused is in jail as a pretrial prisoner and in more than one case and so far not pretrial or pending trial prisoner, which includes under trial prisoners where trial not commenced from production of the accused before the concerned Court, applications/ memos cause to be filed under Section 267 Cr.P.C. for the learned Magistrates/ Sessions Judges/ designated Special Courts of original jurisdiction concerned to secure the presence of the accused and to take the accused to judicial custody on P.T. warrant in the crimes or calendar cases or other special cases or sessions cases pending before them.

44. Further the Director General of Police of both the states of Andhra Pradesh and Telangana are also directed hereby to direct

the Superintendents of Police or the Commissioner/ Additional Commissioner/ Assistant Commissioners concerned, to exercise their duty and power to the extent applicable from the police manual with Standing Orders and instructing and from Section 36 Cr.P.C. in every month coordinating meeting to see that where an accused is shown involved in a crime to cause verify if at all involved in more than one crime and if not produced in the other crimes, to see that they shall be cause produced if in jail on P.T. warrant under Section 267 Cr.P.C., leave about if enlarged on bail in any one or more cases and if not granted bail in other cases for their production in those other cases so that the accused may not loose the benefit of period of set off and period of entitlement to the default bail respectively under Section 428 and 167 Cr.P.C.

45. Coming to the expression of the Constitution of Bench of the Apex Court in *Rakesh Kumar Paul vs. State of Assam*²⁶ on the scope of Section 167 Cr.P.C. it is in relation to the entitlement of the default bail, the majority expression says duty of the Magistrate or Court concerned to grant the default bail in recognition of the personal liberty, where also discussed the right of fair and speedy investigation and entitlement to default bail and right to legal aid as part of the rights enshrined under Article 21 of the Constitution of India to the accused involved in a crime. Thereby, the Sessions Judges or the Magistrates concerned in both the States and by virtue of this order and because of the settled

²⁶ (2017) 15 SCC 67

position of law from the above particularly from the expressions in Tupakula Appa Rao supra, Niranjana Singh supra reiterated in Sundeep Kumar Bafna supra, entertain the regular bail applications from the accused in deemed custody even not produced on P.T. warrant and not surrendered voluntarily, as the case may be.

46. Accordingly, the criminal petitions are disposed of with the above observations and directions. Registrar Judicial to cause circulate copy of this order to all the concerned supra.

Miscellaneous petitions pending, if any, shall stand closed.

Date: 21.12.2018

L.R. Copy to be marked – Yes.

pab/ mar

Dr. B. SIVA SANKARA RAO, J

