

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Tapabrata Chakraborty
&
The Hon'ble Justice Tirthankar Ghosh

C.R.M. No. 464 of 2021

Md. Kalim
versus
The State of West Bengal

For the Petitioner : *Mr. Sekhar Kumar Basu, Sr. Adv.*
Mr. Jyoti Prakash Banerjee,
Mr. Kushal Mukherjee.

For the State : *Mr. Madhusudan Sur, Ld. APP.*
Mr. Dipankar Pramanick.

Hearing is concluded on : *03.03.2021.*

Judgment On : **12th March, 2021.**

Tapabrata Chakraborty, J.

1. The present application under Section 439 of the Code of Criminal Procedure (in short, the Code) has been preferred in connection with Sessions Case No. NDPS 34/2020 arising out of Bhadreswar Police Station Case No.154 of 2020 dated 25-06-2020 under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, the NDPS Act).

2. Shorn of unnecessary details, the facts are that the petitioner was initially arrested on 23rd June, 2020 in connection with Bhadreswar P.S. Case No.122/20 dated 13.05.2020 under Sections 147/ 148/ 149/ 186/ 188/ 332/ 333/ 153A/ 427/ 436/ 325/ 326/ 307 of the Indian Penal Code (in short, the former case). As per the statement of the petitioner, while in custody, the Sub-Inspector of Police, Bhadreswar Police Station conducted a search at RPN Street, Victoria Jute Mill Line, Telinipara and seized contraband substance above commercial quantity. Upon intimation of such fact, the Officer-in-Charge of Bhadreswar Police Station *suo moto* initiated a case being Bhadreswar P.S. Case No.154/2020 (in short, the latter case) dated 25th June, 2020 alleging commission of offence punishable under Section 21(c) of the NDPS Act. On 26th June, 2020 itself the Investigating Officer (in short, IO) filed an application before the court of learned Additional District and Sessions Judge, Special Court, Chinsurah, Hooghly *inter alia* praying that the petitioner '*may kindly be shown arrested in this case in the interest of investigation*'. On 26th June, 2020 a further application was filed *inter alia* praying for an order of inventory by the learned Magistrate. By an order dated 26th June, 2020, the learned court directed for production of accused on 6th July, 2020, with an observation that the prayer regarding certification of correctness of inventory would be considered after production of the accused. On the returnable date, the accused/ petitioner was produced and by an order dated 6th July, 2020 the petitioner was shown arrested and remanded to judicial custody till 20th July, 2020. By the said order the prayer for inventory before the

learned Magistrate was also allowed. The order dated 6th July, 2020 had not been challenged by the petitioner. Thereafter, the learned Magistrate was pleased to fix inventory on 21st September, 2020. Pursuant thereto, the IO along with a professional photographer appeared before the learned Magistrate together with the seized materials. The entire episode, including the photographs taken and the drawal of representative samples, was duly certified by the learned Magistrate on 21st September, 2020 itself. Thereafter upon receipt of the test report from the State Drugs Control and Research Laboratory on 23rd November, 2020, the charge sheet was submitted on 13th December, 2020. The petitioner thereafter filed an application for bail being CRM 8850 of 2020 which was dismissed by an order dated 18th November, 2020. The present application has been preferred by the petitioner on 12th January, 2021 renewing his prayer for bail. The petitioner is in custody since the month of June, 2020.

3. Mr. Basu, learned senior advocate appearing for the petitioner argues that the learned Magistrate lacked jurisdiction to remand the accused/petitioner since he was in illegal detention of the police in violation of Article 22(2) of the Constitution of India. As the petitioner was not produced before the learned Magistrate within 24 hours of arrest in the latter case, the detention thereafter, beyond 24 hours from the time of arrest, was illegal. The Courts have in no uncertain terms held that without the authorisation of a Magistrate, no arrestee shall be detained in the custody of the police beyond 24 hours. In

support of such argument reliance has been placed upon a judgment delivered in the case of ***Manoj -vs- State of Madhya Pradesh***, reported in **1999 (3) SCC 715** and a judgment delivered by this Court in ***Md. Hanif Mondal & Anr. -vs- State***, reported in **(2018)4 C Cr LR (Cal) 188**.

4. Mr. Basu next argues that samples from the seized articles were taken at the spot in the absence of a learned Magistrate in derogation of the provisions of Section 52A. The samples for chemical analysis were drawn in the absence of a learned Magistrate and such irregularities malign the entire proceeding. In support of such argument reliance has been placed upon a judgment delivered in the case of ***Union of India -vs- Mohanlal***, reported in **(2003) SCC 379**.

5. *Per contra*, Mr. Madhusudan Sur, learned Additional Public Prosecutor denies and disputes the contention of the petitioner and submits that though the petitioner was formally arrested, the same cannot be equated to an arrest as adumbrated under Section 46 of the Code and that when only a formal arrest is effected in prison, the arrestee does not get into the custody of the police, and therefore, there is no question of detention in police custody beyond 24 hours.

6. He further contends that sampling was effected in presence of the learned Magistrate and the procedure prescribed under Section 52 A of the NDPS Act was strictly adhered to.

7. The term "arrest" denotes confinement of the body of the person either by a physical act or by words or action. Section 46 of the Code does not indicate any other mode of arrest. Therefore,

as per Section 46 (1), the arrest necessarily involves the taking of the accused into physical custody by the person who effects the arrest. If an accused already is in judicial custody in connection with some other case, when the IO wants to arrest him in connection with a different case, it may not be possible for producing the accused before either the nearest Magistrate or the jurisdictional Magistrate within 24 hours for the purpose of further remand, the reason being that the accused cannot be moved from the jail to the Court either by the jail authority or by the police without the authorization of the Court. This issue was discussed by the Hon'ble Supreme Court in the case of **CBI -vs- Anupam J. Kulkarni**, reported in **(1992) 3 SCC 141** and the Hon'ble Court held that even if the accused is in judicial custody in connection with the investigation of an earlier case, he can formally be arrested regarding his involvement in the different case and it was declared that the period of ninety days or sixty days has to be computed from the date of detention as per the orders of the learned Magistrate and not from the date of arrest by the police.

8. In this connection, we may now refer to the judgment of the Hon'ble Supreme Court in the case of **Sadhwi Pragyna Singh Thakur -vs- State of Maharashtra**, reported in **2011 (6) Supreme 356**, wherein the Hon'ble Supreme Court examined the question as to whether the Magistrate would be competent to pass a valid order of remand, prospectively, even assuming that the accused was earlier kept in illegal custody by the police for some time and it was *inter alia* observed as follows:

‘Even if it is assumed for the sake of argument that there was any violation by the police by not producing the appellant within 24 hours of arrest, the appellant could seek her liberty only so long as she was in the custody of the police and after she is produced before the Magistrate, and remanded to custody by the learned Magistrate, the appellant cannot seek to be set at liberty on the ground that there had been non-compliance of Article 22(2) or Section 167(2) of the Cr.P.C. by the police.’

9. It is now well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. It is also well known that even a slight distinction in fact or an additional fact may make a lot of difference in the decision - making process.

10. The decision in **Manoj** (Supra) was a case where the accused was not produced before the Magistrate in the second case and, therefore, was directed to be released. It was not a case where the person was produced before the learned Magistrate and remanded to custody and then directed to be released because there was infraction by the police. In view thereof, the judgment delivered in **Manoj** (Supra) is distinguishable on facts. The judgment delivered by this Court in **Md. Hanif Mondal** (Supra), placing reliance upon the judgment in **Manoj** (Supra), is also not applicable to the facts of this case.

11. In the case of **Union of India -vs- Mohanlal**, reported in **(2016) 3 SCC 379**, upon which reliance has been placed by Mr. Basu in support of his second contention, the Hon’ble Supreme Court issued directions as regards seizure, storage and

disposal for the time being till government comes up with appropriate guidelines. In paragraph 13 of the said judgment, it was *inter alia* observed that '*the question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise*'. The said judgment is distinguishable since in the present case, sampling was effected in strict consonance with the provisions of Section 52A of the NDPS Act. On 25th June, 2020, a jerrican containing pink-coloured liquid was seized and upon measurement, it was found that the fluid in the said jerrican was of three litres in volume. Out of the said jerrican, 100 ml fluid was taken out and stored in a plastic container. Another 100 ml of fluid was taken out and stored in another plastic container. Thereafter, the jerrican containing 2.8 litres of fluid was marked as mother sample and was sealed and labelled as 'Exhibit A'. The other two plastic containers, each containing 100 ml of fluid, were marked as 'Exhibit A-1' and 'Exhibit A-2' respectively. The plastic container marked as 'A1' was sent to the State Drug Control and Research Laboratory. Pursuant to the order dated 6th July, 2020 passed on the application under Section 52A(2), the mother sample being 'Exhibit A' was produced before the Learned Magistrate on 26th September, 2020 containing 2.8 litres of fluid. During inventory, a further 100 ml of fluid was taken out as per the order of the Learned Magistrate and marked as 'Exhibit A-3'. The remaining fluid in the jerrican marked as Exhibit 'A' was measured and found to be 2.7 litres. From the said conspectus of facts, it is evident that Exhibit 'A1' and Exhibit 'A3' were both drawn from the mother sample marked as Exhibit 'A' and as such

prima facie there had been no irregularity in the drawing of samples as alleged. Solely on the basis of some apprehension, the prosecution version cannot be discarded more so when there is no material to establish any prejudice or bias. The question of prejudice has to be established and not inferred. In this context, it needs to be mentioned that having doubted the correctness of the decision in the case of ***Mohan Lal -vs- State of Punjab***, reported in **(2018) 17 SCC 627** taking the view that in case the investigation is conducted by the police officer who himself is the complainant, the trial is vitiated and the accused is entitled to acquittal, the matter was referred to a Larger Bench consisting of three judges who in turn, referred the same to a Larger Bench of five judges to consider the matter and the same was decided by a judgment delivered in the case of ***Mukesh Singh -vs- State (Narcotic Branch of Delhi)***, reported in **2021 (1) Supreme 259**. In the said judgment, it was ultimately held that the decision in the case of ***Mohan Lal -vs- State of Punjab***, is not good law and was overruled. It was *inter alia* observed that in the case of ***Mohan Lal -vs- State of Punjab***, a general proposition was laid down and the same cannot have any universal operation in all cases. Bias and prejudice have to be established and matter has to be decided on a case to case basis without any universal generalization.

12. For the reasons as discussed above, we are unable to accept the arguments as advanced on behalf of the petitioner and the application being CRM No.464 of 2021 is, accordingly, dismissed.

13. The case diary be returned to Mr. Madhusudan Sur, learned advocate appearing for the State.

14. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(Tirthankar Ghosh, J.)

(Tapabrata Chakraborty, J.)