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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	22.02.2022
DELIVERED ON	11.03.2022

CORAM:

THE HON'BLE MR.JUSTICE P.N. PRAKASH
and
THE HON'BLE MR.JUSTICE A.A. NAKKIRAN

Crl.A.No.80 of 2022

Union of India represented by
The Inspector of Police
National Investigation Agency
Chennai
(R.C. 16/2019/NIA/DLI)

...Appellant

Vs.

Divan Mujipeer @ Divan
S/o.Mydeen Abdul Kader

...Respondent

Criminal Appeal filed under Section 21 of the National Investigation Agency Act to set aside the order dated 20.12.2021 passed in Crl.M.P. No.556 of 2021 on the file of the Special Court for NIA Act Cases, Poonamallee and grant 5 days police custody of the respondent who is detained at Sub Jail, Poonamallee, to the appellant.

For appellant	:	Mr.R.Karthikeyan Special Public Prosecutor for NIA Act Cases
For respondent	:	Mr.Abdul Basith for Mr.A.Rawther Naina Mohamed
Amicus Curiae	:	Mr.Nithyaesh Nataraj

JUDGMENT

P.N. PRAKASH, J.

This criminal appeal is at the instance of the National Investigation Agency (for short "the NIA") calling into question, the legality and validity of the order dated 20.12.2021 passed by the Special Court under the NIA Act, 2008 (for brevity "the Special Court"), in and by which, the police custody application filed by the NIA has been dismissed.

2 The facts necessary for the disposal of this criminal appeal are as under:



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2.1 Based on credible information that a group of terrorists was working under the banners of the Wahadat-E-Islam, Jamaat Wahadat-ul-Islam-al-Jihadiya, Jihadist Islamic Unit and Ansarallah, sympathetic to the ISIS and Al Qaida, the Government of India directed the NIA to investigate the matter, based on which, the NIA registered an FIR in RC No.16/2019/NIA/DLI at New Delhi on 09.07.2019 for the offences under Sections 120-B, 121-A and 122 IPC and Section 17, 18, 18-B, 38 and 39 of the Unlawful Activities (Prevention) Act (for brevity "the UAP Act") and took up the investigation of the case.

2.2 During the course of the investigation, the NIA arrested 16 accused on various dates and remanded them in judicial custody. This case does not concern any of them.

2.3 The NIA suspected the involvement of Divan Mujipeer @ Divan, the respondent herein (for short "Divan") and summoned him for inquiry. Accordingly, Divan appeared before the NIA on 21.09.2019, 23.09.2019 to 27.09.2019 and 30.09.2019 for interrogation. Thereafter, his statement under Section 164 Cr.P.C. was recorded by a Magistrate on 04.01.2020. Seemingly, the NIA did not get anything substantial from the interrogation of Divan. However, they suspected that he was hiding the truth.

2.4 The NIA completed the investigation qua 16 accused who were arrested by them and filed a final report on 07.01.2020 only against 11 accused before the Special Court for the offence under Section 13 of the UAP Act, which was taken on file as C.C. No.1 of 2020 on 21.01.2020. At this juncture, we notice that Divan was not arrayed as an accused in C.C. No.1 of 2020.

2.5 On 28.01.2020, the NIA filed an application under Section 173(8) Cr.P.C. in CrI.M.P.No.15 of 2020 in C.C. No.1 of 2020 for conducting further investigation against some other persons involved in the offence, but, were operating from the Middle East. However, on 29.11.2021, the NIA arrested Divan and remanded him in judicial custody.

2.6 On 01.12.2021, the NIA filed an application in CrI.M.P. No.556 of 2021 seeking police custody of Divan, in which, the Special Court ordered notice to Divan returnable by 04.12.2021.

2.7 On 04.12.2021, the Special Court directed the Prison authorities to produce Divan on 13.12.2021. On 13.12.2021, the counsel for Divan sought time to file counter affidavit in the police custody application in CrI.M.P. No.556 of 2021 and therefore, the petition was adjourned to 16.12.2021. On 16.12.2021, final arguments in the police custody application were heard and the matter was posted for orders on 20.12.2021.



2.8 On 20.12.2021, the Special Court dismissed the police custody application in CrI.M.P. No.556 of 2021, challenging which, the NIA has filed the instant appeal under Section 21 of the NIA Act on 19.01.2022. Since the Registry noticed certain defects in the appeal papers, the same were rectified by the NIA and the appeal was re-presented on 31.01.2022.

3 This Court ordered notice to Divan on 07.02.2022 returnable by 11.02.2022, pursuant to which, Mr. A. Rawther Naina Mohamed has entered appearance and filed a counter affidavit.

4 We requested Mr. Nithyaesh Nataraj, Advocate, to assist us as Amicus Curiae.

5 Heard Mr. R. Karthikeyan, learned Special Public Prosecutor appearing for the NIA and Mr. Abdul Basith, learned counsel representing Mr.A.Rawther Naina Mohamed, learned counsel on record for Divan and Mr.Nithyaesh Nataraj, learned Amicus Curiae.

6 At the outset, Mr. Abdul Basith contended that the present appeal under Section 21 of the NIA Act is not maintainable since an order of remand is essentially an interlocutory order, against which, an appeal will not lie. In support of this contention, he relied on the judgments of the Supreme Court in State represented by Inspector of Police and others vs. N.M.T. Joy Immaculate [(2004) 5 SCC 729] and Gautam Navlakha vs. NIA [2021 (4) SCJ 236].

7 At the first blush, the aforesaid submission of Mr. Abdul Basith did sound convincing. Nonetheless, on a careful reading of Joy Immaculate (supra), it is seen that the Magistrate in that case had granted police custody of the accused, challenging which, the accused filed a revision petition under Section 397 Cr.P.C. The High Court set aside the order granting police custody and also awarded compensation to the accused. Challenging the said order, the State moved the Supreme Court. It is in this backdrop that the Supreme Court held that the revision petition which was filed by the accused against the order granting police custody was not maintainable, as it was an interlocutory order. Likewise, in Gautam Navlakha (supra) also, the issue was not whether an order refusing to grant police custody was an interlocutory order, but was against an order granting house arrest under Section 167 Cr.P.C. Under our system of precedent, a case is an authority for what it decides, and not what it has not decided.



been invoked against Divan and therefore, police custody can be given only within first 30 days. Of course, the second proviso to Section 43(D)(2), *ibid.*, empowers the Court to grant police custody even after the period of 30 days on certain pre-conditions. This issue has been discussed in Gautam Navlakha (*supra*) about which we will advert to a little later.

14 Mr. Karthikeyan placed strong reliance on the second proviso to Section 43(D)(2) of the UAP Act and submitted that the NIA can seek police custody even after 30 days, by filing an affidavit stating reasons for doing so, and also explaining the delay for making such a request.

15 This rival contention has raised an interesting issue which requires to be addressed by this Court. In this case, for "A" reasons, the NIA sought police custody of Divan within first 30 days of his first remand. This was rejected by the Special Court against which the present appeal has been properly filed only on 31.01.2022, which is beyond the 30 day period.

16 The question is, if we hold, on facts, that refusal of police custody by the Special Court was improper, can we issue a direction for police custody now, i.e., beyond the 30 days period?

17 Mr. Nithyaesh Nataraj, learned Amicus Curiae, placed before us a three Judge Bench judgment of the Supreme Court in *Kosanapu Ramreddy vs. State of Andhra Pradesh and others* [AIR 1994 SC 1447], wherein, the Supreme Court has held that if the order granting police custody has been stayed by the High Court at the instance of the accused and if the plea of the accused is rejected finally by the superior Court, then, the period of stay will stand excluded while computing the first 15 day period of remand. We are afraid that the said judgment may not be of any avail in the facts obtaining in this case, as we are now dealing with a converse scenario. At this juncture, it may be profitable to extract the relevant observations from Gautam Navlakha (*supra*):

"128As far as the second proviso in Section 43 (D)(2)(b) is concerned, it does bring about an alteration of the law in *Anupam Kulkarni (supra)*. It is contemplated that a person who is remanded to judicial custody and NIA has not been given police custody during the first 30 days, on reasons being given and also on explaining the delay, Court may grant police custody. The proviso brings about the change in the law to the extent that if a person is in judicial custody on the basis of the remand, then on reasons given, explaining the delay, it is open to the Court to give police custody even beyond 30 days from the date of the



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first remand. We may notice that Section 49(2) of Prevention of Terrorism Act is pari materia which has been interpreted by this Court in AIR 2004 SC 3946 and the decision does not advance the case of Appellant though that was a case where the police custody was sought of a person in judicial custody but beyond 30 days."

18 A combined reading of the second proviso to Section 43 (D) (2) of the UAP Act and the aforesaid paragraph from Gautam Navlakha (supra) shows that the second proviso would apply only in a case where the initial request of the investigating agency for police custody is after the 30 day period. That is why, the provision uses the expression "shall explain the delay". What is the meaning of this expression? The simple and plain meaning of this expression is, where the investigating agency has neither sought nor was unable to seek police custody within 30 days of the initial remand, then, they are entitled to seek police custody after the 30 day period, however, within 180 days, by filing an affidavit and explaining the reasons for the delay.

19 For example, after the initial remand of the accused in judicial custody, he suffers a massive heart attack and is admitted to a hospital, owing to which, the investigating agency is not able to seek police custody, then, they can seek police custody after 30 days under the second proviso to Section 43(D) (2) of the UAP Act. Likewise, if the investigating agency stumbles upon incriminating materials and are of the opinion that in the light of such incriminating materials, police custody of the accused is necessary, they can approach the Special Court seeking police custody under the second proviso to Section 43(D) (2), *ibid*.

20 However, both the above contingencies do not arise in this case. In this case, for "A" reasons, the NIA sought police custody and the Special Court found those reasons to be not fit for grant of police custody and now, if we set aside the order of the Special Court, we cannot order police custody as the 30 day period has lapsed, because, the NIA had failed to come to us before 28.12.2021. We can easily dispose of this appeal on this short ground, but, we find certain disquieting features in the proceedings of the Special Court which require to be addressed, especially when time is the essence in disposal of police custody applications.

21 Reverting to the admitted facts, Divan was placed under first remand on 29.11.2021. The NIA filed the application for police custody on 01.12.2021. The Special Court ordered notice to Divan, pursuant to which, the NIA served on Divan, the



affidavit and petition that was filed in support of the police custody petition. The Special Court adjourned the police custody proceedings for Divan to file his counter affidavit. The counter affidavit was filed on 16.12.2021 and after hearing the arguments of both sides, the police custody petition was dismissed on 20.12.2021. Thus, effectively from 01.12.2021 to 20.12.2021, the Special Court had been conducting enquiry in the police custody petition and thereby, 20 days out of 30 days were lost. It is the correctness of this procedure adopted by the Special Court which requires examination by us.

22 Mr. Abdul Basith placed reliance on the judgment of a learned single Judge of this Court in the Inspector of Police vs. K.C. Palanisamy [2012 Crl.LJ 1506] and contended that the principle of audi alteram partem requires that notice should be given to the accused in the police custody proceedings and he should be heard extensively.

23 Now, we propose to address this legal issue as the same would have a serious bearing on the general procedure for remand. Post K.C. Palanisamy (supra), the Madras High Court has framed rules, viz., the Criminal Rules of Practice, 2019 and it would be worthwhile to extract Rule 6(6), *ibid*.

"6. Remand:

(6) The Magistrate shall not grant remands to police custody, unless he is satisfied that there is good ground for doing so. A request for remand to police custody shall be accompanied by an affidavit setting out briefly, the prior history of the investigation and the likelihood of further clues which the police expect to derive by having accused in custody, sworn by the investigating or other police officer, not below the rank of a Sub-Inspector of Police. The Magistrate shall decide after perusal of the affidavit. He shall personally see and satisfy himself about the accused being sound in mind and body before entrusting him to police custody and also at the end of the period of custody by questioning him whether, he had, in any way, been interfered with during the period of custody. Where the object of a remand is verification of the statement of an accused, he shall, whenever possible, be remanded to the charge of a Magistrate; and the period of remand shall be as short as possible."

24 We are conscious of the fact that police custody is always frowned upon by the Courts and that police custody should not be mechanically ordered. That is why, the aforesaid rule says that the investigating officer should file an affidavit for seeking police custody. We are also conscious of the fact that



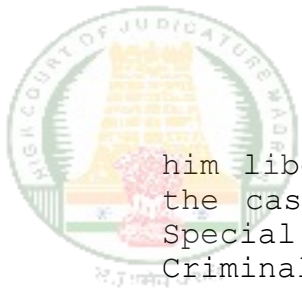
when an accused is produced for remand, he would be entitled to the assistance of an Advocate which is now regarded as a fundamental right flowing from Article 21 of the Constitution of India governing fair trial procedure. Therefore, the Magistrates/Special Courts should ensure that an advocate for the accused is available when police custody is sought.

25 However, the issue is whether an accused is entitled to a copy of the affidavit of the investigating officer seeking police custody. A Full Bench of this Court, in Selvanathan @ Raghavan vs. State [1988 LW (Cr1.) 503], has gone into the entire aspect of remand and has held as follows:

"64. A careful analysis of these provisions shows that the affidavit of the police officer demanding police custody of the accused is based on any information received by him during the course of the investigation, which information needs further probe. The Magistrate, before ordering police custody has to satisfy himself not only by perusing the contents of the affidavit, but also the entries in the case diary on the basis of which the affidavits are to be sworn to by the police officers. Hence the affidavit drawn in accordance with Rule 76 of the Criminal Rules of Practice without any extraneous material, cannot be said to be a 'record' within the meaning of Section 363(5) of the Code before the stage of passing any order thereon. So, till an order is passed by the Magistrate, there is no right whatsoever for the accused to get a copy of the affidavit. But, once an order is passed on the basis of the affidavit filed by the police officer the said affidavit becomes a part of the record. It may be pointed out in this connection that there is no specific legal embargo under S.172(3) of the Code disentitling the accused to get a copy of such affidavit which does not form part of the case diary. Needless to say that the police officer swearing to such affidavit should be extra cautious in drafting the affidavit with the particulars only necessary for that purpose. In view of this legal position, we hold that after an order is passed by the Magistrate on the basis of the said affidavit the accused will be entitled to get a copy of the same as well as the order passed thereon, on application and on payment of the prescribed charges."

(emphasis supplied)

26 In the light of the aforesaid authoritative pronouncement of the Full Bench of this Court, it was not proper on the part of the Special Court in directing the NIA to give a copy of the affidavit and petition to Divan and also granting



him liberty to him to file his counter affidavit and adjourning the case for enquiry and passing an order 20 days later. The Special Court has also lost sight of Rule 231(1)(ii) of the Criminal Rules of Practice, 2019, which reads as follows:

"231 Grant of certified copies of other documents.--

(1) Certified copies of the following documents shall be given to the accused on payment of necessary charges, before the filing of the final report (charge sheet) by the police:-

(i) ...

(ii) Affidavit filed by the police officer for police custody of the accused and the orders passed by the Magistrate thereon. Until the Magistrate passes the order for police custody, the accused is not entitled to a copy of that affidavit."

We deprecate this procedure that has been adopted by the Special Court in this case.

27 The next question is, "What is the scope of an enquiry to be conducted by the Magistrate/Special Court qua an accused during police custody proceedings?" For this, we have to draw inspiration from the first proviso to Section 43(D)(2) of the UAP Act, which is in pari materia with Section 20(4) bb of the repealed Terrorist & Disruptive Activities (Prevention) Act, 1987. While interpreting Section 20(4)(bb), *ibid.*, in *Hitendra Vishnu Thakur and others vs. State of Maharashtra and others* [(1994) 4 SCC 602], the Supreme Court held that notice should be ordered to the accused and that the accused should be heard for the purpose of extending the period of detention beyond 90 days for the purpose of investigation. This prolonged proceedings in the various Courts came to the notice of a 2 Judge Bench of the Supreme Court in *Sanjay Dutt vs. State, through CBI, Bombay* [I] [(1994) 5 SCC 402]. In view of the fact that *Hitendra Vishnu Thakur* (*supra*) also was a decision by a Bench of two Judges, the matter was referred to a Constitution Bench. The Constitution Bench, in *Sanjay Dutt vs. State, through CBI, Bombay* [II] [(1994) 5 SCC 410], held that notice contemplated in Section 20(4) bb, *ibid.* is not a written notice and only the production of the accused at the time of consideration of the report of the Public Prosecutor for grant of extension of detention. This has been further clarified by the Supreme Court in *Devinderpal Singh vs. Government of National Capital Territory of Delhi* [(1996) 1 SCC 44]. The relevant paragraph from the said judgment reads thus:

"15. The Constitution Bench in *Sanjay Dutt* case [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] did not express any contrary opinion insofar as the requirement of the report of the Public Prosecutor for grant of extension is concerned or on the effect of



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the absence of such a report under clause (bb) of Section 20(4), but observed that the 'notice' contemplated in the decision in Hitendra Vishnu Thakur case [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] before granting extension for completion of investigation is not to be construed as a "written notice" to the accused and that only the production of the accused at the time of consideration of the report of the Public Prosecutor for grant of extension and informing him that the question of extension of the period for completing the investigation was being considered would be sufficient notice to the accused." (emphasis supplied)

28 From a conspectus of the above rulings, we are able to discern that remand proceedings, be it judicial custody or police custody, are bilateral in nature, viz., between investigating agency and the Court as Section 167 Cr.P.C. falls in Chapter XII of the Code of Criminal Procedure under the heading "Information to the police and their powers to investigate" and gives a very limited role to the accused. A Magistrate, while granting custody (be it judicial or police), or recording a statement under Section 164 Cr.P.C. or conducting a test identification parade or sending articles to the Forensic Science Laboratory for analysis, etc., acts in aid of investigation to facilitate the collection of evidence. Neither Section 167 Cr.P.C. nor Rule 6(6) of the Criminal Rules of Practice, 2019 speaks about the issuance of a written notice to the accused, counter affidavit from the accused and elaborate enquiry in remand proceedings. However, since an order of remand affects the personal liberty of a prisoner, the procedure therein must be just, fair and reasonable to comport with the requirements of Article 21 of the Constitution of India. It is for these reasons that the accused is given a right of hearing during the remand proceedings. However, it is well settled that the principles of natural justice cannot be allowed to run amuck like an unruly horse. In view of the decision in Sanjay Dutt (II) (supra), which was followed in Devinderpal Singh (supra), the right of hearing of the accused at the stage of detention does not extend to serving on him a copy of the affidavit filed by the investigating officer and inviting a counter affidavit from him. Therefore, for extending the period of detention, no written notice is necessary nor an elaborate enquiry be held.

29 Applying the above ratio, the legal position when the investigating agency seeks police custody of an accused, is formulated as under:

- i. The Magistrate/Court shall insist upon the investigating officer to file an affidavit seeking police custody, as required under Rule 6(6) of the Criminal Rules of Practice,



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2019, extracted in paragraph 23 (supra), setting out briefly the prior history of the investigation and the likelihood of further clues which the police expect to derive by having the accused in custody. However, such affidavit need not disclose all the clue materials, including the name of informants and suspects, which have till then been gathered and it would suffice if the case diary is submitted to the Magistrate/Court for perusal. Of course, in the case diary, the investigating officer should have recorded all the details. The case diary shall not be made available to the accused or his counsel.

- ii. The Magistrate/Court shall ensure that the accused is present physically during the custody proceedings;
- iii. The Magistrate/Court shall ensure that the accused is given legal assistance either of his own choice or through the Tamil Nadu State Legal Services Authority;
- iv. It is not necessary for the Magistrate / Court to furnish a copy of the affidavit of the investigating officer to the accused or his counsel and call upon the accused to file his counter affidavit.
- v. During the custody proceedings, the Court is required to apprise the accused and his counsel, of the request of the investigating agency for police custody and inform the accused and his counsel that the same is being considered, and invite objections, if any.
- vi. While apprising the accused and his counsel, as above, the Magistrate/Court shall emphasise that the proceedings are summary in nature and that no adjournment need be given for filing a written objection of the accused.
- vii. Whatever objections raised by the accused and his counsel shall be considered by the Magistrate/Court and weighed with the genuineness of the request for police custody made by the Investigating Officer and a speaking order shall be passed by the Magistrate/Court either granting or refusing to grant police custody, preferably on the same day.

30 Finally, Mr. Karthikeyan submitted that the NIA has unearthed fresh materials against Divan for justifying police custody under the second proviso to Section 43(D)(2) of the UAP Act and requested this Court for suitable directions. We are afraid that this submission cannot be countenanced as this is an appeal arising out of an order dismissing an application for police custody within the first 30 days, as contemplated under Section 43(D)(2), *ibid*. Therefore, it would be impermissible for us to enlarge the scope of this appeal by considering the request of the learned Special Public Prosecutor. However, it would always be open to the NIA to approach the Special Court by way of filing an appropriate application under the second proviso to Section 43(D)(2), *ibid*. It is made clear that it would not be open to the NIA to re-agitate the grounds for



police custody raised in the present proceedings in any subsequent application that they may file under the second proviso to Section 43(D)(2), *ibid*.

In the result, this criminal appeal stands dismissed with the above observations. We place on record our appreciation to Mr. R. Karthikeyan, learned Special Public Prosecutor, Mr. Abdul Basith, learned counsel for Divan and Mr. Nityaesh Nataraj, learned Amicus Curiae, for the assistance rendered to this Court.

Sd/-

Assistant Registrar(CO)

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Sub Assistant Registrar

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To

- 1.The Inspector of Police
National Investigation Agency
Chennai
- 2.The Special Court for NIA Act Cases
Poonamallee
- 3.The Public Prosecutor
Madras High Court,
Chennai 600 104
- 4.The II Metropolitan Magistrate,
Egmore, Chennai - 8.
- 5.The Superintendent,
Special Sub Judge,
Poonamallee.
- 6.The Chief Metropolitan Magistrate,
Egmore, Chennai-8.
- 7.The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr.R.Karthikeyan, Advocate Sr.No.16603

+5ccs to Mr.A.Rawther Naina Mohamed, Advocate Sr.No.16499

Cr1.A.No.80 of 2022

AD(CO)

RVM(18/03/2022)