

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO. 22/2023

State of Maharashtra,
through Sub Divisional Police Officer,
Jimalgatta, Tq. Aheri, Dist. Gadchiroli,

APPELLANT

VERSUS

Pawankumar Fakrichand Uikey,
Aged about 33 years,
R/o. Kamlapur, Tq. Aheri,
Dist. Gadchiroli,

RESPONDENT

Mr. Amit Chutke, Additional Public Prosecutor for applicant/State.
Mr. R. M. Daga, Advocate for respondent-sole.

CORAM

: VINAY JOSHI AND
VALMIKI SA MENEZES JJ.

DATE OF JUDGMENT

: 18.01.2023

JUDGMENT (PER VINAY JOSHI, J.)

Heard.

2. This is State appeal through Sub Divisional Police Officer, Jimalgatta, Tq. Aheri, Dist. Gadchiroli in terms of Section 21(1) of the National Investigation Agency Act, 2008 ('NIA Act') raising a challenge to the order of learned Additional Sessions Judge, Gadchiroli dated

22.09.2022, whereby Police Custody remand has been rejected.

3. Few uncontroverted facts need initial reference. Crime No. 02/2022 was registered on 28.07.2022 against respondent for the offence punishable under Sections 120-B read with Section 34 of the Indian Penal Code, Sections 10, 13, 20 the Unlawful Activities (Prevention) Act, 1967 ('UAP Act') and Section 135 of the Maharashtra Police Act. The respondent (accused) was arrested on the same day i.e. on 28.07.2022 and was produced before the learned Judicial Magistrate First Class, Aheri on 29.07.2022. In turn, the learned Magistrate has remanded the accused to the Police Custody till 08.08.2022 (for 7 days) and on 08.08.2022, again the learned Magistrate has extended Police Custody remand till 13.08.2022 (total 15 days). On his production before the learned Magistrate on 13.08.2022, the accused has been remanded to the Judicial Custody which is prevailing till date. Undisputedly, the initial period of 30 days from the first remand, was over on 29.08.2022. There is no dispute that after lapse of initial 90 days from the date of first remand, the period of investigation was extended upto 180 days, which would come to an end on 23.01.2022.

4. On 12.09.2022, the Police have applied to the Magistrate for grant of Police Custody from Judicial Custody for 8 days, which was rejected by the learned Magistrate on the same day. The learned Magistrate has rejected conversion of Judicial Custody into the Police

Custody *inter alia* by placing reliance on the decision of the Supreme Court in case of ***Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni, (1992) 3 SCC 141***. It was followed by the Police approaching to the learned Additional Sessions Judge, Gadchiroli seeking Police Custody for 7 days vide remand application dated 17.09.2022. The learned Additional Sessions Judge considered the provisions of Section 43-D of the UAP Act, with its second proviso, but ultimately refused to grant Police Custody vide order dated 22.09.2022 by holding that such conversion can be effected only during first 30 days from the first remand, which is impugned herein.

5. The learned Additional Public Prosecutor ('APP') would submit that Special Court was not designated under Section 11 of the UAP Act for Gadchiroli District, therefore as per prevailing practice, the Police have applied for conversion of Judicial Custody into Police Custody to the Court of the Judicial Magistrate First Class, Aheri. It was later found that since there was no notified Special Court for Gadchiroli District, they have applied to the Court of Sessions in terms of Section 22(3) of the NIA Act. It is primly canvassed that the Special Court fell in serious error in holding that the Police Custody can be granted only during first 30 days from the date of remand. It is submitted that the in terms of Section 43-D(2)(a) of the UAP Act, the provisions of Section 167 of the Code of Criminal Procedure ('Code') have been modified by

altering the reference of “15 days” as “30 days”. He would submit that the second proviso to Section 43-D of the UAP Act authorizes grant of Police Custody from Judicial Custody after initial 30 days on filing of affidavit stating the reasons, and on explanation of delay for requiring Police Custody.

6. The entire controversy hinges around the interpretation of second proviso to Section 43-D of the UAP Act. For the purpose of ready reference, the said provision is reproduced herein below:-

“Section 43.

Section 43-B.....

.....

Section- 43-D Modified application of certain provisions of the Code.-

(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—

(a) the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days” and “ninety days” respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:—

“Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”.

3....
.....”

7. According to the learned APP, second proviso added to Section 43-D of the UAP Act carves out an exception to the general rule that grant of Police Custody must be within initial 15 days (herein 30 days). In order to substantiate said contention heavy reliance is placed on the decision of the Supreme Court in case of ***Maulavi Hussein Haji Abraham Umraji Vs. State of Gajarat and another, AIR 2004 SC 3946***. It is argued that the proviso added to Section 49(2) of the POTA Act, is *pari materia* to the second proviso of Section 43-D of the UAP Act and therefore, conversion of Police Custody after 30 days is held permissible. It is seen that the said decision relates to the provisions under Prevention of Terrorism Act ('POTA'). As against this, respondent relied on the another decision of the Supreme Court which is later in point of time and specifically relates to UAP Act. Further reliance is placed on the decision of this Court in case of ***Iqbal Hasan Shaikh Ibrahim Kaskar Vs. State of Maharashtra, 2003 ALL MR (Cri) 1817***, wherein while dealing with the provisions of the Maharashtra Control of Organized Crimes Act, this Court has expressed that Police Custody can be sought even after the initial period of 30 days.

8. *Per contra*, the learned counsel appearing for accused has vehemently argued that though second proviso to Section 43-D of the UAP Act permits conversion of Judicial Custody into Police Custody,

however it does not mean that after initial 30 days, there can be transposition in Police Custody. In this regard, heavy reliance is placed on the decision of the Supreme Court in case of ***Gautam Navlakah Vs. National Investigation Agency, 2021(7) SCALE 379 (MANU/SC/0350/2021)***.

9. The learned counsel appearing for the accused also challenged the maintainability of appeal by contending that the Police ought to have challenged the first rejection of transposition of custody by Magistrate which they did not. To respond, the learned APP would submit that since the Court of the Magistrate was not designated Court, therefore, the said order being *non est*, they have not challenged but approached to the Court of Sessions which is a Special Court under Section 23(3) of the NIA Act. Be that as it may, we are basically called upon to answer the short controversy whether there can be grant of Police Custody after initial 30 days in the facts of this case under UAP Act.

10. Undoubtedly, under UAP Act, the maximum period of Police Custody is 30 days in terms of Section 43-D(2)(a) of the UAP Act. In other words, as per Section 167 of the Code as modified by Section 43-D(2)(a) of the UAP Act, the remand to the Police Custody on production of the accused can be for 30 days. The controversy revolves around the question whether the second proviso to Section 43-D(2) of the UAP Act,

would authorize the Special Court to grant the Police Custody beyond initial 30 days.

11. The entire thrust of the learned counsel appearing for the accused is on the decision of the Supreme Court in case of Gautam Navlakah (*supra*) with special emphasis on para 128 of the decision which reads as below:-

“128. We would think that the position under Section 167 as applicable in cases under UAPA is as follows:-

Undoubtedly, the period of 30 days is permissible by way of police custody. This Court will proceed on the basis that the legislature is aware of the existing law when it brings the changes in the law. In other words, this Court had laid down in Anupam Kulkarni (supra), inter alia, that under Section 167 which provides for 15 days as the maximum period of police custody, the custody of an accused with the police can be given only during the first 15 days from the date of the remand by the Magistrate. Beyond 15 days, the remand can only be given to judicial custody. Ordinarily, since the period of 15 days has been increased to 30 days, the effect would be that in cases falling under UAPA applying the principle declared in (1992) 3 SCC 141, the investigating officer in a case under UAPA, can get police custody for a maximum period of 30 days but it must be within the first 30 days of the remand. In this regard, the number of days alone is increased for granting remand to police custody. The principle that it should be the first 30 days has not been altered in cases under UAPA.

As 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 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.

In this regard, it would appear that the appellant had surrendered on 14.04.2020. He was not in judicial custody. He was produced with a remand report seeking police custody on 15.04.2020. Treating this as a remand sought within the first 30 days, a remand is ordered for a period of 7 days initially. There is no dispute that the period was police custody. We may notice that an accused under UAPA may be sent to judicial custody, police custody or granted bail. If the argument that the police custody can be sought at any time and it is not limited to cases where there is judicial custody, it will go against the clear terms of the proviso and even a person who is bailed out can after 30 days be remanded to police custody. This is untenable. The case of the appellant that the police custody granted on 15.04.2020 was permissible and consistent with his case does not appear to be correct.”

12. The learned APP also lays hand on the said para by stating that the said decision supports his contention about permissibility of conversion of Police custody after initial 30 days in terms of Section 43-D of the UAP Act.

13. In the said case, the Supreme Court has expressed in unequivocal terms that while bringing about the change in the law the legislature is aware of the existing law laid down in case of Anupam J. Kulkarni (supra) which has ruled that the Police Custody can be given only during the first 15 days from the date of remand. In other words, when the amended provision of Section 43-D was introduced by Act of 35 of 2008 (UAP Act), the law laid down in case of Anupam J. Kulkarni (supra) was in-existence. In that context, it has been observed that in cases falling under UAP Act by applying the principle declared in Anupam J. Kulkarni (supra) case, the Police Custody for maximum period of 30 days but it must be within the first 30 days of the remand.

It has been expressed that the change is only in increase in number of days alone for granting Police Custody remand.

14. The Supreme Court while considering the effect of second proviso observed that, it does bring an alteration of the law in Anupam J. Kulkarni case (*supra*). It is explained that as per proviso, if a person is remanded to Judicial Custody and the National Investigation Agency has not been given Police Custody during the first 30 days, then on reasons being given, Court may grant Police Custody.

15. Case at hand bears a distinct feature. Admittedly, 15 days Police Custody remand was granted to accused and thereafter, accused was in Judicial Custody. It is not a case that no Police Custody at all was given during the first 30 days to invoke the proviso. In above case, it has been expressed that the alternation of law laid in Anupam J. Kulkarni (*supra*) would apply when the accused was remanded to Judicial Custody and National Investigation Agency has not been given Police Custody during first 30 days. We may reiterate that since in case at hand during first 30 days Police Custody was granted therefore, proviso would not help the appellant to seek Police Custody after first 30 days.

16. Though the learned APP relied on the decision of Maulavi Hussein Haji Abraham Umraji (*supra*), however the said case was considered in later decision in case of Gautam Navlakah (*supra*),

therefore the law declared in said case specifically under the UAP Act has to be followed. In substance on considering the proviso as interpreted by the Supreme Court, it would not apply to the facts enabling the National Investigation Agency to seek Police Custody after initial 30 days. Having been held so, we find no error committed by the Court of Sessions while rejecting the application for conversion of Police Custody after initial 30 days.

17. In view of above, appeal carries no merits, hence dismissed.

(VALMIKI SA MENEZES, J.)

(VINAY JOSHI, J.)

Gohane

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