State Through Cbi vs Dawood Ibrahim Kaskar & Ors on 7 May, 1997

Author: M.K. Mukherjee

Bench: M.K. Mukherjee, G.T. Nanavati, B.N. Kirpal

PETITIONER:
STATE THROUGH CBI

Vs.

RESPONDENT:
DAWOOD IBRAHIM KASKAR & ORS.

DATE OF JUDGMENT: 07/05/1997

BENCH:
M.K. MUKHERJEE, G.T. NANAVATI, B.N. KIRPAL

ACT:

HEADNOTE:

JUDGMENT:

Present:

Hon'ble Mr.Justice M.K. Mukherjee Hon'ble Mr.Justice G.T. Nanavati Hon'ble Mr.Justice B.N. Kirpal Ashok Desai, Attorney General, and Altaf Ahmad, Additional Solicitor General, Pallav Shishodia, P. Parmeswaran, Advs. with them for the appellant.

Kapil Sibal, Sr. Adv. (A.C.), Ashok Grover, Sr. Adv. Rajiv Sharma, Adv. (A.C.), T.C. Sharma, Ajay Sharma and Ms. Neelam Sharma, Advs., with them for the Respondents.

J U D G M E N T The following Judgment of the Court was delivered:

M.K. MUKHERJEE, J.

The principal question that is required to be answered in these appeals is when and under what circumstance a Court can invoke the provision of Section 73 of the Code of Criminal Procedure, 1973 (`Code' for short). The question arises in this way.

On March 12, 1993 a series of bomb explosions took place in and around the city of Bombay which result in the death of 257 persons, injuries to 713 persons and damage to properties worth Rs. 27 crores (approximately). Over the explosion 27 criminal cases were registered and on completion of investigation a composite charge-sheet was forwarded to the Designated Court, Greater Bombay on November 4, 1993 against 198 accused persons, showing 45 of them absconders, for commissioner of various offences punishable under the Indian Penal Code, the Terrorist and Disruptive Activities (Prevention) Act, 1987 (`TADA' for short) Arm Acts, 1959, Explosives Substances Act, 1908 and other Acts. On that charge-sheet the Designated court took cognizance and the case registered thereon was numbered as B.B.C. (Bomb Blast Case) No.1 of 1993.

A few days thereafter - on November 11, 1993 to be precise - the Government of India, with the consent of the Government of Maharashtra, issued a notification entrusting further investigation in the above case to Delhi Special Police Establishment (CBI) under the provisions of Section 5 of the Delhi Special Police Establishment Act, 1946. Pursuant thereto CBI registered a case being No. R.C. 1 (5)/93/S.T.F. Bombay on November 19, 1993 and took up further investigation with permission of the Designated Court.

In course of such investigation CBI apprehended Mohd. Salim Mira Moiuddin Shaikh @ Salim Kutta, one of the absconders mentioned in the charge-sheet, on July 24, 1995. He made a confessional statement before Shri S.K. Saikia, Deputy Inspector General of Police, CID, Ahmedabad, which was recorded by him on August 18 and 19, 1995 under Section 15 of TADA. In that confession he disclosed that the respondent Nos. 2 to 7 herein (hereinafter referred to as the `respondents) had taken active part in the criminal conspiracy which was the subject matter of B.B.C. No. 1 of 1993. Thereafter on May 2, 1996, the CBI moved an application before the Designated Court (Misc. Application No. 201 of 1996) wherein it stated that following the disclosure of the involvement of the respondents in the offences in question, raids has been conducted at their known hideouts to arrest them but none could be apprehended in spite of best efforts as they were deliberately evading their arrest to escape the clutches of law and, accordingly, prayed for issuance of non-bailable warrants of arrest against them to initiate further proceedings in the matter to apprehend them and/or to take further action to declare them as proclaimed offenders. Two other applications (Misc. Application Nos. 210 and 211 of 1996) were thereafter moved on June 3, 1996 for publication of written proclamations under Section 8(3)(a) of TADA as also for issuance of open dated non-bailable warrants of arrest so that `Red Corner Notices' might be issued against them. According to CBI such notices are required to be got issued by INTERPOL to seek police assistance in a foreign country to locate and apprehend fugitives.

When the three applications came up for hearing a learned Advocate who was appearing for some of the persons arraigned in B.B.C. No. 1 of 1993 submitted before the Designated Court they were

entitled to copies of the applications and a right of hearing on their merits in the matter. The Designated Court accepted his submission; and on receipt of the copies of the application the learned Advocate filed a rejoinder thereto. After hearing the parties the Designated Court, by its order dated August 1, 1996, rejected the applications. The above order is under challenge in these appeals preferred at the instance of CBI.

From the impugned order we find that before the Designated Court it was submitted on behalf of CBI that since it was making further investigation into the offences in respect of which chargesheet has earlier been submitted and since the presence of the respondents, who were absconding, was absolutely necessary for ascertainment of their roles, if any, in commission of the offences, it was felt necessary to file the applications. It was further submitted that only after warrants and/or proclamations as prayed for were issued, that it (CBI) would be able to take further coercive measure to compel them to appear before the Investigating Agency for the purpose of intended further investigation. According to CBI under Section 78 of the Code and Section (3)(a) of TADA the Designated Court was fully empowered to issue warrants of arrest and proclamations. In rejecting the above contention the Designated Court held that after cognizance was taken in respect of an offence process could be issued to the persons accused thereof only to compel them to face the trial but no such process could be issued by the Court in aid of investigation under Section 73 of the Code. According to the Designated Court, though under code further investigation was not barred there was no provision therein which entitled the Investigating Agency to seek for and obtain aid from the Court for the same. Since the above findings were recorded by the Designated Court relying solely upon the judgment of the Bombay High Court in Mohammad Yasin Mansuri vs. State of Maharastra. (1994) Crl.L.J. 1854, it will be necessary to refer to the same in some details. In that case investigation into an offence of murder and other related offences was taken up initially by the Officer-in-Charge of Byculla Police Station and thereafter by a Deputy Commissioner of Police (DCP) of CID. During the investigation the Designated Court, on the prayer of the DCP, issued non-bailable warrants for apprehension of some of the accused involved in those offences. Thereafter a charge-sheet came to be filed against several accused, some of whom were before the Court and some other including Mansuri (the petitioner before the High Court) were shown as absconding. In the very day the charge-sheet was filed Designated Court took cognizance of the offences mentioned therein. Few months later Mansuri came to be arrested by the CBI, Delhi in connection with some other offence. On receipt of that information the DCP filed an application before the Designated Court for warrants of arrest and production of Mansuri before it. The prayer was allowed and in due course Mansuri was brought to Bombay and handed over to DCP. On the following day Mansuri was produced before the Designated Court; and on such production the prosecution prayed for remand of Mansuri to police custody. The prayer was allowed and the Designated Court remanded him to police custody, but kept the order in abeyance for a few days to enable Mansuri to challenge the same in a superior court. Assailing the above order of the Designated Court, Mansuri moved the Bombay High Court. Before the High Court it was submitted on behalf of Mansuri that once investigation into an offence was complete and a charge-sheet was filed, the provisions of Section 309 of the Code came into operation and sub-section (2) of the said Section left no discretion to a Court. The only course open to the Court then was to remand the accused to judicial custody. It was further submitted that whereas Section 167 conferred a discretion upon the Court of authorising detention of an accused either in judicial custody or police custody

such discretion was completely absent in Section 309 of the Code. Accordingly, it was submitted that the order passed by the Designated Court granting Mansuri to Police custody was without jurisdiction and liable to be set aside. In accepting the above contention and quashing the impugned order the High Court firstly observed:

> "It would, therefore, follow that the warrants which were issued by the Designated Court for production of the petitioner could not have been in aid of investigation but could only have been by way of process issued under Section 204 of the Code of Criminal Procedure. Issue of warrants after cognizance of an offence is taken would be a process contemplated under Section 204(1)(b) of the Code, i.e. it would be a process to face trial. Indeed. We do not find any provision contained in the Code for issue of warrants of arrest and custody of accused for the purpose of, or in aid of, investigation. The process contemplated is a process to face trial."

(emphasis supplied) The High Court further observed:

> "We are conscious that the view we are taking is likely, in certain case such as the present one, to hamper investigation. However, this is not a matter for us. We have construed the provision of the Code and have found that no power is conferred for providing for police custody after cognizance of the offence is taken."

(emphasis supplied) In view of the provision of Chapter XII and those of Section 309(2) of the Code we are constrained to say that the above quoted observations have been made too sweepingly. Chapter XII relates to information to the police and their powers to investigate. Under Section 154 thereof whenever an Officer-in-Charge of a police station receives and information relating to the commission of a cognizable offence he is required to reduce the same in writing and enter the substance thereof in a prescribed book. Section 156 invests the Officer-in-Charge of a police station with the power to investigate into cognizable offences without the order of a Magistrate and Section 157 lays down the procedure for such investigation. In respect of an information given of the commission of a non-cognizable offence, the Office-in-charge required under Section 155(1) to enter the substance thereof in the book so prescribed but he has no power to investigate into the same without an order of the competent Magistrate. Armed with such an order the Officer-in-charge can however exercise all the power of investigation he has in respect of a cognizable offence except that he cannot arrested during investigation has to be dealt with by the investigation Agency, and by the Magistrate on his production before him, is provided in Section 167 of the Code. The said Section contemplates that when the investigation cannot be completed within 24 hours fixed by Section 57 and there are grounds to believe that the charge levelled against the person arrested is well founded it is obligatory on the part of the Investigation Officer to produce the accused before the nearest Magistrate. On such production the Magistrate may authorise the detention of the accused initially for a term not exceeding 15 days either in police custody, or in judicial custody. On expiry of the said period of 15 days the Magistrate may also authorise his further detention otherwise than in police custody if he is satisfied that adequate grounds exist for such detention. However, the total period of detention during investigation cannot be more than 90 days or 60 days, depending upon the nature of offences mentioned in the said Section. Under Sub-section (1) of Section 173 the Officer-in-charge

is to complete the investigation without unnecessary delay and as soon as it is completed to forward, under Sub-section (2) thereof, to the competent Magistrate a report in the form prescribed setting forth the names of the parties, the nature of the information and the names of the persons who appears to be acquainted with the circumstances of the case. Sub-Section (8) entitles the Officer-in-Charges to made further investigation and it reads as under:

> "Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub- section (2) has been forward to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report to the report regarding such evidence in the form prescribed, and the provisions of sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-

section (2)."

In H.N. Rishbud vs. State of Delhi, [AIR 1955 SC 196], this Court dealt with the definition of `investigation' under the Code of Criminal Procedure, 1898 (hereinafter referred to as the `old Code'), which is same under the new Code and after analysing the provisions of Chapter XIV of that Code (which corresponds to Chapter XII of the Code) stated:

> "Thus under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstance of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-

sheet under Section 173."

Though under the old Code there was no express provision - like sub-section (8) of Section 173 of the Code

- statutorily empowering in Police to further investigate into an offence in respect of which a charge-sheet has already been filed and cognizance taken under Section 190(1)(b), such a power was recognised by this Court in Ram Lal Narang vs. State [AIR 1979 SC 1791]. In exemplifying the situation which may prevail upon the police to take up further investigation and the procedure the Court may have to follow on receipt of the supplemental report of such investigation, this Court observed:

> "It is easy to visualise a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate? After all the investigating agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry of not proceeded with the enquiry of trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused, in a single enquiry of trial. If the case of which he has already proceeded to some extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the Code of Criminal Procedure in such situations is a matter best left to the discretion of the Magistrate."

In keeping with the provisions of Section 173(8) and the above quoted observations, it has now to be seen whether Section 309(2) of the Code stands in the way of a Court, which has taken cognizance on an offence, to authorise the detention of a person, who is subsequently brought before it by the police under arrest during further investigation, in police custody in exercise of its power under Section 167 of the Code. Section 309 relates to the power of the Court to postpone the commencement of or adjournment of any inquiry of trial and sub-section (2) thereof reads as follows:

> "If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may be a warrant remand the accused if in custody. Provided that no Magistrate shall remain an accused person to custody under this Section for a term exceeding fifteen days at a time;"
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> There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since,

however, even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who come to be later arrested by the police in course of such investigation. If section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri (supra) - to mean that after the Court takes cognizance of an offence it cannot exercises its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are therefore of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who come under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which has taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfillment of the requirements and the limitation of Section 167.

The moot question that now requires to be answered is whether a Court can issue a warrant to apprehend a person during investigation for his production before police in aid of the Investigating Agency. While Mr. Ashok Desai, the learned Attorney General who appeared on behalf of CBI, submitted that Section 73 coupled with Section 167 of the Code bestowed upon the Court such power, Mr. Kapil Sibal, who appeared as amicus curie (the respondents did not appear inspite of publication of notice in newspaper) submitted that Court has no such power. To appreciate the steps of reasoning of the learned counsel for their respective stands it will be necessary to refer to the relevant provision of the Code and TADA relating to issuance of processes.

Chapter VI of the Code which is captioned as `processes to compel appearance' consists of four parts part A relates to Summons; part B to warrant of arrest; part C to proclamation and attachment and part D to other rules regarding processes. Part B, with which we are primarily concerned in these appeals, has in its fold Section 70 to

81. Section 70 speaks of the form in which the warrant to arrest a person is to be issued by the Court and of its durational validity. Section 71 empowers the Court issuing the warrant to direct the officer who is to execute the warrant, to release that person on terms and condition as provided therein. Section 72 provides that a warrant shall ordinarily be directed to one or more police officers but if its immediate execution in necessary and no police officer is immediate available it may be directed to any other person for execution. Section 73 which is required to be interpreted in

these appeals, read as under:

"73(1) The Chief Judicial Magistrate of a Magistrate of the first class may direct a warrant to an person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enter on, any land or other property under his charge."

Section 76 requires the police officer or other person, who executes the warrant to bring the person arrested before the Courts (unless he is released in terms of Section 71), within twenty four hours.

Section 82, appearing in part C empowers the Court to issue proclamation; and so far as it is relevant for our present purpose, read as under:

"82(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(emphasis supplied)

xxx xxx xxx
xxx
(2) xxx xxx
xxx
(3) xxx xxx
xxx

After issuing a proclamation in terms of the above provision, the Court may also order attachment of the property of the proclaimed person under Section 83; and even deprive him of his such property if he does not appear within the time prescribed under Section 85.

Chapter XVI relates to commencement of proceedings before Magistrates and Section 204 appearing therein enable a Magistrate, who takes cognizance of an offence, to issue process (summons/warrant) against the accused if he finds sufficient grounds to proceed against him.

Coming now to the relevant provisions of TADA was may first refer to sub-section (3) of Section 8 relating to proclamation for and attachment of the property of a person accused of an offence punishable under TADA. Clause (a) of the above sub-section

lays down that if upon a report in writing made by a police officer or an officer referred to in sub-section (1) of Section 7, any Designated Court has reason to believe that any person, who has committed an offence punishable under the Act or any rule made thereunder, has absconded or is concealing himself so that he may not be apprehended, such Court may, notwithstanding anything contained in Section 82 of the Code, publish a written proclamation requiring him to appear at a specified place and at a specified time not less than fifteen days but not more than thirty days for the date of publication of such proclamation; and sub-section (3)(b) thereof entitles the Court issuing the proclamation to order attachment of property belonging to the proclaimed offender and then proceed in accordance with Section 83 to 85 of the Code. For all intents and purpose, therefore, sub-section 8(3) of TADA seeks to achieve the same object as part C of Chapter VI does, namely to compel appearance of the accused. The other section to which reference need be made is Section 20 which makes the provisions of the Code applicable to the proceeding under TADA, subject to the modification envisaged therein.

The contention of Mr. Desai was that though in exercise of its power under Section 41 of the Code a police officer may without an order from a Magistrate and without a warrant arrest a person who is concerned in any cognizable offence of against whom a reasonable complaint has been made, or a credible information has been received or a reasonable suspicion exists, of his having been so concerned, under the Code the police has no power of its own to compel his appearance if he evades the arrest. It is in that context, Mr. Desai argued, that the Court has been given the power under Section 73 to issue warrant of arrest for apprehension of such a person; and, thereafter, if need be, to issue proclamation and pass order for attachment of his properties. In joining issues, Mr. Sibal urged that the scheme of the Code is that the police has complete control of the investigation and is not aided by any judicial authority. Once the investigation culminates in the police report under Section 173(2) that the Court steps in by taking cognizance thereupon and issuing summons or warrant under Section 204 against the person arraigned. According to Mr. Sibal, in the scheme of the Code it is unthinkable that the police, while investigating under Chapter XII is entitled to seek the help of a Magistrate for the purpose of issuance of a warrant of arrest in aid of investigation. As regards Section 73, Mr. Sibal's argument was that in the scheme of part B of Chapter VI that section only lays down a procedure to enable a Court to execute a warrant already issued under Section 204 but does not confer any right to issue a warrant, much less during investigation.

At this stage it is pertinent to mention that under the old Code the corresponding provision was Section 78; and while recommending its amendment the Law Commission in its 41st report stated, inter alia:

"6.8 Section 78 at present confers a power on the District Magistrate or Sub-Divisional Magistrate to issue a special type of "warrant to a land-holder, farmer or manager of land within the district of sub-

> division for the arrest of an escaped convict, proclaimed offender or person who has been accused of a non-bailable offence and who has eluded pursuit".
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> Although the power is infrequently exercised, there appear to be no objection to conferring it on all Magistrates of the first class and all .....
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> ...."

(emphasis supplied) Apart from the above observations of the Law Commission, from a bare perusal of the Section (quoted earlier) it is manifest that it confers a power upon the class of Magistrates mentioned therein to issue warrant for arrest of three classes of person, namely, i) escaped convict, ii) a proclaimed offender and iii) a person who is accused of a non-bailable offence and is evading arrest. If the contention of Mr. Sibal that Section 204 of the Code is the sole repository of the Magistrate's power to issue warrant and the various Sections of part `B' of Chapter VI including Section 73 only lay down the mode and manner of execution of such warrant a Magistrate referred to under Section 73 could not - and would not - have been empowered to issue warrant of arrest for apprehension of an escaped convict, for such a person can not come within the purview of Section 204 as it relates to the initiation of the proceeding and not to a stage after a person has been convicted on conclusion thereof.

That Section 73 confers a power upon a Magistrate to issue a warrant and that it can be exercised by him during investigation also, can be best understood with reference to Section 155 of the Code. As already noticed under this Section a police officer can investigate into a non cognizable case with the order of a Magistrate and may exercise the same powers in respect of the investigation which he may exercise in a cognizable case, except that he cannot arrest without warrant. If with the order of a Magistrate the police starts investigation into a non- cognizable and non-bailable offence, (like Sections 466 or 467 (Part I) of the Indian Penal Code) and if during investigation the Investigating Officer intends to arrest the person accused of the offence he has to seek for and obtain a warrant of arrest from the Magistrate. If the accused evade the arrest, the only course left open to the Investigating Officer to ensure his presence would be to ask the Magistrate to invoke his powers under Section 73 and thereafter those relating to proclamation and attachment. In such an eventuality, the Magistrate can legitimately exercise his power under Section 73, for the person to be apprehended is `accused of a non-bailable offence and is evading arrest.' Another factor which clearly indicates that Section 73 of the Code gives a power to the Magistrate to issue warrant of arrest and that too during investigation is evident from the provisions of part `C' of Chapter VI of the Code, which we have earlier adverted to. Needless to say the provisions of proclamation and attachment as envisaged therein is to compel the appearance of a person who is evading arrest. Now, the power of issuing a proclamation under Section 82 (quoted earlier) can be exercised by a Court only in respect of a person `against whom a warrant has been issued by it'. In other words, unless the Court issues a warrant the provisions of Section 82, and the other Sections that follow in that part, cannot be invoked in a situation where inspite of its best effects the police cannot arrest a person under Section 41. Resultantly, if it has to take the coercive measures for the apprehension of such a person it has to approach the Court to issue warrant of arrest under Section 73; and if need be to invoke the provisions of part `C' of Chapter VI. [Section 8 (3) in case the person is accused of an

offence under TADA] Lastly, we may refer to Section 90, which appears in part `D' of Chapter VI of the Code and expressly states that the provisions contained in the Chapter relating to a summon and warrant, and their issue, service and execution shall, so far as may be, apply to every summon and every warrants of arrest issued under the Code. Therefore, when a Court issues a warrant of arrest, say under Section 155 of the Code, any steps that it may have to subsequently take relating to that warrant of arrest can only be under Chapter VI.

Now that we have found that Section 73 of the Code is of general application and that in course of the investigation a Court can issue a warrant in exercise of power thereunder to apprehend, inter alia, a person who is accused of a non-bailable offence and is evading arrest, we need answer the related question as to whether such issuance of warrant can be for his production before the police in aid of investigation. It cannot be gainsaid that a Magistrate plays, not infrequently, a role during investigation, in that, on the prayer of the Investigating Agency he holds a test identification parade, records the confession of an accused or the statement of a witness, or takes or witnesses the taking of specimen handwritings etc. However, in performing such or similar functions the Magistrate does not exercise judicial discretion like while dealing with an accused of a non-bailable offence who is produced before him pursuant to a warrant of arrest issued under Section 73. On such production, the Court may either release him on bail under Section 439 or authorise his detention in custody (either police or judicial) under Section 167 of the Code. Whether the Magistrate, on being moved by the Investigating Agency, will entertain its prayer for police custody will be at his sole discretion which has to be judicially exercised in accordance with Section 167 (3) of the Code. Since warrant is and can be issued for appearance before the Court only and not before the police and since authorisation for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him, Mr. Desai was not absolutely right in his submission that warrant of arrest under Section 73 of the Code could be issued by the Court solely for the production of the accused before the police in aid of investigation.

On the conclusions as above we allow these appeals, set aside the impugned order and direct the Designated Court to dispose of the three miscellanous applications filed by C.B.I in accordance with law and in the light of the observations made herein before.

Before parting with this judgment was place on record our deep appreciation for the valuable assistance rendered by Mr. Desai and Mr. Sibal in deciding the issue involved in these appeals.