Dukhi And Anr. vs State And Anr. on 9 May, 1955

Equivalent citations: AIR1955ALL521, 1955CRILJ1305, AIR 1955 ALLAHABAD 521

JUDGMENT

Desai, J.

1. The applicants applied for a writ of habeas corpus under Section 491, Criminal P. C. and Article 226 of the Constitution. They were arrested on a charge of murder and are being detained in prison under the orders of a Magistrate since 29-3-1955 in one case and 2-4-1955 in the other case. Their contention is that under Section 167, Criminal P. C. they can be detained in custody under the orders of a Magistrate only for 15 days and that their continued detention after the expiry of 15 days is unlawful and they should be released at once.

Though it is not stated in the application, the applicants seem to have been arrested without a warrant by the police and the police are still investigating the matter.

2. The questions that arise are, (1) Whether a person arrested by the police without a warrant must be released from custody on the expiry of the period of 15 days mentioned in Section 167 (2) of the Code unless the Magistrate having jurisdiction takes cognizance of the offence and decides to postpone the inquiry or trial under Section 344 of the Code, and (2) Whether a Magistrate can avail himself of the provisions of Section 344 without taking cognizance of the offence or while the matter is still under investigation by the police.

We were satisfied that the first question should be answered in the negative and the second question, in the affirmative; so we held that the detention of the applicants was not unlawful and dismissed their application. We now proceed to give seasons for our views.

3. The Legislature has expressly divided the period for which a person can be detained in custody prior to the commencement of an inquiry or trial into two stages. The first stage is of the period of 24 hours; in this period the police have absolute discretion to detain the person anywhere they like during the investigation. If the investigation cannot be completed within 24 hours, the police must forward the accused to the nearest Magistrate; see Section 167(1).

The second stage consists of 15 days, the Magistrate to whom the police have forwarded the accused can authorise his detention in such custody as he thinks fit for a term not exceeding 15 days in the whole; see Section 167(2). This remand is practically automatic as soon as the police report that the investigation cannot be completed within 24 hours and that the accused must be remanded to custody for 15 days, the Magistrate would feel bound to grant the remand. The Legislature expects

investigations to be completed within the period of 15 days, but frequently investigation must go on for more than 15 days; other persons involved in the commission of the offence may be absconding, identification proceedings in respect of the arrested persons or property may have to be done, a report may have to be obtained from an expert such as the Chemical Examiner or the Imperial Sereologist or a handwriting export, witnesses may not be available for interrogation on account oi illness or being away from their homes, or the investigating officer may be absent, on leave or may have more urgent investigations to do in the period.

On account of these and other reasons investigations, particularly investigations in dacoity, riot and murder cases, are often delayed beyond 15 days. So there must be a third stage of investigation, e.g., the stage after 15 days. The Legist lature must have realised that frequently investigation would last more than 15 days, particularly investigation of serious crimes like dacoity and murder.

It could not have contemplated that the arrested person must be released from custody after the expiry of 15 days regardless of the nature of the accusation or information against him and regardless of the quantity of evidence so far available against him. Therefore, it must have made provision for continuing the arrested person's detention after 15 days in suitable cases and there is no provision barring that contained in Section 344.

It follows that Section 344 is meant to be applied when the investigation cannot be completed within 15 days and there is a reasonable ground to believo that the accusation or information is true. It is stated in the explanation to Section 344 that if sufficient evidence has been obtained to raise a suspicion that the accused might have committed the offence and it appears likely that further evidence may be obtained by a remand, it is a reasonable cause for a remand.

This explanation necessarily refers to the stage when the offence is still under investigation by the police. The investigation is to be done by the police only; only they can unearth or collect evidence. The Court simply tries or holds an inquiry by examining witnesses produced before it by the police or the complainant; it does not investigate and docs not collect evidence.

Therefore, when the explanation refers to the probability of obtaining further evidence it means that the remand under Section 344 can be granted while the case is still being investigated by the police. If the investigation has been completed, normally there would not arise any question of the probability of obtaining more evidence by further investigation. If there are good grounds for not completing the investigation within 15 days and there is sufficient evidence or reasonable suspicion against the accused, the Court may postpone the commencement of enquiry or trial pending completion of the investigation and remand the accused to custody in the meanwhile; this is exactly what Section 344 permits.

This remand under Section 344 is to be distinguished from the remand under Section 167(2). Section 344 is more general than Section 167(2), which is confined in its operation to the stage of 15 days of investigation; it can be used at any stage and can be used by any Magistrate or Judge. A remand under Section 344 can be ordered only by the Court having jurisdiction for the offence and not by any Magistrate like a remand under Section 167(2).

It has to be for a reasonable cause and is not almost automatic or as a matter of course like a remand under Section 167(2). Under Section 167(2) the Magistrate has hardly any discretion; if the police report to him that the investigation cannot be completed within 24 hours and that there are reasons to believe that the accusation or information is well founded, he will have no option but to remand the accused.

He is not required to give any reasons for granting remand to jail custody; but a Court granting remand under Section 344 has to give reasons. A Magistrate granting remand under Section 167(2) has discretion to remand the accused either to police custody or to jail custody but it is doubtful if a Court granting remand under Section 344 has such discretion and can remand the accused to police custody.

4. Sections 169, 170 and 173 provide for the acts to be done by the police upon investigation. If "upon an investigation" it appears to the police that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to Court, the police must release him on his executing a bond; see Section 169.

If on the other hand it appears to the police that there is sufficient evidence or reasonable ground, they must forward the accused under custody to the Magistrate empowered to take cognizance of the offence upon a police report and to try the accused; see Section 170.

Since the period of investigation expressly allowed by the Legislature (in Section 167(2)) is of 15 days, the report mentioned in Section 173 must be made within 15 days (if possible) and the acts mentioned in Sections 169 and 170 must necessarily have been done before the report is made. But even if the investigation cannot be completed, and the report cannot be made, within 15 days, the acts mentioned in the two sections must still be done within 15 days.

If in this period sufficient evidence has been obtained or there is a reasonable suspicion against the arrested person, he must be forwarded to the Magistrate, otherwise he must be released, while the investigation is going on. Naturally the police will send a communication to the Magistrate while forwarding the accused explaining the circumstances in which they cannot complete the investigation within 15 days and stating what evidence has so far been collected to prove that the accused has committed the offence or to cause a reasonable suspicion of his having committed it.

The Magistrate then will decide whether to postpone the commencement of enquiry or trial and remand the accused. This communication is not a report within the meaning of Section 190(b); it need not state the facts constituting the offence and the Magistrate is not required to take cognizance on receipt of it; evidently if the communication does not state the facts the Magistrate cannot possibly take cognizance. There is nothing in Section 344 to suggest that the Magistrate must take cognizance efore taking action under it.

It is laid down in Section 173 that the investigation must be completed without unnecessary delay and that as soon as it is completed, the police should forward to the Magistrate empowered to take cognizance of the offence on a police report a report in the prescribed form stating whether the

accused (if arrested) has been forwarded in custody or has been leleased on his bond (he can be released an his bond if the offence is bailable).

This report may be a charge-sheet requesting the Magistrate to take cognizance of the offence and put the arrested person on trial or a final report informing him that there is no evidence against the arrested person or no reason to believe that he has committed the offence. Under Section 190b. a Magistrate may take cognizance of an offence upon a report in writing of facts which constitute such offence by any police officer.

As the report mentioned in Section 173 is the only report which is contemplated by the Code to be made by a police officer to a Magistrate who is entitled to take cognizance of the offence, it must be held that the report upon which a Magistrate masic. take cognizance of an offence is the report me(sic) tioned in Section 173. When the Code provides for a certain report to be made by a police officer sic. does not provide for any other report to be made by him the report contemplated by Section 190 must be the report for which the Code has provided.

It was observed by Bajpai J. in -- 'Chunni Lal v. Emperor', AIR 1933 All 399 (A), that an application made during the trial of a case by the prosecuting inspector that a certain witness should also be put on trial is a report within the meaning of Section 190 (b) but with great respect to the learned Judge I do not think it can be said to be such a report. It cannot be disputed that the report made by the police under Section 173 is such a report. An elaborate procedure is laid down in the Code to be followed by the police before they make such a report; it follows that no other kind of report is permissible under the Code.

It would have been useless for the code to provide for the elaborate procedure to be followed before making a report it any application such as the one made in the case of Chunni Lal could be held to be a report.

I think the doctrine laid down by the Judicial Committee in -- 'Nazir Ahmad v. King Emperor', AIR 1936 PC 253 (2) (B), that where a power is conferred upon an authority to do an act in a particular manner, it must do it in that manner and in no other manner, applies; if the police are required by the Code to make a report in a particular manner they may not make a report at all, but if they make one, they must make it in the prescribed manner and in no other manner.

5. Once it is found that the report contemplated by Section 190 (b) is th3 report referred to in Section 173, it follows that a Magistrate can take cognizance of an offence only after the investigation has been completed and cannot take cognizance of it while the investigation is still progressing. The whole scheme of the Code is against a. Magistrate's taking cognizance of an offence even during the pendency of an investigation. There is only one provision dealing with further investigation after it has been once completed; it is that contained in Section 173(2).

Before the Magistrate passes orders on the report made under Section 173, the Superintendent or the Deputy Superintendent of Police, through whom the report is submitted by the station officer in charge of the police station, may order him to make further investigation. The Station Officer might

have thought that he has done all the investigation that he could but the superior officer may think that the investigation is not complete and that some further investigation is still required and may direct it to be done pending orders of the Magistrate on the report. In no other case can further investigation e done after the submission of the report under Section 173.

After the Magistrate has passed orders on the report, whether of taking cognizance of the offence under Section 190(b) or of approving the final report and discharging the bond executed by the arrested (sic)son under Section 169, there is no scope for any fur- (sic) investigation by the police. Further investi- (sic)on after the Magistrate has taken cognizance of (sic) offence may 'even amount to contempt of his court and be illegal. If no investigation can be done after the Magistrate has taken cognizance of the offence, the explanation to Section 344 must refer to circumstances existing before the taking of cognizance by the Magistrate, i.e., Section 344 can apply even before the Magistrate takes cognizance of the offence.

It was argued that the words "to postpone the commencement of.....any inquiry or trial" of the section suggest that the Magistrate has already taken cognizance of the offence. An inquiry or trial can (sic)mmence only after the Magistrate has taken cogni-(sic)nce of the offence; therefore, the question whe-(sic)fer the commencement of an inquiry or trial should (sic) postponed or not would normally arise after cognizance of the offence has been taken. But there is nothing in the section to suggest that taking cognizance of the offence itself may not be postponed.

There is nothing to be done by a Magistrate after taking cognizance on a police report and before the commencement of an -inquiry or trial; so postponing commencement of an inquiry or trial may include postponing the taking cognizance of an offence. In any case in the absence of express words like "after taking cognizance of an offence" I am not prepared to hold that the power conferred by Section 344 cannot be exercised unless cognizance has been taken.

6. In -- 'Bhola Nath Das v. Emperor', AIR 1924 Cal 614 (C), Greaves and Panton JJ. laid down:

> "At the expiration of the maximum period of 15 days' detention of an accused person.....an accused must either be released by the police under Section 169 ....or the Magistrate, empowered in that behalf, must either take cognizance if he has before him a police report (which ordinarily would be a report in the form laid down in Section 173) .....or he must release him."

With great respect to the learned Judges I may point out that the alternative to proceeding under Section 169 is proceeding under Section 170 and not the Magistrate's taking cognizance of the offence or releasing him. Only two things are possible upon an investigation; either it appears that there is not sufficient evidence or it appears that there is. In the former case the police must act as laid down in Section 169 and in the latter case -- as laid down in Section 170. So acting under Section 170 is the only alternative to acting under Section 169.

The correctness of the decision was doubted by Roxburgh and Blank, JJ. in -- 'Superintendent and Remembrancer of Legal Affairs Bengal v. Bidhindra Kumar Roy', AIR 1949 Cal 143 (D). In that case

it was observed by the learned Judges that the explanation to Section 344 "clearly contemplates a stage prior to submission of the charge sheet and that time is wanted for further investigation. In-- 'Emperor v. Sooba', AIR 1931 All 617 (E), Kendall J. observed that if an investigation is not complete within 15 days, the accused must be forwarded to the Magistrate having jurisdiction for being remanded under Section 344 if there are sufficient reasons and that it is not the law that a police investigation can in no case involve detention of the accused persons in custody for more than 15 days.

In -- 'Kali Charan v. State', AIR 1955 All 462 (sic), decided by our brother Raghubar Dayal on (sic)-1951, a contrary view was taken and it was (sic) that Section 344 cannot apply unless cognizance has been taken. In that case Kali Charan was detained in custody during investigation for more than 15 days. He was remanded to custody after having been in detention for 15 days by a Magistrate who had no jurisdiction to take cognizance of the offence. Under Section 167 a Magistrate not empowered to take cognizance of the offence can remand the accused to custody for no more than 15 days; therefore, the detention of Kali Charan beyond 15 days under the orders of a Magistrate, who was not empowered to take cognizance of the offence, was unlawful, regardless of the question whether Section 344 applies only after cognizance of the offence has been taken or also while the investigation is going on.

Our learned brother, however, considered the provisions of Section 344. He laid considerable stress upon the use of the word "court" and inferred that the section contemplates that a Magistrate has taken cognizance of the offence and a court has come into existence. I do hot think that tin's is the significance of the word "court". The word "Magistrate" also is used in the same section. The word "court" is used instead of the word "Magistrate", because the provisions of the section are meant to be available not only to Magistrates but also to Judges. Had the word "Magistrate" been used, the provision could not have been available to Judges.

I find it difficult to accept our learned brother's observation that there is nothing in the Code to suggest that the police cannot continue investigation after submitting a report to the Magistrate for taking cognizance of the offence. It is only under Section 173 that a report is to be made and the section expressly uses the words "As soon as it is completed"; investigation cannot be completed and also remain pending at the same time. It is true that the explanation docs not use the words "during the course of an investigation", but a similar argument is available against the interpretation sought to be placed upon the section -- the section does not nse the words "after taking cognizance of the offence".

Our learned brother did realize that further investigation, though it can go on after the Magistrate has taken cognizance of the oifence, cannot go on after he has disposed of the case and consequently was forced to lay down that the Magistrate should not pass final orders in the case so long as the investigation has not been completed. What a court should do after it has taken cognizance of an offence is laid down in certain sections of the Code and, apart from the provisions there can be no restriction of any kind on the power of the Court to dispose of the case.

The Legislature would not have left such an importan't restriction unexpressed or to be inferred. There is no warrant for implying that the court's completing the case is dependent upon the investigation being completed. If the investigation can go on even after the court has taken cognizance, there is nothing in the law to prevent its going on even after the Court has disposed of the case. If it would be absurd for the investigation to go on even after the case is disposed of, the absurdity results from holding that investigation can go on simultaneously with an inquiry or trial and not from the operation of any of the provisions laying down the procedure to be followed after cognizance has been taken.

I do not agree with our learned brother that the interpretation that I am putting on Section 344 would render the limit of 15 days placed by Section 167 (2) useless. I have already pointed out the difference between the provisions of the two sections. If a Magistrate by simply passing an order of remand under Section 344 in a case pending investigation is deemed to have taken cognizance of the offence, as our learned brother thinks he is, it would be useless also to presume that the order can be passed only after cogmzance has been taken. It would- ordinarily be useless to presume that a power can be exercised only if a certain condition precedent exists, if the existence of the condition precedent can be inferred from the very exercise of the power.

In 'Kali Charan's case (F)' since the order under Section 344 was passed by a Magistrate not empowered to take cognizance, he could not be presumed to have taken cognisance; in the present case it is not shown to us that the orders of remand were passed by a Magistrate not empowered to lake cognizance of the offence against the applicant.

Our learned brother further observed:

> "The forwarding of the accused to the Magistrate under Section 170, Criminal P. C. was for the purpose of the. Magistrate taking cognisance against the accused.....it was in such a contingency that the Magistrate was to grant further remand under Section 344, Criminal P. C. in order that further evidence might be secured against the accused."

I have already explained how the communication that the police would send to the Magistrate while forwarding the accused under Section 170 cannot be the report contemplated by Section 190(b). Really the Code does not expressly require any report or any other communication to be sent by the police along with the accused; had it been the intention of the Legislature that the Magistrate should take cognizance when the accused is forwarded to him, it would have enacted a provision to that effect, or at least provided for a report to be made by the police while forwarding the accused.

Moreover, action under Sections 169 and 170 is to be taken only if a person has been arrested by the "police without a warrant; if none has been arrested or the arrested person has been released on bail, the action cannot possibly be taken, and the Magistrate can take cognizance of the offence only on receipt of the report made under Section 173. I do not see any reason for saying that the Magistrate must take cognizance even before receipt of. the report just because some arrested person is in custody. The accused is to be forwarded even if there is no evidence, but only a

reasonable suspicion; but the Magistrate cannot take cognizance on mere reasonable suspicion; he must have a statement of facts constituting the offence as laid down in Section 190(b).

If he has taken cognizance on the accused being forwarded to him, it would be superfluous for the police to make a report under Section 173 later; the Magistrate cannot take cognizance again. I have, therefore, no doubt that no cognizance can be taken by the Magistrate on the communication received from the police along with the accused under Section 170. A Magistrate passing an order under Section 344 may have to act judicially but acting judicially is not dependent on taking cognizance.

A Magistrate passing an order under Section 167(2) is also acting judicially; if he can act so without taking cognizance, there is no reason why he cannot act under Section 344 without taking cognizance. For these reasons I think that the law has not been correctly laid down by our learned brother in 'Kali Charan v. State (F)'.

7. The detention of the applicants is not unlawful.

Beg, J.

8. I agree.