

(2015) 12 PAT CK 0040

Patna High Court

Case No: Criminal Writ Jurisdiction Case No. 802 of 2015

Birendra Kumar

APPELLANT

Vs

The State of Bihar and
Others

RESPONDENT

Date of Decision: Dec. 16, 2015

Acts Referred:

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 167, 167(2), 309, 309(2), 439

Citation: (2016) 1 PLJR 440

Hon'ble Judges: Navaniti Prasad Singh and Anjana Mishra, JJ.

Bench: Division Bench

Advocate: Indradeo Prasad, Advocate, for the Appellant; Ashok Kumar Keshari, AAG-XI and Ujjawal Kumar Sinha, AC to AAG-XI, for the Respondent

Final Decision: Dismissed

Judgement

Navaniti Prasad Singh, J.

This is a writ petition under Article-226 of the Constitution for a Writ of Habeas Corpus solely based on the ground that the remand of the accused initially and subsequently by the Magistrate, being not in accordance with law, he be released forthwith from custody. In view of the nature of allegations, this Court thought it proper to examine the original records of the Lower Court. The Lower Court's records were produced.

2. We have heard Sri Indradeo Prasad, learned counsel for the petitioner and Sri Ashok Kumar Keshari, learned A.A.G.-XI at length and perused the records.

3. Before proceeding, we may note that in respect of revenue district Arwal, there is no separate Sessions Divisions. It is included in the Sessions Division of district Jehanabad. At Arwal, there is now a Chief Judicial Magistrate and for Arwal it is the District and Sessions Judge, Jehanabad who exercises the jurisdictions respectively. There is no jail

at Arwal. Accused and under-trials are remanded to and kept in detention at jail located at Jehanabad, which is at quite some distance from the district headquarters of Arwal.

4. It appears that on 30.05.2015, an F.I.R. was registered, being Parasi P.S. Case No. 24 of 2015. Parasi Police Station falls within Arwal Sub-division at Arwal district. The case was registered under various provisions of the Arms Act and the Unlawful Activities (Prevention) Act as also various provisions of the Indian Penal Code.

5. It was registered on basis of the statement of the Officer-in-Charge of Parasi Police Station and consequent to the arrest, inter alia, of the petitioner, allegedly several arms and ammunitions and extremist literatures were recovered. The petitioner and others, who were arrested, were produced before the Chief Judicial Magistrate on 31.05.2015 and were remanded to the judicial custody till 12.06.2015.

6. On behalf of the petitioner, it is first submitted that in fact they had been arrested several days prior to 31.05.2015 and were not produced before the Magistrate for remand within 24 hours, as constitutionally and statutorily required, thus their remand was illegal. It is their case that they were not physically produced on the next date i.e. on 12.06.2015. But thereafter, it is not in dispute that from time to time the accused were produced before the Chief Judicial Magistrate and remanded to custody pending investigation. On 02.09.2015, all the accused, who were in detention including the petitioner, were physically produced before the Chief Judicial Magistrate, Arwal. Upon charge-sheet having been filed against all the accused persons including the petitioner, they were remanded to judicial custody, pending trial, cognizance having been taken of the offences as per the charge-sheet, which were all cognizable offences and non-bailable.

7. Learned counsel for the petitioner does not dispute, that whatever may be position on or about 21.07.2015, when this writ application was filed as of date, they have been remanded to custody, by valid orders of remand. His submission is that, where the initial order of remand was not in accordance with law then subsequent orders, even though validly passed, would not validate the remand. In other words, while seeking a Writ of Habeas Corpus in-validity in remand at any stage would invalidate subsequent remands and it was an incurable defect, entitling the detinue to be released forthwith. According to the learned counsel, it is a question of constitutional rights and human rights apart from statutory rights.

8. To say the least, we are not impressed for in our view the law in this regard is well settled. The judgment in the case of [Surendra Sardar and Buddhu Sardar Vs. The State of Bihar and Others](#), a Division Bench of this Court examined similar contention and held in clear terms that the validity of detention has to be judged on the day when the writ petition is taken up for final adjudication. Notwithstanding any irregularity or illegality at the initial stage, if by the time the writ application is finally heard, valid orders of remand are passed, the detention cannot be held to be unconstitutional or illegal.

9. At this juncture, we may note the emphasis laid by the learned counsel for the petitioner on the provisions of Section-167(2) and Section-309(2) of the Code of Criminal Procedure in order to impress upon us that no order of remand can ever be passed for a period extending 15 days. We are not impressed. To us, it appears that Section-167 of Cr.P.C. deals with the contingency prior to stage of cognizance, while investigation is pending. Section-309 comes into operation after cognizance and the wording is clear, that if after cognizance trial is postponed, pending any further enquiry or investigation, only in that case the restriction of 15 days is applied and if it is not so postponed then upon cognizance being taken, in respect of the offences as charged, as per the charge-sheet and as apparent to the Magistrate exercising the jurisdiction, the trial process commences and then pending trial the accused has a right to be released in terms of Sections-439 and 440 of the Cr.P.C. only, by filing a regular bail application and the restriction of remand of not more than 15 days would not apply.

10. All we can do to refer to a recent judgment of the Apex Court in the case of [Manubhai Ratilal Patel Tr. Ushaben Vs. State of Gujarat and Others](#), wherein the Apex Court has reviewed the law and also the provisions in the scheme under Sections-167 and 309 Cr.P.C. They have emphatically held, that with regard to the Writ of Habeas Corpus, any infirmity in the detention of the petitioner at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits. A petition seeking Writ of Habeas Corpus, on ground of absence of valid order of remand or detention of the accused, has to be dismissed if on the date of return of the rule the custody or the detention is on basis of a valid order.

11. Thus, in our view, as presently the accused/petitioner has been remanded pursuant to valid order, even if there is any invalidity in the order of remand passed earlier, he is not entitled to a Writ of Habeas Corpus today and the writ petition has to be dismissed.

12. In fairness to the learned counsel for the petitioner, we may note with reference to the case of Mahesh Kumar Vs. the State of Bihar and others since reported in 2008(2) BLJ 135 (High Court) , it is submitted to the contrary. We have examined the said judgment. The said judgment though seemingly, without examining the facts of the case, appears what is submitted by the petitioner but it is not so. There is no discussion which shows that the Court intended to lay down any law, that if the initial remand was illegal, subsequent detention would be invalid. The Division Bench relied on the judgment of this Court in the case of Sri Arvind Kumar, on the letter of his wife [Sri Arbind Kumar Vs. The State of Bihar and Others](#), . We have examined the judgment of this Court in the said case as well. In that case, the initial order of remand was found to be illegal and the Writ of Habeas Corpus was issued but the facts clearly bare out, that it was filed, heard and disposed of immediately after the said invalid order and before any further order of remand could be passed. Thus, this case has no application in the present case. Moreover, in view of the judgment of the Apex Court and the earlier Division Bench judgment, as noticed above, the constitutional provision and the constitutional mandate are clear and do not operate to the benefit of the petitioner rather they direct the Court to

reject the Habeas Corpus application.

13. Learned counsel for the petitioner invited us to go into the question, firstly, that the petitioner had in fact, been detained and initially produced before the Magistrate long after expiry of 24 hours. We cannot go into this question at this stage. These contentions ought to have been raised and adjudication sought for, as before the Magistrate, on the day they were first remanded. The story set up by the petitioner is against the facts noted in the F.I.R. needed to be adjudicated at that time itself. At this stage, for the purposes of Habeas Corpus, this Court cannot go back in time and adjudicate the correctness or otherwise and we have to go by the records, especially in view of subsequent events. Then, learned Advocate tried to impress upon us that the petitioner and others were being falsely implicated in the case. Whether the accusation is false or correct, is now, after cognizance, a matter of trial. That is the procedure established by law and it is not open for this Court, that too, in a Habeas Corpus to adjudicate as a trial Court, without yet there being evidence recorded about innocence or guilt of an accused. That would be a matter of trial and the trial cannot be pre-empted in this manner in a proceeding for a Writ of Habeas Corpus.

14. We may observe that there appears from the records some confusion at the initial stage. As one of the provisions, under which the first information report was registered, was under the Unlawful Activities (Prevention) Act, the Chief Judicial Magistrate apparently thought that the matter was exclusively triable by the Court of Sessions and transmitted the records to the Sessions Judge, Jehanabad. The learned Sessions Judge, Jehanabad, having examined the matter, returned the records to the Chief Judicial Magistrate, Arwal, District Arwal. The accused were kept in the judicial custody in Jehanabad and apparently authorities did not know where to produce the accused persons. Of course, later on, they were all produced, physically, before the Chief Judicial Magistrate, Jehanabad on the date fixed and were duly remanded by valid orders of remand. Their presence is not only noted in the order-sheet but they have all individually signed the order-sheet with due endorsement of the date for further remand to judicial custody. The petitioner sought to take advantage of this situation, which cannot be permitted in the facts noted above.

15. We, thus, find no merit in this writ application. It is, accordingly, dismissed.

Anjana Mishra, J.

I agree.