A MITHABHAI PASHABHAI PATEL AND OTHERS

V.

STATE OF GUJARAT

Criminal Appeal No. 941 of 2009

MAY 06, 2009

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[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

Code of Criminal Procedure, 1973:

ss.167, 309 – Power of remand – Held: The Court can C *exercise power of remand u/s. 167(2) when investigation is not complete – Once chargesheet is filed and cognizance of offence is taken, Court cannot exercise its power u/s.167(2) and then s.309(2) is attracted – On facts, appellant were granted bail – They could not be taken into custody ordinarily* D *unless their bail was cancelled – High Court was not correct in holding that as further investigation was required, s.167(2) gives ample power for grant of police remand – Constitution of India, 1950 – Article 142.*

The question which arose for consideration in the E **present appeal is whether with the change of an investigating authority, police custody of the accused on remand can be sought for, although cognizance of the offence had already been taken.**

Allowing the appeal, the Court

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HELD: 1. Indisputably the investigating agency in terms of sub-section (8) of Section 173 Cr.P.C. can pray before the Court and may be granted permission to investigate into the matter further. There are, however, G **certain situations, where such a formal request may not be insisted upon. It is beyond any cavil that 'further investigation' and 're-investigation' stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely under**

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Articles 226 and 32 of the Constitution of India could direct a 'State' to get an offence investigated and/or further investigated by a different agency. Direction of a re-investigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. [Paras 16, 17] [1133-E-H]

Ramachandran v. R. Udhayakumar (2008) 5 SCC 413; *Nirmal Singh Kahlon v. State of Punjab* (2009) 1 SCC 441 – relied on.

2. The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 Cr.P.C. or otherwise. The pre-cognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four-corners of the Code. [Para 21] [1134-F-H]

3. The power of remand in terms of the Section 167 is to be exercised when investigation is not complete. Once charge-sheet is filed and cognizance of the offence is taken, the court cannot exercise its power under sub-section (2) of Section 167 of the Code. Its power of remand can then be exercised in terms of sub-section (2) of Section 309. [Para 22] [1136-D-G]

4. Appellants were granted bail. They were not in custody of the court. They could not be taken in custody ordinarily unless their bail was cancelled. The High Court was not correct in holding that as further investigation was required, sub-section (2) of Section 167 of the Code gives ample power for grant of police remand. The distinction between the power of remand in terms of sub-section (2) of Section 167 and sub-section (2) of Section 309 of the Code is apparent. [Paras 23, 24] [1137-E-G]

Raghubir Singh and others v. State of Bihar (1986) 4

A *SCC 481; CBI v. Anupam J. Kulkarni (1992) 3 SCC 141; State v. Dawood Ibrahim Kaskar*

AIR (1997) SC 2494; Dinesh Dalmia v. CBI, (2007) 8 SCC 770; Rama Chaudhary v. State of Bihar (2009) 5 SCC 366 – relied on.

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5. The Special Investigating Team already submitted its report to this Court. Nothing was pointed out as to why even the bail granted to the appellants should be cancelled so as to consider that question independently. No C **sufficient or cogent material was placed on record by the State or the Special Investigating Team in this behalf. [Paras 26, 27] [1141-C-F]**

6. In the peculiar facts and circumstances of the case, in exercise of jurisdiction under Article 142 of the D **Constitution of India, the interim direction is made absolute subject to any other or further orders that may be passed by the Sessions Judge till an additional charge sheet, if any, is filed by the Special Investigating Agency before the Sessions Judge. [Para 29] [1141-F-G]**

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Case Law Reference

(2008) 5 SCC 413	**relied on**	**Para 17**
(2009) 1 SCC 441	**relied on**	**Para 20**
F **(1986) 4 SCC 481**	**relied on**	**Para 20**
(1992) 3 SCC 141	**relied on**	**Para 20**
AIR (1997) SC 2494	**relied on**	**Para 20**
(2007) 8 SCC 770	**relied on**	**Para 20**
G **(2009) 5 SCC 366**	**relied on**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 941 of 2009

H From the Judgment and Order dated 05.09.2008 passed

by the Hon'ble High Court of Gujarat at Ahmedabad in Criminal Revision Application No. 482 of 2008. A

Nikhil Goel, Sayid M. Bakli, Sheela Goel, for the Appellant.

K. Enatoli Sema, Hemantika Wahi, for the Respondent.

The Judgment of the Court was delivered by B

S, B. SINHA, J.

Leave granted.

1. Whether with the change of an investigating authority, C police custody of the accused on remand can be sought for, although cognizance of the offence had already been taken, is the question involved herein.

2. It arises out of a judgment and order dated 5th September, 2009 passed by the High Court of Gujarat at D Ahmedabad in Criminal Revision Application No.482 of 2008 setting aside an order dated 23rd May, 2008 passed by the learned Second Additional Sessions Judge, Himatnagar in Sessions Case No.70 of 2002.

3. Shorn of all unnecessary details the fact of the matter is E as under :-

Appellants had been prosecuted for commission of an offence under Sections 302/307/395/396/397/201/435/324/ 143/147/148/149/153-A/341/ 337/427 and 120-B of the Indian F Penal Code as also under Section 135 of the Bombay Police Act.

4. The occurrence in which the appellant is involved is said to have taken place on 20th August, 2002 at Vadvasa Patia Village near Prantij. A first information report was lodged on the G same date. During course of investigation all the six appellants were arrested.

5. Indisputably, they were remanded to police custody in terms of sub-section (2) of Section 167 of the Code of Criminal H

A Procedure, 1973 (hereinafter referred to as 'the Code'). Upon completion of investigation, a charge sheet was submitted. The matter was committed to the Sessions Court. Cognizance of the offence was taken by the Sessions Judge. They were granted bail by the High Court by an order dated 30th August, 2003.

B 6. The matter, however, came up before this Court. A Bench of this Court by an order dated 26th March, 2008 passed by in Writ Petition (Crl.) No. 109 of 2003 appointed a Special Investigation Team. Pursuant to or in furtherance of the said direction the State of Gujarat issued a Notification on 1st April, C 2008 constituting a Special Investigation Team to investigate into cases arising out of Godhra incident and communal riots erupted thereafter in the year 2002.

In terms of the said Notification the SIT could work out the D modalities and the norms required to be followed for the purpose of inquiry/investigation including further investigation.

7. An application was filed on or about 22nd May, 2008 by one Himanshu Shukla, Assistant Superintendent of Police, seeking remand of the accused for a period of 14 days. The E reasons assigned therefor were that that offences under some provisions were added and investigation with respect to the said offences from the accused could not be carried out therefor in respect of certain points mentioned therein.

8. By reason of a judgment and order dated 23rd May, 2008 F the said application was rejected by the learned Sessions Judge, relevant portion whereof which reads as under:-

> "....However at present, this Court cannot entrust the physical custody of accused to the Special Investigation G Team for custodial interrogation because in the presence offence, the Hon'ble Gujarat High Court had granted regular bail vide Criminal Miscellaneous Application No.4115/ 2002 dated 30/08/2002 and in that bail order imposed certain conditions. Hence without getting cancelled the said regular bail granted by the Hon'ble High Court, this H

court cannot grant Police remand as the present accused are on bail, hence first of all Special Investigation Team is required to resort the Hon'ble High Court for cancellation of said bail order for Police custody for the purpose of further investigation as directed by the Hon'ble Highest Court of our Land.

14. Therefore, applicant-member of Special Investigation Team directed to approach the Hon'ble High Court to set aside/ cancel the said regular bail order passed by the Hon'ble High Court.

15. It is pertinent to note that Police remand can be granted only by the committal court. Therefore, after getting cancellation of bail order, applicant-member of Special Investigation Team is also directed to first of all approach the learned Judicial Magistrate First Class Prantij-committal court for Police custody in the present case because this court is a Sessions Court not competent to grant remand order unless and until that prayer is rejected by Magistrate."

9. Respondent preferred a revision application thereagainst before the High Court. By reason of the impugned judgment the High Court reversed the decision of the Sessions Judge and directed that the appellants be remanded to custody.

10. Mr. Nikhil Goel, learned counsel appearing on behalf of the appellants would contend that having regard to the provisions contained in Section 167(2) as well Section 309(2) of the Code the impugned judgment cannot be sustained.

11. Ms. K. Enatoli Sema, learned counsel appearing on behalf of the respondent-State, on the other hand, urged that keeping in view the special facts and circumstances of this case, the order of the High Court should not be interfered with.

12. The short question which arises for consideration is whether in the facts and circumstances of the case the High Court was correct in directing custodial remand of the appellants.

13. The High Court in support of its order opined :

a) Having regard to the constitution of the Special Investigating Team, further investigation is required to be made and Section 167(2) of the Code gives ample power for further investigation.

b) Further investigation is required to be made in the facts and circumstances of the case as earlier investigation was carried out in a most perfunctory manner.

c) Since new sections are added, further enquiry/ investigation would be required to be conducted in the matter and the investigating agency cannot be denied such a right and to have the custody of the appellants. For the said purpose, the fact that the appellants had been granted bail would be of no relevance.

d) Section 167 (2) and not the proviso appended to Section 309 (2) of the Code would be applicable in a case of this nature.

e) As the Special Investigating Team has the power to reinvestigate, it is not necessary to seek for cancellation of bail.

f) The committal order having been passed, the Sessions Judge should have exercised its jurisdiction under Section 397 of the Code.

14. By an order dated 22nd September, 2008 this Court directed as under :-

" Application for exempting from filing O.T. is allowed.

Issue notice.

Till further orders, further investigation by Special Investigation Team may proceed. However, the petitioner may be summoned by the Special Investigation Team

"appointed by this Court on the days fixed by it without taking the petitioners into custody and their interrogation shall be done only during day time. One or more members of the Special Investigation Team only would interrogate the petitioners and nobody else."

15. It is stated at the Bar that pursuant to the said order appellants had appeared before the concerned Sessions Judge as also the Special Investigating Team. They had visited Police Station, Prantij on 13th September, 2008 and submitted a written representation expressing their willingness to cooperate with the further investigation by the Special Investigating Team but they were not examined. Their presence, however, was required on 14th September, 2008 wherefor a letter dated 12th September, 2008 was sent by fax on 13th September, 2008. Appellants appeared before the Sessions Judge and the on 14th September, 2008 and the matter was adjourned to 22nd September, 2008. They visited the police station also on 14th and 15th September, 2008.

16. This Court while passing the order in exercise of its jurisdiction under Article 32 of Constitution of India did not direct re-investigation. This court exercised its jurisdiction which was within the realm of the Code. Indisputably the investigating agency in terms of sub-section (8) of Section 173 of the Code can pray before the Court and may be granted permission to investigate into the matter further. There are, however, certain situations, where such a formal request may not be insisted upon.

17. It is, however, beyond any cavil that 'further investigation' and 're-investigation' stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely under Articles 226 and 32 of the Constitution of India could direct a 'State' to get an offence investigated and/or further investigated by a different agency. Direction of a re-investigation, however, being forbidden in law, no superior could would ordinarily issue such a direction.

A Pasayat, J. in *Ramachandran v. R. Udhayakumar*, [(2008) 5 SCC 413], opined as under :-

> "7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of
B investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation..."

18. A distinction, therefore, exists between a re-
C investigation and further investigation.

19. If the investigating authority, in terms of the provisions of the Code, could not ask for re-investigation, we would have to proceed on the basis that this Court in its order dated 26th March, 2008 only directed further investigation.

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20. We may notice that this aspect of the matter has also been considered by this Court in *Nirmal Singh Kahlon v. State of Punjab*, [(2009) 1 SCC 441], wherein it has been opined :-

> "63. The High Court in this case was not monitoring any
E investigation. It only desired that the investigation should be carried out by an independent agency. Its anxiety, as is evident from the order dated 3-4-2002, was to see that the officers of the State do not get away. If that be so, the submission of Mr. Rao that the monitoring of an
F investigation comes to an end and after the charge-sheet is filed, as has been held by this Court in *Vineet Narain* and *M.C. Mehta (Taj Corridor Scam)* v. *Union of India,* loses all significance."

21. The investigating agency and/or a court exercise their
G jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The pre-cognizance jurisdiction to remand vested in the subordinate courts,
H therefore, must be exercised within the four-corners of the Code.

The power to remand, indisputably, is vested in a Magistrate in terms of sub-section (2) of Section 167 of the Code which reads as under :-

"167. Procedure when investigation cannot be completed in twenty-four hours.

(1) ....

(2) The Magistrate to whom all accused person is forwarded under this section may, whether he has or not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) The Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding-

(i) Ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) Sixty days, where the investigation relates to any other offence,

And, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be to released under the provisions of Chapter XXXIII for the purposes of that Chapter;

A (b) No Magistrate shall authorize detention in any custody under this section unless the accused is produced before him;

(c) No Magistrate of the second class, not specially empowered in this behalf by the high Court, shall authorize
B detention in the custody of the police.

Explanation I. For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained
C in Custody so long as he does not furnish bail.

Explanation II. If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person
D may be proved by his signature on the order authorizing detention."

22. The power of remand in terms of the aforementioned provision is to be exercised when investigation is not complete. Once charge-sheet is filed and cognizance of the offence is
E taken, the court cannot exercise its power under sub-section (2) of Section 167 of the Code. Its power of remand can then be exercised in terms of sub-section (2) of Section 309 which reads as under :-

F "309. Power to postpone or adjourn proceedings.

(1) ....

(2) If the court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to
G 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 by a warrant remand the accused if in custody:

H Provided that no Magistrate shall remand an accused

person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for, special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Explanation-1. If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for aremand.

Explanation 2. The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

23. Appellants had been granted bail. They are not in custody of the court. They could not be taken in custody ordinarily unless their bail was cancelled. The High Court, in our opinion, was not correct in holding that as further investigation was required, sub-section (2) of Section 167 of the Code gives ample power for grant of police remand.

24. The distinction between the power of remand in terms of sub-section (2) of Section 167 and sub-section (2) of Section 309 of the Code is apparent.

25. We may notice a few precedents in this behalf :-

In *Raghubir Singh and others v. State of Bihar*, [(1986) 4 SCC 481], this Court held :-

"**22.** The result of our discussion and the case-law is this:

A An order for release on bail made under the proviso to Section 167(2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under Section 309(2). The order for release on bail may however be cancelled under Section 437(5) or Section 439(2). B Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered C with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may abuse the liberty granted to D him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in 60 days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have E the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed."

F Yet again in *CBI v. Anupam J. Kulkarni*, [(1992) 3 SCC 141], K. Jayachandra Reddy, J. speaking for the Bench held as under :-

"We may, however, like to make it explicit that such re-G arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Section 167(2) to the H effect that a fresh remand for police custody of a person

already in judicial custody during investigation of a specific case cannot under any circumstances be issued, would seriously hamper the very investigation of the other case the importance of which needs no special emphasis. The procedural law is meant to further the ends of justice and not to frustrate the same. It is an accepted rule that an interpretation which furthers the ends of justice should be preferred. It is true that the police custody is not the be-all and end-all of the whole investigation but yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited police custody. The period of first fifteen days should naturally apply in respect of the investigation of that specific case for which the accused is held in custody. But such custody cannot further held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused.

[Emphasis supplied]

We may also notice that in *State v. Dawood Ibrahim Kaskar,* [AIR 1997 SC 2494], a Three Judge Bench held as under :-

"The manner in which a person arrested during investigation has to be dealt with by the Investigating 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

A detention otherwise than in police custody if he is satisfied that adequate grounds exist for such detention."

This Court in *Dinesh Dalmia v. CBI*, [(2007) 8 SCC 770], opined:-

B "38. It is a well-settled principle of interpretation of statute that it is to be read in its entirety. Construction of a statute should be made in a manner so as to give effect to all the provisions thereof. Remand of an accused is contemplated by Parliament at two stages; pre-cognizance and post-
C cognizance. Even in the same case, depending upon the nature of charge-sheet filed by the investigating officer in terms of Section 173 of the Code, a cognizance may be taken as against the person against whom an offence is said to have been made out and against whom no such
D offence has been made out even when investigation is pending. So long a charge-sheet is not filed within the meaning of sub-section (2) of Section 173 of the Code, investigation remains pending. It, however, does not preclude an investigating officer, as noticed hereinbefore, to carry on further investigation despite filing of a police
E report, in terms of sub-section (8) of Section 173 of the Code."

In *Rama Chaudhary v. State of Bihar*, [2009 (5) SCC 366], it was held:

F "9. The above said provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the
G charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

10. From a plain reading of Sub-section (2) and Sub-section (8) of Section 173, it is evident that even after
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submission of police report under Sub-section (2) on completion of investigation, the police has a right to "further" investigation under Sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "Further" is additional; more; or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not fresh report regarding the "further" evidence obtained during such investigation.

26. Furthermore in this case the Special Investigating Team has already submitted its report to this Court. Nothing has been pointed out before us as to why even the bail granted to the appellants should be cancelled so as to enable us to consider that question independently.

27. No sufficient or cogent material has been placed on record by the State or the Special Investigating Team in this behalf.

28. For the reasons aforementioned the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed.

29. We, however, in the peculiar facts and circumstances of this case, in exercise of our jurisdiction under Article 142 of the Constitution of India, make the interim direction absolute subject to any other or further orders that may be passed by the Sessions Judge till an additional charge sheet, if any, is filed by the Special Investigating Agency before the learned Sessions Judge.

D.G. Appeal allowed.