

## **Article 21 and Remand of the Accused to Police Custody: Upholding the Constitutional Thrust**

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### **Abstract**

According to Article 21 of the Constitution of India, no person shall be deprived of his life or personal liberty except according to the procedure established by law. When we read in between the lines, we will be able to understand that Article 21 allows the liberty of a person to be curtailed in accordance with the procedure established by law. Thus, when the liberty of a person is deprived, the court should mandatorily follow the procedure established by law. Further, the law states that there should not be any deviation to the procedure established by law in such a manner that it is disadvantageous to such person. The duty of the courts is nothing but to deliver justice and the judicial officers should keep in mind the interest of the victim as well as the liberty of the accused and above all the whole interest of the society. Thus, there is no doubt that liberty of a person must be safeguarded by courts of the nation.

Even though there is an element of essentiality, remand of an accused to police custody is considered as an instance where the liberty of a person is fettered. It is often considered as an important requirement especially in the investigation of serious and heinous offences .<sup>1</sup> But it should also be kept in mind that police custody does not mark the end of everything.

## **Statutory Provisions**

Section 167 of the Code of Criminal Procedure, 1973 and Rule 20 of the Kerala Criminal Rules of Practice lay down the procedure for remanding an accused to the police custody.

A person who is arrested without a warrant by a police officer shall not be detained in custody for a longer period than which is reasonable and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the court of the Magistrate except in the absence of a special order of Magistrate under Section 167. According to Section 167(1) of the Code, whenever any person is arrested and detained in custody, and the police officer finds that investigation cannot be completed within the time period of twenty four hours as fixed by section 57, and there are sufficient grounds for believing that accusation is well founded, the officer in charge of the police station or the police officer making the investigation, shall transmit to the nearest Judicial Magistrate a copy of the entries in the diary relating to the case, and shall at the same time forward the accused to such Magistrate. Further provided that such police officer is not below the rank of sub-inspector.

Section 167(2) of the Code provides that, irrespective of the jurisdiction of the Magistrate to try the case, the Magistrate to whom an accused person is forwarded, may from time to time, authorize the detention of the accused in such custody, as he thinks fit, for a term not exceeding fifteen days in the whole. If the Magistrate 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. According to clause (b) of the first proviso to Section 167(2) of the Code, a Magistrate can authorize the detention of the accused in police custody only when the accused is produced in person before him for the first time and subsequently every time till the accused remains in police custody.

Section 167(3) of the Code provides that, a Magistrate who authorize the detention in police custody shall record the reasons for doing so and Section 167(4) provides that, any Magistrate making such order, other than the Chief Judicial Magistrate shall forward a copy of his order along with the reasons for making it, to the Chief Judicial Magistrate.

Rule 20(1) of the Kerala Criminal Rules of Practice, 1982 provides that remand to police custody shall not be granted by the Magistrates unless they are satisfied that there are sufficient

grounds for doing so. Remand should not be granted merely based on a general statement made by the investigating officer that the accused may be able to give additional information.

### **Police Custody – Mandatory or Not**

Remand to police custody is an essential tool in appropriate cases to ensure an effective investigation. It has multiple uses such as questioning the accused with reference to the circumstances of the case and obtaining statements which are relevant in the future prosecution. In some cases, interrogation in police custody would be needed to ensure a successful prosecution against the accused.<sup>2</sup> Interrogation in police custody of a suspected person is more stimulation oriented than mere questioning him. Efficiently putting questions to the accused would be of extreme advantage in the progress and development of the investigation which enable the police to get many useful information and also materials which would have been secretly concealed.<sup>3</sup>

For the progress of investigation, the police may have to put questions to the accused regarding motive, preparation, and commission of the crime as well as connection of other persons to the crime. This may help the police to get information leading to the discovery of material facts.

### **Analyzing the difference between police custody and judicial custody**

The Honorable Supreme Court has explained the difference between police custody and judicial custody in the famous case *Gautam Navlakha v. National Investigation Agency*.<sup>4</sup> The court held that when a person is handed to police custody, he passes into the exclusive custody of the police officers. Interrogation in police custody is unavoidable to excavate the truth in a given case. But the Magistrate needs to be fully convinced regarding the need for such police custody. Reasons for the same should also be recorded.

Judicial custody is nothing but the custody in jail. It is also referred to as jail custody. Thus, jail custody and judicial custody are the same. The person in judicial custody is indirectly under the control of the court, through the jail authorities. The police officer will not have access to a person in judicial custody unless permission is obtained from the court.

### **Application for Police Custody**

The application for police custody shall be made by the investigating or other police officer, provided that such police officer shall not be below the rank of a sub inspector of police. The application shall be accompanied by an affidavit and it should briefly state the prior history of the investigation and the chance of obtaining further clues from the accused in custody. A general statement made by the police officer is not sufficient.

It is not necessary for the police officer to produce the whole case diary along with the application for the remand of the accused. It is sufficient to submit the relevant extracts of the entries to the court. Copies of the entries help the Magistrate to get necessary information based on which he can take the decision whether the accused should be detained in custody or not.<sup>5</sup> Mere non submission of the extracts will not invalidate the action of the Magistrate remanding the accused to police custody.<sup>6</sup>

The investigating officer should also comply with statutory requirements under section 41 of the code, as per the decision of the Apex court in *Amesh Kumar v. State of Bihar* <sup>7</sup> and the court should be satisfied that the arrest was necessary.

### **At What Stage Police Custody Should be Granted**

The first proviso to Section 167(2) of the Code provides that only judicial custody can be granted after the expiry of first fifteen days and that police custody can be granted only during the period of first fifteen days from the date of production of the accused before the Magistrate, if found necessary. There cannot be any detention in the police custody after the expiry of the first fifteen days even when some more offences committed by the accused in the same transaction come to light at a later stage. If the investigating officer finds that further interrogation of the accused is mandatory after the expiry of the said period of fifteen days, there is no bar for interrogating the accused who is in judicial custody.<sup>8</sup> If the investigation is shifted from one investigating agency to another, police custody of the accused cannot be extended and it can only be in the first fifteen days and not thereafter. The same principle applies when new offences are added against the accused during investigation.

The above restrictions relating to police custody regarding the period of fifteen days is applicable on the interpretation of Section 167 of the Code and if there are special statutory provisions regarding the custody of the accused, then different considerations may arise based on the language employed in those provisions.

### **Remand of an accused – Judicial or Administrative Function**

Remanding an accused is fundamentally a judicial function and the Magistrate does not act in executive capacity. While exercising this judicial act, the Magistrate should be satisfied that materials placed before him justify such a remand and there exist reasonable and sufficient grounds to commit the accused to custody. While dealing with an application for remand to police custody, the Magistrate should apply his mind and should not act in a mechanical manner.<sup>9</sup> The Magistrate has the duty to preserve the liberty of the accused guaranteed under law.<sup>10</sup> It is the duty of the investigating agency to satisfy the court that without police custody, it would be impossible to proceed with the investigation and only in such an event, police custody would be justified.<sup>11</sup>

### **Legal Assistance to the Accused**

When a person is arrested and produced before a Magistrate, the question of personal liberty of the accused comes to question. It is the stage at which the accused gets the first opportunity to apply for bail and obtain his release. At this stage, competent legal advice and representation is essential and no procedure can be said to be just, fair and reasonable which denies legal advice and representation to him at that stage.<sup>12</sup> It is the duty of a Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that the accused has a right to consult and be defended by a legal practitioner. If the accused has no means to engage a lawyer of his choice, then legal assistance shall be provided at the expense of the state.<sup>13</sup>

The right to consult a legal practitioner should not be interpreted as permitting the presence of a lawyer during police interrogation.<sup>14</sup> In *Nandini Satpathy v. P L Dani* <sup>15</sup> the Supreme Court

had held that if the accused person wishes to have his lawyer along with him during the examination by the police, that facility shall not be denied. But Section 41D was inserted in the Code in 2009 with effect from 01/11/2010 and it provides that, when any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.

In *Muhammed Shafi v. State of Kerala*<sup>16</sup> the High Court of Kerala granted permission to the accused persons to meet their lawyer for fifteen minutes on alternate days during the period of police custody but clearly specified that the presence of the lawyer shall not be allowed during their interrogation in police custody.

### **Conclusion**

Police custody of a person is granted only when it becomes necessary to conduct investigation efficiently and effectively. It is the duty of the court to ensure a balance between personal liberty of the accused and the need for conducting proper investigation to excavate the truth. The period of police custody should be limited to the minimum keeping in mind the facts and circumstances of each case.

## **Endnotes**

1. Central Bureau of Investigation v. Anupam J Kulkarni [ 1992 KHC 863: AIR 1992 SC 1768]
2. Gautam Navlakha v. National Investigation Agency [ 2021 KHC 6278 (SC): 2021 (4) KHC SN 9]
3. State v. Anil Sharma [ 1997 KHC 1035: AIR 1997 SC 3806]
4. 2021 KHC 6278 (SC): 2021 (4) KHC SN 9: 2021 KHC Online 6278
5. Central Bureau of Investigation v. Anupam J Kulkarni [ 1992 KHC 863: AIR 1992 SC 1768]
6. Fr. Jose Poothrikkayil v. Union of India [ 2008 (4) KHC 902: 2009 (1) KLD SN 22]
7. Amesh Kumar v. State of Bihar [ 2014 (3) KHC 69: AIR 2014 SC 2756: 2014 (2) KLD 118]
8. Devender Kumar v. State of Haryana [ 2010 KHC 4355: (2010) 6 SCC 753], Budh Singh v. State of Punjab [2000 KHC 764: (2000) 9 SCC 266]
9. Manubhai Ratilal Patel v. State of Gujarat [ 2012 KHC 4545: AIR 2013 SC 313: 2012 (4) KHC SN 27: 2012 (2) KLD 894]
10. Amesh Kumar v. State of Bihar [ 2014 (3) KHC 69: AIR 2014 SC 2756: 2014 (2) KLD 118]
11. Gautam Navlakha v. National Investigation Agency [ 2021 KHC 6278 (SC): 2021 (4) KHC SN 9]
12. Khatri v. State of Bihar [ 1981 KHC 517: AIR 1981 SC 928]
13. Mohammed Amir Kasab @ Abu Mujahid [ 2012 KHC 4467: AIR 2012 SC 3565: 2012 (2) KLD 637]
14. Mohammed Amir Kasab [ 2012 KHC 4467]
15. 1974 KHC 532: AIR 1978 SC 1025]
16. Order dated 21/10/2022 in CrI. R.P No. 725 of 2022

