

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC NO.3703 OF 2022

(From the order dated 15th November, 2022 passed by learned Special Judge, Balasore in Special Case No.280/2022)

Sk. Hussain and others

... Petitioners

-versus-

State of Orissa

... Opposite Party

Advocates appeared in the case through hybrid mode:

For Petitioners: Mr.D.P.Dhal,
Sr. Advocate

-versus-

For Opp.Party: Mr.S.K.Mishra,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
19.5.2023.

Sashikanta Mishra,J. When can a person said to be under arrest?

This is the question to be determined in the present

application filed under Section 482 of Cr.P.C. The Petitioners are accused persons in Special Case No.280/2022 arising out of Sahadevkhunta P.S. Case No.352/2022 of the Court of learned Special Judge, Balasore under Section 21(c)/29 of the N.D.P.S. Act.

2. The brief facts of the case are that on 27th October, 2022, the I.I.C. of Sahadevkhunta P.S. received information that a drug deal is due to take place at a lonely place in Fuladi By-pass area of Balasore Town. A raid was conducted after observing the required formalities and the present Petitioners were nabbed while carrying huge quantity of brown sugar. Other culprits managed to flee from the spot. On search being conducted of the accused persons, four packets containing 1101 gram of brown sugar was recovered, which was seized. After completion of the necessary formalities, the Petitioners were arrested and taken to the Police Station. On the next day, the accused persons were sent for medical examination and

thereafter forwarded to the residential office of the learned Special Judge, Balasore.

3. A petition was filed on 4th November, 2022 basically alleging therein that the Petitioners were not produced before the learned Special Judge within 24 hours of their arrest. It was also alleged that they were actually arrested between 5.40 P.M. to 6.20 P.M. during which time the seizure lists were prepared and thereafter they were kept in Sahadevkhunta P.S. However, they were forwarded to the Court of the Special Judge in his residential office after 11 P.M. on the next day i.e. on 28th October, 2022. As such the statutory requirement of producing the arrested accused before the Court within 24 hours was clearly violated. As regards the time taken for journey, it was stated in the petition that the distance from Sahadevkhunta P.S to the Court is within 150 to 200 mtrs. and the distance between Fakirmohan Medical College and Hospital and the Court is also less than 2 km. Therefore, by no stretch of imagination the time

taken for journey could be more than half an hour at the most. On such grounds it was pleaded that the accused persons should be released on bail having regard to the provisions of Sections 57 and 167 of Cr.P.C. read with Article 22 of the Constitution of India.

4. Learned Special Judge heard the petition and after considering the rival contentions, held vide order dated 15th November, 2022 that there is no cogent material on record to show that the accused persons were detained in police custody for more than 24 hours from the time of their arrest. Learned Special Judge also took note of the gravity of the alleged offence and the bar under Section 37 of the N.D.P.S. Act and rejected the petition. The said order is impugned in the present application.

5. Heard Mr. D.P.Dhal, learned Senior counsel, with Mr. B.S.Dasparida, learned counsel for the Petitioner and Mr. S.K.Mishra, learned Addl. Standing Counsel for the State.

6. Mr. Dhal submits that the moment the Petitioners were apprehended the same amounts to arrest whatever may be the time mentioned in the arrest memo because their liberty must be held to have been curbed from that moment onwards. Therefore, regardless of the time mentioned in the arrest memo prepared subsequently, the Petitioners must be deemed to have been arrested, the moment they were apprehended and searched. Referring to the F.I.R. and other connected documents, Mr. Dhal submits that Police received information around 4.30 P.M. and reached the spot and apprehended the Petitioners at 5.00 P.M. The search of the Petitioners was carried out at 5.30 P.M. and three seizure lists were prepared at 5.40 P.M., 6 P.M. and 6.20 P.M. The F.I.R. was lodged at 7.30 P.M. The arrest memos were prepared at 11 P.M. They were sent for medical examination on the next day at 8.30 P.M. and were ultimately produced before the Special Judge in his residential Office at 11.50 P.M. on the next day. On such basis it is contended by Mr. Dhal that the relevant time for

consideration would be 5 P.M. i.e. the time when the Petitioners were apprehended since they lost their right to go wherever they pleased from that moment onwards. Mr. Dhal further contends that preparation of the arrest memo is just a formality having no bearing on the actual time of arrest. Thus, the Petitioners having been apprehended at 5.P.M. must be deemed to have been arrested at that time and therefore, they should have been produced before the Special Judge within 24 hours after accounting for the time taken for journey. To buttress his contentions, Mr. Dhal has relied upon several decisions, which would be discussed in detail at the appropriate place.

7. Mr. S.K.Mishra, on the other hand, has argued that there can be no deemed arrest within the meaning of NDPS Act. The Act authorizes the Police Office to detain and search any person if he has reason to believe that the said person has committed an offence punishable under the Act. Referring to the provision of Section 42(1)(d) of the Act, Mr. Mishra would argue

that liberty has been given to the Police Officer to detain and search and if he thinks proper, to arrest any person whom he has reason to believe to have committed any offence punishable under the Act. On such basis, Mr.Mishra contends that the initial detention of the Petitioners by the Police for the purpose of search and seizure etc. cannot be treated as arrest and that arrest must be held to have been effected only when they were formally arrested and the memo of arrest was prepared.

8. It would be apposite to deal with the contentions raised by learned State counsel at the outset since he has referred to the provisions of the NDPS Act. As already stated, Mr. Mishra has referred to Section 42 of the Act, which is quoted herein below;

“42. Power of entry, search, seizure and arrest without warrant or authorisation.—

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in

this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

(Emphasis supplied)

9. This Court fails to see as to how the provision quoted above can apply to the facts of the present case inasmuch as admittedly, the search, seizure and arrest of the Petitioners was affected not by entering into any building conveyance or place but in a public place i.e. Fuladi By-pass road. There is a specific provision namely, Section 43 of the Act governing the power of seizure and arrest in public place, which is quoted herein below;

“43. Power of seizure and arrest in public place.—Any officer of any of the departments mentioned in section 42 may—

(a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company. Explanation.—For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.”

10. Of course, clause (b) is similar to clause (d) of sub-rule (1) of Section 42 inasmuch as the said

provision confers power on the police officer to detain and search any person whom he believes to have committed an offence punishable under the Act and if such person is found to be in possession of a contraband, arrest him. Such being the provision, what would then be the effect of Section 57 read with Article 22(2) of the Constitution of India and Section 57 of Cr.P.C. There is no dispute that the NDPS Act does not contain any provision akin to the provisions referred to herein before of the Cr.P.C. but then Section 36-C of the NDPS Act provides that the provisions of Cr.P.C. shall apply to the proceedings before Special Judge. For immediate reference, Section 36-C is quoted herein below;

“36-C.Application of Code to proceedings before a Special Court-

Save as otherwise provides in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court,

shall be deemed to be a public Prosecutor.”

At this stage it would be useful to refer to relevant provision of Cr.P.C., which is Section 57 and is quoted herein below;

“57. Person Arrested not to be detained more than twenty-four hours.- No police officer shall detain in custody a person arrested without warrant for a longer period than under all circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court.”

This provision finds express sanction of the Constitution through Article 22(2), which is quoted herein below;

“22(2). Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest of the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.”

11. Thus, compliance of Section 57 of Cr.P.C. is in fact a compliance of the Constitutional provision referred above and therefore, mandatory. In other words, if the provisions as above are found to have been violated, the same would amount to illegal detention entitling the detainee to be set at liberty.

12. Now coming to the contentions raised by learned Senior Counsel, this Court takes note of the fact that as per the F.I.R., upon receipt of credible information around 4.30 P.M. the Police Party rushed to the spot and detained the present Petitioners while others managed to flee. On search, huge quantity of contraband was recovered from the possession which was weighed and seized as per the seizure lists enclosed under Annexure-2 series. The seizure lists appear to have been prepared at 5.40 P.M., 6 P.M. and 6.20 P.M. The memo of arrest prepared in respect of the Petitioners, copies of which are enclosed also under Annexure-2 series, shows that the same were prepared at 11 P.M. The F.I.R. inter alia, mentions as under;

“xxx xxx xxx xxxx xxx xxx

On arrival of us, some of the persons could manage to flee away from the spot in a white colour car and other persons were trying to flee away from the spot by riding in two motor cycles and another person tried to run by holding a heavy back pack bag. Immediately we caught hold the person, who was running by foot, other persons who fled away by riding two wheelers were also apprehended after a little chase. On being asked, they disclosed their names as (1) Ayub of village-Bada Khedi at present at Kitiyani, Madhya Pradesh (2) Sk. Hussain (3) Laden @ Sk. Safiq, (4) Sk. Raju, (5) Badu @ Sk. Smeer and (6) Rintu Tarei all are of village Arad Bazar, P.S- Sahadevkhunta, Dist – Balasore.

xxx xxx xxx xxx.”

(Emphasis supplied)

The question is, could the petitioners have left the place or gone wherever they pleased from that time onwards? Obviously not.

It is evident that the moment the Petitioners were apprehended, they lost their liberty inasmuch as they could not leave the place any more having come under the control of the Police party.

13. What would be the effect of such a situation is no longer res integra. In the case of **Niranjan Singh v. Prabhakar Rajram Khas** reported in 1980 (2) SCC 559, the Apex court held as follows;

“7. When is a person in custody, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before

the Sessions Judge and the jurisdiction to grant bail thus arose.”

14. Further, in the case of ***Directorate of Enforcement v. Deepak Mahajan***, reported in 1994 SCC Cri 785, the Apex Court observed as follows:

“46. The word ‘arrest’ is derived from the French word ‘Arreter’ meaning “to stop or stay” and signifies a restraint of the person. Lexicologically, the meaning of the word ‘arrest’ is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in Roshan Beevi v. Joint Secretary, Government of T.N. [1984 Cri LJ 134 : (1984) 15 ELT 289 : 1983 MLW (Cri) 289 (Mad)] had an occasion to go into the gamut of the meaning of the word ‘arrest’ with reference to various textbooks and dictionaries, the New Encyclopaedia Britannica, Halsbury's Laws of England, A Dictionary of Law by L.B. Curzon, Black's Law Dictionary and Words and Phrases. On the basis of the meaning given in those textbooks and lexicons, it has been held that:

“[T]he word ‘arrest’ when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality

of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested.”

15. The aforesaid judgment was relied upon by a division Bench of this Court in the case of **Prabir Kumar Das v. State of Orissa**; reported in 2007 (38) OCR 585 and it was observed as follows;

“Learned Counsel for the State submitted that Narayan was not arrested but even assuming that to be true, there is no doubt that he was illegally detained. In this connection, a reference may be made to the decision of the Supreme Court in the case of Directorate of Enforcement v. Deepak Mahajan and Anr. In paragraph-48 of the said judgment, the learned Judges have explained the connotation of the word 'arrest'. After considering various

judgments, the learned Judges have come to the conclusion that the word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The learned Judges have further clarified that the question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go wherever he pleases."

16. Thus, the ratio laid down in the cases referred above is that the moment the liberty of a person is curbed or curtailed, he is said to be under arrest. As regards arrest, the same has not been defined in Cr.P.C., but Section 46 of the Cr.P.C. provides the manner of making arrest as follows;

"46. Arrest how made.

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not

accused of an offence punishable with death or with imprisonment for life.”

17. What had transpired at the spot at the relevant time as mentioned in the F.I.R. has already been referred to hereinbefore. Thus, there can be no manner of doubt that the Petitioners having been apprehended around 5 P.M. or thereabouts must be deemed to have been arrested at that time. The effect of endorsing the time of arrest by the arresting officer in the memo of arrest was considered by a learned Single Judge of the Bombay High Court in the case of **Ashfak Hussain Allah Detha @ Siddiqui v. The Asst. Collector of Customs, Bombay**; reported in (1990) 1 Bom CR 451, wherein it was held as follows;

“10. It is thus clear that arrest being a restraint on the personal liberty, it is complete when such restraint by an authority, commences. [The Law Lexicon—P. Ramanatha Aiyar Reprint Edition 1987, page 85.] Whether a person is arrested or not does not depend on the legality of the act. It is enough if an authority clothed with the power to arrest, actually imposes the restraint by physical act or words. Whether a person is arrested depends

on whether he has been deprived of his personal liberty to go where he pleases. [Section 37(1) of the N.O.P.S. Act.] It stands to reason, therefore, that what label the Investigating Officer affixes to his act of restraint is irrelevant. For the same reason, the record of the time of arrest is not an index to the actual time of arrest, The arrest commences with the restraint placed on the liberty of the accused and not with the time of “arrest” recorded by the Arresting Officers.”

18. Thus imposition of restraint, in the present case by physical act of apprehension of the Petitioners, completes the process of arrest. Therefore, mere mentioning of a different time in the memo of arrest prepared subsequently, in the present case nearly 6 hours after the apprehension of the petitioners, cannot have any relevance whatsoever more so as it only serves to formalize the arrest already effected long back. Thus, on the face of the facts mentioned above, the Petitioners must be deemed to have been arrested around 5 P.M. on 27th October, 2022 and therefore, they ought to have been produced before the Special Judge within 24 hours thereafter excluding the time taken for journey to the Court. It is stated at the bar

that the distance between the spot i.e. Fuladi By-pass and/or the Police Station to the Court is not much and in any case shall not take more than half an hour to reach. Even allowing two hours as the time taken for journey from the spot and the medical examination of the accused persons, the accused persons should have been produced latest by 7 P.M. on the next day. This Court however, finds from the record that the accused persons after being arrested at the spot were taken to P.S. and detained there for the night and for the entire day. On 28th October, 2022, they were taken to the hospital for medical examination at 8 P.M. What was the reason for such inordinate delay has gone unexplained. In any case, the time of medical examination is also found to be beyond 24 hours. As stated earlier, the Police Officer concerned was under Constitutional obligation to forward the Petitioners to the Court of Special Judge within 24 hours, but this Court finds that the Constitutional provision was seriously violated, for which the entire period of detention has to be treated as illegal.

19. Reading of the impugned order shows that learned Special Judge has rejected the petition basically on four grounds;

(i) There is no material on record to show that the accused persons were detained in police custody for more than 24 hours;

(ii) Since the I.O. brought the accused persons to the Court after the office hour some more time must have been consumed in contacting the dealing Assistant doing paper works etc.;

(iii) The Court can grant bail only in exercise of power under section 439 of Cr.P.C. keeping the bar under Section 37 of the NDPS Act in mind and

(iv) the Accused persons have committed offence of serious and grave in nature for which releasing them on such 'flimsy' ground of illegal detention because of 2 to 3 hours delay will encourage other antisocial in the society.

20. In view of what has been discussed in detail hereinbefore, it is more than evident that learned Special Judge has completely misdirected himself in delving upon irrelevant considerations ignoring thereby the seminal issue involved. Moreover, each of the grounds cited by him are found to be without any basis. As has already been discussed hereinbefore, there are enough materials on record to show that the accused persons were detained in police custody for more than 24 hours. Secondly, the finding of the learned Special Judge that some time may have been considered for doing paper works etc. is nothing but granting undue leverage to the investigating officer and the staff of the Court involved in the process who are guilty of committing gross illegality. It was as if learned Special Judge was trying to offer explanation on behalf of the investigating/forwarding officer for the apparent delay. Thirdly, the bar under Section 37 of the N.D.P.S. Act could not have been invoked in a case of illegal detention. Finally, by referring to the ground of illegal detention as 'flimsy', learned Special Judge

has only displayed a lack of sensitivity to the Constitutional obligation imposed upon him as a Court of law. This Court has therefore, no hesitation in holding that the impugned order cannot be sustained in the eye of law.

21. Having held thus, the question that arises is what relief the Petitioners are entitled to. Since the detention of the Petitioners is found to be illegal, there can be no other option than to order their release forthwith. Reference may also be had in this regard to the provision under Article 21 of the Constitution of India which guarantees the fundamental right to life and liberty. It is reiterated that the right to liberty is one of the most cherished objects of the Constitution of India which overrides all other considerations and therefore, cannot be taken lightly. Therefore, the Petitioners have to be set at liberty.

22. In the result, the CRLMC is allowed. The impugned order is set aside. Learned Special Judge is directed to release the Petitioners on bail forthwith on

such terms and conditions as he may deem fit and proper to impose including the following conditions;

(i) The Petitioners shall appear before the I.I.C. of Sahadevkhunta P.S twice a week till conclusion of trial and such fact shall be certified by the I.I.C. to the learned Special Judge once in every fortnight.

(ii) They shall personally appear before the Court below on each date of posting of the case without seeking representation and in case of even a single default, necessary orders shall be passed to take them to custody.

23. Before parting with the case, this Court would like to express its concern at the lackadaisical approach of the Investigating Officer in dealing with such a grave offence i.e. of illegal possession of Brown Sugar to the tune of 1 Kg. 101 grams and whose default in acting with promptitude and diligence enured to the benefit of the accused persons. This is a

fit case for the higher police authorities to take serious note of and to take all necessary steps to prevent such gross lapses from recurring. A copy of this Judgment be forwarded to the D.G. of Police, Odisha for doing the needful at his end.

.....
(**Sashikanta Mishra**)
Judge

Ashok Kumar Behera

