GAUTAM NAVLAKHA
v.
NATIONAL INVESTIGATION AGENCY

(Criminal Appeal No. 510 of 2021)

MAY 12, 2021

[UDAY UMESH LALIT AND K. M. JOSEPH,* JJ.]

Constitution of India: Art.21 – House arrest – When a citizen is placed on house arrest, which has the effect of depriving him of any freedom, it will not only be custody but it would involve depriving him of the fundamental freedoms unless such freedoms are specifically protected – In the case of a person undergoing a house arrest and in the teeth of an absolute prohibition, in the facts of the case forbidding him from moving outside his home, the hallmark of custody described in the case of incarceration is equally present – The right under Art.21 is undoubtedly available to citizens and non-citizens – While personal liberty is a wide expression capable of encompassing within its fold, many elements apart from the right to be protected against the deprivation of liberty in the sense of the freedom from all kinds of restraints imposed on a person, the irreducible core of personal liberty, undoubtedly, consist of the freedom against compelled living in forced custody.

Code of Criminal Procedure, 1973: s.167 – Remedies open to an accused in the case of remand under s.167 – Held: An order under s.167 is purely an interlocutory order – No revision is maintainable – A petition under s.482 cannot be ruled out – When a person arrested in a non-bailable offence is in custody, subject to the restrictions, contained therein, a court other than High Court or Court of Session, before whom he is brought inter alia*, can release him on bail under s.437 – s.439 deals with special powers of High Court and court of session to grant bail to a person in custody – The said courts may also set aside or modify any condition in an order by a Magistrate – Ordinarily, when the court considers a request for remand there would be an application for bail – It is for the court to grant bail failing which an order of remand would follow.*

Code of Criminal Procedure, 1973: ss.437, 439 – While the remand report is considered by the Magistrate the application for bail may

* Author

be moved under s.439 instead of moving under s.437 in view of the restrictions contained therein – Though an application under s.397 would not lie against the remand, an application for bail would lie under s.439 – Therefore, ordinarily the accused would seek bail and legality and the need for remand would also be considered by the High Court or court of session in an application under s.439 – No doubt the additional restrictions under s.43(D)(5) of UAPA are applicable to citizens of India in cases under the said law.

Code of Criminal Procedure, 1973: s.167 – Whether a Writ of Habeas Corpus *lies against an order of remand under s.167 of the Code – A* Habeas Corpus *petition is one seeking redress in the case of illegal detention – It is intended to be a most expeditious remedy as liberty is at stake – If the remand is absolutely illegal or the remand is afflicted with the vice of lack of jurisdiction, a Habeas Corpus petition would indeed lie – Equally, if an order of remand is passed in an absolutely mechanical manner, the person affected can seek the remedy of Habeas Corpus – Barring such situations, a Habeas Corpus petition will not lie.*

Code of Criminal Procedure, 1973: ss.167, 439 – Whether superior courts (including High Court) can exercise power under s.167 of the Code – Can broken periods of custody count for the purpose of default bail – Though the power is vested with the Magistrate to order remand by way, of appropriate jurisdiction exercised by the superior Courts, (it would, in fact, include the Court of Sessions acting under s.439) the power under s.167 could also be exercised by Courts which are superior to the Magistrate – While ordinarily, the Magistrate is the original Court which would exercise power to remand under s.167, the exercise of power by the superior Courts which would result in custody being ordered ordinarily (police or judicial custody) by the superior Courts which includes the High Court, would indeed be the custody for the purpose of calculating the period within which the charge sheet must be filed, failing with the accused acquires the statutory right to default bail – In such circumstances, broken periods of custody can be counted whether custody is suffered by the order of the Magistrate or superior courts, if investigation remains incomplete after the custody, whether continuous or broken periods pieced together reaches the requisite period; default bail becomes the right of the detained person.

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Code of Criminal Procedure, 1973: s.167 – Transit order, effect of – The remand pursuant to a transit remand cannot be judicial custody as the police is exclusively entrusted with the man to produce him before the Magistrate having jurisdiction – It is therefore, police custody – If it is thought that during the journey, it is impermissible to interrogate the accused on the basis of transit order, then such interrogation would equally be impermissible during the time of journey permitted without obtaining an order under s.167 – If also during such journey, the accused volunteers with a statement otherwise falling under s.27 of Evidence Act, it would be one when the accused is in the custody of the police – If it is police custody then, the order of the Magistrate granting transit remand would set the clock ticking to complete the period for the purpose of default bail.

Code of Criminal Procedure, 1973: s.428 – Period of detention, set off of – Held: s.428 enables a person convicted to have the period of detention which he has undergone during the investigation, enquiry or trial set off against the term of imprisonment.

Code of Criminal Procedure, 1973: s.167 – Detention of an accused – Police officer can detain accused and question him in the course of the investigation – However, the officer cannot detain the accused beyond 24 hours excluding the time taken for the journey from the place of arrest to the place where the Magistrate who is competent to try the case sits – If he cannot so produce the accused and the investigation is incomplete, the officer is duty bound to produce the arrested person before the nearest Magistrate – The nearest Magistrate may or may not have jurisdiction – He may order the continued detention of the arrested person based on the request for remand – He would largely rely on the entries in the case diary and on being satisfied of the need for such remand which must be manifested by reasons – The Magistrate can order police custody during the first 15 days (in cases under UAPA, the first 30 days) – Beyond such period, the Magistrate may direct detention which is described as judicial custody or such other custody as he may think fit – It is, no doubt, open to a Magistrate to refuse police custody completely during the first 15 days – He may give police custody during the first 15 days not in one go but in instalments – It is also open to the Magistrate to release the arrested person on bail – The scheme further under s.167 is that

custody (detention/ custody) as authorized under such provisions, if it exceeds the limit as to maximum period without the charge sheet being filed, entitles the person in detention to be released on default bail – In fact, the person may on account of his inability to offer the bail languish in custody but he would undoubtedly be entitled to count the entire period he has spent in detention under orders of the Magistrate/ Superior Court exercising powers under s.167 for the purpose of set off under s.428.

Code of Criminal Procedure, 1973: s.167 – Effect of illegality in the order under s.167 – An order purports to remand a person under s.167 – It is made without complying with mandatory requirements thereunder – It results in actual custody – The period of custody will count towards default bail. s.167(3) mandates reasons be recorded if police custody is ordered – There has to be application of mind – If there is complete non-application of mind or reasons are not recorded, while it may render the exercise illegal and liable to be interfered with, the actual detention undergone under the order, will certainly count towards default bail – Likewise, unlike the previous Code (1898), the present Code mandates the production of the accused before the Magistrate as provided in clause (b) of the proviso to s.167(2) – Custody ordered without complying with the said provision, may be illegal – But actual custody undergone will again count towards default bail.

Code of Criminal Procedure, 1973: s.167 – If the Court purports to invoke and act under s.167, the detention will qualify even if there is illegality in the passing of the order – What matter in such cases is the actual custody – However, when the Court does not purport to act under s.167, then the detention involved pursuant to the order of the Court cannot qualify as detention under s.167.

Code of Criminal Procedure, 1973: s.167 – Judicial custody and police custody – Difference between – When a person is remanded to police custody, he passes into the exclusive custody of the police officers – 'Custodial Interrogation' as is indispensable to unearth the truth in a given case is the substantial premise for such custody – The Magistrate must undoubtedly be convinced about the need for remand to such custody – Reasons must be recorded – Judicial custody is ordinarily custody in a jail – It is referred to also as jail custody – The jails come under the Department of Jails and staffed by the employees of the said department – The person

in jail custody is therefore indirectly, through the jail authorities, under the custody of the Court – The police officer does not have access to a person in judicial custody as he would have in the case of a person in police custody – Unless permission is sought and obtained which would apparently be subject to such conditions as a court places the person in judicial custody cannot be questioned by the police officers – Now in a case, ordinarily, instead of ordering a remand a person can be released on bail – As to whether a case is made out is a question to be decided in the facts of each case – There may be restrictions put in regard to the grant of bail by law which must be observed – But if bail is not granted then a person arrested by the police in connection with the cognizable offence must be remanded to custody – This is inevitable from the reading of s.167 of the Cr.P.C.

Code of Criminal Procedure, 1973: s.167 – Judicial custody of accused – The concept of house arrest as ordered in this case with the complete prohibition on stepping out of the Appellants premises and the injunction against interacting with persons other than ordinary residents, and the standing of guard not to protect him but to enforce the condition would place the Appellant under judicial custody – s.167 speaks of 'such custody as it thinks fit' – If it is found ordered under s.167 it will count.

Code of Criminal Procedure, 1973: s.167 – Does the magistrate/ Court consider the legality of arrest/detention while acting under s.167 – Held: Art.22(1) creates a fundamental right on a person arrested to be not detained without being informed as soon as may be of the grounds for such arrest – It also declares it a fundamental right for the detained person to consult and be defended by a legal practitioner of his choice – Now, detention follows arrest – What Art.22(1) is concerned with is that the detention must be supported by the fulfilment of the rights referred to therein – Strictly speaking, therefore, Art.22(1) does not go to the legality of the arrest – Constitution of India – Art.22(1).

Code of Criminal Procedure, 1973: s.167 – Impact of non-accessibility to the appellant for the investigating agency during house arrest and the effect of the appellant being in police custody from 14.4.2020 to 25.4.2020 – The very purpose of custody under s.167 is to enable the police to interrogate the accused and if that opportunity is not present then such period of custody as alleged

would not qualify for the purpose of s.167 – In other words, the argument appears to be that the object and scheme of s.167 is that an investigation is carried out with opportunity to question the accused and still it is not completed within the period of 90 days whereupon right to default bail arises – By the proceedings on 28.08.2018 when the petition was filed, the High Court stayed the transit remand and the appellant could not be taken to Maharashtra – By the very same order, the High Court placed the appellant under house arrest – No access was provided to the investigating agencies to question the appellant – In such circumstances, the period undergone as house arrest should be excluded.

Prisons: Conditions relating to jails and prisoners – Alarming state of affairs as far as occupancy rate is concerned – Overcrowding in jails, discussed.

Dismissing the appeal, the Court Held:

Whether the period of 34 days spent in house arrest by the appellant is to be counted towards the period of 90 days under Section 167 Cr.P.C.

1.1 Under Section 156 Cr.P.C., any police officer in charge of a police station can without order of a Magistrate investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station have the power to try. Section 157 dealing with Procedure for investigation contemplates *inter alia* the power to proceed, to the spot, to investigate the facts and circumstance of the case, and if necessary, take measures for the discovery and arrest of the offender. With the proviso in the Cr.P.C., 1973, in Section 76, in the case of arrest under a warrant, the person is to be produced before the Court within 24 hours with the exclusion of time taken for travelling. Such a proviso was absent in Section (81) of the Cr.P.C., 1898. [Paras 24, 27]

State of U.P. v. Abdul Samad **AIR 1962 SC 1506 : [1962] Suppl. 3 SCR 915 – held inapplicable.**

1.2 In India, the concept of house arrest has its roots in laws providing for preventive detention. Section 5 of the National Security Act, 1980, is a law providing for preventive detention. The safeguards under Article 22(1) and Article 22(2) are not

available under a law providing for preventive detention. 'House arrests' have been resorted to in India, in the context of law relating to 'preventive detention'. What is however relevant is that preventive detention is also a form of forced detention. House arrest is also custody and forced detention. [Paras 43, 45]

A.K. Roy and Ors. v. Union of India (UOI) and Ors. **AIR (1982) SC 710 : [1982] 2 SCR 272 – followed.**

State of Rajasthan and Ors. v. Shamsher Singh **AIR (1985) SC 1082 : [1985] Suppl. 1 SCR 83 – relied on.**

A LOOK AT PRISONS IN INDIA

2.1 According to the data published by the National Crime Records Bureau (NCRB) the conditions relating to jails and prisoners is fairly alarming. There were a total number of 1350 prisons as of the year 2019. 1350 prisons consists of 617 Sub Jails, 410 District Jails, 144 Central Jails, 86 Open Jails, 41 Special Jails, 31 Women Jails, 19 Borstal School and 2 Other than the above jails. A perusal of the executive summary would reveal an alarming state of affairs as far as occupancy rate is concerned. It has climbed to 118.5 percent in 2019 as on 31st December. The occupancy rate is alarming for male prisoners. In fact, during 2019, a total of 18,86,092 inmates were admitted in the jails. The figure of 4,78,600 prisoners as on 31st December, 2019 is the figure obviously after considering the number of prisoners who would have been inter alia bailed out. The number of under trial prisoners in 2019 was 3,30,487 which in fact constituted 69.05 per cent of the total no. of prisoners. Delhi had the highest occupancy rate of 174.9 percent followed by Uttar Pradesh which came second with 167.9 percent. This means that in Delhi a prison which was meant to be occupied by 100 persons, was used for accommodating 174 persons. There is a tremendous amount of overcrowding in jails in India. Secondly, a very large sum (Rs. 6818.1 crore) was the budget on prisons. Both aspects are relevant in the context of the possibilities that house arrest offer. [Paras 48, 49, 50]

2.2 In the context of the rights conferred on citizens under Article 19 which are essentially constitutional freedoms or rather the enumerated rights as explained by this Court in *Maneka Gandhi*

***vs. Union of India*, when a citizen is placed on house arrest, which has the effect of depriving him of any freedom, it will not only be custody but it would involve depriving citizens under custody of the fundamental freedoms unless such freedoms are specifically protected. A person has a fundamental right to move in any part of the country. It is obvious that in the case of a person undergoing a house arrest and in the teeth of an absolute prohibition, in the facts of the case forbidding the appellant from moving outside his home, the hallmark of custody described in the case of incarceration is equally present. Personal liberty perhaps is the most important of all values recognized as such under the constitution. It is to be jealously guarded from any encroachment, save where such intrusion has the clear sanction of law. The expression "procedure established by law" has received an expansive and liberal exposition in decisions of this Court commencing from *Maneka Gandhi*. Right to personal liberty is the birth right of every human being. The right under Article 21 is undoubtedly available to citizens and non-citizens. While personal liberty is a wide expression capable of encompassing within its fold, many elements apart from the right to be protected against the deprivation of liberty in the sense of the freedom from all kinds of restraints imposed on a person, the irreducible core of personal liberty, undoubtedly, consist of the freedom against compelled living in forced custody. [Para 51]**

Maneka Gandhi v. Union of India **AIR 1978 SC 597 : [1978] 2 SCR 621 – relied on**

2.3 Personal liberty is interlinked with the right to life itself. It is an inseparable part without which the right to life itself is deprived of its content and meaning. The right to life and personal liberty is essentially also based on the principle that men in regard to fundamental rights be treated equal and that no man or a group of men, even organized as a state under which he lives can deprive him except without infringing the right to be treated equally unless there is a legitimate sanction of law. Personal liberty of its members must continue to remain the most cherished goal of any civilized state and interference with the same must be confined to those cases where it is sanctioned by the law and genuinely needed. The court would lean in favour of upholding this precious, inalienable and

immutable value. In the United States ordinarily, house arrest follows a conviction and is a choice which is available to the Courts to send a person to house arrest which is in lieu of a jail sentence. [Paras 53, 54]

Govt. of Andhra Pradesh and another etc. v. Anne Venkateswara Rao etc. etc. **AIR 1977 SC 1096: [1977] 3 SCR 7 – relied on**

THE REMEDIES OPEN TO AN ACCUSED IN THE CASE OF REMAND UNDER SECTION 167 OF THE CR.P.C.

3.1 An order under Section 167 is purely an interlocutory order. No revision is maintainable. A petition under Section 482 cannot be ruled out. When a person arrested in a non-bailable offence is in custody, subject to the restrictions, contained therein, a court other than High Court or Court of Session, before whom he is brought *inter alia,* can release him on bail under Section 437 of the Cr.P.C. Section 439 of the Cr.P.C. deals with special powers of High Court and court of session to grant bail to a person in custody. The said courts may also set aside or modify any condition in an order by a Magistrate. Ordinarily, when the court considers a request for remand there would be an application for bail. It is for the court to grant bail failing which an order of remand would follow. [Paras 57, 59]

State rep. by Inspector of Police and others v. N.M.T. Joy Immaculate **(2004) 5 SCC 729 : [2004] 2 Suppl. SCR 71;** *Central Bureau of Investigation, Special Investigation Cell v. Anupam J. Kulkarni* **(1992) 3 SCC 141 : [1992] 3 SCR 158 – relied on**

3.2 No doubt, while the remand report is considered by the Magistrate the application for bail may be moved under Section 439 instead of moving under Section 437 in view of the restrictions contained therein. Though an application under Section 397 would not lie against the remand, an application for bail would lie under Section 439. Therefore, ordinarily the accused would seek bail and legality and the need for remand would also be considered by the High Court or court of session in an application under Section 439. No doubt the additional restrictions under section 43 (D) (5) of UAPA are applicable to citizens of India in cases under the said law. [Para 60]

WHETHER A WRIT OF HABEAS CORPUS LIES AGAINST AN ORDER OF REMAND UNDER SECTION (167) OF CR.P.C.

4. A Habeas Corpus petition is one seeking redress in the case of illegal detention. It is intended to be a most expeditious remedy as liberty is at stake. If the remand is absolutely illegal or the remand is afflicted with the vice of lack of jurisdiction, a Habeas Corpus petition would indeed lie. Equally, if an order of remand is passed in an absolutely mechanical manner, the person affected can seek the remedy of Habeas Corpus. Barring such situations, a Habeas Corpus petition will not lie. [Paras 61, 63]

> *Manubhai Ratilal Patel v. State of Gujarat and others* **(2013) 1 SCC 314 : [2012] 8 SCR 993**; *Serious Fraud Investigation Office and Ors. v. Rahul Modi and Ors.* **(2019) 5 SCC 266 : [2019] 5 SCR 91 – relied on.**

WHETHER SUPERIOR COURTS (INCLUDING A HIGH COURT) CAN EXERCISE POWER UNDER SECTION (167) OF CR.P.C.? CAN BROKEN PERIODS OF CUSTODY COUNT FOR THE PURPOSE OF DEFAULT BAIL?

5.1 Though the power is vested with the Magistrate to order remand by way, of appropriate jurisdiction exercised by the superior Courts, (it would, in fact, include the Court of Sessions acting under Section 439) the power under Section 167 could also be exercised by Courts which are superior to the Magistrate. While ordinarily, the Magistrate is the original Court which would exercise power to remand under Section 167, the exercise of power by the superior Courts which would result in custody being ordered ordinarily (police or judicial custody) by the superior Courts which includes the High Court, would indeed be the custody for the purpose of calculating the period within which the charge sheet must be filed, failing with the accused acquires the statutory right to default bail. In such circumstances broken periods of custody can be counted whether custody is suffered by the order of the Magistrate or superior courts, if investigation remains incomplete after the custody, whether continuous or broken periods pieced together reaches the requisite period; default bail becomes the right of the detained person. [Paras 66, 67]

THE EFFECT OF TRANSIT ORDER? IS IT A PRODUCTION ORDER THOUGH SOURCED UNDER SECTION 167 CR.P.C.?

6.1 In this case, the transit remand was ordered on 28.08.2018. The Appellant was to be produced under the same on 30.08.2018 before the Magistrate in Pune. A person may be arrested by a police officer in any part of India (Section 48 of Cr.P.C.). Under Section 56, the person arrested without warrant is to be sent before the Magistrate having jurisdiction or before the officer in charge of a police station. It is thereafter, that Section 57 forbids the person so arrested: from being detained for a period more than what is reasonable. from being detained beyond 24 hours from the time of arrest, excluding the time necessary for the journey from the place of arrest to the Magistrate Court. Now, the 'Magistrate Court' referred to in Section 57 is the Magistrate competent to try the case. Section 57 contains the peremptory limit of 24 hours exclusive of the period for journey, in the absence of 'special order' under Section 167. [Paras 71, 72]

6.2 The remand pursuant to a transit remand cannot be judicial custody as the police is exclusively entrusted with the man no doubt to produce him before the Magistrate having jurisdiction. It is therefore, police custody. Could the police be engaged in questioning/ investigating the case by interrogating the accused on the basis of the transit order either before, embarking on the journey or during the course of the journey and after the journey before producing him? If it is thought that during the journey, it is impermissible, then such interrogation would equally be impermissible during the time of journey permitted without obtaining an order under Section 167. If also during such journey, the accused volunteers with a statement otherwise falling under Section 27 of Evidence Act, it would be one when the accused is in the custody of the police. If it is police custody then, the order of the Magistrate granting transit remand would set the clock ticking to complete the period for the purpose of default bail. The remand order be it a transit remand order is one which is passed under Section 167 of the Cr.P.C. and though it may be for the production of the Appellant, it involved authorising continued detention within the meaning of Section 167. [Paras 76, 78]

THE IMPACT OF SECTION 428 OF CR.P.C.

7.1 If house arrest as ordered in this case is to be treated as custody within the meaning of section 167 of the Cr.P.C. would it not entail the period of house arrest being treated as part of the detention within the meaning of Section 428 in case there is a conviction followed by a sentence? Section 428 enables a person convicted to have the period of detention which he has undergone during the investigation, enquiry or trial set off against the term of imprisonment. [Paras 80, 82]

7.2 There is a scheme which is unravelled by the Code regarding detention of an accused. The starting point appears to be the arrest and detention of the person in connection with the cognizable offence by a police officer without a warrant. He can detain him and question him in the course of the investigation. However, the officer cannot detain the accused beyond 24 hours excluding the time taken for the journey from the place of arrest to the place where the Magistrate who is competent to try the case sits. If he cannot so produce the accused and the investigation is incomplete, the officer is duty bound to produce the arrested person before the nearest Magistrate. The nearest Magistrate may or may not have jurisdiction. He may order the continued detention of the arrested person based on the request for remand. He would largely rely on the entries in the case diary and on being satisfied of the need for such remand which must be manifested by reasons. The Magistrate can order police custody during the first 15 days (in cases under UAPA, the first 30 days). Beyond such period, the Magistrate may direct detention which is described as judicial custody or such other custody as he may think fit. It is, no doubt, open to a Magistrate to refuse police custody completely during the first 15 days. He may give police custody during the first 15 days not in one go but in instalments. It is also open to the Magistrate to release the arrested person on bail. [Para 85]

Ajmer Singh and others v. Union of India and others **AIR 1987 SC 1646 : [1987] 3 SCR 84 – relied on**

7.3 The arrested person if detained during the period of investigation can count this period, if he is ultimately charged, tried and convicted by virtue of the provisions of Section 428

of Cr.P.C. It is not every detention which can be relied upon to get the benefit of set-off under Section 428. A period spent under an order of preventive detention being not in connection with the investigation into an offence cannot be counted. Thus, detention 'during investigation' under Section 428 is integrally connected with detention as ordered under Section 167. The scheme further under Section 167 is that custody (detention/ custody) as authorized under such provisions, if it exceeds the limit as to maximum period without the charge sheet being filed, entitles the person in detention to be released on default bail. In fact, the person may on account of his inability to offer the bail languish in custody but he would undoubtedly be entitled to count the entire period he has spent in detention under orders of the Magistrate/ Superior Court exercising powers under Section 167 for the purpose of set off under Section 428. [Paras 86, 88, 89]

EFFECT OF ILLEGALITY IN THE ORDER UNDER SECTION 167 CR.PC.

8.1 An order purports to remand a person under Section 167. It is made without complying with mandatory requirements thereunder. It results in actual custody. The period of custody will count towards default bail. Section 167(3) mandates reasons be recorded if police custody is ordered. There has to be application of mind. If there is complete non-application of mind or reasons are not recorded, while it may render the exercise illegal and liable to be interfered with, the actual detention undergone under the order, will certainly count towards default bail. Likewise, unlike the previous Code (1898), the present Code mandates the production of the accused before the Magistrate as provided in clause (b) of the proviso to Section 167 (2). Custody ordered without complying with the said provision, may be illegal. But actual custody undergone will again count towards default bail. [Para 90]

8.2 The view taken in the impugned judgment that sans any valid authorisation/ order of the Magistrate detaining the Appellant there cannot be custody for the purpose of Section 167 is not correct. Therefore, if the Court purports to invoke and act under Section 167, the detention will qualify even if there

is illegality in the passing of the order. What matter in such cases is the actual custody. However, when the Court does not purport to act under Section 167, then the detention involved pursuant to the order of the Court cannot qualify as detention under Section 167. [Paras 91, 92, 93]

JUDICIAL CUSTODY AND POLICE CUSTODY

9.1 Whether house arrest as ordered by the High Court amounts to custody within the meaning of Section 167 of the Cr.P.C. Undoubtedly custody in Section 167 of the Cr.P.C. is understood as ordinarily meaning police custody and judicial custody. The period of custody begins not from the time of arrest but from time the accused is first remanded. Police custody can, in a case falling under the Cr.P.C. (not under the UAPA), be given only during the first 15 days. During the first 15 days no doubt the Court may order judicial custody or police custody. No doubt the last proviso to Section 167 (2) provides that detention of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution. [Para 94]

9.2 Distinction between police custody and judicial custody

When a person is remanded to police custody, he passes into the exclusive custody of the police officers. 'Custodial Interrogation' as is indispensable to unearth the truth in a given case is the substantial premise for such custody. The Magistrate must undoubtedly be convinced about the need for remand to such custody. Reasons must be recorded. Judicial custody is ordinarily custody in a jail. It is referred to also as jail custody. Thus, jail custody and judicial custody are the same. The jails come under the Department of Jails and staffed by the employees of the said department. The person in jail custody is therefore indirectly, through the jail authorities, under the custody of the Court. The police officer does not have access to a person in judicial custody as he would have in the case of a person in police custody. Unless permission is sought and obtained which would apparently be subject to such conditions as a court places the person in judicial custody cannot be questioned by the police officers. Now in a case, ordinarily, instead of ordering a remand a person can

be released on bail. As to whether a case is made out is a question to be decided in the facts of each case. There may be restrictions put in regard to the grant of bail by law which must be observed. But if bail is not granted then a person arrested by the police in connection with the cognizable offence must be remanded to custody. This is inevitable from the reading of Section 167 of the Cr.P.C. [Para 95]

9.3 The concept of house arrest though familiar in the law relating to preventive detention, therein the underpinnings are different. House arrest in the law of preventive detention is one which is permitted under the law itself and such orders are made in fact by the executive. Taking the ingredients of house arrest as are present in the order passed by the High Court of Delhi, if it is found to be one passed under Section 167, then it would be detention thereunder. The concept of house arrest as ordered in this case with the complete prohibition on stepping out of the Appellants premises and the injunction against interacting with persons other than ordinary residents, and the standing of guard not to protect him but to enforce the condition would place the Appellant under judicial custody. Section 167 speaks of 'such custody as it thinks fit'. If it is found ordered under Section 167 it will count. [Paras 97, 98]

DOES THE MAGISTRATE/ COURT CONSIDER THE LEGALITY OF ARREST/ DETENTION WHILE ACTING UNDER SECTION 167

10. Article 22(1) creates a fundamental right on a person arrested to be not detained without being informed as soon as may be of the grounds for such arrest. It also declares it a fundamental right for the detained person to consult and be defended by a legal practitioner of his choice. Now, detention follows arrest. What Article 22(1) is concerned with is that the detention must be supported by the fulfilment of the rights referred to therein. Strictly speaking, therefore, Article 22(1) does not go to the legality of the arrest. [Para 100]

CUSTODY UNDERGONE UNDER ORDERS OF SUPERIOR COURTS IN HABEAS CORPUS PETITIONS. IS THE CR.P.C APPLICABLE TO WRIT PETITIONS?

11.1 The proceeding in the High Court was a writ petition. At the time when the writ petition was filed, the relief sought was

that a writ of Habeas Corpus be issued to set him at liberty. The further relief sought was that the Appellant may not be arrested without prior notice to enable him to seek appropriate remedies. As far as the prayer that the Appellant may not be arrested is concerned, it is a relief which does not go hand in hand with Section 167 of the Cr.P.C. This is for the reason that the power under Section 167 is invoked only after there has been an arrest and what is sought is the extension of the detention of the person arrested. Though, this was the position when the writ petition was filed, by the time, the writ petition came up for consideration at 2:45 p.m. on 28.08.2018, the Appellant stood arrested at 2:15 p.m. It would appear, in the meantime, the appellant was produced before the Magistrate who passed the transit remand order. Thereafter when the matter was taken up for consideration at 4:00 p.m. and on noticing the transit remand, order, dated 28.08.2018, *inter alia,* ordering house arrest came to be passed. Therefore, at the time (4PM) when the order was passed, the Court was dealing with the matter when the Appellant stood arrested and also remanded by way of the transit remand order. As already found that the superior Courts including the High Court can exercise power under Section 167. The finding of the High Court in the impugned judgment appears to proceed on the basis that only a Magistrate can order remand, does not appear to be correct.[Paras 104, 106, 108, 116]

11.2 Undoubtedly, as pointed out by the appellant, he came to be detained on the basis of an arrest carried out by the police officer from the State of Maharashtra in connection with FIR disclosing the commission of cognizable offences. The arrest is apparently effected in view of the powers available under Section 48 of the Cr.P.C. Finding that an order under Section 167 was required to produce the appellant before the competent Court in Maharashtra, he produced the appellant-in-person before the nearest Magistrate in Delhi and the Magistrate passed an order which is an order of remand under Section 167. The High Court came to be concerned with the validity of the remand order and detention of the appellant. A writ of habeas corpus does lie in certain exceptional cases even by way of challenging the orders of remand. If there is non-compliance with Article 22(1) and the person is detained it is

an aspect which has to be borne in mind by the Magistrate when ordering remand. Detention is the result of an arrest. Article 22(1) applies at this stage after arrest. If fundamental rights are violated in the matter of continued detention, the Magistrate is not expected to be oblivious to it. It is in this sense that the High Court has found violation of Article 22(1) *inter alia* and the Magistrate over-looking it as rendering the transit remand illegal. As far as the arrest being made in violation of Section 41(1)(ba), undoubtedly, it is a matter which related to the legality of the arrest itself which is the stage prior to detention. The High Court finds that the Magistrate had not applied his mind to the question as to whether the arrest was in compliance with Section 41 (1) (ba) of Cr.P.C. [Para 117]

THE IMPACT OF THE NON-ACCESSIBILITY TO THE APPELLANT FOR THE INVESTIGATING AGENCY DURING HOUSE ARREST AND THE EFFECT OF THE APPELLANT BEING IN POLICE CUSTODY FROM 14.4.2020 TO 25.4.2020.

12. **The very purpose of custody under Section 167 is to enable the police to interrogate the accused and if that opportunity is not present then such period of custody as alleged would not qualify for the purpose of Section 167. In other words, the argument appears to be that the object and scheme of Section 167 is that an investigation is carried out with opportunity to question the accused and still it is not completed within the period of 90 days whereupon right to default bail arises. By the proceedings on 28.08.2018 when the petition was filed, the High Court stayed the transit remand and the appellant could not be taken to Maharashtra. By the very same order, the High Court placed the Appellant under house arrest. No access was provided to the investigating agencies to question the Appellant. In such circumstances, the period undergone as house arrest should be excluded. The argument is that under the general law, namely, the Cr.P.C. without the modification effected under Section 43(D) of UAPA, police custody can be sought and given only during the first 15 days, thereafter, police custody cannot be given. In the case of UAPA, in view of the modified application of the Cr.P.C. under Section 43(D) (2), the period of 15 days stands enhanced to 30 days. Thus, police custody by the Magistrate can be given on production**

for a period of 30 days. The argument further runs that if it is on the basis of the Appellant having surrendered on 14.04.2020 and upon being produced before the Court, he stood remanded to police custody, the period of 90 days would begin to run only from the date of the remand i.e. 15.04.2020. If the contention of the appellant is that the period of remand commenced with the house arrest i.e., 28.08.2018, is accepted, it would result in the police custody given on 15.04.2020 as impermissible. In this regard, the fact that the appellant did not object to the police custody being given on 15.04.2020 is emphasized. The appellant acquiesced in the police custody commencing from 15.04.2020. This is possible only on the basis that the period of 90 days would commence only on 15.04.2020 in terms of the law laid down in *Chaganti Satyanarayana*. [Para 119]

Chaganti Satyanarayan & Ors. v. State of Andhra Pradesh **(1986) 3 SCC 141 : [1986] 2 SCR 1128 – relied on**

13.1 The scheme of the law (Cr.P.C.) is that when a person is arrested without warrant in connection with a cognizable offence, investigation is expected to be completed within 24 hours from his arrest. If the investigation is not completed, as is ordinarily the case, the accused must be produced before the Magistrate who is nearest from the place of arrest irrespective of whether he is having jurisdiction or not. The Magistrate on the basis of the entries in the case diary maintained by the officer is expected to apply his mind and decide whether the accused is to be remanded or not. If the police makes a request for police custody which is accepted then an order is to be passed and reasons are to be recorded under Section 167(3). Police custody is an important tool in appropriate cases to carry on an effective investigation. It has several uses. It includes questioning the accused with reference to the circumstances, and obtaining if possible, statements which are relevant in the future prosecution. Custodial interrogation in some cases is clearly a dire need to give a prosecution and therefore the courts a complete picture. The contention of the appellant that it is always open to Magistrate to order only judicial custody and even exclusively with 90 days of

judicial custody alone, an application for default bail would lie cannot be disputed. Whatever be the nature of the custody as long as it falls within four walls of Section 167, if the requisite number of days are spent in police/ judicial custody/ police and judicial custody that suffices. [Para 121]

13.2 However, that may not mean applying the functional test or bearing in mind the object of the law that the purpose of obtaining police custody is lost sight of. According to the appellant, the period of house arrest is to be treated as judicial custody on the terms of the order dated 28.08.2018 as subsequently extended. Investigating officers, undoubtedly, could go to the house of the appellant and question him. It is, however, true that if the High Court had been approached, it may have directed the appellant to cooperate with the officers in the investigation. It however remains in the region of conjecture. [Para 122]

13.3 The special Judge ordered remand for 7 days. Thereafter, a period of 7 days further remand to police custody was granted by the order dated 21.04.2020. Still further, it appears on 25.04.2020, the Appellant was remanded in judicial custody in which he continued. The question would arise that all else being answered in favour of the Appellant whether his case is inconsistent with the police remand initially granted for 7 days on 15.04.2020 and further extended on 21.04.2020 which was, no doubt, cut short on 25.04.2020. The point to be noted is police custody can be given only for 15 days and that too, the first 15 days, ordinarily. In the case of persons accused of offences, under UAPA, the maximum period of police custody is 30 days. If the case of the appellant is to be accepted then it must be consistent with the subsequent proceedings, namely, police custody vide orders dated 15.04.2020 and 21.04.2020. In other words, Section 167 of the Cr.P.C. as modified by Section 43(D)(2) of UAPA, contemplates that remand to police custody on production of the accused can be given only during the first 30 days from the date of production and it advances the case of the respondent that remand on production of the accused before the Special Judge took place only with the production of the accused on 15.04.2020. If the remand in the case of the appellant took place in the year 2018 then it

would be completely inconsistent with the remand to police custody well beyond the first 30 days of the remand in the year 2018. [Para 124]

13.4 The answer of the Appellant is that apart from the period of 15 days being supplanted by 30 days under UAPA, police custody can be sought and granted at any time in cases involving UAPA. It appears to be the Appellants case in one breath that this is possible under the second proviso contemplated in Section 43(2)(b) of UAPA. It is seen contended, that unlike the cases generally covered by the Cr.P.C., police custody can be sought in cases under UAPA at any time. It is also contended however that, it is only if a person is in judicial custody and the investigator wants to get police custody in place of judicial custody that an affidavit is required. In this case, it is the case of the appellant that there is no such affidavit. This is for the reason that when police custody was sought on 15.04.2020, the appellant was not in judicial custody. He had surrendered on the previous day i.e. on 14.04.2020 before the NIA. It is, therefore, to resolve this controversy necessary to find out whether the case of the Appellant that the police custody can be sought at any time in cases falling under UAPA is tenable. [Para 125]

14. Under Section 43(D)(2)(a), it is clear that the maximum period of police custody which is permissible has been increased from 15 days to 30 days. The further modification is that which is relevant which is incorporated in the second proviso. It contemplates that the investigating officer can seek with reasons and explaining the delay obtain the police custody of a person who is in judicial custody. [Para 127]

15. Undoubtedly, the period of 30 days is permissible by way of police custody. This Court will proceed on the basis that the legislature is aware of the existing law when it brings the changes in the law. In other words, this Court had laid down in *Anupam Kulkarni*, inter alia, that under Section 167 which provides for 15 days as the maximum period of police custody, the custody of an accused with the police can be given only during the first 15 days from the date of the remand by the Magistrate. Beyond 15 days, the remand can only be given to judicial custody. Ordinarily, since the period of 15 days has been increased to 30 days, the effect would be that in cases

falling under UAPA applying the principle declared in *Anupam Kulkarni*., the investigating officer in a case under UAPA, can get police custody for a maximum period of 30 days but it must be within the first 30 days of the remand. In this regard, the number of days alone is increased for granting remand to police custody. The principle that it should be the first 30 days has not been altered in cases under UAPA. [Para 128]

16. **As far as the second proviso in Section 43(D)(2)(b) is concerned, it does bring about an alteration of the law in *Anupam Kulkarni.* It is contemplated that a person who is remanded to judicial custody and NIA has not been given police custody during the first 30 days, on reasons being given and also on explaining the delay, Court may grant police custody. The proviso brings about the change in the law to the extent that if a person is in judicial custody on the basis of the remand, then on reasons given, explaining the delay, it is open to the Court to give police custody even beyond 30 days from the date of the first remand. [Para 128]**

17. **In this regard, it would appear that the appellant had surrendered on 14.04.2020. He was not in judicial custody. He was produced with a remand report seeking police custody on 15.04.2020. Treating this as a remand sought within the first 30 days, a remand is ordered for a period of 7 days initially. There is no dispute that the period was police custody. An accused under UAPA may be sent to judicial custody, police custody or granted bail. If the argument that the police custody can be sought at any time and it is not limited to cases where there is judicial custody, it will go against the clear terms of the proviso and even a person who is bailed out can after 30 days be remanded to police custody. This is untenable. The case of the appellant that the police custody granted on 15.04.2020 was permissible and consistent with his case does not appear to be correct. [Para 128]**

THE CIRCUMSTANCES THAT MILITATE AGAINST THE ORDER OF HOUSE ARREST BEING ONE UNDER SECTION 167.

18. **The High Court entertains the writ petition on 28.08.2018. It intended to dispose of the matter on the very next day. The order of house arrest was passed in such circumstances.**

But there was custody and what is more, it went on for 34 days. The High Court was unable to go through the entries in the case diary as the entries were in the Marathi language. In fact, the court expresses inability to make out from the documents what precisely the case against the appellant was. Translation of the documents were to be made available on the next day. The translations were not made available. Yet the house arrest was ordered until further orders on 28.08.2018. What is pertinent is that by the standards in law applicable to a Magistrate acting under Section 167, the High Court did not purport to act under Section 167. This is different from saying that it acted in violation of the mandate of law. It is true that there was no stay of investigation as such. However, what was challenged was the transit remand. The FIR was lodged in another state. Interrogation of the appellant would be integral to the investigation. On the terms imposed by the High Court in regard to house arrest it was not possible for such interrogation to take place. It appears that the parties did not contemplate as it is presently projected. It is no doubt true that the respondent could have moved the High Court. The house arrest according to the appellant is by way of modification of the order of remand. In other words, the contention is that the High Court stayed the transit. But the High Court when it passed the order of house arrest on 28.08.2018, it modified the remand from police custody to house arrest. Subject to what follows we proceed on the basis that the High Court modified the order of remand. The transit remand order of the CMM Saket provided for police custody which was to last for two days. But on the basis of the house arrest ordered by the High Court by interim order the appellant underwent house arrest for 34 days. By the judgment dated 01.10.2018 the High Court of Delhi set aside the transit remand, as the transit remand ordered by the magistrate was found illegal. On the said basis the High Court of Delhi finds that detention beyond 24 hours was clearly impermissible. Now it is relevant to notice that the CMM Saket had not ordered detention for the period after 30.08.2018. Detention was ordered by him only for two days and the appellant was to be produced on 30.08.2018. By the order of the High Court of Delhi, the transit could not

take effect. Therefore, the entire period after 30.08.2018 till 01.10.2018 cannot be said to be based on the order of the magistrate. The said period in fact is covered by the order of house arrest. The period of house arrest covered the period from 28.08.2018 based on the order of the High Court. The arrest was effected at 2.15PM on 28.08.2018. The order of the CMM was passed within the next hour or so. The order of the High Court was passed at about 4.30PM. No doubt, it is the order of the magistrate which originated the remand under Section 167 to police custody. The High Court of Delhi proceeded to find that without the support of a valid remand order by the magistrate, the detention exceeded 24 hours rendering it untenable in law and the further finding however is that consequently the house arrest came to an end as of then (01.10.2018). Therefore, the High Court did not proceed to pronounce the house arrest as non est or illegal. On the other hand, when it is pronounced, it as having come to an end on 01.10.2018 and no part of it is found to be illegal, it meant that it was valid from the point of time it was passed till 01.10.2018. If this is perceived as an order passed under Section 167 then there would not be any detention beyond 24 hours of the arrest which could be illegal. The illegality of the detention is based on the transit order being found illegal. If the transit order has been modified as claimed by the appellant, then the detention would be lawful as the order of house arrest is passed well within 24 hours of the arrest. The High Court of Delhi also did not contemplate that the order of house arrest was passed by way of custody under Section 167. No doubt, the foundational order, the transit remand, being set aside it could be said that the interim order will not survive. But then the order should have been so understood by the High Court. Undoubtedly, the appellant was placed in police custody from 15.04.2020 to 25.04.2020. Even the enhanced period of 30 days of police custody, permissible under Section 43 (D) (2) of UAPA, must be acquired within the first 30 days of the remand. Proceeding on the basis of the case of the appellant that the first remand took place on 28.08.2018, the appellant being in police custody for a period of 11 days in 2020 is inconsistent with appellants case and the law. Though police custody can be had under UAPA beyond

the first 30 days under the Second Proviso to Section 43(D)(2), it is permissible only in a situation, where the accused is in judicial custody. The appellant was, admittedly, not in judicial custody, having surrendered to the NIA on 14.04.2020, which is on the eve of the first order directing police custody. One of the contentions raised by the respondent is that if the order of house arrest was passed under Section 167 Cr.PC then the High Court of Delhi would have after setting aside the transit remand, either released the appellant on bail or remanded him to custody. Instead, the High Court released the appellant on the basis that as the remand order was illegal and set aside, in view of Section 56 and Section 57 the detention beyond 24 hours, cannot be sustained. Now in a proceeding under Section 167 where a remand order is put in issue before a superior court it presupposes an arrest in connection with a cognizable offence. Now if the remand is set aside by the superior court, in a proceeding which originated from a remand under Section 167, then the order that would follow on setting aside the remand, would be to grant him bail or to modify the remand. This is for the reason that there is an arrest which in the first place sets the ball rolling. Therefore, he has either to be released on bail, if not, he would have to be remanded. [Para 131]]

19. There can be no quarrel with the proposition that a court cannot remand a person unless the court is authorised to do so by law. However, we are in this case not sitting in appeal over the legality of the house arrest. But we are here to find whether the house arrest fell under Section 167. In the facts of this case, the house arrest was not ordered purporting to be under Section 167. It cannot be treated as having being passed under Section 167. The concept of house arrest as part of custody under Section 167 has not engaged the courts including this Court. However, when the issue has come into focus, and noticing its ingredients we have formed the view that it involves custody which falls under Section 167. Under Section 167 in appropriate cases it will be open to courts to order house arrest. As to its employment, without being exhaustive, we may indicate criteria like age, health condition and the antecedents of the accused, the nature of the crime, the need for other forms of custody

and the ability to enforce the terms of the house arrest. Under Section 309 also that judicial custody being custody ordered, subject to following the criteria, the courts will be free to employ it in deserving and suitable cases. In view of the fact that the house arrest of the appellant was not purported to be under Section 167 and cannot be treated as passed thereunder. [Paras 136, 138, 139, 140]

Lalita Kumari v. Government of Uttar Pradesh and others **(2014) 2 SCC 1 : [2013] 14 SCR 713**; *Bikramjit Singh v. The State of Punjab* **(2020) 10 SCC 616 – relied on.**

Romila Thapar and Others v. Union of India and others **(2018) 10 SCC 753 : [2018] 11 SCR 951; *State of Punjab v. Ajaib Singh* AIR 1953 SC 10 : [1953] 1 SCR 254; *In re. M.R. Venkataraman and Others* AIR 1948 Mad 100; *The matter of: Madhu Limaye and Others* (1969) 1 SCC 292 : [1969] 3 SCR 154; *Arnesh Kumar v. State of Bihar and Another* (2014) 8 SCC 273 : [2014] 8 SCR 128; *State of West Bengal v. Dinesh Dalmia* (2007) 5 SC 773 : [2007] 5 SCR 561; *Niranjan Singh & Anr. v. Prabhakar Rajaram Kharote & Ors.* (1980) 2 SCC 559 : [1980] 3 SCR 15 – referred to.**

Buzadji v. Moldova 398 **Butterworths Human Rights Cases 42 – referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 510 of 2021.

From the Judgment and Order dated 08.02.2021 of the High Court of Judicature at Bombay in Criminal Appeal Stamp No. 1707 of 2020.

Kapil Sibal, Ms. Nitya Ramakrishnan, Sr. Advs., Ms. Warisha Farasat, Shadan Farasat, Nizam Pasha, Shourya Dasgupta, Ms. Hafsa Khan, Bharat Gupta, Advs. for the Appellant.

S.V. Raju, ASG., Ms. Sairica Raju, Guntur Pramod Kumar, B.V. Balaram Das, Advs. for the Respondent.

The Judgment of the Court was delivered by

K. M. JOSEPH, J.

1. Leave granted.

2. On the basis of FIR No. 4 of 2018 dated 08.01.2018, registered at Vishrambagh Police Station, Pune, Maharashtra, which was one registered under Sections 153A, 505(1B) and Section 34 of IPC to which Section 120(B) was added on 06.03.2018 and still further into which, Sections 13, 16, 17, 18, 18B, 20, 38 and 40 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'the UAPA', for short), were added on 17.05.2018, and, in which FIR, the name of the appellant was added on 22.08.2018, the appellant came to be arrested from his residence in Delhi on 28.08.2018. The appellant moved Writ Petition No. 2559 of 2018 seeking a Writ of Habeas Corpus in the High Court of Delhi. The High Court, apart from issuing notice, *inter alia*, ordered that no further precipitate action of removing the appellant from Delhi be taken till the matter was taken at 04:00 P.M.. The Order was passed at 02:45 P.M.. In the meantime, the CMM at Saket, Delhi disposed of an Application seeking transit remand with the following Order:

"FIR No. 4/18

PS: Vishrambagh, Pune, Maharashtra

U/s: 153A/505(1)(B)/117/34 1PC & u/s 13/15/17/18/185/20/39/40 of Unlawful Activities Prevention Act.

State Vs. Gautam Pratap Navlakha

28.08.2018

Present: Sh. Jagdamba Pandey, Ld. APP for the State

IO Assistant Police Inspector Sushil V. Bobde alongwith

ACP Ganesh Gawade and DCP Bachchan Singh Inspector Sanjay Gupta, PS Special Cell, Lodhi Colony, New Delhi.

Accused Gautam Pratap Navlakha produced in Police custody.

Sh. Om Prakash, Ld. LAC for the accused.

This is a handwritten application preferred by the 10 Assistant Police Inspector Sushil V. Bodbe seeking transit remand of two days the

above noted accused persons. The identity of 10 as a police officer of P Vishrambagh, Pune, Maharashtra is established upto my satisfaction upon his having shown his identity card.

Heard. It is submitted by the IO that above noted accused is required in above noted case FIR registered at PS Vishrambagh, Pune, Maharashtra and has been arrested from his house at Kalkaji, Delhi. It is further submitted by the IO that the accused has been arrested without warrant and he is required to be produced before competent Court i.e. Court of Ld. Special Court, Shivaji Nagar, Pune, Maharashtra and therefore, his transit remand may be granted.

Heard. Considered. I have given my thoughtful consideration to the submissions made by the IO and the APP for the State.

As per the police papers, FIR No 4/18 has been registered under sections 153A/505(1)(B)/117/34 IPC &u/s 13/16/17/18/18B/20/39/40 of Unlawful Activities Prevention Act at police station Vishronbagh, Pune, Maharashtra wherein the accused is required. As per the arrest memo the accused namely Gautam Pratap Navlakha was arrested on 28.08.2018 at. 2.15 pm at Kalkajl, Delhi. Intimation of arrest of accused has been given to his partner/friend.

As the accused is required for further investigation of the case, therefore, his transit remand is granted till 30.08.2018. The accused be produced before the concerned Ld. Special Court, Shivaji Nagar, Pune, Maharashtra on or before 30.08.2018 without fail. Accused be got medically examined as per rules and the directions of the Hon'ble Supreme Court. A copy of this order be given dasti to the Investigating Officer.

Application of transit remand is disposed of accordingly. Necessary record be maintained by the Ahlmad.

(Manish Khurana)

Commissioner/SE/ District Court, Saket

New Delh1/28.08.2018"

3. Thereafter, when the Writ Petition, filed by the appellant before the High Court, came up at 04.00 P.M., the High Court passed the following Order on 28.08.2018:

"2. Court is informed at 4 pm by Mr. Rahul Mehra, learned Standing Counsel for the State that an order was passed today by the learned Chief Metropolitan Magistrate (CMM), South East District, Saket in the post lunch session granting transit remand for producing the Petitioner before the learned Special Court, Shivaji Nagar, Pune on or before 30th August, 2018.

3. The Court is also shown the documents produced before the learned CMM most of which (including FIR No. 4 of 2018 registered at Police Station Vishrambagh, Pune) are in Marathi language and only the application filed for transit remand before the learned CMM is in Hindi. However, it is not possible to make out from these documents what precisely the case against the petitioner is.

4. Since it is already 4.30 pm, the Court considers it appropriate to direct that pursuant to the order dated 28th August, 2018 of the learned CMM, the petitioner will not be taken away from Delhi and this case will be taken up as the first case tomorrow morning.

5.Translations of all the documents produced before the CMM be provided to this Court tomorrow.

6. The petitioner shall, in the meanwhile, be kept at the same place from where the was picked up with two guards of the Special Cell, Delhi Police along with local Police that was originally here to arrest the petitioner, outside the house. Barring his lawyers, and the ordinary residents of the house, the petitioner shall not meet any other persons or step out of the premises till further orders."

4. A Writ Petition was filed in the Supreme Court as Writ Petition (Criminal) Diary No. 32319 of 2018 on the next day. This Writ Petition was filed by five illustrious persons in their own fields, as is observed by this Court in the Judgment, which is reported in *Romila Thapar and Others vs. Union of India and others*[1]. The subject matter of the Writ Petition was the allegedly high-handed action of the Maharashtra Police and the arrest of five Activists which included the appellant on 28.08.2018 from their homes. The relief sought by the Writ Petitioners was to ensure a credible investigation into the

1 (2018) 10 SCC 753

arrest of the five Human Rights Activists. Interim orders were passed in the Writ Petition by this Court, under which, the benefit of house arrest of the appellant, inter alia, was also ordered to be extended to others. The order of house arrest of appellant was extended. The relief sought for, namely, an independent investigation in the Writ Petition, filed in this Court, was rejected by the majority of Judges with Dr. D.Y. Chandrachud, J., dissenting. We notice paragraph-40, which reads as follows:

"40. Accordingly, this writ petition is disposed of with liberty to the accused concerned to take recourse to appropriate remedy as may be permissible in law. The interim order passed by this Court on 29-8-2018 (Romila Thapar v. Union of India, 2018 SCC OnLine SC 1343) shall continue for a period of four weeks to enable the accused to move the court concerned. The said proceedings shall be decided on its own merits uninfluenced by any observation made in this judgment, which is limited to the reliefs claimed in the writ petition to transfer the investigation to an independent investigating agency and/or court-monitored investigation. The investigating officer is free to proceed against the accused concerned as per law. All the accompanying applications are also disposed of in terms of this judgment."

5. This Judgment was rendered on 28.09.2018 by this Court. Thereafter, the Writ Petition, filed by the appellant, before the High Court of Delhi, was allowed. We may, at once notice, that the relief sought in the Writ Petition was initially one seeking a Writ of Habeas Corpus. Thereafter, the Court came to be concerned with the legality of the Order of transit remand passed by the CMM, which we have adverted to. We may notice only, paragraphs-28 and 29, 30 and 31 of judgment dated 01.10.2018:

"28. With there being several non-compliances of the mandatory requirement of Article 22(1), Article 22(2) of the Constitution and Section 167 read with Section 57 and 41(1)(ba) of the Cr PC, which are mandatory in nature, it is obvious to this Court that the order passed by the learned CMM on 28th August, 2018 granting transit remand to the Petitioner is unsustainable in law. The said order is accordingly hereby set aside.

29. In view of Section 56 read with Section 57 Cr PC, in the absence of the remand order of the learned CMM, the detention of the Petitioner, which has clearly exceeded 24 hours, is again untenable in law. Consequently, the house arrest of the Petitioner comes to *an* end as of now.

30. It is clarified that this order will not preclude the State of Maharashtra from proceeding further in accordance with law.

31. At this stage, Mr. Navare submits that this Court should extend the house arrest of the Petitioner by two more days since the Supreme Court had itself extended his house arrest for four weeks. This submission overlooks the fact that the Supreme Court had extended the Petitioner's house arrest only in order to enable him to avail of the remedies that were permissible to him in accordance with law. As far as the present Petitioner is concerned, the fact that this writ petition filed by him was already pending before this Court, was noticed by the Supreme Court and it was made clear that he is free to pursue this remedy among others in accordance with law. The extension of his house arrest by the Supreme was only for that limited purpose. Consequently, this Court is unable to accede to the request of Mr. Navare."

(Emphasis supplied)

6. The appellant filed Writ Petition No. 4425 of 2018 dated 05.10.2018 for quashing the FIR. The High Court protected the appellant from arrest during the pendency of the said Writ Petition. Charge-sheet was filed against the appellant's co-accused on 15.11.2018. Then, this is followed-up by a supplementary charge-sheet against the co-accused on 21.02.2019. On 13.09.2019, the High Court of Bombay dismissed the Writ Petition filed by appellant against the FIR. The interim protection from arrest was, however, extended by three weeks. The Special Leave Petition filed by appellant, as SLP (Criminal) No. 8862 of 2019, came to be disposed of by acceding to the request of the appellant that the appellant may apply for anticipatory bail before the competent Court. The Court extended the interim protection, which was given to the appellant for another period of four weeks, from 15.10.2019 and he was given liberty to apply for regular/anticipatory bail. The Application seeking anticipatory bail came to be dismissed by the Sessions Court by Order dated 12.11.2019.

7. The Appellant approached the High Court of Bombay seeking anticipatory bail, which was declined by Order dated 14.02.2020. However, the High Court granted protection from arrest for four weeks. The Special Leave Petition filed, challenging the Order by the High Court, came to be disposed of by Order dated 16.03.2020. By the said Order, this Court dismissed the Special Leave Petition. In its Order, this Court noticed that since the appellant had enjoyed protection for approximately one and a half years, three weeks' time was granted to surrender. It is, thereafter, that on 08.04.2020, this Court extended the time by a period of one week for surrendering and, accordingly, on 14.04.2020, the appellant surrendered before the NIA, Delhi. On 15.04.2020, seven days police custody was granted by the Sessions Court, New Delhi. On 21.04.2020, the further remand of seven days was ordered. Before the expiry of the appellant's policy custody, he was remanded to judicial custody on 25.04.2020. The appellant was transferred to Mumbai on 26.05.2020 and he was remanded to judicial custody. It is, thereafter, that the appellant moved for default bail on 11.06.2020. In calculating the period of custody for the purpose of filing the Application for default bail, the appellant, included the period of 34 days of house arrest from 28.08.2018 to 01.10.2018. Further, eleven days of custody with the NIA from 15.04.2020 till 25.04.2020 and forty-eight days in Tihar Jail, Delhi and Taloja Jail, Mumbai from 25.04.2020 to 12.06.2020 (judicial custody), were also added. The NIA, it would appear, filed Application for extension of time to file charge-sheet after 110 days of custody on 29.06.2020. The NIA Special Court, before which the Application for default bail was moved, rejected the Application on 12.07.2020. The appellant preferred an Appeal before the High Court of Bombay challenging the Order dated 12.07.2020. On 09.10.2020, the NIA filed the charge-sheet against the appellant, *inter alia*. By the impugned Order dated 08.02.2021, the High Court of Bombay, dismissed the Appeal, which was filed under Section 21 of the NIA Act.

8. We heard Shri Kapil Sibal, learned Senior Counsel as also Smt. Nitya Ramakrishnan, learned Senior Counsel assisted by Shri Shadan Farasat for the appellant and Shri S.V. Raju, learned Additional Solicitor General, on behalf of the respondent.

THE FINDINGS IN THE IMPUGNED ORDER

9. During the period of the house arrest, the appellant was not supposed to meet anyone, barring his lawyers and ordinary residents of the house. He could not step out of the premises. There were to be two Guards of the Special Cell of Delhi Police outside the house. The Investigating Agency/Investigating Officer did not have any access to him or occasion to interrogate him. The Transit Remand Order being stayed, it could not be said that the appellant was under the detention of the Police for investigation. Under Section 167(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the CrPC', for short), the Magistrate has to authorise the detention. The High Court having stayed the transit remand and finally having set aside the transit remand, thereby holding the detention to be illegal, there was no authorised detention by an Order of the Magistrate. Therefore, the appellant cannot claim the benefit of default bail. It is an indispensable requirement to claim the benefit of default bail that the detention of the accused has to be authorised by the Magistrate. The authorisation by the Magistrate having been declared illegal, the detention itself was illegal. The said period (house arrest custody) cannot be treated as authorised custody under Section 167(2) of the CrPC. The Court drew support from decision of this Court which is reported in *Chaganti Satyanarayan & Ors. v. State of Andhra Pradesh*[2], to hold that the period of 90 days will commence only from the date of remand and not from any anterior date in spite of the fact that the accused may have been taken into custody earlier. The Court held that it was not possible for it to hold that every detention, which may have resulted in deprivation of liberty of the accused, to be an authorised detention under Section 167(2) of the Cr.P.C. *Sans* any valid authorisation of the Magistrate, detaining the appellant, he was not entitled to default bail. Thus, the Court took the view that the period, when the appellant was under the house arrest, *i.e.*, 28.08.2018 to 01.10.2018, had to be excluded. After the High Court of Delhi set aside the Transit Remand Order, it was noted that the appellant had applied for anticipatory bail, which was

2 (1986) 3 SCC 141

rejected at all stages and, ultimately, the appellant surrendered only on 14.04.2020. It was based on the said surrender that the Magistrate authorised police custody.

SUBMISSIONS OF THE APPELLANT

10. The learned Senior Counsel for the appellant contended that there is no substance in the reasoning of the High Court that the period of 34 days, during which, the appellant was under house arrest, could not be included within the period of 90 days, for the reason that the Investigating Officer did not have access to the appellant, and it is untenable. It was contended that nothing prevented the Officers from interrogating the appellant/investigating the matter, if need be, after obtaining the leave of the High Court of Delhi. It the appellant's contention that under Section 167 of the CrPC, what is contemplated is granting of such custody by the Magistrate, as he thinks fit. The provision does not contemplate access to the Police for interrogation as a condition. It is pointed out that it is open to the Magistrate and it is often so done that right from the first day of remand, what is granted is judicial custody, wherein Police have no access to the accused. However, such judicial custody is reckoned for calculating the period for considering an Application for default bail. Still further, it is pointed out that under Section 43D(2)(b), of UAPA Police Custody can be sought at any time. It is further contended that there was no stay of investigation. The two conditions required for attracting Section 167 are pointed out to be as follows: (a) A person is arrested under Section 57 of the Cr.P.C. while investigating a cognisable offence and (b) he is produced before a Magistrate after his arrest. It is contended that in the case of the appellant, both the conditions were fulfilled having regard to the fact that the appellant stood arrested on 28.08.2018 and he was produced before the Magistrate for the remand. It was next contended that the fact that the High Court of Delhi finally set aside the said remand and held that the detention was illegal, was an untenable ground to hold that there was no remand under Section 167 of the CrPC. Appellant lay store by the Order of the High Court of Delhi, wherein it had concluded that the house arrest of the appellant 'comes to an end as of now'. It is contended that the Court has not treated the period of house arrest as either nonest or void. Custody, it is pointed out, was authorised by the Magistrate under Section 167. It was extended by a modification by the High Court and, thereafter,

by this Court. The High Court of Delhi, it is pointed out, only stayed the transit and not the remand Order. The Court only modified the nature of the remand, *i.e.*, from transit in Police custody to within the confines of the appellant's house. The detention, being found to be illegal, cannot wipe out the period of detention. The Order of the High Court of Delhi, providing for house arrest can only be sourced from Section 167 of the CrPC. What is required under Section 167 of the CrPC is the total period of custody which can include broken periods and the custody need not be one continuous lot. It is contended that Section 167 does not distinguish between transit or other remand. The remand, be it a transit remand, has to be sourced to Section 167 of the Cr.P.C. and there is no other provision for the transit remand. The High Court has itself found that appellant was in custody when he was under the house arrest. It is then pointed out that the High Court did not have any inherent power to place a person in custody. In this case the power can only, therefore, be what flows from Section 167 of the CrPC. It is the Order of transit remand which occasioned the custody. It was contended that the High Court or any superior Court can modify or change the nature of the Magisterial remand. The modified nature of the remand by the High Court of Delhi and this Court was never set aside.

SUBMISSIONS OF THE RESPONDENT

11. Mr. S.V. Raju, learned Additional Solicitor General would support the order of the High Court:-

    a. He points out that at the time when the writ petition was filed in the High Court of Delhi seeking a writ of habeas corpus, the order of transit remand had not been passed by the CMM, Saket.

    b. In his application seeking for anticipatory bail, the appellant had sought through his pleadings to project the need to be protected. The protection was granted which was continued in various proceedings as already noticed.

    c. Reliance is placed on the bar under Section 43(D)(4) of UAPA against the grant of anticipatory bail.

    d. He referred to paragraph 12 of the order rejecting appellant's plea for anticipatory bail. It is pointed out that it was the case of the appellant that this Court had protected his liberty by granting

house arrest *inter alia.* The meat of the matter is that it was understood by the appellant himself that the house arrest was a protection from custody and therefore it could not be understood as custody within the meaning of Section 167 of the Code of Criminal Procedure. In short, house arrest was permitted in exercise of the extraordinary powers available to this Court.

12. It is further pointed out that house arrest according to the appellant itself was unknown to the code. It is further the case of the respondent that an accused who is remanded to custody under Section 167 of the Cr.P.C. cannot come out of the custody unless he is bailed out or unless he is acquitted. There is no bail in favour of the appellant. He was also not remanded to judicial custody. The so-called custody during the house arrest, in other words, was not custody or detention within the meaning of Section 167 of the Cr.P.C. It also was not a police custody because the investigating agency had no access to the accused during this period. Thus, a period of 34 days in house arrest was neither judicial custody nor police custody as provided in Section 167 of the Cr.P.C. The order of the High Court is relied upon to point out that the Court contemplated that the house arrest came to an end with the judgment. The fact that the High Court did not grant bail when it pronounced the judgment on 1.10.2018, would go to show that it was not an order passed under Section 167 of the Cr.P.C. The contention which found favour with the High Court is reiterated, namely, with its judgment on 01.10.2018, the Court has set the clock back and treated the arrest of the appellant as *non-est*. This is for the reason that the appellant was not bailed out. He was not placed in judicial custody. With the house arrest coming to an end, the appellant became a free person, entitled to apply for anticipatory bail which he availed of. The application for anticipatory bail presupposes that the arrest on 28.08.2018 was *non-est* since a person could not be arrested for an offence twice. By refusing anticipatory bail, the Courts including this Court permitted the arrest of the appellant for the same offences for which he was arrested earlier. This indicates that the earlier proceedings were treated as *non-est* for all practical purposes. The surrender by the appellant estopped the appellant from projecting the house arrest as custody within the meaning of Section 167 of the Cr.P.C. The order passed by CMM, Saket was only an order for production and not an order for detention in custody. Reading Section 167 alongwith

Sections 56 and 57 of the Cr.P.C., it is pointed out that the order of transit remand is to be understood as an order extending the period of arrest of 24 hours for the purpose of facilitating the production of accused before the competent Magistrate which in this case, was the competent Court located at Pune. Sections 56, 57 and 167 is relied upon to contend that since there is a duty to produce an arrested person within 24 hours, Section 57 provided for a special order under Section 167 for such detention beyond 24 hours for production of the accused before the competent Court. Orders are ordinarily passed under this Section 167 are either orders of police remand or orders remanding an accused to judicial custody. The special order referred to in Section 57 is the order forwarding the accused to a Magistrate having jurisdiction to either try the case or commit the accused. In a case where an accused is presented before a Magistrate not having such jurisdiction, the Magistrate has no authority or power to remand an accused to judicial custody. Therefore, the order of transit remand is not an order for the purpose of including the period in computing 90 days and it is only a production order. At any rate, it is pointed out that the order of Saket Court (transit order), even if it is considered to be an order under Section 167 of Cr.PC, it was hardly in force for a couple of hours till the Delhi High Court stayed the same around 4.00 p.m. on the very day. Even if this period of 1 day is included for the purpose of computing the period of 90 days, the appellant would not become entitled to default bail. It is further the case of the respondent that the interpretation adopted by the appellant would render police custody under Section 167 illusory.

13. The investigating authorities would be deprived of the opportunity for custodial interrogation during the first 15 days or 30 days in case of UAPA offences. The interpretation which frustrates a fair investigation under the statute should be avoided.

14. Act of Court should not negatively impact the investigating agency- the maxim "Actus curiae neminem gravabit" would apply in the present case.

15. The order passed by the High Court of Delhi in the writ petition seeking habeas corpus was not an order under Section 167 of the Cr.P.C. If the submission of the appellant is accepted, it would mean that the appellant was remanded to police custody after 30 days i.e.,

on 15.04.2020 and 21.04.2020. The appellant never objected to the same. This clearly shows that the present contention of the appellant is a mere after thought. The period of arrest has to be excluded and the period has to be reckoned from the date of production. The submission is based on the decision of this Court in *Chaganti Satyanarayana(supra)*. This is after treating 15.04.2020 to be the date of production.

ANALYSIS

16. Though the final question to be answered is whether the period of 34 days spent in house arrest by the appellant is to be counted towards the period of 90 days under Section 167 Cr.P.C., several issues arise which we articulate as follows:

1) What is the nature of an order of transit remand? Is it an order passed under Section 167 of the Cr.PC.?

2) What is the nature of the interim order dated 28.08.2018 passed in the writ petition by the appellant in the High Court of Delhi as extended? Are these orders passed under Section 167 of the Cr.P.C.?

3) What is the effect of the judgment of the High Court of Delhi dated 1.10.2018 wherein the arrest of the appellant and the transit remand are found illegal?

4) Does the House arrest of the appellant amount to police custody or judicial custody? Can there be an order for custody other than police custody and judicial custody under Section 167 Cr.P.C.? Is House arrest custody within the embrace of Section 167 of Cr.P.C.?

5) Is the House arrest of the appellant not custody under Section 167 of the Cr.P.C. on the score that the appellant could not be interrogated by the competent investigating officer?

6) What is the effect of the appellant being in police custody from 15.4.2020 till 25.4.2020 and the alleged acquiescence of the appellant in the order and the custody undergone by the appellant?

7) Whether broken periods of custody otherwise traceable to Section 167 Cr.P.C. suffice to piece together the total maximum

period of custody permitted beyond which the right to default bail arises or whether the law giver has envisaged only custody which is continuous?

8) What is the impact of mandate of Article 21 and Article 22 of the Constitution?

17. Before we deal with the various issues, it is necessary to note certain salient features of the Constitution, Cr.P.C. and also Unlawful Activities (Prevention) Act (UAPA).

18. Article 21 of the Constitution incorporates invaluable fundamental rights insofar as it declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 (1) and (2) read as follows:

"2. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

(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 to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate"

19. Chapter V of the Cr.P.C. deals with "Arrest of Persons". Section 41 deals with situations in which any police officer may arrest any person without an order from a Magistrate or without a warrant. Section 41 (1)(a) to 41 (1)(d) provides for safeguards to avoid arbitrary arrest and also confer certain rights on the person arrested. They were inserted by Act 5 of 2009 with effect from 1.11.2010. Section 43 Cr.P.C. provides for power to arrest even by a private person and the procedure to be followed in such case. Section 48 Cr.P.C. reads as follows:

"48. Pursuit of offenders into other jurisdictions. A police officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest, pursue such person into any place in India."

20. Sections 56 and 57 Cr.P.C. are also relevant and we refer to the same.

"56. Person arrested to be taken before Magistrate officer in charge of police station. - A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

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 the 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."

21. Chapter VI deals with *Processes to compel Appearance*. Part A of Chapter VI deals with Summons. Part B deals with *Warrant of arrest*. Warrant of arrest contemplated are those issued by a court under Cr.P.C. Section 76 Cr.P.C. reads as follows:

"76. Person arrested to be brought before Court without delay. The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person:

Provided that such delay shall not, in any case, exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

22. Under Section 77 Cr.P.C., a warrant of arrest may be executed at any place in India. Chapter XII deals with *Information to the Police and their Powers to Investigate*. The mandatory duty of police officer to register first information report has been elaborately considered by a Constitution Bench of this Court in the decision reported in *Lalita Kumari vs. Government of Uttar Pradesh and others*[3].

3 (2014) 2 SCC 1

23. Section 156 Cr.P.C. reads as follows:

"156. Police officer' s power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

24. Under Section 156 Cr.P.C., any police officer in charge of a police station can without order of a Magistrate investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station have the power to try. Section 157 deals with *Procedure for investigation*. The said provision contemplates *inter alia* the power to proceed, to the spot, to investigate the facts and circumstance of the case, and if necessary, take measures for the discovery and arrest of the offender. It is also pertinent to notice Section 167 Cr.P.C. It reads as under:

"167. Procedure when investigation cannot be completed in twenty-four hours.—(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in

such custody as such Magistrate thinks fit, for 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 authorise 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 so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[(*b*) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;]

(*c*) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise 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 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 clause (*b*), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:]

[Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.]

[(2-A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate, or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (*a*) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.]

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it to the Chief Judicial Magistrate.

(5) If in any case triable by Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

25. Section 43(D) (2) of UAPA provides for the modified application of Section 167.

26. In *State of Punjab v. Ajaib Singh*[4], the court had to deal with ambit of Article of 22(1) and also the scope of the expression "arrest" contained therein.

"16. Broadly speaking, arrests may be classified into two categories, namely, arrests under warrants issued by a court and arrests otherwise than under such warrants. As to the first category of arrest, Sections 75 to 86 collected under sub-heading "B-Warrant of Arrest" in Chapter VI of the Code of Criminal Procedure deal with arrests in execution of warrants issued by a court under that Code. Section 75 prescribes that such a warrant must be in writing signed by the presiding officer, or in the case of a Bench of Magistrates, by any Member of such Bench and bear the seal of the court. Form No. II of Schedule V to

4 AIR 1953 SC 10

the Code is a form of warrant for the arrest of an accused person. The warrant quite clearly has to state that the person to be arrested stands charged with a certain offence. Form No. VII of that Schedule is used to bring up a witness. The warrant itself recites that the court issuing it has good and sufficient reason to believe that the witness will not attend as a witness unless compelled to do so. The point to be noted is that in either case the warrant ex facie sets out the reason for the arrest, namely, that the person to be arrested has committed or is suspected to have committed or is likely to commit some offence. In short, the warrant contains a clear accusation against the person to be arrested. Section 80 requires that the police officer or other person executing a warrant must notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant. It is thus abundantly clear that the person to be arrested is informed of the grounds for his arrest before he is actually arrested. Then comes Section 81 which runs thus:

"The police officer or other person executing a warrant of arrest shall (subject to the provisions of Section 76 as to security) without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person."

17. Apart from the Code of Criminal Procedure, there are other statutes which provide for arrest in execution of a warrant of arrest issued by a court. To take one example, Order 38 Rule 1 of the Code of Civil Procedure authorises the court to issue a warrant for the arrest of a defendant before judgment in certain circumstances. Form No. 1 in Appendix F sets out the terms of such a warrant. It clearly recites that it has been proved to the satisfaction of the court that there is probable cause for belief that the Defendant 1s about to do one or other of the things mentioned in Rule 1. The court may under Section 55 read with Order 21 Rule 38, issue a warrant for the arrest of the judgment-debtor in execution of the decree. Form 13 sets out the terms of such a warrant. The warrant recites the decree and the failure of the judgment-debtor to pay the decretal amount to the decree-holder and directs the bailiff of the court to arrest the defaulting judgment-debtor, unless he pays up the decretal amount with costs and to bring him before the court with all convenient speed. The point to be noted is that, as in the case of a warrant of

arrest issued by a court under the Code of Criminal Procedure, a warrant of arrest issued by a court under the Code of Civil Procedure quite plainly discloses the reason for the arrest in that it sets out an accusation of default, apprehended or actual, and that the person to be arrested is made acquainted with the reasons for his arrest before he is actually arrested."

Also in para 20, this Court laid down as follows:-

"20. Turning now to Article 22(1) and (2), we have to ascertain whether its protection extends to both categories of arrests mentioned above, and, if not, then which one of them comes within its protection. There can be no manner of doubt that arrests without warrants issued by a court call for greater protection than do arrests under such warrants. The provision that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right. It is also perfectly plain that the language of Article 22(2) has been practically copied from Sections 60 and 61 of the Code of Criminal Procedure which admittedly prescribe the procedure to be followed after a person has been arrested without warrant. The requirement of Article 22(1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest indicates that the clause really contemplates an arrest without a warrant of court, for, as already noted, a person arrested under a court's warrant is made acquainted with the grounds of his arrest before the arrest is actually effected. There can be no doubt that the right to consult a legal practitioner of his choice is to enable the arrested person to be advised about the legality or sufficiency of the grounds for his arrest. The right of the arrested person to be defended by a legal practitioner of his choice postulates that there is an accusation against him against which he has to be defended. The

language of Article 22(1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by a court on the allegation or accusation that the arrested person has, or is suspected to have, committed, or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest. In other words, there is indication in the language of Article 22(1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority. The *Blitz case* (Petition No. 75 of 1952), on which Sri Dadachanji relies, proceeds on this very view, for there the arrest was made on a warrant issued, not by a court, but, by the Speaker of State Legislature and the arrest was made on the distinct accusation of the arrested person being guilty of contempt of the legislature. It is not, however, our purpose, nor do we consider it desirable, to attempt a precise and meticulous enunciation of the scope and ambit of this fundamental right or to enumerate exhaustively the cases that come within its protection. Whatever else may come within the purview of Article 22(1) and (2), suffice it to say for the purposes of this case, that we are satisfied that the physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest, and delivery of that person to the custody of the officer in charge of the nearest camp under Section 4 of the impugned Act cannot be regarded as arrest and detention within the meaning of Article 22(1) and (2). In our view, the learned Judges of the High Court over-simplified the matter while construing the article, possibly because the considerations hereinbefore adverted to were not pointedly brought to their attention."

[Emphasis supplied]

27. It will be noted that with the proviso in the Cr.P.C., 1973, in Section 76, in the case of arrest under a warrant, the person is to be produced before the Court within 24 hours with the exclusion of time taken for travelling. Such a proviso was absent in Section (81) of the Cr.P.C., 1898 which was considered by the Court.

28. In *State of U.P. v. Abdul Samad*[5], the respondents who were husband and wife were arrested for non-compliance with the order of deportation passed against them. They were sent to Amritsar for being deported to Pakistan. They were produced before the Magistrate on 23rd July, 1960 at 10.00 A.M. who ordered them to be kept in the Civil Lines Police Station. They were brought back to Lucknow on the 25th July 1960 based on a message from the High Court of Allahabad requiring their production and they were produced before the Deputy Registrar, High Court who directed them to be produced on the next day of the morning. The court which was dealing with the writ of Habeas Corpus by the respondents directed the respondents be produced the next day. On 28th July 1960, the High court focussing on the second period i.e. 25th July 1960 to 2.00 p.m. 27th July, 1960 found that during this period the respondents having not being produced before a Magistrate within 24 hours of the commencement of the custody the detention was found to be violative of Article 22(2). It is on these facts the majority (Justice K. Subba Roa -dissenting)held as follows:

"….It is very difficult to appreciate what exactly either of the learned Judges had in mind in making these observations holding that the guarantee under Article 22(2) had been violated. During the "second stage" at which the learned Judges held that the detention has been illegal because of a violation of Article 22(2), the facts were these: The respondents had been brought back to Lucknow on a message requiring their production before the High Court. They reached Lucknow on the 25th at 1 p.m. and were produced at 3 p.m. the same day i.e. within two hours of reaching Lucknow before the Deputy Registrar. The Deputy Registrar had directed their production the next day and they were accordingly so produced. Even taking it that the Deputy Registrar was not a judicial authority such as the learned Judges had in mind, the respondents had been produced on 26th morning at 10.15 a.m. before the learned Judges when they were at liberty to make any order regarding the custody which they considered proper and the time when they were produced before the Judges was admittedly not beyond 24 hours from the time the respondents reached Lucknow. On the 26th the learned Judges who took part in the final decision

5 AIR 1962 SC 1506

passed an order directing the production of the respondents on July 27, 1960 at 2 p.m. which obviously permitted the previous custody to be continued till further orders. They were produced accordingly at 2 p.m. on that day and by a further order of July 27, 1960 the learned Judges had directed the release of the respondents on bail and in pursuance of this order the respondents had been released on July 27, 1960 itself. In these circumstances we are at a loss to understand which is the period during "the second stage" or "on the 27th", when the respondents could be said to have been illegally detained for more than 24 hours without production before a judicial authority as required by Article 22(2). We would add that even if Article 22(2) were construed to require that a person arrested and detained has to be produced before a Magistrate every 24 hours during his detention, a meaning which it assuredly cannot bear, though it is not clear to us whether the learned Judges did not understand the article to require this, even such a requirement was satisfied in this case as the respondents were during "the second stage" produced before the High Court itself "for suitable orders" on the 26th and again on the 27th. We have no desire to comment further on this judgment of the learned Judges except to say that there was no justification whatsoever for the finding on the basis of which the learned Judges directed the release of the respondents."

[Emphasis supplied]

29. The aforesaid reasoning is not inapposite in the context of Respondent's case that only a Magistrate can authorize detention under Section 167 Cr.PC.

PROCEEDINGS IN THE HIGH COURT OF DELHI

30. The writ petition filed by the appellant was mentioned before the Chief Justice of the Court on 28.08.2018 at 2:15 p.m. From the judgment, it is further clear that it was taken up at 2:45 p.m. on the same day. The Court initially ordered that 'no precipitate action be taken' of removing the appellant till the matter was taken up again at 4:00 p.m. In the meantime, it would appear that in the transit remand application moved by the Maharashtra police, the CMM, Saket passed the order on the transit remand application which we have extracted.

31. We have also noticed the contents of the order which was passed at 4:00 p.m. on 28.08.2018. The perusal of the judgment further reveals that the counsel for the state of Maharashtra, in fact, raised the preliminary objection to the maintainability of the writ. It reads as follows:-

"6. Mr. Vinay Navare, learned counsel appearing for the State of Maharashtra, raised a preliminary objection to the maintainability of the present writ petition relying on the recent judgment dated 5th September 2018 of a three judge bench of the Supreme Court in Crl. A. 1124 of 2018 (*State of Maharashtra* v. *Tasneem Rizwan Siddiquee*). He submitted that the Supreme Court has, in said decision, reiterated the settled position in law, as explained in the decisions in *Manubhai Ratilal Patel* v. *State of Gujarat,* (2013) 1 SCC 314 and *Saurabh Kumar* v. *Jailor, Koneil Jail*, (2014) 13 SCC 436, that once a person is in judicial custody pursuant to a remand order passed by a magistrate in connection with an offence under investigation, a writ of *habeas corpus* is not maintainable."

32. The High Court tides over this objection by holding as follows:-

"9. On the question of the maintainability of the present petition, as already noticed earlier, this Court had even prior to the learned CMM passing the order on the remand application directed at around 2.45 pm on 28th August 2018 that "no further precipitate action of removing the Petitioner from Delhi be taken till the matter be again taken up at 4 pm." Mr. Rahul Mehra, learned Standing Counsel for the State (NCT of Delhi) informed the Court that he had conveyed the aforementioned interim order to the concerned police officials at 2.54 pm on 28th August 2018. While it is not clear if the learned CMM was actually informed of this Court's interim order, the arrest memo of the Petitioner shows that he was arrested at 2.15 pm at his residence in Nehru Enclave. Given a reasonable time taken to reach the Saket Court complex, it is unlikely that the learned CMM heard the matter, perused the remand application and then passed the order before 2.45 pm, i.e. before this Court passed the interim order.

10. Consequently, when the present *habeas corpus* petition was entertained and the above interim order was passed by this Court, there was no order of the learned CMM granting transit remand of the Petitioner. In each of the aforementioned decisions cited by

Mr. Navlakha the entertaining of the *habeas corpus* petition by the High Court was subsequent to the transit remand order passed by the concerned Judicial Magistrate. This one factor distinguishes the present case from the above cases. Consequently, this Court rejects the preliminary objection raised by Mr. Navakre as to the maintainability of the present writ petition."

33. The High Court, thereafter, proceeded to find that even before a Magistrate, before whom the transit remand application is filed, the mandatory requirement of Section 167 is that the entries in the case diary should be produced, is applicable. He is required to apply his mind to ensure there exists material in the form of entries to justify the prayer for transit remand. While the Magistrate examining the transit remand application is not required to go into the adequacy of the material, he is obliged to satisfy himself from about the existence of the material. He further found that the Magistrate is bound to ask the arrested person whether in fact, he has been informed about the grounds of arrest and whether he requires to consult and be defended by any legal practitioner of his choice. Though, a duty lawyer empanelled under the Legal Services Authority Act, 1987 was shown representing the appellant, the High Court noticed that the Magistrate did not ask the counsel of the arrested person whether he was informed about the grounds of arrest and whether he asked to consult and be defended by the legal practitioner of his choice. The High Court emphasized that this requirement does not get diluted only because the proceedings are for transit remand. It was found be the mandate under Article 22(1) of the Constitution. The appearance of the duty lawyer was found to be essentially cosmetic and not in the true spirit of Article 22(1). The materials in the case diary were found to be written in the Marathi language. It was found undisputed that the Magistrate was not conversant with the Marathi language. This disabled the Magistrate from appreciating whether the requirements under Section 41(1)(b)(a) of the Cr.P.C. stood satisfied. It is thereafter noticed that the Court disposed of the writ petition with the findings and the directions as noted in paragraphs 28, 29, 30 and 31 which we have already extracted.

34. The SLP against the judgment was disposed of as follows on 11.08.2020:

"Heard the learned Solicitor General and the learned counsel appearing in the matter at length.

The learned Solicitor General has submitted that the High Court should not have interfered in the matter and the order should not have been passed and it is palpably illegal. Ms. Nithya Ramakrishnan, learned counsel, has submitted that the order is absolutely correct and there is no ground to make any interference in the order.

Be that as it may, the exercise is academic in nature and the accused have surrendered on 14.04.2020, pursuant to the order passed by this Court on 08.04.2020. We do not propose to go into the rival submissions, as the petitions have been rendered infructuous for practical purposes.

However, we direct that the impugned order shall not be treated as a precedent for any other case, questions of law are kept open.

The Special Leave Petitions and the pending interlocutory application(s), if any, is/are disposed of."

NATURE OF HOUSE ARREST

35. The High Court in the impugned order has itself found that the period of 34 days spent in house arrest by the appellant amounted to custody. We, however, consider it necessary to articulate our views regarding the nature of house arrest.

36. In an article "A Brief History of House Arrest and Electronic Monitoring" by J. Robert Lilly and Richard A. Ball, we find the following discussion:-

"HOME CONFINEMENT "House arrest" has a long history dating at least to St. Paul the Apostle, who is reported to have been placed under "house arrest" (custodia libera) in Rome at about the age of 60. St. Paul's sentence lasted two years during which time he paid rent and earned his keep as a tent maker, thus avoiding becoming a ward of the church or state. While it would go far beyond the historical record to claim that St. Paul was the first person to pay for his keep under conditions of house arrest, it is interesting to note that many of today's "house arrest" programs expect their clients to pay supervision fees, restitution, and their living expenses. Galileo Galilei, the Florentine philosopher, physicist, and astronomer, also experienced "house arrest" after a "second

condemnation" trial in Rome in 1633. After the trial, he returned to Florence and house arrest for the rest of his life. More recently, Czar Nicholas II of Russia and his family were kept under house arrest in 1917 until their deaths in 1918. This history is a cause for concern among some because of the traditional use of the practice as a means of silencing political dissent. South Africa, for example, has a long history of control through "banning" and societies found in Poland, South Korea, India, and the Soviet Union are known to employ "house arrest" primarily to deal with troublesome political dissenters. On the other hand, France introduced the concept of control judiciare in 1970 as a fairly straightforward form of pre-trial detention involving a provision that employed home confinement as an alternative for common offenders. In 1975, Italy initiated a policy of affidamento in provo ai servizio sociale (trial custody), which may be described as a form of parole following a shock period of three months incarceration. Other European countries have also experimented with some manner of home confinement as a means of dealing with a variety of offenders. The traditional use of "house arrest" should not in itself become a rationale for rejecting it. In the United States, "home detention" had been put in practice in St. Louis as early as 1971.

Home confinement as a policy for use with adult offenders began to draw more attention in 1983 with the delivery of two different papers on the subject, passage of the Correctional Reform Act, and the use of an "electronic bracelet" to monitor compliance with home confinement on the part of an offender in New Mexico. The latter was inspired by a New Mexico district court judge, who read a comic strip where "Spiderman" was being tracked by a transmitter fixed to his wrist. The judge approached an engineer, who designed a device consisting of an electronic bracelet approximately the size of a pack of cigarettes that emitted an electronic signal that was picked up by a receiver placed in a home telephone. This bracelet could be strapped to the ankle of an offender in such a way that if he or she moved more than approximately 150 feet from the home telephone, the transmission signal would be broken, alerting authorities that the offender had left the premises. Officials in New Mexico gave approval for trial use of the device and a research project funded by the National Institute of Justice eventually reported successful results with this "electronic monitoring."

37. In the United States, in December 1985, one Ms. Murphy stood convicted in a case of insurance fraud. She could have been packed off to a jail for a maximum period of 50 years. Instead, the Federal Judge placed her under house arrest (See 108 F.R.D. 437, 439 (E.D.N.Y. 1985). This is what the Federal Judge *inter alia* ordered: -

"The sentencing of Maureen Murphy requires, in the court's opinion, a sentence not heretofore used in this District and almost never used in the country in the federal court. It is used elsewhere in the world and is considered by some to be highly objectionable. The difference, however, is that in other countries it is used to repress political dis- sent and before trial. Here it will be used after a full trial where the defendant has been found guilty of a serious offense. The penalty is house arrest."

She was allowed to leave her apartment only for medical reasons, employment, religious services or to conduct essential food shopping. House arrest has been employed in the United States essentially as an intermediate level penal sanction. In other words, upon being found guilty instead of sentencing the convict to a term in prison and in lieu of incarceration, as a condition of probation, the convict is compelled to confine himself to his place of residence. Interestingly, consistent with the constitutional protection afforded under United States constitution, the house arrest does not visit the convict with an absolute restriction from leaving his home. In the article "House Arrest", a critical analysis of an intermediate level penal sanction by Jeffrey N. Hurwitz, we notice the following:-

"House arrest is a form of intensive law enforcement supervision characterized by confinement to the offender's place of residence with permission to leave only for explicit, pre-authorized purposes. Generally, it is imposed as a penal sanction in lieu of incarceration and mandated by the sentencing judge as a condition of probation. In Florida, however, house arrest is considered a criminal sanction entirely separate from probation. In addition, at least one jurisdiction has reported using house arrest for individuals who have been released on their own recognizance while awaiting trial.

For example, a number of states and counties have recently added intensive supervision to probation programs in order to provide an intermediate punishment in lieu of incarceration for selected offenders.

Many of the reported conditions of intensive supervision strategies are similar or even identical to those imposed as part of the house arrest sanction. For example, multiple weekly contacts between offenders and probation officers, as well as mandatory employment, may be common to both control techniques.

The unique restriction on the offender's freedom to leave home is the distinguishing feature of the house arrest sanction. Although other heightened surveillance sanctions generally include strict curfews, house arrest allows the offender to leave her residence only for specific purposes, unless time spent away from home is used for pre-authorized ends, the offender risks detention and incarceration.

The Florida Community Control statute mandates that the court impose "intensive supervision and surveillance for an offender placed into community control, which may include … confinement to an agreed-upon residence during hours away from employment and public service activities. The Florida law has classified three tiers of permissible travel, ranked according to the purposes for spending time away from the site of confinement. "Essential travel" includes travel for work, religious expression, vocational or educational training, self-improvement programming, public service, and scheduled appointments with the supervising officer. Movement from the home oriented toward "the fulfilment of the basic needs of the community controllee" is considered "acceptable travel. All three types of travel must be approved in advance, although movements for family emergencies may occur without pre-authorization provided that they are reported no later than the following day."

We may also notice the following discussion in the said article: -

"While the conditions of house arrest imposed in Murphy are highly restrictive, another federally imposed home confinement pro- gram establishes even greater control. In United States v. Wayte3 the defendant was convicted for failure to register with the Selective Service System." The imposition of sentence was suspended and the defendant was placed on probation for six months. The court ordered that the entire probationary period be spent under house arrest at the residence of Wayte's grandmother, and that Wayte be allowed to leave his site of confinement only for "emergency purposes with

the permission of the probation officer."3" The house arrest regime in Wayte is the most restrictive yet re- ported. Because Wayte is unable to leave home at all, he is precluded from obtaining outside employment. All travel from his site of confinement must be only in response to a life-threatening crisis; apparently, even movement for religious expression must be approved by the probation officer as an emergency. He is functionally isolated and removed from the outside world, as if he were incarcerated, his wife acts as his intermediary with the community."

38. In the caption "the goals of house arrest", we notice the following discussion: -

"Yet house arrest, generally imposed as a special condition of probation, includes a distinctly retributive component.42 The sentencing court in Murphy de- scribes the incorporation of retribution, humiliation, and deterrence into the traditionally palliative scheme of probation: There will be some people who will believe that this sentence is much too lenient. Others will believe it too humiliating. Public humiliation is a part of the punishment .... In many respects the colonial use of stocks and the equivalent punishment in other societies served a useful goal in providing swift social disapproval as a deterrent. It is obvious that some form of this disapproval is required under modern conditions."

39. Among the advantages which have been perceived in promoting the house arrest, have been avoidance of overcrowding of the prisons and also cost saving. However, concerns have also emerged in regard to the issues arising out of the proper supervision of house arrest.

40. The said article goes on to describe house arrest as a community based probationary sanction. We may also notice the following discussion under the heading of waiver and probation being an act of grace: -

"Moreover, because of the particularly restrictive nature of home confinement, the implicated constitutional right might not be waivable. For example, if a confinee's housing is substandard, home confinement imposed by the state may violate the eighth amendment ban on cruel and unusual punishment. Similarly, it is likely that the offender might sacrifice a right that is not alienable to the state. If a

regime of home confinement does not include access to a house of worship, the state will have coerced from the offender a waiver or transfer of the inalienable right to freedom of worship guaranteed by the free exercise clause of the first amendment.

[Refer to decision by EC. Also refer to Russian.]"

41. It will be noticed that ordinarily in the United States, house arrest is ordered after the trial is conducted and an accused is found guilty. No doubt, it has also been resorted in respect of juveniles even during the pendency of the proceedings against him.

42. In *Buzadji v. Moldova*; 398 Butterworths Human Rights Cases 42, the European Court of Human Rights (Grand Chamber), was dealing with a case against the Republic of Moldova lodged under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Dealing with the questions, whether the applicant is deprived of liberty and whether the applicant had waived his right to liberty, i*nter alia,* the Court held as follows:-

"As it does in many other areas, the court insists in its case law on an autonomous interpretation of the notion of deprivation of liberty. A systematic reading of the Convention shows that mere restrictions on the liberty of movement are not covered by art 5 but fall under art 2(1) of Protocol No 4. However, the distinction between the restriction of movement and the deprivation of liberty is merely one of degree or intensity, and not one of nature or substance. In order to determine whether someone has been 'deprived of his liberty' within the meaning of art 5, the starting point must be the concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see Guzzardi v Italy (1980) 3 EHRR 333, [1980] ECHR 7367/76, paras 92–93).

According to the court's case law (see, among many others, Mancini v Italy (App no 44955/98) (judgment, 2 August), para 17; Lavents v Latvia (App no 58442/00) (judgment, 28 November 2002), paras 64–66; Nikolova v Bulgaria (No 2) [2004] ECHR 40896/98, para 60; Ninescu v Moldova (App no 47306/07) (judgment, 15 July 2014), para 53; and Delijorgji v Albania [2015] ECHR 6858/11, para 75), house arrest is considered, in view of its degree and intensity, to amount to deprivation of liberty within the meaning of art 5 of the Convention.

In Storck v Germany (2005) 43 EHRR 96, [2005] ECHR 61603/00, para 75 the court held that the right to liberty is too important in a 'democratic society' within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the sole reason that he gives himself up to be taken into detention. Detention might violate art 5 even though the person concerned might have agreed to it (see De Wilde v Belgium (1971) 1 EHRR 373, [1971] ECHR 2832/66, para 65)."

We may also notice:-

"The government submitted that lesser reasons were required in order to justify house arrest than detention in an ordinary remand facility because the former measure was more lenient than the latter.

It is true that in most cases house arrest implies fewer restrictions and a lesser degree of suffering or inconvenience for the detainee than ordinary detention in prison. That is the case because detention in custody requires integrating the individual into a new and sometimes hostile environment, sharing of activities and resources with other inmates, observing discipline and being subjected to supervision of varying degrees by the authorities twenty-four hours a day. For example, detainees cannot freely choose when to go to sleep, when to take their meals, when to attend to their personal hygiene needs or when to perform outdoor exercise or other activities. Therefore, when faced with a choice between imprisonment in a detention facility and house arrest, as in the present case, most individuals would normally opt for the latter.

However, the court notes that no distinction of regime between different types of detention was made in the Letellier principles (see para 92, above). It further reiterates that in Lavents (cited above), where the court was called upon to examine the relevance and sufficiency of reasons for depriving the applicant of liberty pending trial for a considerable period of time, the respondent government had unsuccessfully argued that different criteria ought to apply to the assessment of the reasons for the impugned restriction on liberty as the applicant had been detained not only in prison but also been held in house arrest and in hospital. The court dismissed the argument, stating that art 5 did not regulate the conditions of

detention, referring to the approach previously adopted in Mancini (cited above) and other cases cited therein. The court went on to specify that the notions of 'degree' and 'intensity' in the case law, as criteria for the applicability of art 5, referred only to the degree of restrictions to the liberty of movement, not to the differences in comfort or in the internal regime in different places of detention. Thus, the court proceeded to apply the same criteria for the entire period of deprivation of liberty, irrespective of the place where the applicant was detained."

HOUSE ARREST IN INDIA

43. In India, the concept of house arrest has its roots in laws providing for preventive detention. Section 5 of the National Security Act, 1980, is a law providing for preventive detention. Section 5 reads as follows:-

"5. Power to regulate place and conditions of detention.—Every person in respect of whom a detention order has been made shall be liable—

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention, whether within the same State or in another State, by order of the appropriate Government: Provided that no order shall be made by a State Government under clause (b) for the removal of a person from one State to another State except with the consent of the Government of that other State."

Article 22(3) reads as follows: -

"22(3).Nothing in clauses (1) and (2) shall apply

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention."

Thus, the safeguards under Article 22(1) and Article 22(2) are not available under a law providing for preventive detention.

44. We notice that *State of Rajasthan and Ors. vs. Shamsher Singh*[6] was a case under the said act. It was a case where the High Court had after quashing the order of detention on certain grounds gave certain directions. The detenu was to be released from the central jail but thereafter it was directed that the detenu be placed under house arrest or in place like Dak Bungalow or Circuit House with members of his family consisting of his wife and children. The authorities were to permit interview with other relatives also if the detenu was kept outside the house. This Court allowed the appeal of the state finding that the requirements of law in relation to detention had been complied with and the detention was wrongly quashed. In *A.K. Roy and Ors. vs. Union of India (UOI) and Ors.*[7] a Constitution Bench also dealt with the issue relating to preventive detention and house arrest in the said context. We may notice only paragraph 74.

"74. By Section 5, every person in respect of whom a detention order has been made is liable-

a. to be detained in such place and under such conditions, including conditions as to maintainance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify: and

b. to be removed from one place of detention to another place of detention, whether in the same State or another State, by order of the appropriate Government.

The objection of the petitioners to these provisions on the ground of their unreasonableness is not wholly without substance. Laws of preventive detention cannot, by the back-door, introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered, but to no greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor just that a detenu should have to suffer detention in "such place" as the Government may specify. The normal rule has to be that the detenu will be kept in detention in a place which is within the environs of his or her ordinary place of residence. If

6 AIR (1985) SC 1082
7 AIR (1982) SC 710

a person ordinarily resides in Delhi, to keep him in detention in a far off place like Madras or Calcutta is a punitive measure by itself which, in matters of preventive detention at any rate, is not to be encouraged. Besides, keeping a person in detention in a place other than the one where he habitually resides makes it impossible for his friends and relatives to meet him or for the detenu to claim the advantage of facilities like having his own food. The requirements of administrative convenience, safety and security may justify in a given case the transfer of a detenu to a place other than that where he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. Even when a detenu is required to be kept in or transferred to a place which is other than his usual place of residence, he ought not to be sent to any far-off place which, by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. Whatever smacks of punishment must be scrupulous avoided in matters of preventive detention."

45. Thus 'house arrests' have been resorted to in India, in the context of law relating to 'preventive detention'. What is however relevant is that preventive detention is also a form of forced detention. House arrest is also custody and forced detention.

46. As to whether such detention would qualify as custody under Section 167 will be considered when we discuss the provision relating to set off under Section 428 of Cr.P.C.

A LOOK AT PRISONS IN INDIA

47. The executive summary published by the National Crime Records Bureau for 2019 is as follows:

"Prison Statistics India – 2019

Executive Summary

Prisons – Types & Occupancy

Year	No. of prisons	Actual Capacity of Priosns	No. of Prisoners at the end of the year	Occupancy rate at the end of the year
2017	1,361	3,91,574	4,50,696	1 15.1%
2018	1,339	3,96,223	4,66,0X4	117.6%
2019	1,350	4,03,739	4,78,600	118.5%

1. The total number of prisons at national level has increased from 1,339 in 2018 to 1,350 in 2019, having increased by 0.82%.

2. The 1,350 prisons in the country consist of 617 Sub Jails, 410 District Jails, 144 Central Jails, 86 Open Jails, 41 Special Jails, 31 Women Jails, 19 Borstal School and 2 Other than the above Jails.

3. The highest number of jails was reported in Rajasthan (144) followed by Tamil Nadu (141), Madhya Pradesh (131), Andhra Pradesh (106), Karnataka (104) and Odisha (91). These Six (6) States together cover 53.11 % of total jails in the country as on 31st December, 2019.

4. Delhi has reported the highest number of Central jails (14) in the country. States/UTs like Arunachal Pradesh, Meghalaya, A & N Island, D & N Haveli, Daman & Diu and Lakshadweep have no central Jail as on 31st December, 2019.

5. Uttar Pradesh has reported the highest number of District jails (62). States/UTs like Goa, Chandigarh, D & N Haveli, Daman & Diu, Delhi, Lakshadweep and Puducherry have no District Jail as on 31st December, 2019.

6. Tamil Nadu has reported highest number of Sub-jails (96). States/UTs like Arunachal Pradesh, Goa, Haryana, Meghalaya, Mizoram, Nagaland, Sikkim, Chandigarh and Delhi have no sub-jail in their States/UTs, as on 31st December, 2019.

7. Only 15 States/UTs were having Women Jails (31 Women Jails) with a total capacity of 6,511 in India. These States/UTs (number of Jails, Inmates Capacity) are – Rajasthan (7) (1048), Tamil Nadu (5) (2018), Kerala (3) (232), Andhra Pradesh (2) (280), Bihar (2) (152), Gujarat (2) (410), Delhi (2) (648), Karnataka(1) (100), Maharashtra(1) (262), Mizoram (1) (90), Odisha(1) (55), Punjab(1) (320), Telangana(1) (250), Uttar Pradesh(1) (420) and West Bengal(1) (226) and The rest of 21 States/ UTs have no separate Women Jail as on 31st December, 2019.

8. The actual capacity of prisons has increased from 3,96,223 in 2018 to 4,03,739 in 2019 (as on 31st December of each year), having increased by 1.90%. Number of prisoners lodged in

various jails has increased from 4,66,084 in 2018 to 4,78,600 in 2019 (as on 31st December of each year), having increased by 2.69% during the period.

9. Out of the total capacity 4,03,739 in 1,350 prisons in 2019, the Central Jails of the country were having the highest capacity of inmates (1,77,618) followed by the District Jails (capacity of 1,58,986 inmates) and the Sub Jails (capacity of 45,071 inmates). Among the other types of jails, Special Jails, Open Jails and Women Jails were having a capacity of 7,262, 6,113 and 6,511 inmates respectively as on 31st December, 2019. The highest number of inmates were lodged in Central Jails (2,20,021) followed by District Jails (2,06,217) and Sub Jails (38,030) as on 31st December, 2019. The number of inmates in Women Jails were 3,652.

10. Uttar Pradesh has reported the highest capacity in their jails (capacity of 60,340 inmates in 72 jails contributing 14.95% of total capacity) followed by Bihar (capacity of 42,222 inmates in 59 Jails contributing 10.46% of total capacity) and Madhya Pradesh (capacity of 28,718 inmates in 131 jails contributing 7.1% of total capacity).

11. Out of the 4,78,600 prisoners, 4,58,687 were male prisoners and 19,913 were female prisoners.

12. The occupancy rate has increased from 117.6% in 2018 to 118.5% in 2019 (as on 31st December of each year).

13. The highest occupancy rate was in District Jails (129.7%) followed by Central Jails (123.9%) and Sub Jails (84.4%). The occupancy rate in Women Jails was 56.1% as on 31st December, 2019.

14. Uttar Pradesh has reported the highest number of prisoners (1,01,297) in its jails contributing 21.2% followed by Madhya Pradesh (44,603), Bihar (39,814), Maharashtra (36,798), Punjab (24,174) and West Bengal (23,092) as on 31st December, 2019. These States together are contributing around 56.4% of total prisoners in the country.

15. Delhi has reported the highest occupancy rate (174.9%) followed by Uttar Pradesh (167.9%) and Uttarakhand (159.0%) as on 31st December, 2019.

16. The capacity in 31 Women Jails was 6,511 with the actual number of women prisoners in these Women Jails was 3,652 (Occupancy Rate: 56.1%). The capacity of Women Inmates in other types of Jail (i.e. except Women Jails) was 21,192 with the actual number of women inmates in these jails was 16,261 (Occupancy Rate: 76.7%) as on 31st December, 2019.

17. Uttarakhand has reported the highest female occupancy rate (170.1%) followed by Chhattisgarh (136.1%) and Uttar Pradesh (127.3%). However, the highest number of female inmates were confined in the Jails of Uttar Pradesh (4,174) followed by Madhya Pradesh (1,758) and Maharashtra (1,569).

Prisoners – Types & Demography

Year	No. of convicts	No. of undertrial prisoners	No. of Detenues	No. of other inmates	Total no. of prisoners
2017	1,39,149	3,08,718	2,136	693	4,50,696
2018	1,39,488	3,23,537	2,384	675	4,66,084
2019	1,44,125	3,30,487	3,223	765	4,78,600

1. During the year 2019, a total of 18,86,092 inmates were admitted in various jails of the country.

2. A total of (4,78,600) prisoners as on 31st December, 2019 were confined in various jails across the country. The number of Convicts, Undertrial inmates and Detenues were reported as 1,44,125, 3,30,487 and 3,223 respectively accounting for 30.11%, 69.05% and 0.67% respectively at the end of 2019. Other prisoners accounted for 0.2% (765 prisoners) of total prisoners.

3. Convicted Prisoners

    a. The number of convicted prisoners has increased from 1,39,488 in 2018 to 1,44,125 in 2019 (as on 31st December of each year), having increased by 3.32% during the period.

    b. Out of total 1,44,125 convicts, the highest number of convicted prisoners were lodged in Central Jails (66.2%, 95,470 convicts) followed by District Jails (27.0%, 38,846

convicts) and Open Jails (3.0%, 4,288 convicts) as on 31st December,2019.

c. Uttar Pradesh has reported the maximum number of convicts (19.2%, 27,612 convicts) in the country followed by Madhya Pradesh (14.1%, 20,253 convicts) and Maharashtra (6.3%, 9,096 convicts) at the end of 2019.

d. Among the 1,44,125 convicts, 325 were civil convicts.

4. Undertrial Prisoners

a. The number of undertrial prisoners has increased from 3,23,537 in 2018 to 3,30,487 in 2019 (as on 31st December of each year), having increased by 2.15% during this period.

b. Among the 3,30,487 undertrial prisoners, the highest number of undertrial prisoners was lodged in District Jails(50.5%, 1,66,917 undertrials) followed by Central Jails(36.7%, 1,21,342 undertrials) and Sub Jails(10.6%, 35,059 undertrials) as on 31st December, 2019.

c. Uttar Pradesh has reported the maximum number of undertrials (22.2%, 73,418 undertrials) in the country followed by Bihar (9.5%, 31,275 undertrials) and Maharashtra (8.3%, 27,557 undertrials) at the end of 2019.

d. Among the 3,30,487 undertrial prisoners, only 91 were civil inmates.

5. Detenues

a. The number of detenues has increased from 2,384 in 2018 to 3,223 in 2019 (as on 31st December of each year), having increased by 35.19% during this period.

b. Among the 3,223 detenues, the highest number of detenues were lodged in Central Jails (81.4%, 2,622 detenues) followed by District Jails (9.9%, 318 detenues) and Special Jails (6.1%, 196 detenues) as on 31st December,2019.

c. Tamil Nadu has reported the maximum number of detenues (38.5%, 1,240) in the country followed by Gujarat (21.7%, 698) and Jammu & Kashmir (12.5%, 404) at the end of 2019.

6. Women Prisoners with Children

    a. There were 1,543 women prisoners with 1,779 children as on 31st December, 2019.

    b. Among these women prisoners, 1,212 women prisoners were undertrial prisoners who were accompanied by 1,409 children and 325 convicted prisoners who were accompanied by 363 children.

7. Age-group of the Prisoners

    a. As on 31st December, 2019 the maximum number of inmates (2,07,942 inmates, 43.4%) were belonging to the age group 18- 30 years followed by the age group 30- 50 years (2,07,104 inmates, 43.3%).

    b. 63,336 inmates (13.2%) were belonging to the age group above 50 years.

    c. 218 inmates belonged to the age group of 16-18 years.

8. Education

    a. Among the 4,78,600 prisoners, literacy profile of 1,98,872 (41.6%) prisoners was Below Class X, 1,03,036 (21.5%) prisoners were Class X & above but below Graduation, 30,201 (6.3%) prisoners were having a Degree, 8,085 (1.7%) prisoners were Post Graduates and 5,677 (1.2%) prisoners were Technical Diploma/Degree holders.

    b. A total of 1,32,729 (27.7%) prisoners were Illiterate.

9. Domicile of Origin of Prisoners

    a. Among the 4,78,600 prisoners as on 31st December, 2019, around 90.8% (4,34,564 inmates) of prisoners belonged to the State followed by prisoners belonging to the Other States (8.0%, 38,428 inmates) and prisoners belonging to the Other Country (1.2%, 5,608 inmates).

    b. Among the 1,44,125 convicts, 92.4% convicts (1,33,228 inmates) belonged to the State while 6.1% (8,726 inmates) and 1.5% (2,171 inmates) belonged to the Other States and Other Country respectively.

c. Haryana has reported the most number of other State domicile convicts (15.5%, 1,353 convicts) followed by Delhi (9.8%, 855 convicts) and Maharashtra (9.2%, 800 convicts) as on 31st December, 2019.

d. Among the 3,30,487 undertrial prisoners, 90.2% (2,98,208 inmates) belonged to the State while 8.9% (29,300 inmates) and 0.9% (2,979 inmates) belonged to the Other States and Other Country respectively.

e. Maharashtra has reported the highest number of undertrial prisoners of other states (16.0%, 4,675 inmates) followed by Uttar Pradesh (11.8%, 3,470 inmates) and Delhi (11.8%, 3,453 inmates) at the end of 2019.

Year	No. of prisons at the end of the year	No. of foreign prisoners	Share of foreign prisoners
2017	4,50,696	4,917	1.1%
2018	4,66,084	5,168	1.1%
2019	4,78.600	5,608	1.2%

1. The number of prisoners of foreign nationality (as on 31st December of each year) has increased from 5,168 in 2018 to 5,608 in 2019, having increased by 8.51% during this period.

2. The percentage share of foreign prisoners out of total prisoners has increased from 1.1% in 2018 to 1.2% in 2019 (as on 31st December of each year).

3. Among 5,608 prisoners of foreign nationality at the end of 2019, 4,776 were Males and 832 were females.

4. Among these foreign national prisoners, 38.7% (2,171 inmates) were Convicts, 53.1% (2,979 inmates) were Undertrials and 0.7% (40 inmates) were Detenues.

5. Among the foreign convicts, the highest number of foreign convicts were from Bangladesh (67.7%, 1,470 convicts) followed by Nepal (10.5%, 228 convicts) and Myanmar (7.1%,155 convicts) at the end of 2019.

Prison – Budget & Infrastructure

1. The total budget for the financial year 2019-20 for all prisons in the country was ' 6818.1 Crore. The actual expenditure was ' 5958.3 Crore which is 87.39% of total annual budget for FY 2019-20.

2. A total of ‘ 2060.96 Crore was spent on inmates during FY 2019-20 which is almost 34.59% of total annual expenditure of all prisons for FY 2019-20.

3. Almost 47.9% (‘ 986.18 Crore) of total expenses on inmates were spent on Food followed by 4.3% (‘ 89.48 Crore) on Medical matters, 1.0% (‘ 20.27 Crore) on welfare activities, 1.1 %(‘ 22.56 Crore) on Clothing and 1.2% (‘ 24.20 Crore) on Vocational/ Educational trainings.

4. Among all the States/UTs, out of total expenditure, Haryana has spent the highest share of expenditure on inmates (100.0%, ‘ 272.62 Crore) followed by Andhra Pradesh (88.1%, ‘ 152.24 Crore) and Delhi (66.2%, ‘ 310.02 Crore) during the Financial Year 2019-20.

5. Among the 1,350 prisons, 269 prisons were renovated/expanded during 2019.

6. Among the 1,350 prisons, 808 prisons were having Video Conference facility as on 31st December 2019.

7. A total of 33,537 quarters were available against the actual staff strength of 60,787 as on 31st December, 2019.”

48. According to the data published by the National Crime Records Bureau (NCRB) the conditions relating to jails and prisoners is fairly alarming. There were a total number of 1350 prisons as of the year 2019. 1350 prisons consists of 617 Sub Jails, 410 District Jails, 144 Central Jails, 86 Open Jails, 41 Special Jails, 31 Women Jails, 19 Borstal School and 2 Other than the above jails.

49. A perusal of the executive summary would reveal an alarming state of affairs as far as occupancy rate is concerned. It has climbed to 118.5 percent in 2019 as on 31st December. The occupancy rate is alarming for male prisoners. In fact, during 2019, a total of 18,86,092 inmates were admitted in the jails. The figure of 4,78,600 prisoners as on 31st December, 2019 is the figure obviously after considering the number of prisoners who would have been inter alia bailed out. The number of under trial prisoners in 2019 was 3,30,487 which in fact constituted 69.05 per cent of the total no. of prisoners. Delhi had the highest occupancy rate of 174.9 percent followed by Uttar Pradesh which came second with 167.9 percent.

This means that in Delhi a prison which was meant to be occupied by 100 persons, was used for accommodating 174 persons. We cannot also be oblivious to the fact that the figures represent the official version.

50. There is a tremendous amount of overcrowding in jails in India. Secondly, a very large sum (Rs. 6818.1 crore) was the budget on prisons. Both aspects are relevant in the context of the possibilities that house arrest offer.

51. In the context of the rights conferred on citizens under Article 19 which are essentially constitutional freedoms or rather the enumerated rights as explained by this Court in *Maneka Gandhi vs. Union of India,*[8] when a citizen is placed on house arrest, which has the effect of depriving him of any freedom, it will not only be custody but it would involve depriving citizens under custody of the fundamental freedoms unless such freedoms are specifically protected. A person has a fundamental right to move in any part of the country. It is obvious that in the case of a person undergoing a house arrest and in the teeth of an absolute prohibition, in the facts of the case forbidding the appellant from moving outside his home, the hallmark of custody described in the case of incarceration is equally present. Personal liberty perhaps is the most important of all values recognized as such under the constitution. It is to be jealously guarded from any encroachment, save where such intrusion has the clear sanction of law. The expression "procedure established by law" has received an expansive and liberal exposition in decisions of this Court commencing from Maneka Gandhi(supra). Right to personal liberty is the birth right of every human being. The right under Article 21 is undoubtedly available to citizens and non-citizens. While personal liberty is a wide expression capable of encompassing within its fold, many elements apart from the right to be protected against the deprivation of liberty in the sense of the freedom from all kinds of restraints imposed on a person, the irreducible core of personal liberty, undoubtedly, consist of the freedom against compelled living in forced custody.

52. Here we bear in mind the concept of negative liberty. In the celebrated lecture, "Two Concepts of Liberty" by Isaiah Berlin, he states as follows, *inter alia*:-

8 AIR 1978 SC 597

"The notion of 'negative' freedom

I am normally said to be free to the degree to which no human being interferes with my activity. Political liberty in this sense is simply the area within which a man can do what he wants. If I am prevented by other persons from doing what I want I am to that degree unfree; and if the area within which I can do what I want is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved. Coercion of not, however, a term that covers every form of inability. If I say that I am unable to jump more than 10 feet in the air, or cannot read because I am blind or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced. Coercion implies the deliberate interference of other human beings within the area in which I wish to act. You lack political liberty or freedom only if you are prevented from attaining your goal by human beings. Mere incapacity to attain your goal is not lack of political freedom. This is brought out by the use of such modern expressions as 'economic freedom' and its counterpart, 'economic slavery'. It is argued, very plausibly, that if a man is too poor to afford something on which there is no legal ban- a loaf of bread, a journey round the world, recourse to the law courts- he is as little free to have it as he would be if it were forbidden him by law. If my poverty were a kind of disease, which prevented me from buying bread or paying for the journey round the world, or getting my case heard, as lameness prevents me from running, this inability would not naturally be described as a lack of freedom at all, least of all political freedom. It is only because I believe that my inability to get what I want is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness. If my lack of means is due to my lack of mental or physical capacity, then I begin to speak of being deprived of freedom (and not simply of poverty) only if I accept the theory. If, in addition, I believe that I am being kept in want by a definite arrangement which I consider unjust or unfair, I speak of economic slavery or oppression. 'The nature of things does not madden us, only ill will does', said Rousseau. The criterion of oppression is the part that I believe to be played by other human

beings, directly or indirectly, in frustrating my wishes. By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom."

53. In fact, personal liberty is interlinked with the right to life itself. It is an inseparable part without which the right to life itself is deprived of its content and meaning. The right to life and personal liberty is essentially also based on the principle that men in regard to fundamental rights be treated equal and that no man or a group of men, even organized as a state under which he lives can deprive him except without infringing the right to be treated equally unless there is a legitimate sanction of law. Personal liberty of its members must continue to remain the most cherished goal of any civilized state and its interference with the same must be confined to those cases where it is sanctioned by the law and genuinely needed. The court would lean in favour of upholding this precious, inalienable and immutable value.

54. We have noticed that in the United States ordinarily, house arrest follows a conviction and is a choice which is available to the Courts to send a person to house arrest which is in lieu of a jail sentence.

55. We will use this opportunity to echo the argument of Sh. Kapil Sibal, learned senior counsel for the appellant that no Court even if it is the High Court has any inherent power to deprive any person of his personal liberty by placing him under house arrest. Placing a person in custody depriving him of his rights which would include his fundamental rights as he would stand deprived of on giving effect to the term of house arrest, would amount to a completely illegal exercise, were it not for the fact that the High Court must be treated as having exercised powers available to a Judge under Section 167 of the Cr.P.C. Thus, runs the argument.

THE REMEDIES OPEN TO AN ACCUSED IN THE CASE OF REMAND UNDER SECTION 167 OF THE CR.P.C.

56. In *State rep. by Inspector of Police and others vs. N.M.T. Joy Immaculate*[9], a bench of 3 learned judges considered the question of maintainability of a revision under Section 397 of the Cr.P.C. against an order of remand. We notice para 13 which reads as follows:

9 (2004) 5 SCC 729

"(13) Section 167 Cr.PC. empowers a Judicial Magistrate to authorise the detention of an accused in the custody of police. Section 209 Cr.P.C. confers power upon a Magistrate to remand an accused to custody until the case has been committed to the Court of Session and also until the conclusion of the trial. Section 309 Cr.PC. confers power upon a court to remand an accused to custody after taking cognisance of an offence or during commencement of trial when it finds it necessary to adjourn the enquiry or trial. The order of remand has no bearing on the proceedings of the trial itself nor can it have any effect on the ultimate decision of the case. If an order of remand is found to be illegal, it cannot result in acquittal of the accused or in termination of proceedings. A remand order cannot affect the progress of the trial or its decision in any manner. Therefore, applying the test laid down in Madhu Limaye case [(1977) 4 SCC 551 : 1978 SCC (Cri) 10 : AIR 1978 SC 47] it cannot be categorised even as an "intermediate order". The order is, therefore, a pure and simple interlocutory order and in view of the bar created by sub-section (2) of Section 397 Cr.P.C, a revision against the said order is not maintainable. The High Court, therefore, erred in entertaining the revision against the order dated 6-11-2001 of the Metropolitan Magistrate granting police custody of the accused Joy Immaculate for one day."

57. Thus, an order under Section 167 is purely an interlocutory order. No revision is maintainable. A petition under Section 482 cannot be ruled out. Now at this juncture we must notice the following dimension. When a person arrested in a non-bailable offence is in custody, subject to the restrictions, contained therein, a court other than High Court or Court of Session, before whom he is brought inter alia, can release him on bail under Section 437 of the Cr.P.C. Section 439 of the Cr.P.C. deals with special powers of High Court and court of session to grant bail to a person in custody. The said courts may also set aside or modify any condition in an order by a Magistrate.

58. In *Central Bureau of Investigation, Special Investigation Cell v. Anupam J. Kulkarni*[10], we may notice the following statement:-

10 (1992) 3 SCC 141

"Now coming to the object and scope of Section 167 it is well-settled that it is supplementary to Section 57. It is clear from Section 57 that the investigation should be completed in the first instance within 24 hours; if not the arrested person should be brought by the police before a Magistrate as provided under Section 167. The law does not authorise a police officer to detain an arrested person for more than 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate court. Sub-section (1) of Section 167 covers all this procedure and also lays down that the police officer while forwarding the accused to the nearest Magistrate should also transmit a copy of the entries in the diary relating to the case. The entries in the diary are meant to afford to the Magistrate the necessary information upon which he can take the decision whether the accused should be detained in the custody further or not. It may be noted even at this stage the Magistrate can release him on bail if an application is made and if he is satisfied that there are no grounds to remand him to custody but if he is satisfied that further remand is necessary then he should act as provided under Section 167."

59. Thus, ordinarily, when the court considers a request for remand there would be an application for bail. It is for the court to grant bail failing which an order of remand would follow.

60. No doubt, while the remand report is considered by the Magistrate the application for bail may be moved under Section 439 instead of moving under Section 437 in view of the restrictions contained therein. Though an application under Section 397 would not lie against the remand, as already noticed, an application for bail would lie under Section 439. Therefore, ordinarily the accused would seek bail and legality and the need for remand would also be considered by the High Court or court of session in an application under Section 439. No doubt the additional restrictions under section 43 (D) (5) of UAPA are applicable to citizens of India in cases under the said law.

WHETHER A WRIT OF HABEAS CORPUS LIES AGAINST AN ORDER OF REMAND UNDER SECTION (167) OF CR.P.C.

61. A Habeas Corpus petition is one seeking redress in the case of illegal detention. It is intended to be a most expeditious remedy as liberty is at stake. Whether a Habeas Corpus petition lies when

a person is remanded to judicial custody or police custody is not res integra. We may notice only two judgments of this court. In *Manubhai Ratilal Patel v. State of Gujarat and others*,[11]. We may notice paragraph 24.

"(24) The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner."

However, the Court also held as follows:

"31. It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in *B. Ramachandra Rao [*(1972) 3 SCC 256 : 1972 SCC (Cri) 481 : AIR 1971 SC 2197] and *Kanu Sanyal* [(1974) 4 SCC 141 : 1974 SCC (Cri) 280] , the court is required to scrutinise the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted."

11 (2013) 1 SCC 314

62. One of us (U.U. Lalit, J.) speaking for a Bench of two, followed the aforesaid line of thought in the decision of *Serious Fraud Investigation Office and Ors. vs. Rahul Modi and Ors.*[12] and held as follows:

"(21) The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition."

We may also notice paragraph 19 from the same judgment.

"(19) The law is thus clear that "in habeas corpus proceedings a court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings".

63. Thus, we would hold as follows:

If the remand is absolutely illegal or the remand is afflicted with the vice of lack of jurisdiction, a Habeas Corpus petition would indeed lie. Equally, if an order of remand is passed in an absolutely mechanical manner, the person affected can seek the remedy of Habeas Corpus. Barring such situations, a Habeas Corpus petition will not lie.

WHETHER SUPERIOR COURTS (INCLUDING A HIGH COURT) CAN EXERCISE POWER UNDER SECTION (167) OF CR.P.C.? CAN BROKEN PERIODS OF CUSTODY COUNT FOR THE PURPOSE OF DEFAULT BAIL?

64. One of the contentions raised is that the order passed by the High Court of Delhi, is not one passed under Section 167 of the Cr.P.C., for the reason that what the Cr.P.C. contemplates is an order passed by a Magistrate. It, therefore, becomes necessary to consider whether a Court other than a Magistrate can order remand under Section 167. In the first place, going by the words used in Section 167, what is contemplated is that Magistrate orders remand under Section 167(2).

65. Let us, however, delve a little more into the issue. Let us take a case where a Magistrate orders a remand under Section 167 and at the same time, he also rejects the application for bail preferred by the accused. The accused approaches the High Court under Section 439 of the Cr.P.C. The court reverses the order and grants him bail. The

12 (2019) 5 SCC 266

accused who was sent to custody means police custody or judicial custody is brought out of his custody and is released on bail pursuing to the order of the High Court. This order is challenged before the Apex Court. The Apex Court reverses the order granting bail. The original order passed by the Magistrate is revived. It is apparent that the accused goes back to custody. Since assuming that the period of 15 days is over and police custody is not permissible, he is sent back to judicial custody. Equally if he was already in judicial custody, the order granting judicial custody is revived. Let us assume in the illustration that the accused was in custody only for a period of 10 days and after the order passed by this Court and the accused who spent another 80 days, he completes, in other words, a total period of custody of 90 days adding the period of custody, he suffered consequent upon the remand by the Magistrate. That is by piecing up these broken periods of custody, the statutory period of 90 days entitling the accused to default bail, is reached. Can it be said that the order of this Court granting custody should not be taken into consideration for calculating the period of 90 days, upon completion of which the accused can set up a case for default bail. We would think that the mere fact is that it is the Apex Court which exercised the power to remand, which was wrongly appreciated by the High Court in the illustration, would not detract from the custody being authorized under Section 167.

66. Let us take another example. After ordering remand, initially for a period of 15 days of which 10 days is by way of police custody and 5 days by way of judicial custody, the Magistrate enlarges an accused on bail. The High Court interferes with the order granting bail on the basis that the bail ought not to have been granted. Resultantly, the person who on the basis of the order of bail, has come out of jail custody, is put back into the judicial custody or jail custody. The order is one passed by the High Court. The order granting custody by the High Court cannot be treated as one which is not anchored in Section 167 of the Cr.P.C. Therefore, we would think that though the power is vested with the Magistrate to order remand by way, of appropriate jurisdiction exercised by the superior Courts, (it would, in fact, include the Court of Sessions acting under Section 439) the power under Section 167 could also be exercised by Courts which are superior to the Magistrate.

67. Therefore, while ordinarily, the Magistrate is the original Court which would exercise power to remand under Section 167, the exercise of power by the superior Courts which would result in custody being ordered ordinarily (police or judicial custody) by the superior Courts which includes the High Court, would indeed be the custody for the purpose of calculating the period within which the charge sheet must be filed, failing with the accused acquires the statutory right to default bail. We have also noticed the observations of this Court in AIR 1962 SC 1506 (supra). In such circumstances broken periods of custody can be counted whether custody is suffered by the order of the Magistrate or superior courts, if investigation remains incomplete after the custody, whether continuous or broken periods pieced together reaches the requisite period; default bail becomes the right of the detained person.

68. Equally when an order in bail application is put in issue, orders passed resulting in detaining the accused would if passed by a superior court be under Section 167.

THE EFFECT OF TRANSIT ORDER? IS IT A PRODUCTION ORDER THOUGH SOURCED UNDER SECTION 167 CR.P.C.?

69. The Respondent contends that the transit remand order is not a remand for detention under Section 167 of the Cr.P.C. but only one for production. Reliance is placed on Section 57. It is in other words, pointed out that Section 57 contemplates that in the absence of 'special order' under Section 167, a person arrested without warrant must be produced withing 24 hours excluding the time taken for journey from the place of arrest to the place where the Magistrate is located. Therefore, if a 'special order' under Section 167 is obtained, it is for the purpose of extending the time in Section 57 for production of the arrestee.

70. Per contra, Appellant contends that Section 167 specially covers cases where a judicial Magistrate who has no jurisdiction to try a case, can order a remand. There is no other provision for ordering transit remand.

71. In this case the transit remand was ordered on 28.08.2018. The Appellant was to be produced under the same on 30.08.2018 before the Magistrate in Pune. A person may be arrested by a police officer in any part of India (Section 48 of Cr.P.C.). Under Section 56 the

person arrested without warrant is to be sent before the Magistrate having jurisdiction or before the officer in charge of a police station. It is thereafter, that Section 57 forbids the person so arrested:

i. from being detained for a period more than what is reasonable.

ii. from being detained beyond 24 hours from the time of arrest, excluding the time necessary for the journey from the place of arrest to the Magistrate Court.

72. Now, the 'Magistrate Court' referred to in Section 57 is the Magistrate competent to try the case. Section 57 contains the peremptory limit of 24 hours exclusive of the period for journey, in the absence of 'special order' under Section 167.

73. The words 'special order' is not found in Section 167 of the Cr.P.C. Therefore, could it not be said that but for Section 57 permitting the Magistrate to allowing time by passing an order under Section 167, detention in violation of Section 57 would be rendered illegal? What is the nature of the custody on the basis of the special order under Section 167 referred to in Section 57? Is it police custody or is it judicial custody? Is it any other custody? Will the period of remand for statutory bail begin from the date of this 'special order'? Will it begin only when the competent Magistrate orders remand?

74. Now as far as this case is concerned, we notice findings of the High Court of Delhi as follows: (para 11 and para 15)

"(11) Mr. Navare next tried to draw a distinction between the scope of the function of a Magistrate before whom an application for transit remand is moved and the jurisdictional Magistrate who should be approached for an order of remand in terms of Section 56 of the Cr.P.C. According to Mr. Navare, at the stage of transit remand the concerned Magistrate would not be required to satisfy himself anything more than whether an offence is made out and whether the Police Officer seeking the remand is in fact the one authorized to do so."

"(15) Therefore, when a person who after arrest is required to be produced before a jurisdiction Judicial Magistrate is detained in a place which is away from that jurisdiction, and therefore cannot be produced before the jurisdictional Magistrate within 24 hours, as mandated both by Article 22(2) of the Constitution and by Section 57

Cr.P.C., he will be produced before the 'nearest Judicial Magistrate' together with 'a copy of the entries in the diary'. Therefore, even before a Magistrate before whom a transit remand application is filed, the mandatory requirement of Section 167 (1) Cr.P.C. is that a copy of the entries in the case diary should also be produced. It is on that basis that under Section 167 (2) such 'nearest Judicial Magistrate' will pass an order authorising the detention of the person arrested for a term not exceeding 15 days in the whole. Where he has no jurisdiction to try the case and he finds further detention unnecessary, he may order the accused to be forwarded to the jurisdictional Magistrate."

75. In fact, as already noticed the submission of the State of Maharashtra was also that once a person was in judicial custody a writ of habeas corpus would not lie which also was rejected.

76. Now, the question may persist as to whether the remand pursuant to a transit remand is to police custody or judicial custody. It cannot be judicial custody as the police is exclusively entrusted with the man no doubt to produce him before the Magistrate having jurisdiction. It is therefore, police custody. Could the police be engaged in questioning/ investigating the case by interrogating the accused on the basis of the transit order either before, embarking on the journey or during the course of the journey and after the journey before producing him? If it is thought that during the journey it is impermissible, then such interrogation would equally be impermissible during the time of journey permitted without obtaining an order under Section 167. If also during such journey the accused volunteers with a statement otherwise falling under Section 27 of Evidence Act, it would be one when the accused is in the custody of the police. If it is police custody then, the order of the Magistrate granting transit remand would set the clock ticking in terms of (1986) 3 SCC 141 to complete the period for the purpose of default bail.

77. We may also notice that the interplay of Section 57 and 167 was considered in the judgment of this Court in *Chaganti Satyanarayana (supra)*. It was held as follows:

"(12) On a reading of the sub-sections (1) and (2) it may be seen that sub-section (1) is a mandatory provision governing what a police officer should do when a person is arrested and detained in

custody and it appears that the investigation cannot be completed withing the period of 24 hours fixed by Section 57. Sub-section (2) on the other hand pertains to the powers of remand available to a Magistrate and the manner in which such powers should be exercised. The terms of sub-section (1) of Section 167 have to be read in conjunction with Section 57. Section 57 interdicts a police officer from keeping in custody a person without warrant for a longer period than 24 hours without production before a Magistrate, subject to the exception that the time taken for performing the journey from the place of arrest to the magistrate's court can be excluded from the prescribed period of 24 hours. Since sub-section (1) provides that if the investigation cannot be completed within the period of 24 hours fixed by Section 57 the accused has to be forwarded to the magistrate along with the entries in the diary, it follows that a police officer is entitled to keep an arrested person in custody for a maximum period of 24 hours for purposes of investigation. The resultant position is that the initial period of custody of an arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of an order of remand passed by a magistrate. In fact the powers of remand given to a magistrate become exercisable only after an accused is produced before him in terms of sub-section (1) of Section 167."

"(13) Keeping proviso (a) out of mind for some time let us look at the wording of sub-section (2) of Section 167. This sub-section empowers the magistrate before whom an accused is produced for purpose of remand, whether he has jurisdiction or not to try the case, to order the detention of the accused, either in police custody or in judicial custody, for a term not exceeding 15 days in the whole."

78. We would hold that the remand order be it a transit remand order is one which is passed under Section 167 of the Cr.P.C. and though it may be for the production of the Appellant, it involved authorising continued detention within the meaning of Section 167.

THE IMPACT OF SECTION 428 OF CR.P.C.

79. Section 428 of the Code of Criminal Procedure reads as follows:-

"(428) Period of detention undergone by the accused to be set-off against the sentence of imprisonment.—Where an accused person has, on conviction, been sentenced to imprisonment for a term [,

not being imprisonment in default of payment of fine,] the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him:

[Provided that in cases referred to in Section 433-A, such period of detention shall be set off against the period of fourteen years referred to in that section.]"

80. If house arrest as ordered in this case is to be treated as custody within the meaning of section 167 of the Cr.P.C. would it not entail the period of house arrest being treated as part of the detention within the meaning of Section 428 in case there is a conviction followed by a sentence?

81. Do the provisions of Section 428 throw light on the issues which we are called upon to decide?

82. Section 428 enables a person convicted to have the period of detention which he has undergone during the investigation, enquiry or trial set off against the term of imprisonment.

83. In this context, we may notice the judgment of this court reported in *Govt. of Andhra Pradesh and another etc. v. Anne Venkateswara Rao etc. etc.*[13]. In the said case the Appellant in one of the appeals had been detained under the Preventive Detention Act on 18.12.1969. He was produced before the Magistrate sometime in April, 1970 in connection with certain offences after he had been released from preventive detention. He was later convicted. This Court while dealing with the contention that the benefit of provisions of Section 428 must ennure to the Appellant held:-

"The argument is that the expression period of detention in Section 428 includes detention under the Preventive Detention Act or the Maintenance of Internal Security Act. It is true that the section speaks of the 'period of detention' undergone by an accused person, but it

13 AIR 1977 SC 1096

expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be during the investigation, enquiry or trial in connection with the 'same case' in which he has been convicted. We therefore agree with the High Court that the period during which the writ petitioners were in preventive detention cannot be set off under Section 428 against the term of imprisonment imposed on them."

84. We may also notice that in *Ajmer Singh and others v. Union of India and others*[14] dealing with the question as to whether the benefit of Section 428 of the Cr.PC. was available to a person convicted and sentenced by court martial under the Army Act *inter alia*, this court took the view that the benefit is not available.

The Court held: -

"(12) The section provides for set-off of the period of detention undergone by an accused person during the 'investigation, inquiry or trial' of the same case before the date of conviction. The expression 'investigation' has been defined in Section 2 (h) of the Code as follows:-

'2(h) 'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf'. In the case of persons tried by Courts-Martial there is no investigation conducted by any police officer under the Code or by any person authorised by Magistrate in that behalf."

85. There is a scheme which is unravelled by the Code regarding detention of an accused. The starting point appears to be the arrest and detention of the person in connection with the cognizable offence by a police officer without a warrant. He can detain him and question him in the course of the investigation. However, the officer cannot detain the accused beyond 24 hours excluding the time taken for the journey from the place of arrest to the place where the Magistrate who is competent to try the

14 AIR 1987 SC 1646

case sits. If he cannot so produce the accused and the investigation is incomplete, the officer is duty bound to produce the arrested person before the nearest Magistrate. The nearest Magistrate may or may not have jurisdiction. He may order the continued detention of the arrested person based on the request for remand. He would largely rely on the entries in the case diary and on being satisfied of the need for such remand which must be manifested by reasons. The Magistrate can order police custody during the first 15 days (in cases under UAPA, the first 30 days). Beyond such period, the Magistrate may direct detention which is described as judicial custody or such other custody as he may think fit. It is, no doubt, open to a Magistrate to refuse police custody completely during the first 15 days. He may give police custody during the first 15 days not in one go but in instalments. It is also open to the Magistrate to release the arrested person on bail.

86. The arrested person if detained during the period of investigation can count this period, if he is ultimately charged, tried and convicted by virtue of the provisions of Section 428 of Cr.P.C. We are not concerned with custody of the accused during the period of an inquiry or trial which is a matter governed essentially by Section 309 of the Cr.P.C. In this context, it must be remembered that it is not every detention which can be relied upon to get the benefit of set-off under Section 428. A period spent under an order of preventive detention being not in connection with the investigation into an offence cannot be counted. (See AIR 1977 SC 1096)

87. Detention pursuant to proceedings under the Army Act *inter alia* does not count. (See AIR 1987 SC 1646)

88. Thus, detention 'during investigation' under Section 428 is integrally connected with detention as ordered under Section 167.

89. The scheme further under Section 167 is that custody (detention/ custody) as authorized under such provisions, if it exceeds the limit as to maximum period without the charge sheet being filed, entitles the person in detention to be released on default bail. In fact, the person may on account of his inability to offer the bail languish in custody but he would undoubtedly be entitled to count the entire period he has spent in detention under orders of the Magistrate/ Superior Court exercising powers under Section 167 for the purpose of set off under Section 428.

EFFECT OF ILLEGALITY IN THE ORDER UNDER SECTION 167 CR.PC.

90. Now, it is necessary to make one aspect clear. An order purports to remand a person under Section 167. It is made without complying with mandatory requirements thereunder. It results in actual custody. The period of custody will count towards default bail. Section 167(3) mandates reasons be recorded if police custody is ordered. There has to be application of mind. If there is complete non-application of mind or reasons are not recorded, while it may render the exercise illegal and liable to be interfered with, the actual detention undergone under the order, will certainly count towards default bail. Likewise, unlike the previous Code (1898), the present Code mandates the production of the accused before the Magistrate as provided in clause (b) of the proviso to Section 167 (2). Custody ordered without complying with the said provision, may be illegal. But actual custody undergone will again count towards default bail.

91. Take another example. The Magistrate gives police custody for 15 days but after the first 15 days, (Not in a case covered by UAPA). It is not challenged. Actual custody is undergone. Will it not count? Undoubtedly, it will. The power was illegally exercised but is nonetheless purportedly under Section 167. What matters is 'detention' suffered. The view taken in the impugned judgment that sans any valid authorisation/ order of the Magistrate detaining the Appellant there cannot be custody for the purpose of Section 167 does not appear to us to be correct. The finding that if any illegality afflicts the authorisation, it will render the 'detention' not authorised is inconsistent with our conclusion as aforesaid.

92. Therefore, if the Court purports to invoke and act under Section 167, the detention will qualify even if there is illegality in the passing of the order. What matter in such cases is the actual custody.

93. However, when the Court does not purport to act under Section 167, then the detention involved pursuant to the order of the Court cannot qualify as detention under Section 167.

JUDICIAL CUSTODY AND POLICE CUSTODY

94. Now, we must squarely deal with the question as to whether house arrest as ordered by the High Court amounts to custody within the meaning of Section 167 of the Cr.P.C. Undoubtedly custody in the

said provision is understood as ordinarily meaning police custody and judicial custody. The period of custody begins not from the time of arrest but from time the accused is first remanded (1986 (3) SCC 141). Police custody can, in a case falling under the Cr.P.C. (not under the UAPA), be given only during the first 15 days ((1992) 3 SCC 141). During the first 15 days no doubt the Court may order judicial custody or police custody. No doubt the last proviso to Section 167 (2) provides that detention of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.

95. What is the distinction between police custody and judicial custody? When a person is remanded to police custody, he passes into the exclusive custody of the police officers. 'Custodial Interrogation' as is indispensable to unearth the truth in a given case is the substantial premise for such custody. The Magistrate must undoubtedly be convinced about the need for remand to such custody. Reasons must be recorded. Judicial custody is ordinarily custody in a jail. It is referred to also as jail custody. Thus, jail custody and judicial custody are the same. The jails come under the Department of Jails and staffed by the employees of the said department. The person in jail custody is therefore indirectly, through the jail authorities, under the custody of the Court. The police officer does not have access to a person in judicial custody as he would have in the case of a person in police custody. Unless permission is sought and obtained which would apparently be subject to such conditions as a court places the person in judicial custody cannot be questioned by the police officers. Now in a case, ordinarily, instead of ordering a remand a person can be released on bail. As to whether a case is made out is a question to be decided in the facts of each case. There may be restrictions put in regard to the grant of bail by law which must be observed. But if bail is not granted then a person arrested by the police in connection with the cognizable offence must be remanded to custody. This is inevitable from the reading of Section 167 of the Cr.P.C.

96. In re. *M.R. Venkataraman and Others*[15], a petition was filed seeking a writ of Habeas Corpus inter alia on the ground that the petitioners

15 AIR 1948 Mad 100

were remanded to a central jail of a district which was other than the one in which there were being tried. The court inter alia held as follows:-

"On the first point, it seems to us that no illegality or irregularity was committed. Section (167) empowers a Magistrate having jurisdiction to remand a prisoner to such custody as he thinks fit. Section 344 does not use the words "as he thinks fit" with regard to the order of remand; but there is nothing in the section which suggests that after a charge-sheet has been filed, the Magistrate has not the same freedom with regard to the custody to which he commits the accused as he had before a charge-sheet was filed. The learned Advocate for the petitioners has referred to the wording of Section 29 of the Prisoners' Act, as indicating that the only person who can transfer a prisoner from one Jail to another within the same province is the Inspector-General of Prisons; but by its very wording Section 29 of the Prisoners' Act does not apply to an under-trial prisoner; nor are we dealing with a transfer of a prisoner. Whenever an accused is brought before the Court and the Court issues an order of remand, the Magistrate has complete freedom, as far as we can see, to remand the accused to whatever custody he thinks fit."

[Emphasis supplied]

97. The concept of house arrest though familiar in the law relating to preventive detention, therein the underpinnings are different. House arrest in the law of preventive detention is one which is permitted under the law itself and such orders are made in fact by the executive. Also, detention under Section (167) would not embrace preventive detention in the form of house arrest as noticed by us in the discussion relating to impact of Section 428 of Cr.P.C.

98. However, taking the ingredients of house arrest as are present in the order passed by the High Court of Delhi in its order dated 28.08.2018, if it is found to be one passed under Section 167, then it would be detention thereunder. The concept of house arrest as ordered in this case with the complete prohibition on stepping out of the Appellants premises and the injunction against interacting with persons other than ordinary residents, and the standing of guard not to protect him

but to enforce the condition would place the Appellant under judicial custody. Section 167 speaks of 'such custody as it thinks fit'. If it is found ordered under Section 167 it will count.

99. In the impugned judgment the High Court reasons as follows to deny default bail:

(1) The transit remand order came to be stayed by the Delhi High Court on 28/10/2018.

(2) The appellant was placed under house arrest pursuant to the directions of the Delhi High court during which period the investigating officer did not get the opportunity of interrogating him.

(3) The High court of Delhi quashed the appellant's arrest holding that the appellant's detention is illegal.

(4) Pursuant to the declaration of the detention as illegal, the appellant was set at liberty. It is not as if the appellant was released on bail but after being set at liberty, the appellant is protected by an order of this Court restraining the investigating agency from taking coercive steps during the pendency of appellant's challenge to the FIR.

(5) The Hon'ble Supreme Court having dismissed the challenge of the appellant to quash FIR granted 4 weeks protection with liberty to seek pre arrest bail/protection before the Sessions Court. The Hon'ble Supreme Court granted the appellant time to surrender after the appellant failed to serve pre arrest bail. The appellant ultimately surrendered to NIA Delhi on 14/04/2020. Only after the appellant surrendered, the Magistrate authorised the police custody whereupon the appellant was interrogated.

It further held:

"The CMM granted transit remand on 28.08.2018. The High Court of Delhi by an interim order having stayed the transit remand and then having finally set aside the order of transit remand thereby holding the detention during the period 28.08.2018 upto 01.10,2018 (period of house arrest) as illegal, then, in our opinion, in the absence of there being an authorised detention by an order of Magistrate, the Appellant cannot claim entitlement to statutory default bail under Sub-Section (2) of Section 167 of Cr.PC…"

It goes on to hold:

"It is not possible for us to fathom a situation where detention of the Appellant though held to be illegal & unlawful rendering the authorisation by the Magistrate untenable should still be construed as an authorised detention for the purpose of Sub-Section (2) of Section 167 of the Cr.P.C. In our view sans any valid authorisation/ order of the Magistrate detaining the appellant, the incumbent will not be entitled to a default bail…"

Finally, it holds:

"Resultantly, we hold that the period from 28.08.2018 to 01.10.2018 has to be excluded from computing the period of 90 days as the said custody has been held to be unsustainable in law by the High Court of Delhi."

DOES THE MAGISTRATE/ COURT CONSIDER THE LEGALITY OF ARREST/ DETENTION WHILE ACTING UNDER SECTION (167).

100. The High Court of Delhi in its judgment dated 01.10.2018 has found that the order of remand is illegal as there was violation of Article 22(1). Article 22(1) creates a fundamental right on a person arrested to be not detained without being informed as soon as may be of the grounds for such arrest. It also declares it a fundamental right for the detained person to consult and be defended by a legal practitioner of his choice. Now, detention follows arrest. What Article 22(1) is concerned with is that the detention must be supported by the fulfilment of the rights referred to therein. Strictly speaking, therefore, Article 22(1) does not go to the legality of the arrest.

101. Now, as far as the non-fulfilment of the conditions under Article 22(1) and the duty of a Magistrate exercising power to remand, we notice the judgment of this Court rendered by a Bench of three learned Judges in *The matter of: Madhu Limaye and Others*;[16]. Therein, the petitioners were arrested apparently for offence under Section 188 of the IPC which was non-cognizable. The officer did not give the arrested persons the reasons for their arrest or information about the offences for which they had been taken into custody. this was a case

16 (1969)1 SCC 292

where the Magistrate offered to release the petitioners on bail but on the petitioners refusing to furnish bail, the Magistrate remanded them to custody. The proceeding before this Court was under Article 32. It was in fact, initiated on a letter complaining that the arrest and detention were illegal. It was contended that the arrests were illegal as they were arrested for offences which were non-cognizable. In fact, it was found that the arrest were effected without specific order of Magistrate. It was also contended that Article 22(1) was violated. What is relevant is the following discussion:-

"12. Once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters. This the State has failed to do. The remand orders are patently routine and appear to have been made mechanically. All that Mr Chagla has said is that if the arrested persons wanted to challenge their legality the High Court should have been moved under appropriate provisions of the Criminal Procedure Code. But it must be remembered that Madhu Limaye and others have, by moving this Court under Article 32 of the Constitution, complained of detention or confinement in jail without compliance with the constitutional and legal provisions. If their detention in custody could not continue after their arrest because of the violation of Article 22(1) of the Constitution they were entitled to be released forthwith. The orders of remand are not such as would cure the constitutional infirmities. This disposes of the third contention of Madhu Limaye."

102. We may further notice that in In *Arnesh Kumar vs. State of Bihar and Another*;[17], this Court taking note of indiscriminate arrests issued certain directions. We may notice: -

"8.2. Before a Magistrate authorises detention under Section 167 CrPC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty-bound not to authorise his further detention and release

17 (2014) 8 SCC 273

the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition precedent for arrest under Section 41 CrPC has been satisfied and it is only thereafter that he will authorise the detention of an accused.

8.3. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement, etc. the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the accused."

103. In terms of paragraph 8.2, it is clear that if the arrest does not satisfy the requirements of Section 41, the Magistrate is duty bound not to authorize further detention. The Magistrate is to be satisfied that the condition precedent for arrest under Section 41 of the CrPC has being satisfied. He must also be satisfied that all the constitutional rights of the person arrested are satisfied. Therefore, it is not as if an arrest becomes a *fait accompli*, however, illegal it may be, and the Magistrate mechanically and routinely orders remand. On the other hand, the Magistrate is to be alive to the need to preserve the liberty of the accused guaranteed under law even in the matter of arrest and detention before he orders remand. This is no doubt apart from being satisfied about the continued need to detain the accused.

CUSTODY UNDERGONE UNDER ORDERS OF SUPERIOR COURTS IN HABEAS CORPUS PETITIONS. IS THE CR.P.C APPLICABLE TO WRIT PETITIONS?

104. We have noticed that there is no absolute taboo against an order of remand being challenged in a habeas corpus petition. Should the remand be absolutely illegal or be afflicted with vice of lack of jurisdiction such a writ would lie? If it is established in a case that

the order of remand is passed in an absolutely mechanical manner again it would lie. Now in such cases the person would be in custody pursuant to the remand ordinarily. What would be the position if the writ court were to modify the order of remand passed by the magistrate. Take a case where police custody is ordered by the Magistrate. By an interim order of the High court let us take it the High Court provides for judicial custody. It is done after the accused undergoes police custody for 5 days. Finally, the writ petition is however dismissed. What would happen to the period of judicial custody? Will it be excluded from the period undergone for the purpose of grant of default bail? Another pertinent question which arises is whether Section 167 of the Cr.P.C. is applicable in writ proceedings. If a writ petition is not a criminal proceeding, Will Section 167 apply or does the provision apply only to the proceedings which arise under the Code? In the example, we have given if we hold that irrespective of facts which otherwise justified including the period of jail custody as part of the custody under one Section 167, it will not be reckoned it may produce anomalous and unjust results. We expatiate as follows:

In the example we have given the High Court does not stay the investigation. The petitioner who has been in police custody is made over to judicial custody by the interim order of the High Court. The High Court also applies its mind and finds that no case is made out at any rate for continuing the writ petitioner in police custody and then passes the order to continue the petitioner in judicial custody. Finally, the writ petition is dismissed. In such a case where there is no stay of investigation and in fact even the police custody was obtained and thereafter the High Court after looking into the records also find that the petitioner should only be continued in the modified form of remand, the custody, which is undergone under an order of the court being also 'during the investigation' which the investigation is also not stayed, ought to be counted.

105. Now though the Cr.P.C. will not apply to a writ petition, what is required to include custody under Section 167 is that the detention brought about by the court ordering it during the investigation into an offence. It is a matter which will turn on the facts.

106. The crucial question to be answered is whether the High Court of Delhi was exercising power under Section 167 when it ordered house arrest. The proceeding in the High Court was a writ petition. At the

time when the writ petition was filed, the relief sought was that a writ of Habeas Corpus be issued to set him at liberty. The further relief sought was that the Appellant may not be arrested without prior notice to enable him to seek appropriate remedies. As far as the prayer that the Appellant may not be arrested is concerned, it is a relief which does not go hand in hand with Section 167 of the Cr.P.C. This is for the reason that the power under Section 167 is invoked only after there has been an arrest and what is sought is the extension of the detention of the person arrested.

107. Though, this was the position when the writ petition was filed, by the time, the writ petition came up for consideration at 2:45 p.m. on 28.08.2018, the Appellant stood arrested at 2:15 p.m. The Court initially at 2:45 p.m. passed the following order: -

"4. When the matter was taken up at 2:25 pm yesterday, Mr. Rahul Mehra, learned Standing Counsel (Criminal) for the State of NCT of Delhi appeared. The Court then passed the following order at around 2:45 pm:

"1. The petition complains of the Petitioner and his companion Sehba Husain being restrained in his house by the Maharashtra Police pursuant to FIR No. 4/2018, registered at P.S. Vishrambagh, Pune.

2. Notice. Mr. Rahul Mehra, who appears and accepts notice and informs that he will take some instructions.

3. The Court is informed by Ms. Nitya Ramakrishnan, learned counsel appearing for the Petitioner, that her information is that the Petitioner is just being taken away from his house. No further precipitate action of removing the Petitioner from Delhi be taken till the matter is taken up again at 4 pm."

[This is taken from order dated 29.08.2018 extracted in the judgment.]

108. It would appear, in the meantime, the appellant was produced before the Magistrate who passed the transit remand order. Thereafter when the matter was taken up for consideration at 4:00 p.m. and on noticing the transit remand, order, dated 28.08.2018, *inter alia,* ordering house arrest came to be passed. Therefore, at the time (4PM) when the order was passed, the Court was dealing with the matter when the Appellant stood arrested and also remanded by way of the transit remand order.

109. One way to look at the matter is to remind ourselves of the contents of the order dated 28.08.2018. In the said order, we notice the following portion which we recapture at this juncture: -

"The Court is also shown the documents produced before the learned CMM most of which (including FIR No. 4 of 2018 registered at Police Station, Vishrambagh, Pune) are in Marathi language and only the application filed for transit remand before the learned CMM is in Hindi. However, it is not possible to make out from these documents what precisely the case against the Petitioner is."

110. The Court further proceeded to direct that the translations of all the documents be provided to the Court on the next date (29.8.2018).

111. Now, the direction to supply the translation could not be complied with as is the evident from the order dated 29.08.2018 (See para 6 of the said order) as reproduced in the judgment.

112. Finally, we may notice paragraphs 18 and 19 of the order dated 29.08.2018 reproduced in the judgment:-

"He is informed that the Supreme Court has in the said petition passed an interim order today staying the transit remand orders, including the one passed by the CMM in respect of the Petitioner, and has ordered that all those who have been arrested including the Petitioner shall continue under house arrest.

In view of the above development, it would not be appropriate for this Court to continue considering the validity of the transit remand order passed by the learned CMM. The Court considers it appropriate to list this matter tomorrow at 2:15 pm by which time the order of Supreme Court would be available.

List on 30th August 2018 at 2:15pm."

113. On the next day i.e., on 30.08.2018, the Court passed a further order. Therein, in fact the order recites that the Court was in the process of pronouncement an order on the validity of the transit remand and consequently on the validity of the arrest of the appellant. It is further stated that the court was informed by the counsel for the State of Maharashtra that an interim order continuing the house arrest of

the appellant and some other similarly situated had been passed. It is specifically recorded that the dictation of the order was then halted in order to peruse the order passed by the Supreme Court. Thereafter, it is stated that as the Supreme Court as per the interim order extended the house arrest of the appellant, the court did not consider it appropriate to proceed with the matter. Orders of the Supreme Court were awaited.

114. It was further adjourned. Thereafter, this Court pronounced the judgment on 28.09.2018 and finally, the judgment was pronounced on 01.10.2018 by the High Court. We may also notice: - para 5

"5. This writ petition was listed for hearing today at 2:15 pm before this Court. It is noted that the Supreme Court in para 7 of the majority judgment notes that the Petitioner has filed the present petition on 28th August 2018 "challenging the transit remand order passed by the Chief Metropolitan Magistrate (CMM) on 28th August 2018". At this stage it is required to be noted that although when the writ petition was originally filed the ground of challenge was that the arrest of the Petitioner was in violation of Section 165 and 166 Cr PC, during the course of arguments on 28th August 2018 in light of the developments that took place subsequent to the filing of the petition, challenge was laid to the remand order of the learned CMM. It was further contended that there had been a violation of the mandatory provision contained in Section 41(1)(ba) Cr PC."

115. The Court went on to find that the writ petition was maintainable as the writ petition was entertained at a time when the transit remand order had not been passed. The Court finally proceeds to find violations of Articles 22(1) and 22(2)of the Constitution and Section 167 read with Section 57 and also Section 41(1)(ba) of the Cr.P.C. The remand order is set aside. The continued detention beyond 24 hours of the arrest of the appellant, in the absence of the remand order which stood set aside, was found untenable. Consequently, the house arrest of the appellant was pronounced as having "come to an end as of now".

116. We have already found that the superior Courts including the High Court can exercise power under Section 167. The finding of the

High Court in the impugned judgment appears to proceed on the basis that only a Magistrate can order remand, does not appear to be correct.

117. Undoubtedly, as pointed out by the appellant, he came to be detained on the basis of an arrest carried out by the police officer from the State of Maharashtra in connection with FIR No. 84 of 2018 disclosing the commission of cognizable offences. The arrest is apparently effected in view of the powers available under Section 48 of the Cr.P.C. Finding that an order under Section 167 was required to produce the appellant before the competent Court in Maharashtra, he produced the appellant-in-person before the nearest Magistrate in Delhi and the Magistrate passed an order which we have found to be an order of remand under Section 167. The High Court came to be concerned with the validity of the remand order and detention of the appellant. A writ of habeas corpus does lie in certain exceptional cases even by way of challenging the orders of remand. If there is non-compliance with Article 22(1) and the person is detained it is an aspect which has to be borne in mind by the Magistrate when ordering remand. Detention is the result of an arrest. Article 22(1) applies at this stage after arrest. If fundamental rights are violated in the matter of continued detention, the Magistrate is not expected to be oblivious to it. It is in this sense that the High Court has found violation of Article 22(1) *inter alia* and the Magistrate over-looking it as rendering the transit remand illegal. As far as the arrest being made in violation of Section 41(1)(ba), undoubtedly, it is a matter which related to the legality of the arrest itself which is the stage prior to detention. The High Court finds that the Magistrate had not applied his mind to the question as to whether the arrest was in compliance with Section 41 (1) (ba) of Cr.P.C.

118. This is unlike the decision in Madhu *Limaye*(supra) where this court found that there was a violation of Article 22(1) and even during the course of arguments before this court, it could not be explained to the court as to why the arrested persons were not told of the reasons for their arrest or of the offences for which they had been taken into custody. In the said case in fact one of the specific issues was about the legality of the arrest both on the ground that the offences being non cognizable arrest which was illegally effected by the police officer and also there was violation of Article 22(1).

THE IMPACT OF THE NON-ACCESSIBILITY TO THE APPELLANT FOR THE INVESTIGATING AGENCY DURING HOUSE ARREST AND THE EFFECT OF THE APPELLANT BEING IN POLICE CUSTODY FROM 14.4.2020 TO 25.4.2020.

119. This is the most serious contention raised by the respondent to exclude the period of house arrest. The contention is that having regard to the nature of the proceedings in the High Court of Delhi during the period of house arrest, no investigation could be carried out. The very purpose of custody under Section 167 is to enable the police to interrogate the accused and if that opportunity is not present then such period of custody as alleged would not qualify for the purpose of Section 167. In other words, the argument appears to be that the object and scheme of Section 167 is that an investigation is carried out with opportunity to question the accused and still it is not completed within the period of 90 days whereupon right to default bail arises. By the proceedings on 28.08.2018 when the petition was filed, the High Court stayed the transit remand and the appellant could not be taken to Maharashtra. By the very same order, the High Court placed the Appellant under house arrest. No access was provided to the investigating agencies to question the Appellant. In such circumstances, the period undergone as house arrest should be excluded. It is appropriate that the allied argument, namely, the effect of the Appellant surrendering on 14.04.2020, being produced on 15.04.2020 and being remanded to police custody in which he remained till 25.04.2020, is considered. The argument is that under the general law, namely, the Cr.P.C. without the modification effected under Section 43(D) of UAPA, police custody can be sought and given only during the first 15 days, thereafter, police custody cannot be given. In the case of UAPA, in view of the modified application of the Cr.P.C. under Section 43(D)(2), the period of 15 days stands enhanced to 30 days. Thus, police custody by the Magistrate can be given on production for a period of 30 days. The argument further runs that if it is on the basis of the Appellant having surrendered on 14.04.2020 and upon being produced before the Court, he stood remanded to police custody, the period of 90 days would begin to run only from the date of the remand i.e. 15.04.2020. If the contention of the appellant is that the period of remand commenced with the house arrest

i.e., 28.08.2018, is accepted, it would result in the police custody given on 15.04.2020 as impermissible. In this regard, the fact that the appellant did not object to the police custody being given on 15.04.2020 is emphasized. The appellant acquiesced in the police custody commencing from 15.04.2020. This is possible only on the basis that the period of 90 days would commence only on 15.04.2020 in terms of the law laid down in *Chaganti Satyanarayana(supra)*.

120. Per contra, the case of the appellant is as follows: -

There is no requirement in law that the person should be granted police custody in all cases. Section 167 of Cr.P.C. confers a power with the Magistrate to grant either police or other custody (judicial custody) during the first 15 days in a case not covered by UAPA. After the first period of 15 days, undoubtedly, custody cannot be police custody but there is no requirement that any police custody at all should be given. It is entirely with the Magistrate/ Court to determine as to whether the custody should be police or judicial. Furthermore, it is contended that in this case, the offences under UAPA are the main offences. A period of 30 days is available by way of police custody. It is open to the investigator to seek police custody at any time.

It is contended that in any event, a reading of the second proviso under Section 43(D)(2)(b) of the UAPA shows that in cases under the said act for the purpose of investigation, police custody can be sought any time and is not limited by 30 days/ 15 days period. It is submitted that the principle in *Central Bureau of Investigation,Special Investigation Cell(supra)* that police custody is limited to the first 15 days of remand, does not apply. It is further contended that there was no stay of investigation and police could have sought access to the appellant during the 30 days period of interrogation or investigation but this was not done. It is also seen contended in the written submissions that the second proviso to Section 43(2)(D) of UAPA nullifies the judgment in Anupam Kulkarni (supra) in UAPA cases and custody can, therefore, be sought at any time even from judicial custody without the limit of first 15 days or even 30 days. The requirement of an affidavit in terms of the proviso arises only when custody is taken by the police from judicial custody. It was open to the investigating agency to file such an affidavit and seek such custody or even the

permission to interrogate during the period of house arrest which was not done. It is seen further contended that on 14.04.2020, the appellant surrendered before the NIA i.e. police custody. Therefore, when the police custody was sought on 15.04.2020 and extended again on 21.04.2020, there is no transfer from judicial custody to police custody. Therefore, it is contended that the police custody was not under the second proviso to Section 43(D)(2)(b). This explains why no affidavit as required thereunder was filed by the police. The conduct of the appellant in not objecting to the application seeking police custody cannot defeat the case for counting the period of 34 days of house arrest. The appellant was indeed in police custody on 28.08.2018 for the purpose of investigation. All his devices were seized by the investigating agency who had spent several hours at his house and restrained him from morning till 2:15 P.M. when they proceeded with him to the Magistrate.

121. The scheme of the law (Cr.P.C.) is that when a person is arrested without warrant in connection with a cognizable offence, investigation is expected to be completed within 24 hours from his arrest. If the investigation is not completed, as is ordinarily the case, the accused must be produced before the Magistrate who is nearest from the place of arrest irrespective of whether he is having jurisdiction or not. The Magistrate on the basis of the entries in the case diary maintained by the officer is expected to apply his mind and decide whether the accused is to be remanded or not. If the police makes a request for police custody which is accepted then an order is to be passed and reasons are to be recorded under Section 167(3). Police custody is an important tool in appropriate cases to carry on an effective investigation. It has several uses. It includes questioning the accused with reference to the circumstances, and obtaining if possible, statements which are relevant in the future prosecution. Custodial interrogation in some cases is clearly a dire need to give a prosecution and therefore the courts a complete picture. The contention of the appellant that it is always open to Magistrate to order only judicial custody and even exclusively with 90 days of judicial custody alone, an application for default bail would lie cannot be disputed. Whatever be the nature of the custody as long as it falls within four walls of Section 167, if the requisite number of days are spent in police/ judicial custody/ police and judicial custody that suffices.

122. However, that may not mean applying the functional test or bearing in mind the object of the law that the purpose of obtaining police custody is lost sight of. According to the appellant, the period of house arrest is to be treated as judicial custody on the terms of the order dated 28.08.2018 as subsequently extended. Investigating officers, undoubtedly, could go to the house of the appellant and question him. It is, however, true that if the High Court had been approached, it may have directed the appellant to cooperate with the officers in the investigation. It however remains in the region of conjecture. The impact of this aspect, will be further considered later.

123. We must, in this regard, also consider the impact of the police custody, admittedly, obtained on 15.04.2020. The order which is produced before us would show that police custody was sought for 10 days. Custodial interrogation was necessary, it is seen pleaded, for analysing the retrieved electronic data/ documents from the electronic devices recovered during the investigation.

124. The special Judge ordered remand for 7 days. Thereafter, a period of 7 days further remand to police custody was granted by the order dated 21.04.2020. Still further, it appears on 25.04.2020, the Appellant was remanded in judicial custody in which he continued. The question would arise that all else being answered in favour of the Appellant whether his case is inconsistent with the police remand initially granted for 7 days on 15.04.2020 and further extended on 21.04.2020 which was, no doubt, cut short on 25.04.2020. The point to be noted is police custody can be given only for 15 days and that too, the first 15 days, ordinarily. In the case of persons accused of offences, under UAPA, the maximum period of police custody is 30 days. If the case of the appellant is to be accepted then it must be consistent with the subsequent proceedings, namely, police custody vide orders dated 15.04.2020 and 21.04.2020. In other words, Section 167 of the Cr.P.C. as modified by Section 43(D)(2) of UAPA, contemplates that remand to police custody on production of the accused can be given only during the first 30 days from the date of production and it advances the case of the respondent that remand on production of the accused before the Special Judge took place only with the production of the accused on 15.04.2020. If the remand in the case of the appellant took place in the year 2018 then it would be completely inconsistent with the remand to police custody well beyond the first 30 days of the remand in the year 2018.

125. The answer of the Appellant is that apart from the period of 15 days being supplanted by 30 days under UAPA, police custody can be sought and granted at any time in cases involving UAPA. It appears to be the Appellants case in one breath that this is possible under the second proviso contemplated in Section 43(2)(b) of UAPA. It is seen contended, that unlike the cases generally covered by the Cr.P.C., police custody can be sought in cases under UAPA at any time. It is also contended however that, it is only if a person is in judicial custody and the investigator wants to get police custody in place of judicial custody that an affidavit is required. In this case, it is the case of the appellant that there is no such affidavit. This is for the reason that when police custody was sought on 15.04.2020, the appellant was not in judicial custody. He had surrendered on the previous day i.e. on 14.04.2020 before the NIA. It is, therefore, to resolve this controversy necessary to find out whether the case of the Appellant that the police custody can be sought at any time in cases falling under UAPA is tenable.

126. Section 43 D(2) of UAPA reads as follows:-

"(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2), —

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be *inserted*, namely:—

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody".

127. Under Section 43(D)(2)(a), it is clear that the maximum period of police custody which is permissible has been increased from 15 days to 30 days. The further modification is that which is relevant which is incorporated in the second proviso. It contemplates that the investigating officer can seek with reasons and explaining the delay obtain the police custody of a person who is in judicial custody.

128. We would think that the position under Section 167 as applicable in cases under UAPA is as follows:-

Undoubtedly, the period of 30 days is permissible by way of police custody. This Court will proceed on the basis that the legislature is aware of the existing law when it brings the changes in the law. In other words, this Court had laid down in Anupam Kulkarni (supra), inter alia, that under Section 167 which provides for 15 days as the maximum period of police custody, the custody of an accused with the police can be given only during the first 15 days from the date of the remand by the Magistrate. Beyond 15 days, the remand can only be given to judicial custody. Ordinarily, since the period of 15 days has been increased to 30 days, the effect would be that in cases falling under UAPA applying the principle declared in (1992) 3 SCC 141, the investigating officer in a case under UAPA, can get police custody for a maximum period of 30 days but it must be within the first 30 days of the remand. In this regard, the number of days alone is increased for granting remand to police custody. The principle that it should be the first 30 days has not been altered in cases under UAPA.

As far as the second proviso in Section 43(D)(2)(b) is concerned, it does bring about an alteration of the law in Anupam Kulkarni (supra). It is contemplated that a person who is remanded to judicial custody and NIA has not been given police custody during the first 30 days, on reasons being given and also on explaining the delay, Court may grant police custody. The proviso brings about the change in the law to the extent that if a person is in judicial custody on the basis of the remand, then on reasons given, explaining the delay, it is open to the Court to give police custody even beyond 30 days from the date of the first remand. We may notice that Section 49 (2) of Prevention of Terrorism Act is pari materia which has been interpreted by this Court in AIR 2004 SC 3946 and the decision does not advance the

case of Appellant though that was a case where the police custody was sought of a person in judicial custody but beyond 30 days.

In this regard, it would appear that the appellant had surrendered on 14.04.2020. He was not in judicial custody. He was produced with a remand report seeking police custody on 15.04.2020. Treating this as a remand sought within the first 30 days, a remand is ordered for a period of 7 days initially. There is no dispute that the period was police custody. We may notice that an accused under UAPA may be sent to judicial custody, police custody or granted bail. If the argument that the police custody can be sought at any time and it is not limited to cases where there is judicial custody, it will go against the clear terms of the proviso and even a person who is bailed out can after 30 days be remanded to police custody. This is untenable. The case of the appellant that the police custody granted on 15.04.2020 was permissible and consistent with his case does not appear to be correct.

THE DECISION IN (2007) 5 SCC 773

129. The High Court placed considerable reliance on the judgment reported in *State of West Bengal v. Dinesh Dalmia*[18]. So also the Additional Solicitor General, Shri Raju. In the said case, the Respondent was arrested in New Delhi. He was produced before the Magistrate on transit remand in Chennai. The Investigating Officer, in cases in Calcutta, prayed for production warrant before the Court at Calcutta as the Respondent was arrested and detained in the CBI case before the Magistrate at Chennai. The said prayer was allowed and the order was sent to the Court at Chennai. There was a further order by the Calcutta Court issued that the Respondent should not be released in the CBI cases in Chennai. The Respondent also came to know that he was wanted in two more cases pending in Calcutta. He voluntarily surrendered before the Magistrate in Chennai. It was on the basis of the cases at Calcutta. The Respondent stood remanded to judicial custody till 13.03.2006. Finally, after the procedures were under gone the Respondent was produced before the Magistrate at Calcutta. The Investigating Officer in the case at Calcutta sought police custody of 15 days. The Respondent moved for bail contending that he had

18 (2007) 5 SC 773

surrendered in the Court at Chennai and the period of 15 days had elapsed from the date of surrender. Finally, the matter reached before the Calcutta High Court against the order of the Magistrate rejecting the application for bail and ordering police custody. The Calcutta High Court in the revision filed by the Respondent found that more than 90 days, had expired from the time of the detention which should have been counted from 27.02.2006 when the Respondent had surrendered before the Court at Chennai. Therefore, the question for consideration before this Court was whether the period of detention started from 27.02.2006 when the Respondent had surrendered before the Court at Chennai in connection with the CBI case or whether it should be counted from 13.03.2006 when the Respondent was actually taken into custody by the police and produced before the Magistrate at Calcutta. This Court held that the respondent having voluntarily surrendered before the Court at Chennai could not be treated as being in detention under the cases registered at Calcutta. The accused, in fact, it was found continued to be under the judicial custody in relation with the CBI case in Chennai. The Court referred to the decision of this Court in Niranjan Singh & Anr. vs. Prabhakar Rajaram Kharote & Ors.[19] and reiterated that if there is a totally different offence then it will be a separate offence for which the detention in the previous case cannot be counted for the purpose Section 167.

130. The present is a case where there is only one FIR, one case. This is a case where following arrest and production before the Magistrate a remand is made which is then questioned. The High Court orders house arrest.

131. THE CIRCUMSTANCES THAT MILITATE AGAINST THE ORDER OF HOUSE ARREST BEING ONE UNDER SECTION 167.

1. The High Court entertains the writ petition on 28.08.2018. It intended to dispose of the matter on the very next day. The order of house arrest was passed in such circumstances. But there was custody and what is more, it went on for 34 days.

2. The High Court was unable to go through the entries in the case diary as the entries were in the Marathi language. In fact, the

19 (1980) 2 SCC 559

court expresses inability to make out from the documents what precisely the case against the appellant was. Translation of the documents were to be made available on the next day. The translations were not made available. Yet the house arrest was ordered until further orders on 28.08.2018. What is pertinent is that by the standards in law applicable to a Magistrate acting under Section 167, the High Court did not purport to act under Section 167. This is different from saying that it acted in violation of the mandate of law.

3. It is true that there was no stay of investigation as such. However, what was challenged was the transit remand. The FIR was lodged in another state. Interrogation of the appellant would be integral to the investigation. On the terms imposed by the High Court in regard to house arrest it was not possible for such interrogation to take place. It appears that the parties did not contemplate as it is presently projected. It is no doubt true that the respondent could have moved the High Court.

4. The house arrest according to the appellant is by way of modification of the order of remand. In other words, the contention is that the High Court stayed the transit. But the High Court when it passed the order of house arrest on 28.08.2018, it modified the remand from police custody to house arrest. Subject to what follows we proceed on the basis that the High Court modified the order of remand. The transit remand order of the CMM Saket provided for police custody which was to last for two days. But on the basis of the house arrest ordered by the High Court by interim order the appellant underwent house arrest for 34 days. By the judgment dated 01.10.2018 the High Court of Delhi set aside the transit remand, as the transit remand ordered by the magistrate was found illegal. On the said basis the High Court of Delhi finds that detention beyond 24 hours was clearly impermissible. Now it is relevant to notice that the CMM Saket had not ordered detention for the period after 30.08.2018. Detention was ordered by him only for two days and the appellant was to be produced on 30.08.2018. By the order of the High Court of Delhi, the transit could not take effect. Therefore, the entire period after 30.08.2018 till 01.10.2018 cannot be said to be based on the order of the

magistrate. The said period in fact is covered by the order of house arrest. The period of house arrest covered the period from 28.08.2018 based on the order of the High Court. The arrest was effected at 2.15PM on 28.08.2018. The order of the CMM was passed within the next hour or so. The order of the High Court was passed at about 4.30PM. No doubt, it is the order of the magistrate which originated the remand under Section 167 to police custody. The High Court of Delhi proceeded to find that without the support of a valid remand order by the magistrate, the detention exceeded 24 hours rendering it untenable in law and the further finding however is that consequently the house arrest came to an end as of then (01.10.2018). Therefore, the High Court did not proceed to pronounce the house arrest as non est or illegal. On the other hand, when it is pronounced, it as having come to an end on 01.10.2018 and no part of it is found to be illegal, it meant that it was valid from the point of time it was passed till 01.10.2018. If this is perceived as an order passed under Section 167 then there would not be any detention beyond 24 hours of the arrest which could be illegal. The illegality of the detention is based on the transit order being found illegal. If the transit order has been modified as claimed by the appellant, then the detention would be lawful as the order of house arrest is passed well within 24 hours of the arrest. We are highlighting this aspect to emphasize this as a circumstance to show that the High Court of Delhi also did not contemplate that the order of house arrest was passed by way of custody under Section 167. No doubt, the foundational order, the transit remand, being set aside it could be said that the interim order will not survive. But then the order should have been so understood by the High Court.

5. Undoubtedly, the appellant was placed in police custody from 15.04.2020 to 25.04.2020. Even the enhanced period of 30 days of police custody, permissible under Section 43 (D) (2) of UAPA, must be acquired within the first 30 days of the remand. Proceeding on the basis of the case of the appellant that the first remand took place on 28.08.2018, the appellant being in police custody for a period of 11 days in 2020 is inconsistent with appellants case and the law. Though police custody can

be had under UAPA beyond the first 30 days under the Second Proviso to Section 43(D)(2), it is permissible only in a situation, where the accused is in judicial custody. The appellant was, admittedly, not in judicial custody, having surrendered to the NIA on 14.04.2020, which is on the eve of the first order directing police custody.

6. One of the contentions raised by the respondent is that if the order of house arrest was passed under Section 167 Cr.PC then the High Court of Delhi would have after setting aside the transit remand, either released the appellant on bail or remanded him to custody. Instead, the High Court released the appellant on the basis that as the remand order was illegal and set aside, in view of Section 56 and Section 57 the detention beyond 24 hours, cannot be sustained. Now in a proceeding under Section 167 where a remand order is put in issue before a superior court it presupposes an arrest in connection with a cognizable offence. Now if the remand is set aside by the superior court, we are of the view that in a proceeding which originated from a remand under Section 167, then the order that would follow on setting aside the remand, would be to grant him bail or to modify the remand. This is for the reason that there is an arrest which in the first place sets the ball rolling. Therefore, he has either to be released on bail, if not, he would have to be remanded. It is here that we may remember the decision of this Court in (1969) 1 SCC 292 (supra). There was a remand. Violation of Article 22(1) was found in a Writ Petition under Article 32. It was, in fact, a non-cognizable offence, which was involved. The Court released the petitioners. The remand orders were found patently routine and were not such as would cure the constitutional infirmities. In the said case, arrest was put in issue and found bad in law.

7. No doubt there is the filing of application for anticipatory bail wherein the appellant has clearly projected the period of house arrest as protection of this liberty. It was also sought to be rested under the extraordinary power of this Court. [We would observe that while his conduct is not irrelevant in appreciating the matter, the contours of personal liberty would better rest

on surer foundation. Estoppel, may not apply to deprive a person from asserting his fundamental right. A right to default bail is fundamental right [See Bikramjit Singh vs. The State of Punjab[20]]. But hereagain, it must depends upon fulfilment of conditions in Section 167.

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132. Now, the argument, which survives is as follows:

What mattered was that the appellant actually underwent the actual custody of 34 days by way of house arrest. The fact that there may have been illegality in the Order of the Magistrate, will not take away, the factum of actual custody. The fact that the appellant was given in Police custody and he did not object, cannot defeat appellant's right. What is relevant is that a period of 90 days had run out. It is emphasised before us that be it the High Court, it could not have ordered the detention of the appellant without authority of the law. The only law, which supports the house arrest, is Section 167 of the CrPC.

133. We have already noticed the circumstances surrounding the Order passed by the High Court. We would also, at this juncture, again capture the Order dated 29.08.2018, passed by this Court:

"Taken on Board.

Issue notice.

Mr. Tushar Mehta and Mr. Maninder Singh, learned Additional Solicitor Generals being assisted by Mr. R. Balasubramanian, learned counsel shall file the counter affidavit by 5.9.2018. Rejoinder thereto, if any, be filed within three days therefrom.

We have considered the prayer for interim relief. It is submitted by Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the petitioners that in pursuance of the order of the High Court, Mr. Gautam Navalakha and Ms. Sudha Bharadwaj have been kept under house arrest. It is suggested by him that as an interim measure, he has no objection if this Court orders that Mr. Varavara Rao, Mr.

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Arun Ferreira and Mr. Vernon Gonsalves, if arrested, they are kept under house arrest at their own homes. We order accordingly. The house arrest of Mr. Gautam Navalakha and Ms. Sudha Bharadwaj may be extended in terms of our orders.

Needless to say, an interim order is an interim order and all contentions are kept open.

Let the matter be listed on 6.9.2018."

134. We would think that the reality of the situation is explained by the said Order. Upon being informed that the appellant and another were kept under house arrest, on the suggestion of the Counsel for the petitioners in the Public Interest Litigation before this Court, that he had no objection in three others, if arrested, they be kept under house arrest, at their own homes, it was so ordered. It is not a case where this Court even had in its mind the duty to go through the entries in the case diaries relating to them, leave alone actually going through them. Quite clearly, in respect of those persons, house arrest even was the result of the choice exercised by the Senior Counsel for the Writ Petitioners, who were not the persons to undergo the house arrest. No doubt, the Public Interest Litigation was launched to have an impartial enquiry regarding their arrests. It is thereafter that it was ordered that the house arrest of appellant and other (Sudha Bharadwaj), may be extended in terms of the order. House arrest was, undoubtedly, perceived as the softer alternative to actual incarceration. It was in that light that the Court proceeded in the matter. That house arrest, in turn, involved, deprivation of liberty and will fall within the embrace of custody under Section 167 of the CrPC, was not apparently in the minds of both this Court and the High Court of Delhi. This is our understanding of the orders passed by the court.

135. Now, here, we are confronted with a clash between the two values. On the one hand, there is the deprivation, in law, of the liberty of the appellant, by way of house arrest for 34 days. On the other hand, it does not fall actually in the facts of this case within the ambit of Section 167 of the CrPC, for the reasons, which have been discussed earlier. While, the Right to Default Bail is a Fundamental Right, it is subject to the conditions, obtaining in Section 167 of the CrPC, being satisfied. It must be purported to be passed under Section 167

CrPC. The right to statutory bail arises dehors the merits of the case. The fundamental right arises when the conditions are fulfilled. The nature of detention, being one under Section 167 is indispensable to count the period.

136. On the other hand, Article 21 of the Constitution of India, provides that no person shall be deprived of his life or personal liberty except in accordance with the procedure prescribed by law. This Article, creates a Fundamental Right, which cannot be waived. Moreover, unlike the persons, who apparently underwent house arrest on the basis of the offer made on their behalf, in the case of the appellant, even prior to the order dated 29.08.2018, the High Court had ordered house arrest, which constituted house arrest. The appellant was an accused in a FIR invoking cognizable offences. He stood arrested by a Police Officer. He was produced before a Magistrate. A transit remand, which was a remand, under Section 167, was passed. Police custody followed. The High Court ordered that the appellant be kept in house arrest. The setting aside of the Order of transit remand will not wipe out the Police custody or the house arrest. We agree that illegality in order of the CMM, Saket, will not erase the deprivation of liberty. But other aspects already discussed militate against the order being treated as passed purportedly under Section 167. There can be no quarrel with the proposition that a court cannot remand a person unless the court is authorised to do so by law. However, we are in this case not sitting in appeal over the legality of the house arrest. But we are here to find whether the house arrest fell under Section 167. We are of the view, that in the facts of this case, the house arrest was not ordered purporting to be under Section 167. It cannot be treated as having being passed under Section 167.

137. There is one aspect which stands out. Custody under Section 167 has been understood hitherto as police custody and judicial custody, with judicial custody being conflated to jail custody ordinarily.

138. The concept of house arrest as part of custody under Section 167 has not engaged the courts including this Court. However, when the issue has come into focus, and noticing its ingredients we have formed the view that it involves custody which falls under Section 167.

139. We observe that under Section 167 in appropriate cases it will be open to courts to order house arrest. As to its employment, without being exhaustive, we may indicate criteria like age, health condition and the antecedents of the accused, the nature of the crime, the need for other forms of custody and the ability to enforce the terms of the house arrest. We would also indicate under Section 309 also that judicial custody being custody ordered, subject to following the criteria, the courts will be free to employ it in deserving and suitable cases.

140. As regards post-conviction cases we would leave it open to the legislature to ponder over its employment. We have indicated the problems of overcrowding in prisons and the cost to the state in maintaining prisons.

141. In view of the fact that the house arrest of the appellant was not purported to be under Section 167 and cannot be treated as passed thereunder, we dismiss the appeal. There will be no order as to costs.

Headnotes prepared by: Devika Gujral

Result of the case: Appeal dismissed.