P L D 2005 Supreme Court 86

Present: Nazim Hussain Siddiqui, C J

THE STATE---Petitioner

Versus

NASIR JAVED RANA, CIVIL JUDGE 1ST CLASS/MAGISTRATE SECTION 30, RAWALPINDI ---Respondent

Suo Motu Case No.1 of 2004, decided on 26th October, 2004.

Criminal Procedure Code (V of 1898)-----

----S. 167---Penal Code (XLV of 1860), Ss.420, 471 read with S.468, P.P.C.---High Court (Lahore) Rules and Orders Vol. III, Chap. 9, Part B, Rule 7---Constitution of Pakistan (1973), Art. 184---Suo Motu action by Supreme Court---Remand---Magistrate who grants remand is under legal duty to satisfy himself if under the circumstances remand is to be granted or not---Liberty of a person cannot be curtailed and he has a legal right to explain his point of view before the Magistrate when remand is to be granted and it is a sacred duty of a Magistrate to safeguard the rights of the people---Remand is not to be granted automatically after the police makes such a request---Remand order would be illegal if at the time of its passing, accused was not produced before the Court, which passed the remand order---Magistrate, in the present case, wherein dispute was of civil nature about a house, emanating from a general power of attorney executed as far back as eight years and matter was finally decided by the Supreme Court, without applying his mind and to favour, somebody; granted physical remand of the accused, a senior Advocate of Supreme Court, though the accused was not produced in the Court---Validity--Magistrate, in circumstances, had deliberately mis conducted himself and passed an illegal order, handing over a senior lawyer in police custody in an atmosphere and in a manner, which had seriously jeopardised the sanctity attached to a Court of law and had not observed the legal formalities before passing the remand order---Magistrate, not only passed a wrong order but also took a brazen-faced stand that the accused was produced before him-- Magistrate had a strong tendency of committing any mischief and was absolutely unfit for judicial service, his judicial powers were ordered to be withdrawn by the Supreme Court with a direction that another judicial officer be posted in his place---Supreme Court referred the matter to the High Court for further action against the Magistrate according to law and directed that the proceedings shall be concluded as early as possible, preferably within two months--Employees, serving in the Court of Magistrate, who had filed false affidavits just to please the Magistrate were ordered to be suspended forthwith by the District-and Sessions Judge and he should take disciplinary action against them and such proceedings shall be completed as early as possible, but not' later than three months from the receipt of the present order of the Supreme Court---Advocates who had filed false, affidavits, were guilty of grave indiscipline and misconduct, Provincial. Bar Council shall proceed against them according to law and such proceedings were directed to be concluded as early as possible, but not later than four months, till the proceedings were concluded, these Advocates were restrained by the Supreme Court from appearing before any Court of law.

Farooq Badar v. Inspector-General of Police, West Pakistan PLD 1969 Lah. 1.020; Muhammad Siddiq v. Province of Sindh PLD 1992 Kar. 358; Senator Asif Ali Zardari.v. State 2000 MLD 921; Allah Rakhi v. S.S.P. 2000 PCr.LJ 1576; Asma Khatoon v. Shabbir Hussain Shah PLD 1996 Kar, 517 and Abdul Majid v. Abbas Hussain Shah 1995 SCMR 429 ref.

Habib-ul-Wahab-ul-Khairi (present in person).

Sh. Muhammad Saleem, Muhammad Aamir Naeem, Mrs. Farhat Zafar, Ms. Irshad, Sh. Anwarul Haq, Advocates and Engineer Usman Hameed Butt and Abdul Aleem Zaigham (in person).

Rana Nasir Javed, Civil Judge 1st Class/Magistrate, Section 30, Rawalpindi (present in person).

Ms. Afshan Ghazanfar, A.A.-G. for the State.

Date of hearing: 19th October, 2004.

ORDER

On 24-9-2004, in this Suo Motu Action case relating to F.I.R. 11o.420 dated 16-9-2004 registered. at Police Station New Town, Rawalpindi under sections 420 and 471 read with section 468, P.P.C. at the instance of Shafiqur Rehman son of Haji Abdul Wahab, bail was granted to Mr. Habib-ul-Wahab-ul-Khairi subject to furnishing P.R. bond in the sum of Rs.10,000. Notice was issued to Mr. Nasir javed Rana, learned Civil Judge/Magistrate Section 30, Rawalpindi (hereinafter referred to as "the Magistrate") to appear before this Court and to explain as to how he granted physical remand of accused. (Mr. Khairi) while he was not produced before him. The Magistrate was also directed to explain as to why action be not taken against him for acting in gross violation of law.

2. On the same day, S.I. Abdul Qayyum Headquarter. Investigation Rawalpindi (inadvertently mentioned as Sohail Ehsan, S.H.Q. in the order of that date) in presence of Mr. M. Bilal, Senior Advocate Supreme Court, Sahibzada Ahmed Raza Khan Qasuri, Senior Advocate Supreme Court, Mr. Muhammad Ikram Chaudhry, Advocate Supreme Court, Mr.Zulfiqar Ahmed Bhutta, Advocate Supreme Court, Mr. Fazal Elahi Siddiqui, Advocate Supreme Court, Mr. Said Tahar Khan, Advocate Supreme Court, Ch. Muhammad Akram, Advocate-on Record, Mr. Munsif Awan, Advocate Supreme Court, Ms. Fakhar-un Nisa, Advocate, Mr. Muhammad Khalid Abbasi, Advocate, Ms. Sarkar Abbas, Advocate, Ms. Irshad, Advocate, Ms Farhat Zafar, Advocate, Mr. Talat Abbas Khan, Advocate, Mr. Imran Fazal Siddiqui, Advocate, Ms. Tahira, Advocate, Syed Shabbar Raza Rizvi, Advocate-General, Punjab, Ms.Afshan Ghazanfar, Assistant Advocate-General Rana Shahid Pervez, D.S.P. Headquarter (Investigation), Rawalpindi and Mr. Sohail Ehsan, Inspector/S.H.O., Police Station New Town, Rawalpindi, stated that Mr. Khairi was not produced before the Magistrate and remand in police custody was taken only on producing the case file.

3. Mr. Zulfiqar Ahmed Bhutta, Advocate Supreme Court/Finance Secretary, Supreme Court Bar Association filed affidavit giving the detailed facts of this case. He stated that after the arrest of Mr. Khairi he tried to obtain Vakalat Nama through Mr. Khairi's son, who could not get it on account of tense circumstances and partial attitude of the police authorities. He appeared before the Magistrate on 18-9-2004 at about 10-00 a.m. and informed him that when Mr. Khairi is produced before his Court, he would get his Vakalat Nama for filing bail application or his behalf. He was told to wait. A large number of lawyers and media persons had also reached there. At about 12-00 noon, hr received a telephone call from Mr. Awais Khairi son of Mr. Khairi, who informed that the police van carrying his father had moved from Police Station Waris Khan. Mr. Awais followed the police van and continued to update Mr. Zulfiqar Ahmed Bhutta about the movement of the police van. He informed him that Mr. Khairi was taken to Police Station C.I.A. near Fawara Chowk, Rawalpindi. Later, the police officials informed Mi. Awais Khairi that his father would be produced before the Court at 2-30 3-00 p.m. According to Mr. Zulfiqar Ahmed Bhutta, at about 3-45 p.m. GEO and ARY

TV personnel had recorded his interview as well as of other lawyers present in the Court of the Magistrate regarding non production of Mr. Khairi.

4. The Court-room was closed at about 4-00 p.m. He left the Court premises at 4.45 p.m. Next day i.e. on 19-9-2004 he visited several police stations and after 3-4 hours he found out that Mr. Khairi had been detained in Police Station Waris Khan, but he was not allowed to get Vakalat Nama signed from him. He was told that Mr. Khairi was in personal custody of D.S.P. Shahid Pervez Rana, who was not available, and only he could attest the Vakalat Nama. The same day, which was Sunday, he filed bail application before the Duty Magistrate without any Vakalat Nama. The Duty Magistrate ordered fixation of the bail application before the concerned Magistrate on 20-9-2004. He later came to know that the Magistrate had remanded Mr. Khairi in police custody for 10 days. He has particularly referred to following portion of para. 4 of the order dated 21-9-2004 passed by the Magistrate whereby the bail application moved on behalf of Mr. Khairi was dismissed:--

> "Perusal of record reflects that the accused is in custody on physical-remand under section 167, Cr.P.C. till 28-9-2004."

5. Besides Mr. Khairi himself, Sheikh Anwarul Haq, Mrs. Farhat Zafar, Ms. Irshad, Mr. Muhammad Fazil Siddiqui and Muhammad Khalid Abbasi Advocates and Muhammad Latif Azar son of Shadi Khan, Awais Khairi son of Mr. Khairi, Abdul Aleem Zaigham son of Abdul Haleem Qureshi, Usman Hameed Butt son of Khawaja Abdul Hameed Butt and Abdur Rauf Awan son of Muhammad Asghar Awan, in their respective affidavits, stated that on 18-9-2004 Mr. Khairi was not produced before the Magistrate.

6. As against above, M/s. Muhammad Saleem Raza, Raja Muhammad Ishfaq and Syed Muhammad Moosa Shah, respectively working as Stenographer, Reader and Naib Qasid in the Court of the Magistrate, have filed affidavits to the effect that Mr. Khairi was produced before the Magistrate and thereafter his remand in policy custody was granted.

7. Malik Tahseen Khalid; Shahid Mehmood Mughal, Chaudhry Nisar Ahmed and Choudhry Muhammad Maqbool Gujar Advocates and Wahid Ali Abbasi son of Zaman Ali, Clerk of Syed Mumtaz Hussain Sherazi Advocate have also filed affidavits to the above effect. A.S.-I. Muhammad Sharif, Investigation Headquarters, Rawalpindi has also filed affidavit that on 18-9-2004 he along with S.-I. Abdul Qayyum went to Police Station New Town, handcuffed accused (Mr. Khairi), produced him before the Magistrate and obtained physical remand for 10 days.

8. It is significant to note that S.-I. Abdul Qayyum submitted an application before this Court stating therein that he has been threatened by his superiors with dire consequences for making above statement before this Court. He also filed affidavit to this effect.

9. The first point to be determined is whether Mr. Khairi was physically produced before the Magistrate on 18-9-2004 for grant of remand, or not. Close scrutiny of the facts reveals that soon after bud news of arrest of Mr. Khairi, a number of Advocates, who were present in the District Courts premises, wanted to witness the remand proceedings of Mr. Khairi. From the affidavits filed by various Advocates in support of Mr. Khairi's version, it is evident that he (Mr. Khairi) was never produced before the Magistrate. All these Advocates remained in and around the Court of the Magistrate from morning till the courtroom was closed at 4-15 p.m. Above named Advocates have great respect for Mr. Khairi and wanted to know his whereabouts and also his welfare. Nothing substantial is available on record to discard their affidavits, which are confidence inspiring. It is significant that the' Advocates, who have filed affidavits in support of the version of the Magistrate, said nothing about presence of various Advocates who supported Mr. Khairi. None of them has refuted the detailed facts

given in the affidavit of Mr. Zulfiqar Ahmed Bhutta or the affidavits filed by other Advocates in that behalf. Mr. Khairi is an Advocate of this Court, is well-known member of the Supreme Court Bar and commands great respect in the entire legal community.

10. The Magistrate, in his written reply, stated that on 18-9-2004 at about noon time S.I. Abdul Qayyum produced accused (Mr. Khairi) before him and sought 14 days' physical remand to carry out investigation, recover alleged forged documents, get his specimen signatures and thumb-impressions for comparison and to complete other formalities, but he allowed 10 days' physical remand. According to him, besides his staff, a number of Advocates including Malik Tebsin Khalid, Mr. Shahid Mehmood Mughal, Ch. Nisar Ahmed, Ch. Muhammad Maqbool Gujjar, Advocates and Malik Wajid Ali Abbasi. Clerk of Syed Mumtaz Hussain Sherazi Advocate were present in his Court when Mr. Khairi was produced before him. On a query as to when Mr. Khairi was produced before him for remand, the Magistrate stated that probably it was 12 noon. It is on record that many Advocates at about 2-00-2-30 p.m. were present in the Court of the Magistrate to know as to when Mr. Khairi would be produced and he reportedly told them that whenever he would be produced, they would be informed. I asked him (the Magistrate) that when he had already granted remand at 12-00 noon, why he told the Advocates at 2-30 p.m, that he was not aware when Mr. Khairi would be produced. The Magistrate had no answer to this query. There is irrefutable material on record to indicate that Mr. Khairi was, not produced at all before the Magistrate and he had granted remand only on the basis of case papers placed before him. Statement of S.-I. Abdul, Qayyum before this Court in presence of persons mentioned above was true; spontaneous and was the voice of his conscience. He gave correct facts and also rendered himself liable for legal action. He had no animosity against the Magistrate nor the latter had said anything against him. Assertions of said Sub-Inspector are corroborated by the affidavits of the-Advocates. Mr. Khairi is a senior lawyer and it is unlikely that he would have accepted the remand order without any objection or protest. The remand order is silent on this aspect. In the affidavits it has been stated that even newspaper reporters and T.V. personnel were there and none of them had seen Mr. Khairi being produced before the Magistrate. Press clippings of the following day brought on record bear our above position. The Magistrate in fact, became a tool in the hands of the police officers and granted remand at the behest of someone behind the scene. It is noted that that registration of the F.I.R. in question was followed in quick succession by the arrest of Mr. Khairi. It is not easy to get an F.I.R. registered and daily large number of writ petitions are filed in the High Courts for this purpose, but in the instant case it seems the police was anxiously waiting for the complainant.

11. A Magistrate who grants remand is under a legal duty to satisfy himself if under the circumstances remand is to be granted or not. Liberty of a person cannot be curtailed and he has a legal right to explain his point of view before the Magistrate when remand is to be granted. It is sacred duty of a Magistrate to safeguard the rights of the people. Rule 7 of the Rules and Order of the Lahore High Court, Vol. III, Part B, is as follows:

> "7. Accused must be produced before the Magistrate who should satisfy himself about necessity for remand.
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> Before making an order of remand to Police custody under section 167 of the Code of Criminal Procedure, the Magistrate should satisfy himself that---
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> (1) there are grounds for believing that the accusation against, the person sent up by the Police is well founded;
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> (2) there are good and sufficient reasons for remanding the accused to Police custody instead of detaining him in magisterial custody.

> In order to form an opinion as to the necessity or otherwise of the remand applied for by the Police, the Magistrate should examine the copies of the diaries submitted under section 167 and ascertain what previous orders (if any) have been made in the case, and the longer the accused person has been in custody, the stronger should be the grounds required for a further remand to Police custody.
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> The accused person must always be produced before the Magistrate when a remand is asked for."

12. In various cases including Farooq Badar v. Inspector-General of Police, West Pakistan PLD 1969 Lahore 1020 and Muhammad Siddiq v. Province of Sindh PLD 1992 Karachi 358, it has been, inter alia, laid down that remand is not to be granted automatically after the police makes such a request.

13. In Senator Asif Ali Zardari v. State 2000 MLD 921, it was held that remand order would be illegal if at the time of its passing, accused was not produced before the Court, which passed the remand order.

14. In Allah Rakhi v. S.S.P. 2000 PCr.LJ 1576 it was held that main reason for separation of Executive and Judiciary was the fact that remands were not properly granted by Executive Magistrates and sometimes bail applications were not attended to seriously. If same type of working, which was prevalent, before separation is adopted, it would lay the foundation of injustices in subordinate Courts.

15. In Asma Khatoon v. Shabbir Hussian Shah PLD.1996 Karachi 517, the duties and obligations cast upon police functionaries and Magistrates under sections 61, 62, 167, 173 and 344, Cr.P.C. were highlighted of which they do not seem to have been mindful, which makes the custody of the accused illegal.

16. In Abdul Majid v. Abbas Hussain Shah 1995 SCMR 429, it was held as under:--

> "This Court expects the presiding officers to perform their duties with their eyes and ears open as required under the law and pass orders after judicial application of mind and not in perfunctory and slipshod manner allowing room for mistakes because these mistakes whether they are inadvertent or not reflect upon the conduct of the Judge and can be considered as a minus point. We disapprove and deprecate such conduct of the presiding, officers and it should be discouraged in true sense as far as possible. Raja Muhammad Anwar, learned counsel for the Senior Civil Judge, has pleaded this case to show us that there are mitigating circumstances in it not to justify stern action as the Senior Civil Judge has regretted his mistake and suffered mental anguish and has thrown himself at,. the mercy, of the Court. "

17. Unfortunately, in the facts and circumstances of the present case, it is not possible to take a lenient view in respect of the Magistrate. In this particular case, the dispute is about a quarter/house, emanating from a general power of attorney executed as far back as 24-8-1966. It is noteworthy that the matter was finally decided by the Supreme Court: Obviously, it was a dispute of civil nature and the Magistrate without applying mind, to favour somebody, granted remand. He has deliberately misconducted himself and passed an illegal order, handing over a senior lawyer in police custody in an atmosphere and in a manner, which has seriously jeopardised the sanctity attached to a Court of law. He had not observed the legal formalities before passing the remand order. Not only he passed a wrong order, but also took a brazen-faced stand that Mr. Khairi was produced before him He has a strong tendency of committing any mischief and is absolutely unfit for judicial service. His judicial powers are withdrawn forthwith. It is directed that another judicial officer be posted in his place. The matter is referred to the Lahore High Court for further action against him according to law and

these proceedings shall be concluded as early as possible, preferably within two months.

18. The employees named earlier, serving in the Court of the Magistrate, have filed false affidavits just to please him. The District anti Sessions Judge, Rawalpindi is directed to suspend them forthwith and take disciplinary action against them and such proceedings shall be completed as early as possible, but not later than three months from the x receipt of this order. The copies of suspension orders shall be sent to this Court immediately.

19. Messrs Malik Tahseen Khalid, Shahid Mehmood Mughal, Chaudhry Nisar Ahmed and Choudhry Muhammad Maqbool Gujjar Advocates have also filed false affidavits. They are guilty of grave indiscipline and misconduct. The Punjab Bar Council shall proceed against there according to law. The proceedings shall be concluded as early as possible, but not later than four months. Till the proceedings are concluded, these Advocates are restrained from appearing before any Court of law.

20. Inspector-General of Police, Punjab is directed to immediately submit report in pursuance of this Court's order dated 24-9-2004.

M.B.A./S-67/S Order accordingly.

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