

Court No. 46

Case: Criminal Misc. Writ Petition No. 17410 of 2011

Petitioner: Shaukin

Respondent: State of UP and others

Petitioner counsel: Mrs. Tabassum Hashimi, Ashwani Kumar Srivastava

Respondent counsel: Government Advocate

Hon'ble Amar Saran, J.

Hon'ble Kalimullah Khan, J.

1. A personal affidavit of the DGP, U.P. dated 11.10.11 has been filed and this Court is pleased to note that in compliance of our earlier order dated 15.9.11. the DGP, U.P. has issued a circular dated 3.10.11 addressed to all the regional IGs/ DIGs/ SSPs/SPs in-charge of all districts and departmental heads of other police units to strictly enforce the newly introduced amendments, viz. sub-section 41(1)(b) and section 41 A Cr.P.C and the directions contained in the order of this Court dated 15.9.11 in Cr. Misc Writ Petition No. 17410 of 2011, *Shaukeen v State* and order dated 23.9.11 in Cr. Misc. Writ Petition No. 18661/ 2011, *Ram Abhilash and others v State*.
2. It was also pointed out in the circular that the investigating officers who file counter-affidavits before the High Court do not have any knowledge about these provisions and how they are to be applied.
3. The following observations in the order dated 15.9.11 have been quoted in the DGP's circular: *“Let a copy of this order be forwarded to the DGP, U.P. within one week by the registry. The DGP may circulate this order to all police stations and investigating officers in U.P. with directions to ensure strict and*

honest compliance with the provisions of sections 41(1)(b) and 41 A Cr.P.C and to refrain from routinely arresting persons wanted in cases punishable by imprisonment up to 7 years, unless in particular cases the exceptional circumstances enumerated in section 41(1)(b) Cr.P.C. exist, after recording his reasons for arrest. Let the DGP submit his compliance report of this direction within three weeks.”

4. Annexure 2 to the DGP's affidavit in compliance of our dated 15.9.11 also contains the following endorsement from all 72 districts in U.P.: “जनपद / थाना स्तर पर आदेश का अनुपालन कड़ाई से किया जा रहा है”
5. The directions were issued by the DGP's circular dated 3.10.11 to the subordinate police officials to clarify that ordinarily the police shall not immediately arrest accused persons wanted in matters punishable with imprisonment upto 7 years. This limitation was subject to the exceptions mentioned in the aforesaid amended sections.
6. By the present order we proceed to explain the import and meaning of the amended provisions 41(1)(b) and 41 A Cr.P.C, and to give some illustrations where accused could be arrested straightaway on the lodging of the FIR, and other illustrations where immediate arrests may not be needed, because we think that in many cases the police is still routinely proceeding to arrest accused persons even if they are involved in offences punishable with up to 7 years imprisonment, in contravention

of the express terms of sections 41(1)(b) or 41 A Cr.P.C.

7. It would be useful to extract the material provisions, sections 41(1)(b) and 41 A, which have been introduced by Act No. 5 of 2009, with effect from 1.11.2010 and also section 170(1) of the Code of Criminal Procedure, here :

41. When police may arrest without warrant. -- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person --

(a)-----

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:-

(i) the police office has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police office is satisfied that such arrest is necessary--

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

© to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing.

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest. -

41 A. Notice of appearance before police officer- *(1) The police officer shall in all cases, where the arrest of a person is not required under the provisions of sub-section(1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.*

(2) Where such a notice is issued to any person, it shall be the duty of the person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent court in this behalf, arrest him for the offence mentioned in the notice.

170. Cases to be sent to Magistrate when evidence is sufficient. -(1) If, upon an investigation under this Chapter, it appears to the officer in

charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

8. The import of the said provisions is that **normally where an accused has been named in the FIR**, and the offence is punishable with upto 7 years imprisonment, the arrest of the accused may not be necessary at the initial stage and his attendance may be secured by issuing a notice to him to appear before the police officer under section 41 A Cr.P.C. In such cases it would be advisable to arrest the accused only after sufficient evidence of his involvement in the crime has been collected and the charge sheet needs to be submitted. Under section 170(1) Cr.P.C. it has been provided that on completion of investigation if sufficient evidence has been collected the accused shall be forwarded in custody to the Magistrate concerned, unless he has been released on bail (if the offence was bailable), in which event security may be taken for his appearance before the Magistrate. This practice of not arresting the accused straightaway and arresting them only after sufficient evidence has been collected is normally followed by the CBI, and CB (CID) in their investigations.
9. Where however the accused has **not been named in the FIR**,

or at the time when the co-accused have been picked up, for example in a case of vehicle theft or recovery of other stolen goods, or where the co-accused has been arrested while committing a crime, and he names another accused as also having participated in the crime, whose custodial interrogation may be necessary and the police officer is of the opinion that the disclosure furnishes credible information or gives rise to reasonable suspicion for inferring that this accused whose arrest is sought could also be involved, or there are chances that such an accused would abscond or not respond to a notice under section 41A to appear, looking to the nature of the crime and the background of the particular accused, these may be appropriate cases where immediate arrests may be needed. Likewise where the accused whose arrest is sought appears to be habitually engaged in committing crimes or appears to be participating in some organized crimes, and there is probability of the accused repeating the offence, these would also be circumstances where it may be necessary to arrest such accused without delay.

10. However in a case under section 498 A IPC where the wife subject to violence has gone back to her "*maika*" following the violence, it may not be necessary in a particular case to immediately arrest the husband and other family members who have been made accused in the FIR until adequate evidence has been collected, as she is unlikely to encounter violence when she is away from her "*sasural*." In E.C. Act offences again where the licences of a ration card

dealer named in the FIR has been suspended, he may not have any opportunity to again indulge in blackmarketing or to commit a new offence under the E.C. Act. Here too arrests can be deferred until sufficient evidence to submit a charge sheet has been collected, when he needs to be produced before the trial court. But where the dealer is trying to obtain affidavits from ration card holders and it appears that he is trying to win over witnesses, then it may be open to the police to arrest him straight away. We have mentioned these examples as illustrations for situations where arrests may or not be immediately needed and they are by no means exhaustive.

11. It is with the objective of striking a balance on the need to provide the Constitutional protection from arbitrary arrest guaranteed under Article 21 and the restraint on arrests for offences punishable with imprisonment up to 7 years, subject to certain exceptions as provided for under section 41(1)(b) Cr.P.C. and the need of the police to carry out its investigation without interference, that we have refrained from passing blanket orders staying the arrests of the accused in all such cases.
12. But we do expect the police officer to record reasons in a *bona fide* and honest manner, why it has become necessary to arrest the accused in a particular case punishable with imprisonment with upto 7 years. The police officer should not mechanically and routinely write down in the case diary that there is likelihood of the accused running away, or presume that the accused would not respond to the notice to appear

under section 41 A Cr.P.C, or that he would tamper with the evidence, unless there are strong reasons with concrete material for taking such a view, and this satisfaction along with the concrete reasons for taking the view need to be spelt out clearly in the case diary before the accused is arrested.

13. Thus strong reasons are needed for arresting an accused with respectable antecedents, who is an income tax payee with roots in the community, and a permanent abode, no history of earlier abscondance or non-cooperation with the police and who is not likely to tamper with the evidence or to again commit a crime unless he is immediately arrested.
14. The propriety, honesty and genuineness of the reasons given for arrests in particular cases punishable with imprisonment up to seven years and whether they conform to the requirements of sections 41(1)(b) and 41 A Cr.P.C. therefore need to be strictly monitored by the superior officers, i.e. C.O.s/ S.P.s/SSPs or DIGs in the districts, as has been emphasized in the DGP's circular dated 3.10.11. We make it clear that in the event that this Court finds that the accused who are wanted in cases punishable with up to 7 years imprisonment are being arrested in a routine and mechanical matter, without the existence of the conditions necessary for arresting them as mentioned in sections 41(1)(b) and 41 A Cr.P.C. this Court will have no hesitation in summoning the concerned police officers or even the superior police officers and they may even have to face contempt charges. For persistent unwarranted arrests in such matters in violation of

the provisions of sections 41(1)(b) and 41 A and the DGP's circular dated 3.10.11. we may even recommend disciplinary action against such errant police officers to the DGP, U.P.

15. Section 167(1) of the Code of Criminal Procedure also requires production of the case diary before the Magistrate before whom the accused is produced for remand.

16. Section 167(1) reads thus:

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.

17. As rightly pointed out in *Bir Bhadra Pratap Singh v D.M., Azamgarh, 1959 Cri.L.J 685* the forwarding of case diary entries under section 167(1) Cr.P.C. is not an empty formality, and the Magistrate is not simply to “rubber stamp” the prayer of the police officer seeking remand of the accused, but he is to apply his judicial mind to satisfy himself that the requirements of law are met when the police produces an accused for remand. At the time of granting the remand we

expect the Magistrate to examine the case diary for satisfying himself whether the police officer's reasons for immediate arrest in the cases punishable with imprisonment upto 7 years was held by him in a *bona fide* manner and whether the reasons for remand are restricted to the pre-conditions for arrest mentioned in the newly introduced sections 41(1)(b) and 41 A Cr.P.C. The Magistrate needs to closely examine as to how the police officer could reach a conclusion that unless the accused was arrested he would repeat the offence, or why without arrest the investigation could not proceed, or whether the particular accused was as a matter of fact likely to cause the evidence to disappear, or would tamper with the evidence, or the accused would try and influence witnesses, or without arrest the particular accused would not appear in Court. These opinions of the police officer are to be based on concrete material and cannot be the mere *ipse dixit* of the officer. If he finds that no genuine reasons which accord with the requirements of sections 41(1)(b) and 41 A exist the Magistrate may even refuse to grant remand to the accused, and allow the accused to be released on a personal bond with a direction to appear before the competent court or before the police when called upon to do so, with or without security.

18. There would be no impediment in the Magistrate remanding the accused to judicial custody at later stages as authorized under section 41(1)(b)(ii)(e) and section 170(1) Cr.P.C. when the accused is produced before the Magistrate and the case diary shows that sufficient evidence for

submitting a charge sheet has been collected. Needless to mention that in case the accused has already secured bail, then the police officer would be disentitled to arrest an accused person for seeking his remand because the charge sheet is to be submitted. The accused could then be summoned to appear by the Magistrate taking cognizance of the offence in exercise of powers under section 204 Cr.P.C.

19. If accused who are required in cases punishable with upto 7 years sentence are not routinely arrested by the police, or are granted bail by the lower court itself, without any undue delay in disposing of their bail applications, and in appropriate cases the facility of releasing the accused on interim bails on personal bonds pending consideration of their regular bails with or without security with a direction to appear when required is also extended to them, as has been laid down in the Apex Court Court in *Lal Kamendra Pratap Singh V State of U.P.*, (2009) 4 SCC 437, the Full Bench in *Amaravati and another v State of U.P.*, 2005 Cri.L.J. 755, and the Division Bench in *Sheoraj Singh @ Chuttan v State of U.P. and others*, 2009(65) ACC 781, considerable time of the High Court could be spent more productively in hearing single judge and two judge appeals, or bails in grave matters. At present we find that most of the High Court single and division benches on the criminal side are engaged in considering an inordinately large number of applications for bail, applications under section 482 Cr.P.C., and Division Bench criminal writ petitions in such matters punishable with imprisonment up to 7 years, which

could easily be dealt with by the Magistrates and Sessions Courts.

DIRECTIONS:

20. We therefore direct the Magistrates that when accused punishable with upto 7 years imprisonment are produced before them remands may be granted to accused only after the Magistrates satisfy themselves that the application for remand by the police officer has been made in a *bona fide* manner and the reasons for seeking remand mentioned in the case diary are in accordance with the requirements of sections 41(1)(b) and 41 A Cr.P.C. and there is concrete material in existence to substantiate the ground mentioned for seeking remand. Even where the accused himself surrenders or where investigation has been completed and the Magistrate needs to take the accused in judicial custody as provided under section 170(1) and section 41(1)(b)(ii)(e) Cr.P.C, prolonged imprisonment at this initial stage, when the accused has not been adjudged guilty may not be called for, and the Magistrates and Sessions Courts are to consider the bails expeditiously and not to mechanically refuse the same, especially in short sentence cases punishable with upto 7 years imprisonment unless the allegations are grave and there is any legal impediment in allowing the bail, as laid down in *Lal Kamendra Pratap Singh V State of U.P.*, (2009) 4 SCC 437, and *Sheoraj Singh @ Chuttan v State of U.P. and others*, 2009(65) ACC 781. The facility of releasing the accused on interim bail pending consideration of their regular bails may also be accorded by the

Magistrates and Sessions Judges in appropriate cases.

21. The Magistrate may also furnish information to the Registrar of the High Court through the District Judge, in case he is satisfied that a particular police officer has been persistently arresting accused in cases punishable with upto 7 year terms, in a mechanical or *mala fide* and dishonest manner, in contravention of the requirements of sections 41(1)(b) and 41 A, and thereafter the matter may be placed by the Registrar in this case, so that appropriate directions may be issued to the DGP to take action against such errant police officer for his persistent default or this Court may initiate contempt proceedings against the defaulting police officer.
22. The District Judges should also be directed to impress upon the remand Magistrates not to routinely grant remands to police officers seeking remand for accused if the pre-conditions for granting the remands mentioned in sections 41(1)(b) and 41 A Cr.P.C. are not disclosed in cases punishable with 7 year terms, or where the police officer appears to be seeking remand for an accused in a *mala fide* manner in the absence of concrete material. The issue of compliance with sections 41(1)(b) and 41 A Cr.P.C and the directions of this Court in this regard may also be discussed in the monthly meetings of the District Judges with the administration and the superior police officials.
23. We are also of the view that the Registrar General may issue a circular within a period of one month with directions to the Sessions Courts and Magistrates to monitor and oversee the

applications for remand sought by the arresting police officers and to comply with the other directions mentioned herein above.

24. The DGP, U.P. is directed to send a status report with better particulars by the next listing as to the extent to which arrests are only being effected in cases punishable with upto 7 years imprisonment strictly in accordance with the conditions mentioned in sections 41(1)(b) and 41 A Cr.P.C. We are not satisfied by the mechanical incantation of the words by the police of 72 U.P. districts: *“जनपद / थाना स्तर पर आदेश का अनुपालन कड़ाई से किया जा रहा है.”*
25. As already indicated above we are of the view that by routinely mentioning in the case diary that a particular condition referred to in sections 41(1)(b) or 41 A Cr.P.C. has been met for seeking police remand, would not provide adequate reason for effecting the arrest. The DGP is also directed to circulate the present order to all subordinate police officers.
26. We are also of the view that the UP Legal Services Authority be directed to bring out pamphlets for distribution in the legal literacy camps etc., or even issue news paper announcement with headings such as *“सात साल तक की सजा पाने वाले अभियुक्तों को राहत,”* informing the public that henceforth accused wanted in cases punishable with upto 7 years imprisonment would get relief and not be routinely arrested because of the recent amendment

to the Code of Criminal Procedure, which has been enforced from 1.11.2010.

27. Let a copy of this order be sent to the DGP, U.P., Member Secretary, U.P. SLSA and District Judges in all districts of U.P. for compliance and communication to all the concerned judicial magistrates before whom the accused are produced for remand by the police officers within ten days.
28. Let a copy of this order be also furnished to the learned Government Advocate forthwith.
29. Let a compliance report be submitted by the DGP, U.P., Member Secretary, U.P. SLSA and District Judges by the next listing. The said authorities may also indicate the difficulties if any, faced in complying with the aforesaid directions.

List on 14.12.2011.

Dated: 11.10.2011

Ishrat