

**HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD**

Criminal Appeal No.66 OF 2023

Between:

Abdul Raheem @ Shaik Raheem and others

... Appellants

And

The State of Telangana,
rep. by Inspector of Police
National Investigation Agency, Hyderabad
Ministry of Home Affairs.

...Respondent

DATE OF JUDGMENT PRONOUNCED: 09.02.2023

Submitted for approval.

**THE HON'BLE SRI JUSTICE M.LAXMAN &
THE HON'BLE SMT. JUSTICE G.ANUPAMA CHAKRAVARTHY**

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|---|--|--------|
| 1 | Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/No |
| 2 | Whether the copies of judgment may be marked to Law Reporters/Journals | Yes/No |
| 3 | Whether Their Lordship/Ladyship wish to see the fair copy of the Judgment? | Yes/No |

JUSTICE M.LAXMAN

JUSTICE G.ANUPAMA CHAKRAVARTHY

*** THE HON'BLE SRI JUSTICE M.LAXMAN**
AND
THE HON'BLE SMT. JUSTICE G.ANUPAMA CHAKRAVARTHY

+ CRL.A. No. 66 of 2023

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... Respondent

! **Counsel for the Appellant:** M/s. Mohd. Muzafferullah Khan

^ **Counsel for the Respondent:** Special Public Prosecutor

>**HEAD NOTE:**
? **Cases referred**

1. Criminal Appeal No. 22 of 2023, dated 18.01.2023
2. Criminal Appeal No.510 of 2021 dated 12 May, 2021

**THE HON'BLE SRI JUSTICE M.LAXMAN
AND
THE HON'BLE SMT. JUSTICE G.ANUPAMA CHAKRAVARTHY**

CRIMINAL APPEAL No. 66 of 2023

JUDGMENT: *(per Hon'ble Sri Justice M. Laxman)*

1. This criminal appeal has been filed against the order dated 17.01.2023 in Cr1.MP.No.09 of 2023 in RC-03/2022/NIA/HYD on the file of the IV Additional Metropolitan Sessions Judge-cum-Special Court for NIA cases, Nampally, Hyderabad, whereunder appellants/ accused Nos.32 to 36 were granted police custody for three days i.e., from 19.01.2023 to 21.01.2023.

2. The impugned application i.e., Cr1.MP.No.09 of 2023 was moved by the National Investigation Agency (NIA) seeking police custody of accused Nos.32 to 36 for a period of five days based on collection of certain forensic evidence from the cell phones of other accused and to elicit certain information relating to data obtained from the mobiles phones.

3. It is not in dispute that the impugned application was moved when the appellants completed judicial custody of 117 days. This means, the impugned application was moved after 30 days, which is the permissible period for grant of police custody in terms of the Unlawful Activities (Prevention) Act, 1967 (for short "the Act").

4. The contention of the learned counsel for the appellants is that once the police custody is availed by the NIA within 30 days, their second application for further custody, even on good reasons for delay beyond 30 days, is not maintainable. According to him, the order impugned is without jurisdiction and suffers from illegality.

5. The Special Public Prosecutor representing NIA has contended that the second proviso to 43 D (2) (b) of the Act enables the NIA to file the application for police custody beyond 30 days, if reasonable explanation is offered for the delay in moving such application. According to him, the said proviso is an exception to Section 167(2) of the Code of Criminal Procedure, 1973. He further contended that there is no limitation for moving number of applications within 30 days and there is no such language used in either in the Act or in Cr.P.C barring the second application in terms of second proviso of Sec.43 D (2) (b) of the Act.

6. Learned counsel for the appellants has relied upon the Judgment of the Bombay High Court in case of *State of Maharashtra Vs. Pawankumar Fakrichand Uikey*¹, whereunder the Bombay High Court held as follows:

¹ Criminal Appeal No. 22 of 2023, dated 18.01.2023

“14. The Supreme Court while considering the effect of second proviso observed that, it does bring an alteration of the law in Anupam J.Kulkarni case. It is explained that as per proviso, if a person is remanded to Judicial Custody and the National Investigating Agency has not been given Police Custody during the first 30 days, then on reasons being given, Court may grant Police Custody”.

7. In the light of the said contention, it is apt to refer to Section 167 (2) of the Code of Criminal Procedure, 1973, which reads here under:

“167. Procedure when investigation cannot be completed in twenty-four hours:

(1) ...

(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 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.

8. It is also apt to refer to Section 43D (2) (a) & (b) of the Act, which reads here under:

“43 (D) Modified application of certain provisions of the Code:-

(1) ...

(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**”.

9. The conjoint reading of both provisions would show that by virtue of special provision under the Act, the words 'fifteen days' were substituted with thirty days which means the police custody can be given within thirty days unlike fifteen days as contemplated under Section 167 (2) of the Code of Criminal Procedure, 1973.

10. It is also not in serious dispute that for giving police custody within the time stipulated, the NIA is entitled to move number of applications. There is no embargo that once an application is filed, the second application for police custody is not maintainable within thirty days.

11. In this regard, it is apt to refer to the decision of the Hon'ble Supreme Court in the case of "*Gautham Navlakha Vs. National Investigation Agency*"², which reads here under:

"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* (1992 AIR 1768), 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

² Criminal Appeal No.510 of 2021 dated 12 May, 2021

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.”

12. A reading of the above provision and the ratio laid down by the Apex Court, it is clear that the second proviso to 43D (2) (b) of the Act is an exception to the general rule under Section 167 (2) of the Code of Criminal Procedure, 1973. It is also clear that an application for police custody beyond thirty

days is maintainable, if there are good reasons for delay in moving such application. The only embargo is that the application has to be moved, if the accused is in the judicial custody. If the accused is bailed out or judicial custody is completed, the application is not maintainable.

13. Learned counsel for the appellants has argued that once an application is moved by the National Investigation Agency during initial 30 days period, they cannot move the subsequent application even though they have good reasons for not moving the application is unmerited and contrary to the wording used in the second proviso to Section 43D (2) (b) of the Act. This argument was developed by the learned counsel for the appellants basing on the above referred Judgment in Bombay High Court, wherein it is held that such an application is only maintainable if the NIA has not invoked such custody within initial remand period of thirty days. This is contrary to the intendment of the second proviso to Section 43D (2) (b) of the Act. With great respect to the Bench of the Bombay High Court, we are not in agreement with such principle and such principle cannot be read under the second proviso. When the NIA is entitled to move multiple applications within thirty days, they can also move such application beyond 30 days if they have good reasons and there is no restriction that once the remedy of police

custody is availed in 30 days, no such second application is maintainable, which is running against the express provision by way of exception to the rational provision. The arguments advanced by the counsel for appellants are unmerited. Further, in this case, the remand was taken on 19.01.2023 and remand was completed on 21.01.2023 and such remand was granted, when the appellants are in judicial custody only.

14. Further, there is no challenge to the merits of the case and the learned counsel representing the appellant has fairly admitted that they are not challenging the merits of the order. However, their grievance is that the NIA, having already availed police custody once, moving another application beyond thirty days even with good reasons is not maintainable. Such contention held to be unsustainable. Therefore, the appeal is devoid of any merits.

15. In the result, the appeal is dismissed. Miscellaneous petitions, pending if any, shall stand closed.

JUSTICE M.LAXMAN

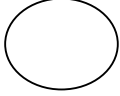
JUSTICE G.ANUPAMA CHAKRAVARTHY

Date: 09.02.2023

Note: L.R Copy to be marked

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**THE HON'BLE SRI JUSTICE M.LAXMAN
AND
THE HON'BLE SMT. JUSTICE G.ANUPAMA CHAKRAVARTHY**



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