
MAPPING CRITICALITY IN THE PROCESS OF CUSTODY AND REMAND

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INTRODUCTION

Criminal law is the powerful tool in the hands of the state for maintenance of law and order as well as for the protection of the society. This is achieved by the state through establishment of a set of rules and regulations that prohibit certain behaviors and actions, and by imposing penalties or punishments for those who violate these rules. With punishment comes the power of the state to curtail the liberty of the accused persons. And this power of the State has been circumscribed by the constitutional provisions, as the curtailment of liberty cannot be done except by “procedure established by law”¹ and this procedure must be just, fair and reasonable². The Constitutional constraints aim to ensure that in the process of obtaining justice for one, injustice is not caused to others.

In India, there is Code of Criminal Procedure, 1973 (hereinafter ‘Cr.P.C’) which lays down the procedure for administration and enforcement of substantive criminal law, with the principal object to ensure that the accused gets a full and fair trial in accordance with the well-established principles of natural justice and Constitution. The code in its various provisions, provides for the detailed procedure related to all the stages of involved in a criminal case.

One such provision provides for the requirement of production of accused before the magistrate within 24 hours of his arrest³, and this is followed by the decision by the magistrate whether to send the accused to the custody of the Police for enablement of investigation or not⁴. This stage of production of the accused before the Magistrate holds crucial importance as this is the very first time when the accused comes in contact with the judicial functionary of the state and more significantly because the essential question of the liberty of the accused is decided at this very

¹ The Constitution of India, A. 21.

² *Maneka Gandhi v Union of India* (1978) 1 S.C.C. 248.

³ The Code of Criminal Procedure, 1973. s.57.

⁴ The Code of Criminal Procedure, 1973. s.167.

juncture. “This is thus an interaction between Constitution and criminal procedure, which is between protecting ‘personal liberty’ and sub-serving ‘public good’. The guarantees of criminal due process rights ensure that a State validly justifies every denial of liberty.”⁵

Thus the matter related to remand and custody is noteworthy not only from the viewpoint of state actors as they get the custody of the accused which facilitates investigation, but also for the accused as his sacrosanct liberty at stake.

This paper revolves around the concept of custody and remand. In the first part, it throws light upon the legal discourse on custody and remand in India and how it has come to the present position. The second part of the paper enumerates the associated critical issues, few of them resolved through judicial pronouncements and others still unresolved, along with the criticalities in their practical insinuations in the process. This paper picks up four such issues for a deeper analysis and expansion by examining the judicial approach towards them as well as exploring the repercussions of their different possible interpretations.

LEGAL DISCOURSE ON CUSTODY AND REMAND IN INDIA

Chapter V of Criminal Procedure Code, 1973 grants the primary power to arrest any person to the Police Authorities. Such power to arrest however is not absolute and has to be exercised sensibly, as “the existence of the power to arrest is one thing. The justification for the exercise of it is quite another.”⁶ With the power of arrest there are a few procedural requirements provided in the code itself which have to be sincerely fulfilled. One of them being the production of the accused before the magistrate within 24 hours of arrest⁷, which is a manifestation of the fundamental right of the accused specified under Article 22(2) of the Constitution of India. Any arrest made in contravention to this provision is illegal.⁸

The purpose behind Article 22(2) is to ensure the application of a judicial mind to the arrest and also keep a check as to whether the procedural formalities required under law have been sufficiently complied with. “This requirement of production before a Magistrate is not a mere ‘formality’ rather, it is ‘to enable the person arrested and detained to be released on bail or other provision made for his proper custody pending the investigation into the offence with

⁵ Aparna Chandra & Mrinal Satish, *Criminal Law and the Constitution*, in The Oxford Handbook of The Indian Constitution (published in 2016, Oxford University Press).

⁶ *Joginder Kumar v State of Uttar Pradesh* (1994) 4 S.C.C. 260.

⁷ s.57 (n 3).

⁸ *State of U.P. v Abdul Samad*, A.I.R. 1962 S.C. 1506.

which he is charged or pending an enquiry or trial”⁹, which is done through a remand order passed by the Magistrate. “‘Remand’, though has not been defined under Code of Criminal Procedure, is an act of sending back (a prisoner) into custody, especially in order that further evidence may be obtained. The power of remand can be exercised only by a Judicial Magistrate when he is satisfied that further detention of accused is necessary.”¹⁰

This power of Magistrate to pass remand order is provided under Section 167 of the code. The Section dictates that when the accused is produced before the Magistrate by the police within 24 hours, as necessitated by Section 57, the Magistrate has the discretion to warrant detention of an accused in custody of the Police for a term not exceeding 15 days if it appears that investigation cannot be completed within the said period and there are well-founded grounds for believing the accusation or information.

The Section further envisages the possibilities that can follow up on end of the 15 day custody. It provides for the time periods for up to which the custody can be extended and the circumstances under which the Magistrate can do so. The time periods specified under the Section which grant the maximum time for confinement during the pendency of investigation is 90 days where the offence is punishable with death, imprisonment for life or an imprisonment for a term of not less than 10 years and 60 days where the investigation relates to any other offences. On expiry of the given time periods, the accused person shall be released on bail if the investigation has not resulted in filing of the charge sheet. This is called the accused’s right to default bail.¹¹

The exercise of remand has undergone several changes historically to reach its present state. The power of remand which could be exercised by both Executive Magistrate and Judicial Magistrate and there was a restriction of 15 days on period of remand under the Original Code of 1898¹².

However, this created a strange situation where the police would file an incomplete charge sheet and use Section 344, which was meant to be used only after the magistrate had taken

⁹ *Ibid.*

¹⁰ *Natabar v State of Orissa* 1975 SCR 137.

¹¹ The Code of Criminal Procedure, 1973. s.167.

¹² This power was eventually given to the Judicial Magistrate exclusively on the recommendation of 37th Law Commission Report (p. 138, para 482), as it required application of judicial mind.

cognizance of the offense. As a result, the charge sheet filed would not be in the required format.¹³

CRITICAL ISSUES PERTAINING TO THE PROCESS OF CUSTODY AND REMAND

Section 167 elucidates the juncture that determines the route that investigation is going to follow, as this is the first stage when the investigating agency invokes the right of arrest. More prominently, the decision as to the fate of accused, with respect to his most precious right- his right to personal liberty is taken at this point of time by the Magistrate during the criminal proceeding. Its significance can be realized more notably in the light of Herbert Pecker's due process model¹⁴ whose reflection is quite conspicuous in the present criminal procedure code introduced in post constitution era.

The process of custody and remand as given under subsections (1) and (2) of Section – 167, though has undergone transformation as mentioned before, still carries within itself scope of various snooping issues which need to be inquired. Some of these issues can be addressed through making interpretative explorations in the text of the provision itself, taking recourse to aids like the intent of the legislature and purpose of the provision, while some of them require consideration of feasibilities and difficulties in the practical application of the statutory procedural requirements.

These issues involved are:

1. What is the procedure to be followed when one of the accused (may be absconding) is arrested after filing of the charge sheet and when court has already taken cognizance?¹⁵
2. From which date the period of 15 days shall begin, date of arrest of the accused or date of production before the magistrate or the date of remand, considering the fact that these may or may not overlap practically?¹⁶
3. Whether the period of 15 days provided for Police Remand can be interpreted as 15 days at any period of time during the investigation or shall be the first 15 days only?¹⁷

¹³ The 14th Law Commission Report proposed a solution, which was reiterated in 41st report to extend the investigation period from 15 to 60 days. The current law allows a maximum of 90 days for an offense punishable by death, life imprisonment, or imprisonment for a term of at least 10 years, and 60 days for any other offence.

¹⁴ Herbert Packer, *Two Models of the Criminal Process*, (published in 1964, University of Pennsylvania Law Review).

¹⁵ *CBI v Rathin Dandapat*, (2016) 1 SCC 507., *State v Dawood Ibrahim Kaskar*, (2000) 10 SCC 438.

¹⁶ *Chaganti Satyanarayana v State of A.P.*, (1986) 3 SCC 141.

¹⁷ *CBI v Anupam J. Kulkarni*, (1992) 3 SCC 141, *Devender Kumar v State of Haryana*, (2010) 6 SCC 753.

4. What will be the course of action when there are multiple FIRS against the same accused at different points of time? Will the period of police custody run consecutively or concurrently, separately or conjointly?¹⁸
5. How the computation and calculation of the period of remand is done?
6. What are the grounds which the magistrate needs to take into consideration while extending the custody? Are these grounds different for IPC offences and offences under special legislation?
7. Whether the time spent in executing the transit remand order by transferring of the accused from one place to another is included in the remand period or not?
8. Whether “house arrest” can be interpreted as custody and the time spent therein on the order of the court be included within the period of remand?

The issues 1 to 4 have been answered through several of judicial pronouncements by the High Courts and Supreme Court (see footnotes). Given the complexity, recentness and multidimensionality of issues 5 to 8, these are dealt with in this paper in following sections.

A. COMPUTATION AND CALCULATION OF PERIOD OF CUSTODY

Section 162 (2)- first proviso provides for 60 and 90 days period of Judicial Custody depending of the term of imprisonment provided for the offences under the substantive law, which is Indian Penal Code, 1860. This debate regarding the calculation of number of days concerns the question- **whether the period of remand under the first proviso to Sec. 167 (2) of the Cr.P.C is inclusive of the day on which the Magistrate orders for the remand or not.**

This time period is pivotal to the question of liberty, i. e. the decision of right of default bail of the accused which accrues on the inability of the investigating agency “to file the report on completion of investigation”¹⁹. Hence, it can be said that it is the wrangle of number of days that becomes the decisive factor not only qua the liberty of the detained accused, but also for the time period for which the investigation agency will have the accused detained, to aid the interrogation process. As to the above-mentioned question, there have been catena of judgments wherein this question has been under the consideration of the Court, however, due

¹⁸ *CBI v Anupam J. Kulkarni*, (1992) 3 SCC 141.

¹⁹ The Code of Criminal Procedure, 1973. s.173.

to obliviousness or a convenient ignorance of correct precedents, there have been conflicting decisions by the benches of the poly-vocal Supreme Court.²⁰

This issue first came up for consideration before the court in *Chaganti Satnayaran*²¹ case where the division bench held that the period of remand will start from the day of its order, and not from the subsequent day. The holding was relied upon by the in subsequent decisions in *State v Mohd. Ashraf Bhat*²². However, the decision in *State of M.P. v. Rustam*²³ ignored the *Changanti* decision and held against including the date of remand order in the period of remand. This law was then followed in multiple judgments like *Ravi Prakash Singh v State of Bihar*²⁴ and the full bench decision in *M. Ravindran v Intelligence Officer*²⁵.

The most recent development on this issue is another holding by a three judge bench to the reference made to the court of this question, due to series of combative judgments by the courts. In *Enforcement Directorate v Kapil Wadhawan*²⁶, the bench ruled in favor of including the day of remand order in computing the period of custody, that is, the reckoning shall start from the day on which the order for remand is made by the magistrate, following the initial principle laid down in *Chaganti Satnarayan* case.

The opinion of the court to initiate the reckoning period from date of remand order, which has the practical consequence of one-less day of remand for the accused if it would have ruled otherwise, shows the pro-accused stance of the court, which is accentuating upon the liberty and is furthering the due-process compliance in criminal proceedings.

The court relied on the legislative intent of the provision and observed that the aim of the provision is that investigation should be completed without delay. “Although, the State is tasked to prevent crime and maintain security, personal liberty-should not be the collateral”²⁷ and thus the accused should not be at the receiving end if such delay happens on the part of investigating agency.

²⁰ see *Chaganti Satyanarayana v State of A.P.*, (1986) 3 SCC 141, *State of M.P. v Rustam & Ors.* 1995 Supp (3) SCC 221, *Ravi Prakash Singh v State of Bihar* (2015) 8 SCC 340, *M. Ravindran v Intelligence Officer, Director of Revenue Intelligence* (2021) 2 SCC 485.

²¹ *Chaganti Satyanarayana v State of A.P.* (n 16).

²² *Pragya Singh Thakur v State of Maharashtra* (2011) 10 SCC 445.

²³ *State of M.P. v Rustam & Ors.* 1995 Supp (3) SCC 221. (*per incuriam*).

²⁴ *Ravi Prakash Singh v State of Bihar* (2015) 8 SCC 340.

²⁵ *M. Ravindran v Intelligence Officer, Director of Revenue Intelligence* (2021) 2 SCC 485.

²⁶ *Enforcement Directorate v Kapil Wadhawan* 2023 LiveLaw (SC) 249.

²⁷ *Ibid.*

Another point of reasoning propounded by the court was that Section 167 is exhaustive in itself, hence there is no requirement of taking recourse to Section 469 (Cr.P.C.) or Section 10 of General Clauses Act, 1897 to decide as to the date of reckoning. Furthermore, if the alternate of the decision is accepted, that is, the day of remand order is not included while computing the remand period and the reckoning begins from the next day, then it creates an anomalous situation of legal vacuum, wherein even if the accused would be under custody, such custody would neither be covered under Section 56 nor under Section 167.

Hence, the ambiguity around the issue of computation of the period has been resolved by the court, however, it should be noted that the practical application of it can also result in varied circumstances for two accused persons, who may be accused of offences of same nature and same punishment. “The situation can arise keeping in the view that the period of custody, as per the ratio of this case, can range anywhere between 59 days 23 hours or so to 59 days 1 hour or so for the offences covered under proviso (a) (ii) and between 89 days 23 hours or so to 89 days 1 hour or so for offences covered under proviso (a) (i) to Section 167 (2). This was also addressed to by the bench in the judgment as a possibility”²⁸.

This likelihood of accused persons of offences of same nature and same punishment being subject to differential treatment by subjecting them to different period of custody raises certain doubts as regards the validity of the decision of the court, nonetheless, the stakes being the right of personal liberty of the accused and the due process requisite of speedy investigation, this slight differential treatment can be overlooked as a subtle fallout which can be delicately accepted.

B. PARAMETERS GOVERNING AUTHORIZATION OF CUSTODY BEYOND 15 DAYS

Section 167 (2) proviso empowers the Magistrate “to authorize detention of the accused person, otherwise than in the custody of the police, beyond the period of 15 days, if he is satisfied that adequate grounds exist for doing so”²⁹. The power given to the Magistrate herein is vital considering the fact that here he needs to strike a balance between the interest of the state to complete the investigation in an effective manner and on the other hand the interest of the accused person whose fundamental right of liberty is at stake. “The intent of legislature also

²⁸ *Ibid.*

²⁹ s.167 (n 4).

was to balance the need for sufficient time limits to complete the investigation with the need to protect the civil liberties of the accused.”³⁰

The power though has been conferred upon the Magistrate under Cr.P.C. however, no express guideline has been provided except the broad dictate of “satisfaction on the basis of adequacy of grounds”³¹. This dearth of the express parameter for the crucial decision of extension of remand of the accused can very well result into potential risks of remand orders being passed by the Magistrate in a mechanical and routine manner³².

In special statutes (“Narcotic Drugs and Psychotropic Substances Act, 1985, Unlawful Activities (Prevention) Act, 1967, Terrorist and Disruptive Activities (Prevention) Act, 1987, Maharashtra Control of Organised Crime Act, 1999”) though, for the extension of the remand period on non-completion of investigation, the legislature has expressly provided for requirements like “report of the Public Prosecutor indicating the progress of the investigation and specific reasons for the detention of the accused beyond the said period”³³

These express requirements of a progress report of investigation by the Public Prosecutor and specific reasons as to why the prosecution thinks that the period of detention should be extended, serve as guiding lights as to on what basis the Magistrate has to decide on the fate of the accused’s liberty. “This report by the Public Prosecutor must disclose on the face of it that he has applied his mind and has been satisfied with the progress of the investigation and considered a grant of further time, to complete the investigation as necessary. The report is not merely a formality but is a very vital report as it affects the liberty of an accused, and the Prosecutor has the option to agree as well as disagree on the opinion of Investigating Officer.”³⁴

Another object of such report is that there happens to be a scrutiny by the Public Prosecutor of the investigation and the accused is not left on the mercy of the Investigating Officer alone. The court has time and again emphasized on the importance of the role of Public Prosecutor in the criminal proceedings³⁵ as him being “an independent statutory authority”³⁶ and “not a mere

³⁰ *Satender Kumar Antil v CBI*, (2022) 10 SCC 51.

³¹ s.167 (n 4).

³² see *Kundan Kumar v State of Bihar & Ors.* WP (Crl) No. 1703/2019.

³³ Narcotic Drugs and Psychotropic Substances Act, 1985, s. 36A, Unlawful Activities (Prevention) Act, 1967, s. 43D, Terrorist and Disruptive Activities (Prevention) Act, 1987, s. 20, Maharashtra Control of Organised Crime Act, 1999, s. 21.

³⁴ *State of Maharashtra v Surendra Pundlik Gading and ors.* (2019) 5 SCC 178.

³⁵ *Union of India v Mubarak*, (2019) 6 SCC 252, *State v Shakul Hameed*, (2019) 6 SCC 350.

³⁶ *Hitendra Vishnu Thakur v State of Maharashtra*, (1994) 4 SCC 602.

post office or forwarding agency”³⁷, application of mind by the Public Prosecutor while preparing the progress report of investigation.

Having understood the importance of the substantial matters before the Magistrate to help him to decide on the extension of period of custody of the accused, let's come back to Section 167, where there is lack of such requirements. Then the obvious question arises that how the Magistrate decides whether to extend the period of detention or not in case of offences otherwise than those in special legislations. The “satisfaction that adequate grounds exist” for extension has to be complied with. Here also, though not expressly written the Magistrate relies upon whatever material the prosecution puts forth before him. However, as observed that even after there being express requirement of a progress report by the public prosecutor in special offences, the court had to stress upon the necessity of strengthening the independence of prosecution and also on doing away with mechanical approach of Magistrates in passing remand orders; there are even higher likelihoods of non-application of mind by the Prosecution as well as by the Magistrate when it comes to the cases not covered under Special legislations, where there is no such guideline at all.

The 14th Law Commission Report and then subsequently 41st Law Commission Report had recommended the need for an suitable provision specially providing for an extended remand after expiry of 15 days for a full and proper investigation in cases of serious crime, nonetheless, none of them listed out the considerations, except the satisfaction of existence of adequate grounds, to be undertaken by the magistrate who is supposed to decide on such extension. Indeed there is a need of similar, if not more elaborate, guidelines to be provided to the Magistrate in the provision itself by the legislature as “remand is a fundamental judicial function of a Magistrate; the Magistrate has to satisfy himself/herself that there are reasonable grounds and that the material placed before him justify the police remand of the accused”³⁸.

In addition to those basic ones provided in the special legislations, the actions that the Magistrate can take at the juncture when question of extension of custody of the accused comes before him are the inquiry into day-wise updates on investigation till that date, why the extended custody of the accused is required, how the custody of accused is going to help in the remaining investigation, why the remaining investigation cannot be completed when the accused is released on the condition that he will cooperate with the investigating agency as and

³⁷ *State of Maharashtra v Surendra Pundlik Gading and ors.* (n 34).

³⁸ *Manubhai Ratilal Patel v State of Gujarat*, (2013) 1 SCC 314.

when required, the reason for delay in investigation (the legislative intent being speedy investigation). The Magistrate can have both the Investigating Agency as well as the Prosecutor make independent reports on the above-mentioned questions and place materials before him supporting the respective reports, and obviously, liberty of the accused person should be the frontrunner among all the considerations before the Court deciding the custody and remand.

C. TIME SPENT IN TRANSIT REMAND PERIOD AMOUNTS TO PERIOD IN CUSTODY OR NOT

When the accused is apprehended at a place otherwise than where the offence has been reported and the arrested person is sought to be taken by the police to the place of jurisdiction for production before the Magistrate having jurisdiction over the matter, the police seeks transit remand order from the magistrate having jurisdiction over the place where the arrest was made. Hence the key object of such a remand is to facilitate the police to shift the person in custody from the place of arrest to the place where the matter can be investigated and tried. However, there is no express provision in Cr.P.C. which mentions this process.

The criticality in the process of transit remand lies in the fact that **the time period spent in taking the arrested person from the place of arrest to the place of jurisdiction would set the clock ticking for the purpose of computation of period of custody under Section- 167 or not, that is, whether transit remand amounts to custody under Section 167?**

The issue had not come up before the court until the recent case of *Gautam Navlakha v. NIA*³⁹. In this case, the Supreme Court held in favor of including the period of transit remand under “custody” in Section 167.

*“The Court held that an order for transit remand would fall under Section 167 as it involves authorising the continued detention of the accused beyond the period of 24 hours within the meaning of this section. If a transit remand order were not granted under Section 167, the detention of the accused beyond the period of 24 hours would be in violation of Section 57 CrPC.”*⁴⁰

Further, while discussing the nature of the custody entailed by the transit remand order, the court observed that it cannot be in the nature of a judicial custody, as the accused is in exclusive

³⁹ *Gautam Navlakha v National Investigation Agency*, 2021 SCC OnLine SC 382.

⁴⁰ *Ibid.*

entrustment of the Police during this period. Hence, it amounts to police custody.⁴¹

The interpretative issue though has been resolved by the above-mentioned judicial pronouncement, transit remand still as a process is complex in its pragmatic implications. The investigating agency of a state goes to another state, apprehends a person and takes him along. There have been cases where the said agency has acted despotically by sheer neglect of the mandates provided under provisions of Cr.P.C. as well as by violation the fundamental rights of the persons being apprehended⁴². The Court in *Tasleema v. The State (NCT of Delhi)*⁴³, “where a 14-year-old boy was picked up by the Gujarat police from Delhi and taken to Gujarat without following the due procedure had observed that in a country governed by the rule of law, this is simply unacceptable”⁴⁴.

Taking such infringement of rights of the arrested persons, and lack of set rules governing the actions of police authorities while arresting a person in other state and acting on the order of transit remand, Delhi High Court has devised certain guidelines putting forth the course of action to be followed by the Police authorities in such cases⁴⁵.

Other associated ramifications of transit remand are the impediments which the apprehended person faces during the process. From getting arrested to being taken to an unfamiliar territory, where the apprehended person is kept in custody and made subject to the trial process, the practical difficulties could be countless, to state a few: not getting proper legal advice and representation, not having the requisite number of sureties, inability to present a proper defence in the court due to unfamiliarity to language and script, limitations in answering to the questions put up in examination and cross-examination.

All such difficulties are due to the introduction of the accused to an unfamiliar and unacquainted place, and are in addition to the complexity and callousness of the criminal process that he has to undergo. The law being silent on the concept and process of transit remand altogether, there are greater odds of wronging the powers by the Police Authorities to the disadvantage of the arrested persons. The vacuum in the law has to be addressed and filled as soon as possible, by the legislature by providing a holistic structural and procedural setup

⁴¹ *Ibid.*

⁴² *Shweta Priyadarshini v State of Jharkhand W.P.(Cr) (Hb.) No. 369 of 2021, Iqbal Kaur Kwatra v The Director General of Police 1996 (2) ALD 390.*

⁴³ *Tasleema v The State (NCT of Delhi) WP (CRL) 758/2008.*

⁴⁴ *Ibid.*

⁴⁵ *Sandeep Kumar v State (Govt. of NCT of Delhi), 2019 SCC OnLine Del 11901.*

related to the process of transit remand and by the judiciary by ensuring that there is compliance of the due procedure established by law.

D. “HOUSE ARREST” AMOUNTS TO CUSTODY OR NOT

House Arrest or custodia libera is not a novel concept. “The first being 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. South Africa 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 judiciaire as a fairly straightforward form of pre-trial detention involving a provision that employed home confinement as an alternative for common offenders. 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. In the United States, “home detention” had been put in practice in St. Louis as early as 1971.”⁴⁶

In India, the notion of house arrest has its origins in laws relating to preventive detention⁴⁷, where the state resorted to such forced arrests to incarcerate the mischievous elements in the society. Here, the protections under Article 22(1) and Article 22(2) are not available under a law providing for preventive detention. Hence, the concept of house-arrest is not novice for the judiciary and it has had cases⁴⁸ where it had to come across this very subject.

The relevant point of analysis on house arrest with respect to the current matter of discussion, that is, **custody and remand is different from the house-arrest discourse in preventive detention cases. The issue here is whether the period spent by a person in the house arrest, will constitute the period spent in “such custody” for the purpose of Section-167 or not.** This point holds more significance as the answer to it can affect not only the time during which the sacrosanct liberty is being curtailed, but also will affect his impending right to default bail.

This very issue came up recently before the court in the case of *Gautam Navlakha v. NIA*⁴⁹. Where the accused was detained his own house for a period of 34 days, pursuant to an order

⁴⁶ J. Robert Lilly and Richard A. Ball “*A Brief History of House Arrest and Electronic Monitoring*” (Published in 2014, 6th Edition, SAGE Publications, Inc.).

⁴⁷ National Security Act, 1980.

⁴⁸ *State of Rajasthan v Shamsher Singh* 1985 Supp SCC 416, *A.K. Roy v Union of India* (1982) 1 SCC 271.

⁴⁹ *Gautam Navlakha v National Investigation Agency* (n 41).

and further extension due to a writ petition filed for ensuring a credible investigation⁵⁰. This detention period was then claimed by the accused to be included in the period of custody for the purpose of Section-167, so that the right of default bail can accrue. The Apex Court in this case did an extensive perusal of the occupancy rate in jails in India. The court under the constitutional sanctifications of freedoms conferred under Article 19 and the right of life and liberty under Article 21 ruled that the custody under Section 167 is inclusive of the period spent in house arrest:

“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 v. 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.”⁵¹

The court did not sustain the argument that since the Investigating Officer did not have access to the appellant, the period should be excluded, by stating that the Section 167 itself “does not contemplate access to the Police for interrogation as a condition. 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.”⁵²

This interpretation manifestly reflects the accused-centric traction of the court, where the court, by placing the liberty of the individual at central pedestal, has furthered the ends of due-process requirement in a criminal proceedings. But, on critical examination of such deduction, one can argue that this might open a route for all the accused arguing for house arrest as a mode of custody as a replacement of police custody or judicial custody for that matter. Furthermore, the purpose of police custody, that is custodial interrogation which is the primary mode of investigation in India, cannot be achieved as efficiently when the arrested person is in the comfortable space of his own household rather than in the four walls of police custody, whose environment is more challenging psychologically for the detained person. Adding to the

⁵⁰ *Romila Thapar v Union of India* (2018) 10 SCC 753.

⁵¹ *Gautam Navlakha v National Investigation Agency* (n 41).

⁵² *Ibid.*

complexities is the question of forum empowered to grant house arrest as a form of custody. In the present case, the order of house arrest came on the stance of the High Court, but then the question that arises is about the power of magistrate to grant house arrest while deciding on the question of custody under Section-167, if the answer is affirmative then that can be said to amount to conferment of powers which are beyond the text of the statute, that is inherent powers on the Magistrate.

On the other hand, if one attempts to take an alternative approach and explores the possible state of affairs if the period spent in house arrest is not included in the custody period under Section 167 then this interpretation seems to be tilted more towards state. This approach is also derelict towards the rights of the arrested person, as the period of notional custody undergone by the accused under house arrest amounts to be illegal and a foray on his liberty rights. Hence, through this alternative route to address the problem also leaves an unaddressed void. What is required is a clear perusal of facts by the judiciary as well as by the legislature so that the above lacunae of the above mentioned nature can be addressed.

CONCLUSION:

The process of Custody and Remand is a crucial stage in the criminal proceeding, both from the standpoint of the State actors who have the duty of conducting a detailed as well as speedy investigation, and from the outlook of the arrested person whose liberty and freedom are under threat. Section 167 confers the distinctive responsibility to the magistrate to strike a delicate balance between these two competing interests. This decision has to be taken on case to case basis, taking into consideration multitude of factors, however the primary being the commitment to due process and fair trial. As pointed out, there are several interpretative questions and practical concerns with respect to the process, however as “Section 167 is integrally linked to the constitutional commitment under article 21”⁵³ the answers to these questions and concerns should unquestionably uphold this commitment.

⁵³ *Satender Kumar Antil v CBI* (n 32).

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ANNEXURE

SYNOPSIS

Mapping Criticality in the process of Custody and Remand

INTRODUCTION:

Section 57 of Cr.P.C. provides for the requirement of production of accused before the Magistrate within 24 hours of arrest. At this stage, the Magistrate decides on the question of remand of the accused. The accused is brought before the magistrate at this point, and this stage is of utmost importance because it is the first time the accused interacts with a state official involved in the judicial system. It is also the point at which the crucial issue of the accused's freedom is decided.

Thus, the issue of remand and custody is significant both from the perspective of state actors, as it allows them to take custody of the accused and aids an investigation, and from the perspective of the accused, whose inviolable right to liberty is at risk.

REVIEW OF LITERATURE

The issue whether whether the period of remand under the first proviso to Sec. 167 (2) of the Cr.P.C is inclusive of the day on which the Magistrate orders for the remand or not, first came up for consideration in *Chaganti Satnayaran*⁵⁴ case where the division bench held that the period of remand will start from the day of its order, and not from the subsequent day. The holding was relied upon by the in subsequent decisions in *State v Mohd. Ashraf Bhat*⁵⁵. However, the decision in *State of M.P. v. Rustam*⁵⁶ ignored the *Changanti* decision and held against including the date of remand order in the period of remand. This law was then followed in multiple judgments like *Ravi Prakash Singh v State of Bihar*⁵⁷ and the full bench decision in *M. Ravindran v Intelligence Officer*⁵⁸.

The fresh development on this issue is another holding by a three judge bench to the reference made to the court of this question, due to series of combative judgments by the courts. In *Enforcement Directorate v Kapil Wadhawan*⁵⁹, the bench ruled in favor of including the day

⁵⁴ *Chaganti Satyanarayana v State of A.P.* (n 16).

⁵⁵ *Pragyna Singh Thakur v State of Maharashtra* (2011) 10 SCC 445.

⁵⁶ *State of M.P. v Rustam & Ors.* 1995 Supp (3) SCC 221. (*per incuriam*)

⁵⁷ *Ravi Prakash Singh v State of Bihar* (2015) 8 SCC 340.

⁵⁸ *M. Ravindran v Intelligence Officer, Director of Revenue Intelligence* (2021) 2 SCC 485.

⁵⁹ *Enforcement Directorate v Kapil Wadhawan* 2023 LiveLaw (SC) 249.

of remand order in computing the period of custody, that is, the reckoning shall start from the day on which the order for remand is made by the magistrate, following the initial principle laid down in *Chaganti Satnarayan* case. In the recent case of *Gautam Navlakha v. NIA*⁶⁰. In this case, the Supreme Court held in favor of including the period of transit remand under “custody” in Section 167. The Apex Court in this case did an extensive perusal of the occupancy rate in jails in India. The court under the constitutional sanctifications of freedoms conferred under Article 19 and the right of life and liberty under Article 21 ruled that the custody under Section 167 is inclusive of the period spent in house arrest.

STATEMENT OF PROBLEM

This paper sheds light on India's legal debate on detention and remand and explains how it got to where it is now in the first section. In the second section of the article, the significant questions that are related to them are listed. Some of these issues have been addressed by court pronouncements, but others remain unsolved. By reviewing the judicial approach to them and examining the effects of their various potential interpretations, this study chooses four of these issues for a fuller analysis and extension.

RESEARCH QUESTIONS

1. What is the law on procedure of Custody and Remand in India?
2. How the computation and calculation of the period of remand is done?
3. What are the grounds which the magistrate needs to take into consideration while extending the custody? Are these grounds different for IPC offences and offences under special legislation?
4. Whether the time spent in executing the transit remand order by transferring of the accused from one place to another is included in the remand period or not?
5. Whether “house arrest” can be interpreted as custody and the time spent therein on the order of the court be included within the period of remand?

RESEARCH OBJECTIVES

1. To shed light upon the legal discourse on the process of Custody and Remand in India.
2. To map critical issues in the process of Custody and Remand.

⁶⁰ *Gautam Navlakha v National Investigation Agency*, 2021 SCC OnLine SC 382.

3. To examine the judicial trends on four selected critical issues pertaining to Custody and Remand.

RESEARCH METHODOLOGY

The research methodology used by the researcher is doctrinal and analytical in nature.

CHAPTERIZATION

1. Introduction

The first chapter introduces the significance of the study on the topic of Custody and Remand, highlighting the relation of the said process to the constitutional principles. It also highlights how the research paper is going to proceed in the ensuing sections.

2. Legal Discourse on the process of Custody and Remand in India

This chapter gives an overview of the law related to the said topic in laid down in the Code of Criminal Procedure, 1973 and how it has come to the present state. Further, it also highlights the corresponding noteworthy constitutional provisions.

3. Critical Issues pertaining to the process of Custody and Remand

In this chapter, the researcher maps all the critical issues that arise in the practical process of granting custody and remand to the arrested person. In total eight major issues have been enlisted, out of which on the basis of recentness and multidimensionality, four issues have been dealt with in detail in sub-parts to this very chapter. These are: Computation and Calculation of Period of Custody, Parameters governing authorization of custody beyond 15 days, Time spent in Transit Remand amounts to period in custody or not and House-Arrest amounts to custody or not.

4. Conclusion

The last chapter concludes the whole research and underlines the need of a constitutionally committed criminal procedure, especially when the question is of liberty of individuals.