P.A. Saleem v. State Of Madras

Madras High Court (Jul 13, 1994)

Janarthanam, J.:-

(1) These petitions coming on for hearing on monday, the 27th day of june 1994, upon perusing the petitions and upon hearing the arguments of mr. M. Karpagavinayagam, advocate for the petitioner in cr1. O. P. No. 3995/94 and of mrs. S. Panneerselvam, advocate for the petitioner in cr1. O. P. Nos. 4810 to 4813 of 1994, and of mr. George charles, advocate for the petitioner in cr1. O. P. No. 4925 of 1994, and of mr. G. Jeremiah, advocate for the petitioner in cr1. O. P. Nos. 4934 and 4975 of 1994, and of mr. K. P. Muthu mohan, advocate for the petitioner in cr1. O. P. No. 4966 of 1994, and of mr. B. Kumar, advocate for the petitioner in cr1. O. P. No. 4968/ 94, and of mr. S. Ashok kumar, advocate for the petitioner in cr!. O. P. No. 4970/94 and of mr. N. Pappiah, advocate for the petitioner in cr1. O. P. No. 4972/94 and of mr. T. Baskaran, advocate for the petitioner in cr1. O. P. No. 4979/94 and of mr. P. Punniyakotti, advocate for the petitioner in cr1. O. P. No. 4984/94, and of mr. K. Sampathkumar, advocate for the petitioner in cr1. O. P. No. 4989/94, and of mr. P. Rajendra, advocate for the petitioner in cr1. O. P. No. 4990/94, 4992/94, 5136/94, and of mr. C. V. Kumar, advocate for the petitioner in cr1. O. P. No. 5007/94, 5029/94, and for mr. R. Subramanian, advocate for the petitioner in cr1. O. P. 5011/94 and of mr. M. Ajmalkhan, advocate for the petitioner in cr1. O. P. No. 5032/94, and of mr. K. Azhagarasan, advocate for the petitioner in cr1. O. P. No. 5040/94, and of mr. B. Raj bahadur, advocate for the petitioner in cr1. O. P. No. 5066/94, and of mr. A. K. Kumarasamy, advocate for the petitioner in cr1. O. P. No. 5140/94; and of mr. D. Selvaraj, advocate for the petitioner in cr1. O. P. No. 5143/94 and of mr. Prakash gokianey, advocate for the petitioner in cr1. O. P. 5152/94 and of mr. S. Uthiasamy, advocate for the petitioner in cr1. O. P. No. 5 164/94, and of mr. P. Anbarasan, advocate for the petitioner in cr1. O. P. No. 5 167/94, and of mr. A. Chandrasekar, advocate for the petitioner in cr1. O. P. No. 5207/ 94,5208/94 and of mr. V. Balu, advocate for the petitioner in cr1. O. P. No. 5209/94, and of mrs. K. S. Rajagopalan, advocate for the petitioner in cr1. O. P. No. 52 14/94 and of mr. R. Regupathi, additional public prosecutor on behalf of the state, and having stood over for consideration till this day, the court made the following order: in these actions, non - bailable warrants issued by lower courts concerned, under certain eventualities, as contemplated by the code of criminal procedure, 1973 (act no. 2 of 1974 - for short code) , for the arrest and production of the respective petitioners, facing trial for certain specified offences, are sought to be re - called, by invoking the inherent powers of this court under section 482 of the code, straightaway, even without approaching the courts concerned, which issued such warrants, for cancellation.

(2) The entertainment of actions of this nature by this court, it appear, is of recent origin and warrants issued by the courts below had been recalled even without

issuance of any notice whatever, by a direction to the respective persons to appear before the courts concerned on a date to be specified, besides ordering suspension of execution of the same till such time. Of course, in some cases, reports of the courts concerned have also been called for, before exercise of such power.

(3) This sort of entertainment of such petitions and exercise of power, as revealed by the latest statistics furnished to this court, seems to have encouraged frequent absence of petitioners - accused facing trial, which led to the prolongation of trials for years together, causing agonising situations, not only to the other co - accused, if any, but also to the witnesses for prosecution; thereby causing concern to the right of speed trial, a cherished goal enshrined under article 21 of the constitution of india (for short constitution) , in the administration of criminal justice system. Such an alarming situation chocked the con - science of this court to make an investigation, as to whether such exercise of power under section 482 of the code is legally permissible and justified. Such an investigation prima facie reveals that the power hitherto exercised for such a purpose was not in accordance with law. Consequently, without adopting the earlier procedure in all these actions, learned counsel concerned were required to put forth their submissions as to the tenability or otherwise of such exercise of powers under sections 482 of the code, besides extending invitations to members of the barto participate in the discussion, since a decision on such a question is, of paramount importance in the administration of criminal justice system. Members of the bar also responded nicely to such an invitation.

(4) Mr. M. Karpagavinayagam, learned count self or the petitioner in cr1 o. P. No. 3995 of 1994, besides pleading the cause of his client, also protected his arguments, in an admirable fashion in the general discussion, ably supported by the members of the bar. Messrs. A. Packiaraj, n. Jothi, v. Sairam, ravi anandan, v. Padmanabhan, jayachandran, s. Venkateswaran and surya selvaraj. Arguments so put forth by them had adopted by other learned counsel appearing for the remaining petitioners.

(5) Mr. R. Raghupathy, learned additional public prosecutor, with all circumspection and caution, projected his verbal submission in a sharp and incisive fashion, in a bid to solve the tangle posed in these action, and thereby rendered valuable assistance to the court.

(6) The word warant is not at all defined in the code. But, none - the - less, the said word appears in many a place in the code. Such being the case, better it is, i think to understand the etymological meaning of such a word as given in the shorter oxford english dictionary of historical principles. Volume - il (third edition) at page 2387, reflecting thus: warrant:1. 5. Command or permission of a superior which frees the doer of an act from blame or legal responsibility; authorization; sanction. Ii. I. A writing issued by the sovereign, an officer of a state, or an administrative body authorizing those to whom it is addressed to perform some act.

(7) A cursory perusal of the various provisions of the code reveals the issuance of

warrants for certain purposes, either during enquiry, trial stage or post - trial stage. The salient provisions adumbrated under **sections 70, 71, 87, 93, iii, 113, 204** and 205 of the code deal with situations empowering the court for issuance of a warrant during enquiry or trial stage, while **section 413, 414, 418** to 423 and 425 contemplate contingencies under which a warrant can be issued post - trial.

(8) Section 204 dealing with issue of process, figures in chapter xvi - commencement of proceedings before magistrate - takes cognizance of an offence, in the sense of there being sufficient ground for proceeding, process is required to be issued, either in the form of summons or warrant to the accused, depending upon the nature or the case and the fulfillment of certain requirements. If a case is a summons case summons shall ordinarily be issued for the attendance of an accused. Similarly, a warrant shall be issued in a warrant case for his appearance or production. However, neither a summons; nor a warrant shall be issued against an accused, unless a list of the prosecution witnesses had been filed. The provisions of this section shall not, however, be deemed to affect the **provisions of section 87 of the code** wherein the courtts power for issuance of a warrant in lieu of or in addition to summons is preserved intact and such power may be exercised after recording its reasons in writing.

(9) Under section 205 of the code, personal attendance of an accused may be dispensed with and he may be permitted to appear by his pleader. But the magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct personal attendance of the accused and if necessary, enforce such attendance as had been provided for in the code.

(10) Section 111 and 113 figure in chapter viii dealing with security for keeping the peace and for good behaviour. Section iii prescribes that when a magistrate acting under **section 107, section 108, section 109 or section 110,** deems it necessary to require any person to show cause under such section, he shall make an order in writing setting forth the submission of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

(11) Section 113 deals with a situation or contingency, empowering a magistrate either for the issuance of a summons or a warrant. If the person required to show cause is not present in court, the magistrate shall issue summons requiring him to appear, or, when such person is in custody, a warrant directing the officer, in whose custody he is to bring him before the court, provided that whenever it appears to such magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the magistrate) , that there is reason to fear the commission of breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the magistrate may, at any time, issue a warrant for the arrest.

(12) Thus, the situations, as narrated above, arise, as already stated, either during the course of an enquiry or trial. The effect or the result to be produced by issuance of a warrant for arrest of a person accused of an offence before court takes away the valuable liberty of a citizen of our motherland. That perhaps was the reason for enactment of various provision, as referred to above, circumscribing or limiting the powers of the magistrate to issue warrant only when certain primordial requisites are satisfied and not otherwise. Such a sanguine provisions, while safeguarding the liberty of such citizen do not hesitate to snatch away such priceless liberty of such individual, by issuance of a warrant of arrest and production before court, with laudable objective of moving freely the wheels of administration of criminal justice system, without any impediment or obstruction whatever ensuring the right of speedy trial of such persons, in tune with the goal as enshrined under article 21 of the constitution.

(13) Section 70 of the code deals with the form of warrant of arrest and duration. Every warrant of arrest issued by a court under this code shall be in writing, signed by the presiding officer of such court and shall bear the seal of the court. Every such warrant shall remain in force, until it is cancelled by the court which issued it or until it is executed.

(14) Section 71 dealing with the power to direct security to be taken prescribes that any court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the court at a specified time and thereafter until otherwise directed by the court, the officer to whom the warrant is directed shall take such security and shall release such person from custody. The endorsement shall state the number of sureties; the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; and the time at which he is to attend before the court. Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the court.

(15) Reflecting the provisions of section 70 and 71, form no. 2 - warrant of arrest, had been prescribed in the second schedule of the code.

(16) The provisions such as sections 413, 414, 418 to 423 and 425 of the code are relatable to issuance of warrant for levy of fine or execution of sentence, by the competent authorities - posttrial in nature. The provision under section 93 is relatable to a warrant issued for search and seizure - during enquiry. They are not germane for consideration of the issue on hand.

(17) It is not as if a warrant of arrest issued by a court is not capable of being cancelled by the very court, which issued it. Sub - **section (2) of section 70** may be recapitulated, at this junction and it prescribes, that every such warrant shall remain in force until it is cancelled by the court which issued or until it is executed. It is thus clear that once a warrant is issued, it shall remain in force, even beyond the date of hearing, until its cancellation or its execution. Once power is given to the court, which

issued it to cancel it, it is but proper to knock at the doors of the said court, by filing an application for cancellation of the warrant so issued, on sufficient cause being shown therefore. Once such an application is filed, it is but necessary for the court to consider such an application and pass an order, without brooking any sort of a delay mid penning down reasons therefore. If the order so passed in favourable to the accused, there is no need for him to agitate the matter a further. If it goes against him then, such an order has to be construed, in the eye of law, as a final order, liable to be further agitated in revisions, either under section 397 before court of session or under section 401 before this court, no doubt a concurrent jurisdiction conferred upon those courts, by the code.

(18) It is brought to my notice that pernicious practice adopted by the magistracy uniformlly in the state was to insist on the production of the accused, against whom warrants of arrest had been issued at the time of enquiry on an application for cancellation of the warrant being filed and the accused so present is invariably taken into custody and sent to prison, while orders thereon are passed leisurely in a belated fashion. It is high time that such a practice, if adopted by the magistracy, (is stopped forthwith and the magistracy) learns the art of passing orders then and there without causing any least delay. The personal appearance of the accused voluntarily before magistracy, who issued the warrant for his arrest, by no stretch of imagination, can be construed as if the warrant that had been issued had been executed, so that nothing survives there for cancellation. It must be remembered here that by taking scent of the pendency of a warrant for his arrest and production before court, a person against whom the same is issued, can appear before court voluntarily and file an application for cancellation of the warrant so issued on stated grounds. In such an eventuality, if the order to be passed ends in his favour, then it goes without saying that the warrant so issued must have to be cancelled and necessary direction issued therefore to the concerned police officer, to whom the same had been, issued, recalling the same and the person against whom the same had been issued, is bound over to appear before court on a date fixed for trial and all subsequent dates till the trial is over. In case the order ends against him, he has to be immediately taken into custody and sent to prison with a direction to the prison authorities for his production before court on the earliest date fixed for trial and on all other subsequent dates till the trial is. Over. At the same time, nothing prevents him to move or bail and on such application being made the magistracy, on being satisfied by recording reasons therefore, may release him on bail on his executing a bond for a specified sum with sufficient number of sureties, for such, sum, for securing his appearance on the dates fixed for hearing or trial, as the case may be.

(19) In such process, the liberty of a citizen, accused of an offence, facing trial, is better preserved, in the sense of not snatching away his priceless liberty on grounds, not contemplated by the salient provisions adumbrated under the code, besides preserving the constitutional goal of right speedy trail, as enshrined under article 21 of the constitution. It is not as if an aggrieved accused, being sent to prison, by the

refusal of the cancellation of a warrant so issued or consequent bail, is not having any other remedy. If he feels that an order so passed is the resultant product of perverse appreciation of tile materials placed, he could very well canvass the correctness or otherwise of the order, by resorting to file revisions before competent forums, as earlier stated and thereafter, even by way of further remedy, if so advised, under section 482 of the code, if grounds for resortment to such a course existed.

(20) Simpliciter, recall of a warrant, in exercise of power under section 482 of the code, in anyone of these actions, is not legally permissible and this will be. Patent, on a cursory perusal thereof. The said section prescribes that nothing in this code shall be deemed to limit or affect the inherent powers of the high court to make such order as may be necessary to give effect to any order under this code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice. It is thus patently clear that the inherent power is capable of being exercised either to give effect to any order under this code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

(21) Re - call of a warrant can, by no stretch of imagination, be stated to come under the former clause, to give effect to any order under this code, which would mean that this court bas power to see whether the warrant that has been issued by a magistrate under section 70 had been executed by the issuance of a proper direction to the police officer, or any other person, to whom the same had been issued, if such an officer is keeping the warrant, without executing it, thereby hampering the progress of speedy trial. In view of specific provisions engrafted under **sub - clause (2) of section 70 of the code** for the redress of the grievance of an aggrieved accused and further remedy by way of revision either under section 397 or 401 of the code, simpliciter re - call warrant cannot be stated to extract the latter clause also, namely, to prevent the abuse of the process of any court or otherwise to secure the ends of justice.

(22) Most of the members of the bar, who participated in the lively discussion, made a fervent appeal, at the concluding portion of their arguments, leave alone legal niceties involved in the problem that the practice of re - calling warrant simpliciter under section 482 of the code evolved by this court, adopted and followed hitherto by various learned judges, need not at all be disturbed, inasmuch as such disturbance is likely to affect the professional career of the members of the bar at this distance of time. No doubt true it is, that i am not an exception to such course. The fact that such a practice bad hitherto been followed is by itself no ground to stick on to such a practice, unless the same is having the sanction of law. This sort of a practice bad its origin, by assumption of power under section 482 of the code, without making an investigation therefore. The impelling occasion or moment has now come to decide the tenability or otherwise of such a practice, when especially it tilted the very foundation of the smooth functioning of the administration of criminal justice system, in the sense of creating or causing agonising situation by prolongation of trials, especially in heinous crimes of murder and what not, by reason of indiscriminate and

wanton absence of one or other of the accused, where there are more than one, by turns and by getting warrants issued to secure their appearance or production before court, re - called by this, court, under section 482 of the code, with an ulterior motive of hampering the progress of trial, that what little bit of evidence available in a case is irretrievably getting lost either by death or by creation of a situation, making it almost impossible for the investigating agency to trace the witnesses or by tampering, getting their memories failed etc. , in the process of passage of sands of time and thereby getting innumerable acquittals, as revealed by recent statistics, as earlier advertised to, rudely shocking, not only the conscience of this court, but also eroding the faith of the society in the very system of administration of criminal justice in courts, to which judges themselves should not be responsible, either knowingly or unknowingly, some times by abuse or misuse of their power.

(23) Worthy it is, at this junction, to recapitulate here, what lord denning, a true living legend of law, wrote in one of his books, what next in the law?tt, under the topic or caption, there remains the most touchy question of all. May not the judges themselves ometimes abuse or misuse their power? it is their duty to administer and apply the law of the land. If they should divert it or depart from it - and do so knowingly - they themselves would be guilty of a misuse of power. So we come up against juvenals question, sed ouis custodiet ipsos custodes? (but who is to guard the guards themselves?) h every judge on his appointment discards all politics and all pre - judices. You need have no fear. The judges of england have always in the past - and - always will - be vigilant in guarding over freedoms. Someone must be trusted. Let it be the judges.

(24) In view of the discussions as above, the following positions emerge: (1 issuance of a warrant of arrest by a court under this code shall remain in force beyond the date fixed for its return, until it is cancelled or executed.

(2) since the court, which issued the warrant has the power to cancel it, it is but necessary for the person against whom a warrant of arrest had been issued to approach the said court, by his personal appearance, for its cancellation, which issued it. (3) once a person of an offence against whom a warrant of arrest had been makes his personal appearance, with a petition for its cancellation, before the court, which issued it, it behoves on its part not to take him into custody and send him to prison immediately after his appearance; but to pass an order on such petition, forthwith, without borrowing any sort of a delay and if the order so passed ends in his favour, he shall be bound over to appear before court on an earliest date fixed for hearing or trial, as the case mayas, or otherwise, he could be taken into custody forthwith and sent to prison, with a direction to the prison authorities for his production before court on the earliest date fixed for such hearing or trial and on such other dates till the trial is over, so as to enable it to proceed, with ease and grace, and without any obstruction whatever, thereby not affecting in the least his right to speedy trial, a goal to be achieved, as enshrined under article 21 of the constitution; or on his application,

being presented, release him on bail, or his executing a bond for a specified sum, with sufficient number of sureties, for such sum to secure his appearance on the dates fixed for hearing or trial, as the case may be. (4) however, a person, aggrieved by an order of refusal of the cancellation by a magistrate, who issued the same, can further agitate the same, if he so desires, by filing a revision, either under section 397 or 401 of the code, and then resort to invoke the inherent power of this court under section 482 of the code, if grounds for resortment to such a course existed; and **(5) section 482 of the code** is not at all attracted for simpliciter tre - call of a warrant; but, on the other hand, it is getting attracted for execution of a warrant, by issuance of a direction to a police officer or for that matter, any other person to whom it is issued, for its immediate compliance.

(25) In view of the aforesaid positions of law, batter it is, i feel, this order is circulated to all judicial officers in the state of tamil nadu. However, instead of the registry taking copies of this order and circulating them to all the subordinate judicial officers, in the state of tamil nadu, which in fact, is a stupendous task, i feel such number of copies of the orders, as there are sessions judges and chief judicial magistrates in the state of tamil nadu could be taken, which may not pose any serious problem to the administration of this court and circulate such of those copies to those sessions judges and chief judicial magistrates, with a direction to them that after receipt of a copy of this order, they should take xerox copies of the same and circulate them to all the subordinate judicial officers in their respective divisions/units.

(26) However; ordering for taking copies of this order and circulating them to the subordinate judicial officers, i feel, is a domain pertaining to administrative power and function of my lord, the honourable to chief justice. If straightaway, a direction is given by me for such circulation, it will tantamount to encroaching upon such administrative function of my lord, the honourable the chief justice. Therefore, the best course, i feel, in the circumstances, would be for the registry to place a note before my lord, the honourable the chief justice on this aspect of the matter and get my lord, the honourable the chief justices approval and take such numbers of copies of the order and dispatch the same to the intended judicial officers.

(27) In view of what has been stated above, all these criminal original petitions are dismissed, as not maintainable. Petitions disposed of