

**CJ & SVSJ:**  
15.06.2020

**W.P.No.7338/2020**

On the earlier dates, we have heard the learned counsel on the issue of conducting remand proceedings under Section 167 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C') by use of Video Conferencing (electronic video linkage). This is in the context of a very exceptional situation created by spread of Novel Corona Virus. During last three weeks, the number of persons tested positive for Novel Corona Virus (COVID 19) in the State is ever rising. There are few instances in the State where immediately after remand proceedings, either the accused or the police personnel who brought the accused to the Court of a learned Magistrate were tested positive. Due to such situation, two judicial officers in the State and the members of the staff working in the Court have been forced to undergo fourteen days' quarantine. In one case, where a police personnel who brought the accused before the Court for remand proceedings was tested positive. As a result, the concerned Public Prosecutor who appeared before the Court and two learned Advocates who were present before the Court for representing the accused are also undergoing home quarantine

for fourteen days. As a result of these incidents, the concerned Courts were required to be kept closed for one or two days for the purpose of sanitization.

2. With the assistance of the learned Senior Counsel appearing before us and especially Shri C.V. Nagesh, we have gone through the legal provisions touching the controversy. There are three relevant provisions which are material.

3. The first is clause (2) of Article 22 of the Constitution of India which reads thus:

**“22. Protection against arrest and detention in certain cases –**

**(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest** excluding the time necessary or the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.”

(Emphasis added)

4. The second is Section 57 of Cr.P.C which reads thus:

**“57. Person arrested not to be detained more than twenty-four hours –** No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court”.

5. The third relevant legal provision is Section 167 of Cr.P.C which 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.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no 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 the 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.

*Explanation 1.*—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused

shall be detained in custody so long as he does not furnish bail.

***Explanation II.*—If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:**

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate, or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and

shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it to the Chief Judicial Magistrate.

(5) If in any case triable by Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify”.

(emphasis added)



6. The first submission made by Shri. C.V. Nagesh, the learned Senior Counsel is that clause (2) of Article 22 of the Constitution of India requires that every person who is arrested and detained in police custody shall be produced before the nearest Magistrate within twenty four hours of such arrest. He pointed out that the same is the requirement of Section 167 of Cr.P.C. He submitted that clause (b) of proviso to sub-section (2) of Section 167 of Cr.P.C clearly lays down in which cases the accused can be produced before a Magistrate through the medium of electronic video linkage. He submitted that the production of the accused before a learned Magistrate has to be in person when the learned Magistrate authorizes his detention in the custody of the police, as provided in sub-section (2) of Section 167 of Cr.P.C. He submitted that even the extension of the police custody remand can be granted only on physical production of the accused. Only in case of extension of judicial custody remand, the production of the accused can be made by the medium of electronic video linkage. He submitted that even if at the time of first production of the accused, the police are seeking judicial custody, the personal production of the accused before the Magistrate is necessary, as it gives an opportunity to

the accused to complain about the ill-treatment given by the police. If he is produced *via* electronic video linkage, the presence of the police personnel around the accused at the police station may prevent him from making a grievance regarding ill-treatment at the hands of the police. He placed reliance on the decision of the Madras High Court rendered in the case of ***K. Anandan –vs- K. Manoharan***<sup>1</sup>. He submitted that the failure to physically produce the accused person before the Magistrate within twenty-four hours from the time of his arrest will amount to violation of his fundamental rights conferred under clause (2) of Article 22 of the Constitution of India and consequently, violation of fundamental rights guaranteed by Article 21.

7. The submissions made by the learned Senior Counsel Shri. C.V. Nagesh are supported by the learned counsel representing the third respondent, the Karnataka State Bar Council and Shri. Uday Holla learned Senior Counsel.

8. We have reproduced the provisions of Section 167 of Cr.P.C. Clause (b) of proviso to Sub-Section (2) of Section 167

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<sup>1</sup> 2015 (1) MWN (Cr.) 416

Cr.P.C provides for a prohibition on a learned Magistrate authorizing detention of the accused in police custody, 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. Clause (b) specifically lays down that in case the detention of an accused in judicial custody is to be extended, as provided in clause (b) of proviso to sub-section (2) of Section 167 of Cr.P.C., it is permissible to produce the accused through medium of electronic video linkage. Explanation II to sub-section (2) of Section 167 of Cr.P.C deals with a situation where a question arises whether an accused person was really produced before the Magistrate as required by clause (b) of the proviso to sub-section (2) of Section 167. Such production can be proved by two methods. The first is by signature of the accused appearing on the order authorizing detention or where the accused is produced through medium of electronic video linkage, by an order certified by the learned Magistrate as to the production of the person. Thus, explanation II to sub-section (2) of Section 167 of Cr.P.C contemplates that a signature of the accused should be obtained on the order authorizing his detention.

9. As held by the Madras High Court in the case of **K. Anandan** (supra), on plain reading of clause (b) of proviso to sub-section (2) of Section 167 of Cr.P.C, it is apparent that a learned Magistrate can authorize detention of an accused in custody of the police only when the accused is produced before him in person for the first time. When the police custody is to be extended further, at the time of every extension, the accused must be produced in person before the learned Magistrate. Moreover, clause (b) lays down in which contingency it is permissible to produce the accused by use of medium of electronic video linkage (through video conferencing hearing). Production of the accused through video conferencing is permissible when the remand to judicial custody is extended. Thus, clause (b) to proviso to sub-section (2) of Section 167 of Cr.P.C lays down that a Magistrate is empowered to authorize detention of the accused in the custody of police only when the accused is produced before him in person. As clause (b) of the proviso to sub-section (2) of Section 167 specifically lays down the contingency in which production of the accused can be made through electronic video linkage, its use in the contingency not covered by clause (b) may not be lawful. If a

statute provides that a particular act should be done in a particular manner, the same shall be done in the same manner and in no other manner.

**10.** At this stage, it is necessary to refer to the Rules for Video Conferencing Hearing framed by the Karnataka High Court, in exercise of its power under Article 225 and 227 of the Constitution of India. The said Rules are hereinafter referred to as 'the Video Conferencing Hearing Rules'. A copy of the Rules is annexed to the *suo – motu* writ petition. Rule 11.1 is relevant which read thus:

**“11.1** The Court may, as its discretion, authorize detention of an accused, frame charges in a criminal trial under the Cr.PC by video conferencing. **However, ordinarily judicial remand in the first instance or police remand shall not be granted through video conferencing save and except in exceptional circumstances for reasons to be recorded in writing.”**

(emphasis added)

**11.** Thus, Rule 11.1 specifically provides that in an exceptional circumstances, the police custody remand or judicial

custody remand, at the first instance, can be granted through Video Conferencing Hearing which means that the production of the accused before the Magistrate can be by Video Conferencing Hearing even at the time of seeking first remand. The Video Conferencing Hearing Rules have been framed on the initiative taken by the E-Committee of the Supreme Court of India which came out with the model Video Conferencing Rules. The model Rules have been formulated during COVID 19 pandemic period which have been adopted with certain modification by this Court.

**12.** At this stage, we must refer to two orders passed by the Apex Court, in exercise of its jurisdiction under Article 142 of the Constitution of India. The first order is of 23<sup>rd</sup> March, 2020 passed in *suo – motu* Writ Petition (civil) No.1 of 2020 (**In Re: Contagion of COVID 19 Virus in Prisons**). The first paragraph of the said order records that a notice was issued by the Apex Court to all the States and Union Territories to show cause why directions should not be issued for dealing with the present health crisis arising out of Corona virus (COVID 19) with regard to Prisons and remand homes. One of the directions issued which is relevant for our consideration read thus:

“xxxx Taking into consideration the possibility of outside transmission, **we direct that the physical presence of all the undertrial prisoners before the Courts must be stopped forthwith and recourse to video conferencing must be taken for all purposes.** Also, the transfer of prisoners from one prison to another for routine reasons must not be resorted except for decongestion to ensure social distancing and medical assistance to an ill prisoner. Also, there should not be any delay in shifting sick person to a Nodal Medical Institution in case of any possibility of infection is seen”.

(emphasis added)

This direction is in respect of undertrial prisoners who are already in prison in Judicial custody pursuant to order already passed by the Court of Magistrate. This will not apply to an accused who is produced before a learned Magistrate for the first time.

**13.** Another *suo – motu* writ petition (civil) No.5 of 2020 was initiated by the Apex Court (**In Re: Guidelines for Courts functioning through Video Conferencing during COVID 19 pandemic**). There is an order dated 6<sup>th</sup> April, 2020 passed in

the said case which is relevant. Paragraph-5 of the said order reads thus:

**“5. Faced with the unprecedented and extraordinary outbreak of a pandemic, it is necessary that Courts at all levels respond to the call of social distancing and ensure that court premises do not contribute to the spread of virus. This is not a matter of discretion but of duty.** Indeed, Courts throughout the country particularly at the level of the Supreme Court and the High Courts have employed video conferencing for dispensation of Justice and as guardians of the Constitution and as protectors of individual liberty governed by the rule of law. Taking cognizance of the measures adopted by this Court and by the High Courts and District Courts, it is necessary for this Court to issue directions by taking recourse to the jurisdiction conferred by Article 142 of the Constitution.”

Clauses (i) and (ii) of paragraph 6 which are part of the directions specifically issued under Article 142 are material which reads thus:

**“6 (i) All measures that have been and shall be taken by this Court and by the High Courts, to reduce the need for the physical**



**presence of all stakeholders within court premises and to secure the functioning of courts in consonance with social distancing guidelines and best public health practices shall be deemed to be lawful;**

**(ii) The Supreme Court of India and all High Courts are authorized to adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies; and”**

(emphasis added)

**14.** At this juncture, it is relevant to note that all sections of the society across the nation are under a very serious threat of infection of novel Corona virus (COVID 19). The challenge before the Judiciary amid the pandemic COVID 19 is to preserve of the rule of law as well as access to justice and while doing so, there is a responsibility cast upon the Judiciary to ensure that functioning of the Courts do not contribute to spread of Novel Corona Virus. It is the duty of the Court to ensure that the Courts function in such a manner that the possibility of spread of virus is reduced to minimum. It is for this reason, the Apex Court has issued directions in paragraph 6 of the aforesaid

order, in exercise of its jurisdiction under Article 142 of the Constitution of India. Clause (i) of paragraph 6 of the aforesaid order clearly lays down that all measures that have been taken and shall be taken by the High Courts to reduce the need for physical/personal presence of all stakeholders within the Court premises and to ensure that functioning of the Courts should be strictly in consonance with the social distancing guidelines and best public health practices, shall be deemed to be lawful. However, as contended by the learned Senior Counsel Shri. C.V. Nagesh, perhaps, it can be successfully argued that Rule 11.1 of the Video Conferencing Hearing Rules framed by this Court in exercise of the power under Article 225 and 227 of the Constitution runs contrary to clause (b) of proviso to sub-section (2) of Section 167 of the Cr.P.C to some extent and what will prevail is clause (b) of proviso to sub-section (2) of Section 167 of Cr.P.C. Therefore, the second part of Rule 11.1, in the normal course, may be attacked on the ground that it is vulnerable being in violation of the express statutory provisions. However, Video Conferencing Hearing Rules have been framed by this Court during the exceptional circumstances created by the pandemic of COVID 19. Therefore, in a very exceptional

case, where the learned Magistrate is of the considered view that there is a serious apprehension that the accused may be infected with Novel Corona Virus (COVID 19) and therefore, for the purpose of following the best health practice, physical production of the accused for the first time before the Court should be avoided, he can for the reasons specifically assigned, authorize the production of accused through video conferencing. One such very exceptional case can be where an accused who is a resident of containment zone or red zone is sought to be produced or an accused who has symptoms of COVID 19 is sought to be produced or a person infected with COVID 19 is sought to be produced. What is done by a learned Magistrate under such an exceptional circumstances may become lawful, by virtue of a deeming fiction provided in clause (i) of paragraph 6 of the aforesaid directions issued by the Apex Court under Article 142 of the Constitution of India.

**15.** Thus, notwithstanding the clear provision of law under clause (b) of proviso to sub-section (2) of Section 167 of Cr.P.C that the order of first remand whether in respect of police custody or judicial custody and the subsequent extension of police custody remand can be made only by producing the

accused in person before the learned Magistrate, some very exceptional cases where first remand is permitted through video conferencing will be covered by the directions issued by the Apex Court in clause (i) of paragraph 6 of the order dated 6<sup>th</sup> April, 2020. Therefore, the same shall be deemed to be lawful. However, it is not necessary for us to lay down with precision the cases which will be covered by clause (i) of paragraph 6 of the aforesaid order of the Apex Court. The reason being that it will all depend on facts of each case.

By this Order, we answer the issue which is noted in the first paragraph of the Judgment and Order.

**Sd/-  
CHIEF JUSTICE**

**Sd/-  
JUDGE**

Vr