

BRIEFING PAPER

POWERS & DUTIES OF MAGISTRATES AT FIRST PRODUCTION



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A CHECKLIST FOR MAGISTRATES AT FIRST PRODUCTION

A magistrate has to 'apply the judicial mind' which means that s/he has a duty to:

- ✚ Insist on the **production of the case diary and the arrest memo** by the police
- ✚ **Scrutinise the case diary** to satisfy her/himself that there are valid grounds to support an arrest, especially where an offence is punishable with imprisonment for less than seven years
- ✚ **Discharge the accused** in case the grounds of arrest are clearly baseless and unfounded
- ✚ Inform the accused of her/his **right to bail in case of bailable offence** and release the accused on bail if s/he is able to give bail as directed, or release the accused on personal bond if s/he is unable to give bail
- ✚ Ensure that the accused has a **legal aid lawyer** if unrepresented
- ✚ Satisfy her/himself by asking the accused that **her/his rights have been protected** - s/he has been informed about the grounds of arrest; has been medically examined (particularly if there is any complaint of torture or maltreatment in police custody); and a family member/friend has been informed about the arrest
- ✚ Do nothing to hear the police or prosecution without having the **accused physically present in court**
- ✚ Check whether the right of the accused to **counsel's presence during interrogation** (even if not throughout) had been provided
- ✚ Decide **what kind of custody is justified and the duration** if there are reasonable grounds for believing that the accused is involved in the crime as culprit or accomplice
- ✚ Order remand to **police custody only if the police have made out a strong case** for the absolute need to have the accused in their custody at the station house and that the investigation has begun, and not otherwise
- ✚ Order remand to **judicial custody only if it is reasonable** for the police to require the accused person to be available to them for reasons such as there is flight risk, or the possibility of evidence tampering, or that witnesses may be influenced or threatened
- ✚ Pass an **order giving reasons** for placing the accused in police/judicial custody
- ✚ Give the accused **bail if none of these concerns prevail** and **release the accused on personal bond** with or without surety if s/he is granted bail but is unable to furnish the same

1. IMPORTANCE OF FIRST PRODUCTION

"Article 22(2), the next and most material safeguard [is] that the arrested person must be produced before a Magistrate within 24 hours of such arrest so that an independent authority exercising judicial powers may without delay apply its mind to his case."

1.1 Powers of the Police to Arrest Without a Warrant

The Code of Criminal Procedure (hereinafter referred to as the Code) confers the powers of apprehending the offender and of investigation on the police. The police can carry out an arrest without a warrant from a competent magistrate in the case of a cognizable offence.

The courts have dealt extensively with the frequent abuse of the power to arrest by the police.¹ False implications and wrongful arrests are common and have disastrous ramifications on lives and rights. The practice swells the numbers awaiting trial in jails and increases overcrowding. Once caught in the coils of these malpractices, the poor who make up the majority accused of petty offences or falsely implicated on unfounded charges, must endure prolonged pre-trial detention because they are without legal representation or very poorly represented, and because the judicial processes that would have assisted them to get a fair trial are dysfunctional.

In order to curb the abuse of the power to arrest by the police, the Code was amended² based on the Supreme Court's directions in *Joginder Kumar*³ and *D.K. Basu*,⁴ and the Law Commission's recommendations in its 177th Report.⁵

1.2 Amendments to the Code

The amendments to the Code are intended to provide safeguards to make the arrest process transparent and subject it to judicial scrutiny by a magistrate at first production under Section 167. This is intended to make it difficult for the police to act arbitrarily and whimsically and to counter custodial violence. These safeguards confer rights on an arrested person that include:

¹ Some landmark cases on this issue are *Joginder Kumar v State of UP* 1994 SCC (4) 260 and *D.K. Basu v State of West Bengal* AIR 1997 SC 610.

² In 2008, for the first time, significant amendments were made to the 1973 Code. The 2008 Act met with severe criticism from some sections and was notified and enforced only on December 31, 2009 (Sections 54, 55, 60A). Provisions dealing with arrest powers were again sent to the Law Commission and on its recommendations, provisions were further amended by the 2010 Act. The arrest provisions in the 2008 Act were notified and enforced from October 30, 2010 and the 2010 Act was notified on November 1, 2010 (Sections 41B, 41C, 41D).

³ *Joginder Kumar v State of UP* 1994 SCC (4) 260.

⁴ *D.K. Basu v State of West Bengal* AIR 1997 SC 610.

⁵ 177th report of the Law Commission of India available at <http://lawcommissionofindia.nic.in/reports/177rptp1.pdf>.

- ✚ the right to have an arrest memo prepared by the police, which should be attested by at least one witness, either a family member or a respectable member of the locality where the arrest is made and countersigned by the person arrested (Section 41B)
- ✚ the right of information to any friend, relative or any other person nominated by the arrested person about the arrest and the place of detention (Section 50 A)
- ✚ the right to medical examination by a medical officer/registered medical practitioner soon after arrest – female medical practitioner in the case of a female accused (Section 54)
- ✚ the right to meet an advocate of her/his choice during interrogation (though not throughout) (Section 41 D)

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

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

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

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

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

(b) for proper investigation of the offence; or

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

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

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

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

Further, the amendments to the arrest provisions are intended to make the police more accountable for their actions by requiring them to give reasons for carrying out a particular arrest in less serious offences punishable with imprisonment up to 7 years. This amendment is in keeping with the 3rd Report of the National Police Commission, which said that that a majority of arrests are connected with very minor prosecutions and cannot therefore be regarded as necessary for crime prevention.⁶

The newly introduced Section 41(1)(b) deals with offences punishable with imprisonment up to 7 years and provides specific conditions that need to be fulfilled before carrying out an arrest in such cases. The police now have to give specific reasons for carrying out an arrest or for not doing so in cases not falling within the specified situations, and a magistrate at first production has to independently assess the validity of these reasons.

⁶ Available at <http://bprd.nic.in/writereaddata/linkimages/4097048343-THIRD%20REPORT.pdf>.

In all cases where the arrest of a person is not required under Section 41(1) the police officer is required to issue a 'notice of appearance' directing the person to appear before her/him at a specified place and time under Section 41A. Such a person is obliged to appear before the police officer and s/he cannot be arrested if s/he complies with the terms of the notice, unless the police officer is of the opinion that the arrest is necessary for the conditions prescribed in Section 41. Reasons have to be recorded before any such arrest, which will be subject to scrutiny by a magistrate.

Five years after the amendments, the non-implementation of the provisions pertaining to arrest and the continuing abuse by the police of the power to arrest came up before the Supreme Court in *Arnesh Kumar*.⁷ Expressing concern, the court again called for a change in police attitudes and directed the force to exercise caution before arresting any person and to exercise the power to arrest only if supportable reasoning exists for doing so. Most importantly, the court again pointed out the importance of judicial scrutiny and the duty of a magistrate in a remand proceeding to check unnecessary and baseless arrests.

1.3 The Role of a Magistrate under Section 167 to Check Illegal Arrests and Prevent Unnecessary Detention

An arrested person can be detained in police custody for up to 24 hours, subject to the right to get bail in bailable offences at the police station itself.⁸ Calculation of the 24-hour period, the maximum limit, starts the minute a person is taken into police custody.⁹ During this period the police must begin to investigate the alleged offence.

Under Section 167 of the Code, if it appears that the investigation cannot be completed within 24 hours from the time of the arrest and *there are grounds to believe* that the information about the involvement of the accused as being the culprit is well founded, the officer in charge of the police station or the investigating officer¹⁰ has to forthwith (without waiting till the last minute) forward the relevant entries in the diary relating to the case along with the accused to the nearest judicial magistrate.¹¹ Detention beyond 24 hours is illegal, unless authorised by a magistrate.¹²

Under the statutory scheme as set out in Section 167, the role of a magistrate during the first production of an accused is very crucial for two reasons:

- (i) This stage affords the first opportunity for an independent authority, that is, a magistrate, to use her/his own reasoning to see whether the arrest is

⁷ *Arnesh Kumar v State of Bihar* 2014 (8) SCALE 250.

⁸ Section 56 read with Section 57 of the Code.

⁹ *Iqbal Kaur Kwatra v The Director General of Police, Rajasthan State, Jaipur and Ors* 1996 CriLJ 2600.

¹⁰ Provided s/he is not below the rank of sub-inspector.

¹¹ *R.K. Nabachandra Singh v Manipur Administration* 1964 CriLJ 307 and *Chadayam Makki v State of Kerala* 1980 CriLJ 1195 (Ker).

¹² Section 57 of the Code.

necessary and justified.¹³ The section was intended to prevent arrests without cause and allow for an independent set of eyes to scrutinise police actions. Even in bailable cases, where no order of remand to either police or judicial custody can be passed (the latter is possible only if the person arrested is unable to give bail), the magistrate has to scrutinise the grounds of arrest and release the accused if s/he finds that the arrest has been made for insufficient reasons.

- (i) Secondly, a magistrate is all-powerful in the courtroom and is the arbiter of the proceedings. S/he, therefore, has a duty to ensure that the proceedings are absolutely fair and that the constitutionally and statutorily guaranteed rights¹⁴ of the accused are protected.

A magistrate also has a very important role to play in reducing unnecessary detentions in judicial custody by applying the bail provisions judiciously. S/he has a duty to ensure that an indigent accused, both in bailable and non-bailable offences, does not languish in jail only because of her/his inability to furnish the bail amount. An order granting bail can be rendered meaningless if a magistrate is not mindful of the socio-economic circumstances of the accused while fixing the bail amount and fixes an improbably high amount.¹⁵

This becomes all the more stark in bailable offences where the police (at the police station itself) or a magistrate (when the accused is produced in court) have to release the accused on bail if s/he wants to and is able to give bail as directed by the police/court. They do not have any discretion in this regard.¹⁶ Moreover, at first production, a magistrate has a duty to inform a person accused of a bailable offence of the right to bail and cannot pass any order of remand in bailable offences when the accused is ready to give bail.¹⁷

When the accused is obviously an indigent, a magistrate should release her/him on personal recognisance, with or without surety, and should not insist on a local surety. This approach, first propounded by the Supreme Court in *Moti Ram*,¹⁸ has been followed by the higher judiciary to periodically direct release of undertrials from jails.

¹³ *Madhu Limaye, Inre* (1969) 1 SCC 292: 1969 CriLJ 1440.

¹⁴ Some of the important rights of an accused are given in Article 22 of the Constitution and Sections 41B, 41C, 41D, 50, 50A, 54, 56, 57 of the Code.

¹⁵ Section 440 of the Code, which says that the amount of every bond should be fixed with due regard to the circumstances of the case and should not be excessive.

¹⁶ *Rasiklal v Kishore s/o Khanchand Wadhwani* (2009) 4 SCC 446.

¹⁷ *Pravinkumar Chandrakant Vyas v State Of Gujarat* (2001) 3 GLR 2755.

¹⁸ *Moti Ram v State of MP* (1978) 4 SCC 47.

1.4 The Reality

"The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner."

The current practice wherein a magistrate does not ask questions during the first appearance of an accused and grants remand to custody without a proper perusal of documents, and without insisting on effective legal representation for the accused destroys the pillars of fair trial. This is perhaps all too visible in instances of mass arrests where a magistrate will often accept the need for remand on the claim of the police without going into the details of each individual case as s/he is required to do.

While the lack of time, burden of excessive workload on a magistrate, and the lack of infrastructure need to be acknowledged, none of it can stand as a justification for not complying with the letter and spirit of Section 167.

The Supreme Court in *Arnesh Kumar* has been constrained to point out- once again - that the magistracy has failed to play this vital role in checking indiscriminate arrests. It laments that the mechanical passing of remand orders and throwing the accused into custody is so common that it has gained acceptance in criminal practice, though it is entirely wrong.

Lawyers too share the perception that first production requires no particular intervention except the fulfilment of the 24-hour rule. There is a common perception among lawyers that they do not have any right of access to any documents at the stage of first production nor do they have any role at that stage.¹⁹ Remand to either police custody or judicial custody without any intervention by the defence lawyer is considered to be 'normal'. But nothing could be further from the letter and spirit of the law.

First appearances done without a legal representative for the accused are violative of fair trial standards. If the right to mount a competent defence is to be honoured there must be legal representation and the defence counsel must have a copy of the application for remand so that he can effectively oppose remand to either custody, seek bail immediately, or even argue for the immediate release of the accused for lack of any reasonable grounds to support the arrest.

Invariably the impoverished accused, will either not be represented at the stage of first production, or, if represented, the defence lawyer will not be in a position to oppose the remand effectively in the absence of any documents or consultation with the accused or

¹⁹ Experience of lawyers shared during a workshop on remand conducted by CHRI for remand and bail lawyers in Jodhpur. The workshop was held on 31 January, 2013 and was part of a series of workshops conducted by CHRI in Jodhpur for legal aid and private lawyers on remand and bail.

his/her family. The magistrate must not accept this and must take on the onus of ensuring that every legal requirement of first production is fulfilled through her/his own efforts.

2. WHAT DOES 'APPLICATION OF THE JUDICIAL MIND' MEAN

Repeated judgements and the statute itself indicate quite clearly that the role of a magistrate at first production requires her/him to independently examine reasons for arrest and see if it was reasonable and needs to be continued, or whether the accused can be released unconditionally or on bail - there and then.

2.1 Judicial Scrutiny by a Magistrate

Independent judgement required to verify the legality of the act of arrest: A remand by a magistrate is an act of judicial discretion and is not an automatic one, to be exercised in a routine manner. Scrutiny by a magistrate is all the more critical in arrests without a warrant, as it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted.²⁰ Sufficient grounds must exist for a magistrate to exercise the power of remand. That is why the law requires that s/he must look at the case diary and see if there is justification for the arrest.²¹ Since the accused will be before the court at this time, a combination of questioning her/him and the police, and examining the papers will provide the magistrate with enough material to make a reasoned and defensible order, whether it is for remand or release.²²

Remand to police custody is not an executive order: Under the new Code, powers under Section 167 reside with judicial magistrates only. The Law Commission observed in its 37th Report: "The power is ancillary to the trial of offences and its exercise requires an approach different from the mere maintenance of law and order. It may require, particularly, where detention in police custody is to be ordered, a careful recording of reasons, for which Executive Magistrate may not have sufficient time."²³ "...a Magistrate acting under Section 167 has to weigh the evidence with respect to the offence and does not act in a purely executive capacity."²⁴

Verifying the legality of arrest to prevent arbitrary restraints on liberty: In cases involving mass protests, such as, *Madhu Limaye*,²⁵ and *G.K.Moopanar*,²⁶ the courts have again frowned on the practice of giving remand orders mechanically. In *Madhu Limaye*, the petitioner and his companions were arrested for non-cognisable offences without communicating the

²⁰ *State of Punjab v Ajaib Singh* 1953 CrLJ 180.

²¹ *Swami Hariharnand Saraswati v Jailor* AIR 1954 All 601 and *Bir Bhadra Pratap Singh v DM, Azamgarh* AIR 1959 All 384.

²² *E. Pedda Subba Reddy v State* 1969 CriLJ 1025, where the court held that under Section 167, the magistrate should act judicially, and not merely in an executive capacity, on the report submitted by the police when an accused is produced for remand.

²³ www.lawcommissionofindia.nic.in.

²⁴ *id.*

²⁵ *Madhu Limaye, Inre* (1969) 1 SCC 292: 1969 CriLJ 1440.

²⁶ *G.K. Moopanar v State of Tamil Nadu* 1990 CrLJ 2685.

reasons for the arrests. Subsequently, a cognisable offence was added to the FIR. A writ petition under Article 32 challenging the validity of the arrest order was filed. While releasing the arrested persons on grounds of violation of Article 22(1), the court observed, "Once it is shown that the arrests made by the police officers were illegal, it was necessary for the state to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters. The state has failed to do this. The remand orders are patently routine and appear to have been made mechanically." The duty of a magistrate cannot be more clearly understood.

2.2 Power of a Magistrate to Refuse Remand

At the first production of an accused, a magistrate is expected to sift the wheat from the chaff by studying the grounds of arrest. If an arrest effected by a police officer does not satisfy the requirements of Section 41 of the Code, the magistrate is duty bound not to authorise further detention and release the accused.²⁷

Section 167 further makes it clear that a magistrate can consider granting remand to either police or judicial custody only if there are grounds for believing that the accusation is well founded and the investigation requires more than 24 hrs for completion. If the *prima facie* accusation or information is not well founded and sufficient grounds do not exist for the magistrate to exercise the power of remand, in such cases, the remand of the accused can be refused.

Power to remand or refuse remand to be based on the magistrate's own satisfaction: The magistrate before authorising detention has to record her/his own satisfaction which must be reflected from the order. The police have to place before the magistrate the facts and the reasons and materials on the basis of which the decision to arrest the accused was taken. The magistrate has to first see whether specific reasons have been recorded for the arrest and if so, whether they are relevant. S/he has to then address the question as to whether the conclusion arrived at by the police is reasonable and could have been reached on the basis of Section 41 of the Code.²⁸

Order of remand has to be based on a reasoned decision given in writing: It is an essential part of the process of making a reasoned decision that a magistrate carefully reads the case diary and hears the accused and the justification of the police for asking for further remand and only then decides whether to (i) remand to police custody (ii) remand to judicial custody (iii) release on bail (iv) release unconditionally by refusing to authorise any further detention. An order of remand giving reasons for the decision has to be in writing.

²⁷ *Arnesh Kumar v State of Bihar* 2014 (8) SCALE 250.

²⁸ *id.*

When the magistrate considers further detention unnecessary: Where first production is before a magistrate who does not have the jurisdiction to try or commit the case, such a magistrate can remand the accused to police/judicial custody for a total of 15 days. Thereafter, if such a magistrate is of the view that further detention is unnecessary, s/he must forward the case to the magistrate having jurisdiction. It follows that a magistrate having such jurisdiction may opt not to extend the custody and release the accused.

2.3 Scrutiny of the Case Diary

When the accused is produced before a magistrate within 24 hours it means that the police have sound grounds to think s/he has been involved in perpetrating a crime and must be held further or s/he might run away, tamper with evidence or suborn witnesses. These grounds must be put before the magistrate so that s/he can make an independent evaluation that an ordinary person is not being unnecessarily held when there is no real reason to imagine s/he is involved as a suspect or an accomplice. This cannot be done without the relevant papers being brought before the magistrate along with the accused.

It is for this reason that Section 167(1) requires that the officer in charge of the police station or the investigating officer²⁹ have to forward the relevant entries in the diary relating to the case along with the accused to the nearest judicial magistrate. The significance of the case diary lies in its relevance as a safeguard against unfairness of police investigation. "In as much as such diary would also record and reflect the time, place and circumstances of arrest, it is necessary that the provisions of this subsection should be strictly complied with."³⁰

²⁹ The investigating officer should not be below the rank of sub-inspector.

³⁰ 177th Report of the Law Commission on the Law of Arrests
<http://lawcommissionofindia.nic.in/reports.htm>.

INFORMATION TO BE NOTED IN THE CASE DIARY

Section 172 (1) of the Code requires that every police officer making an investigation under the chapter shall enter her/his daily proceedings in the investigation in a diary:

- Setting forth the time at which the information reached her/him
- The time at which s/he began and closed the investigation
- The place/places visited
- A statement of the circumstances ascertained through the investigation

Presentation of the case diary at the time of remand is mandatory: The law is - no case diary, no remand - only release. If the police do not produce their diary to justify further remand, a magistrate would be exceeding her/his authority in ordering further remand.³¹ Without the extracts of the diary of investigation, it is not possible for the magistrate to be satisfied about the adequacy of grounds for the arrest. Since the order passed by a magistrate has the effect of taking away the liberty of a person, s/he must ascertain that every investigating officer has fulfilled her/his legal obligation to maintain the said diary with all necessary details regarding the progress of the investigation and produce it along with the accused.³²

Reasons for immediate arrest in cases punishable with seven years of imprisonment to be examined: A magistrate is expected to examine the case diary to satisfy her/himself that the police officer's reasons for immediate arrest in cases punishable with imprisonment up to seven years are held by her/him in a bona fide manner. The magistrate must satisfy her/himself that there was no other way but immediate arrest that was possible in the matter.

Whether the preconditions for arrest prescribed under the new amendments to the Code are met: A magistrate must ascertain whether the reasons for arrest are restricted to the preconditions mentioned in the newly introduced Section 41(1)(b) of the Code.³³ Non-compliance of the amended provisions will render the concerned police officer liable for departmental action and contempt of court.³⁴ It will also render the magistrate who authorises detention without giving reasons for the same liable for departmental action by the concerned High Court.³⁵

2.4 Scrutiny of the Arrest Memo

The amendments to the Code were intended to protect the interests of an accused from the excesses of the police. The 'Arrest Memo' is one such safeguard provided to ensure that no

³¹ *Anu Meah v The Tripura Administration* 1961 CriLJ 160.

³² *Shrawan Waman Nade* 1994 CriLJ 780 (Bom HC).

³³ *Arnesh Kumar v State of Bihar* 2014 (8) SCALE 250.

³⁴ *id.*

³⁵ *id.*

person can be just picked up by the police and detained illegally without the whereabouts of the person being known to anyone.

Judicial scrutiny of the arrest memo: Beyond the case diary, at first production, a magistrate must scrutinise the arrest memo to ascertain that when the police officer made the arrest, s/he prepared a memorandum of arrest.

The memorandum of arrest should be attested by a witness: A magistrate should check that the memorandum of arrest is duly attested by at least one witness, who is a member of the family of the arrested person or a respectable member of the locality where the arrest is made, and countersigned by the arrested person.³⁶

Ensure that a friend or relative of the accused has been informed about the arrest: A magistrate must also ascertain whether the police officer carrying out the arrest has informed the arrested person that s/he has the right to inform a relative or a friend named by her/him about the arrest.³⁷

Duty to inform the accused about right to a lawyer: A magistrate has to inform the accused that s/he has the right to access to counsel, if necessary a legal aid lawyer at state expense, during police interrogation,³⁸ though not throughout the interrogation.

2.5 A Magistrate's Duties Before Remanding the Accused to Police custody and While the Accused Remains in Such Custody

Before police custody is extended a magistrate must be satisfied that the police have made out a compelling case for it. It is not enough for the police to baldly state they need it. The magistrate must be convinced of the reasons and record them both in relation to continued custody and the period he intends to grant. The magistrate has to evaluate the police case to determine if the facts justify the loss of freedom. The magistrate's remanding powers and duties have been laid down so as to prevent possible abuse of police powers to solve crimes by means of duress, terror and wrongful confinement.³⁹

A magistrate must determine the shortest period necessary for police remand: The law does not generally favour police custody and the scheme of Section 167 is such that police custody at first production can be granted only initially for a maximum of 15 days. A magistrate needs to keep in mind the intent behind Section 167 and must determine the shortest period necessary for police remand or judicial custody.

Opposing recovery-related remand: The police often ask for the presence of the accused in their lock up in order to recover articles they suspect may be in her/his knowledge. At first appearance in court, if the accused denies any knowledge of where such objects are then the

³⁶ Section 41B (b) of the Code.

³⁷ Section 41B(c) of the Code.

³⁸ Section 41D OF THE Code.

³⁹ 1957 CrLJ 567; 1962 (1) CrLJ 673 (Tripura).

magistrate cannot send her/him to police custody. If such a line of questioning about the location of material objects is absolutely necessary there is no reason why judicial custody cannot be used. The accused will be available to the police, cannot run away and that is all that is required. Distance from the police is in all likelihood going to reduce the possibility of third degree methods, beating and torture. The magistrate must have regard to his role in preventing this, given the strong possibilities that exist.

The magistrate must record the reasons for remand: Sec 167 (3) of the Code requires that clear reasons be given for giving the accused into further police custody. A mere noting like 'custodial remand is necessary for inquiry' that offer no explanation and do not make visible the mind of the judge are no reason at all. It is just a bald statement and is inadequate and such orders are liable to be reversed.⁴⁰

As a double safeguard against unnecessary police remand the section requires that another pair of eyes view the reasoning and be satisfied with it. Any magistrate other than the Chief Judicial Magistrate making such an order shall forward a copy of the order with his/her reasons to the Chief Judicial Magistrate.

Making the physical production of the accused mandatory: It is a fundamental principle of our trial system that nothing at all can be done without the presence of the accused. S/he or her/his representative has to be there at every hearing, unless the court has excused the presence at her/his request.

A magistrate cannot remand an accused to police custody unless the accused is produced in person for the first time and every subsequent time, till the accused remains in police custody.⁴¹ This is an important safeguard against custodial violence and gaps in the legal process.

The purpose of physical production is to guarantee that the accused has a fair opportunity to put forward her/his grievance, if any, vis-à-vis custodial treatment and for the magistrate to ascertain from the accused if the preconditions of the arrest were met; the grounds of arrest are indeed as stated by the police; ensure the physical safety and sanctity of the person in custody; and the status of her/his legal representation.

Transferring remand from judicial custody to police custody: The nature of the custody can be altered from judicial custody to police custody during the first 15 days only. In *Anupam Kulkarni*,⁴² reiterating this position, the Supreme Court held that police custody is possible only during the first 15 days. This could be by one order or several orders. Section 167 states categorically that, thereafter, the remand can be only to judicial custody or any other custody as ordered by the magistrate.

⁴⁰ *Jairajsinh Temubha Jadeja v State of Gujarat* 2002 (1) GLH 645

⁴¹ Section 167 (2) Proviso (b) of the Code.

⁴² *CBI Special Investigation Cell v Anupam Kulkarni* (1992) 3 SCC 141; 1992 SCC (Cri) 554.

However, there could be a contingency when the accused, while in judicial custody, is arrested for another occurrence unconnected to the offence for which investigation is underway. The accused can then be remanded to police custody for the purpose of investigation into the second occurrence even after the expiry of the initial period of 15 days.⁴³

2.6 Powers to Discharge the Accused under Section 59

Section 59 of the Code provides that once the accused is arrested by the police, s/he shall not be discharged except on own bond, or on bail, or under a special order of a magistrate.

Duty of magistrate if he finds that the arrest is illegal: If the arrest is found to be illegal, there is no question of releasing the accused on her/his bond or on bail and the only proper order is an order of discharge, i.e. an order directing her/his release as contemplated in Section 59.⁴⁴ Therefore, when an accused is presented to a magistrate along with the entries in the case diary and the magistrate finds that the arrest is illegal or is based on insufficient grounds, s/he can discharge such an accused. Section 59 very clearly vests such a power on a magistrate, even though it is not used much.

3. CONCLUSION

Non-application of the judicial mind in the exercise of remand powers violates the principles of fair trial and results in unnecessary pre-trial detention of the accused.

The judicial interpretation of the nature of magisterial powers under Section 167 through a series of judgements, leaves one in no doubt that there is a large gap between the judgements pronounced by the higher judiciary and the remand proceedings in magisterial courts, which have become routine and mechanical, resulting in unnecessary pre-trial detentions of persons, largely due to burdens on the magistracy. Yet this cannot be an acceptable reason for mechanical remand or non-application of judicial mind to the problem at hand when life and liberty are at stake.

This paper has laid out sufficient jurisprudential basis to suggest that the power of a magistrate to remand an accused person under Section 167 should be exercised after application of the judicial mind. Most importantly, the application of the judicial mind is the essence and hallmark of the distinctive work of the judiciary as an independent and fair agency of the criminal justice system entrusted to protecting the principles of law and justice, codified in the form of inalienable fundamental rights in our Constitution and statutory provisions intended to safeguard life, liberty and equal access to justice.

Thus, on first production, if the magistrate is satisfied that the grounds of arrest are unfounded and without any basis, he should discharge the accused using the powers of his

⁴³ *id.*

⁴⁴ *Assistant Collector of Customs v Shankar Govardhan Mohite* 1987 (3) BomCR 708: 1988 (15) ECC 141.

calling, and the duties placed on him to defend the principles of justice, and safeguard the life and liberty of persons who are entirely at the mercy of his decisions and judgements.

Fair trial cannot be conducted in an atmosphere of fear or favour. A magistrate, while being wary of interfering with police investigations, cannot condone errors in detention and arrest through unnecessary remand.

The need for custody is therefore to be determined in a manner that is attentive to the possible excesses of police powers, the subjugated position of the accused and the magistrate, who is the key individual on whom the onus rests. S/he decides whether or not the principles of 'reasonableness' in the application of law have been met by all agencies – the police who must prevent crime and conduct their investigation without terror and torture; the prosecution who must assist the court to arrive at the truth in all fairness between the rights of the victim and those of the accused; the defence lawyer who must rightfully oppose unnecessary remand/custody of his client – and then to determine through her/his own scrutiny and inquiry, the merit of a case for remand, release on bail and bond, or discharge.

ABOUT CHRI

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. CHRI's objectives are to promote awareness of and adherence to the Harare Commonwealth Declaration, the Universal Declaration of Human Rights, and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

The Prison Reforms Programme of CHRI is more than a decade old. The programme focuses on improving prison monitoring through the strengthening of undertrial review mechanisms and prison visiting system nationally, and ensuring early safeguards against unnecessary pre-trial detentions, specifically in Rajasthan and West Bengal. The programme also concentrates on the release, repatriation and asylum of foreign national prisoners. Evidence-based research, advocacy, capacity-building of actors of the criminal justice system including prison officials, welfare and probation officers, criminal defense lawyers, magistrates, legal aid functionaries, and civil society actors are the regular activities of the programme.