

MISCELLANEOUS CRIMINAL.

Before Bhide J.

SUNDAR SINGH—Petitioner

versus

THE CROWN—Respondent.

Criminal Miscellaneous No. 107 of 1930.

Criminal Procedure Code, Act V of 1898, section 491—“illegal detention”—what constitutes—section 167 (3)—remand to police custody—Magistrate’s reasons for—should be stated—Section 340—interviews with legal adviser—while in police custody—whether accused entitled to.

Held, that although, in remanding a prisoner to police custody under section 167 of the Criminal Procedure Code, the Magistrate is not expected to pass any elaborate order, he must briefly indicate his reasons for doing so.

Held also, that a Magistrate acts under section 167 of the Code in his judicial, and not in his executive, capacity; and, that the right, which section 340 of the Code gives to an accused person to be defended by a pleader, necessarily implies the right to previous consultation and advice. Therefore, subject to such legitimate restrictions as may be necessary in the interest of justice, in order to prevent any undue interference with the course of investigation, the accused should be given access to legal advice even while he is in police custody (failing which, the police must be prepared to support their refusal on substantial grounds), the interview with a legal adviser being in the presence, but not within the hearing, of a police officer.

In re Evans (1), and *Mukerjee v. Crown*, Criminal Miscellaneous No. 99 of 1929, per Forde J. (unpublished), followed.

Application under sections 491 and 561-A of the Criminal Procedure Code, for release of the petitioner’s son, who is said to be “illegally” or “improperly” detained in custody by the police, or, in the

alternative, for release of his son on bail, and for permission to allow the legal adviser and relations to see his son.

1930

SUNDAR SINGH
v.
THE CROWN.

A. R. KAPUR, for Petitioner.

R. C. SONI, Assistant Legal Remembrancer, for Respondent.

BHIDE J.—This is an application by one Sundar Singh under section 491 of the Code of Criminal Procedure for the release of his son, Dhruvdev, who is said to be “illegally” or “improperly” detained in custody by the police. In the alternative, there is a prayer for bail and also for the legal adviser and relations of Dhruvdev being permitted to see him—the police having refused to allow such interviews.

BHIDE J.

The first question for consideration is whether Dhruvdev is being “illegally” or “improperly” detained within the meaning of section 491, Criminal Procedure Code. It appears that he was arrested at Delhi on suspicion of being concerned in an offence under section 302 read with 120-B of the Indian Penal Code and was thereafter remanded to police custody by a Magistrate under section 167 of the Criminal Procedure Code. It was urged that the order of remand was illegal as the Magistrate has given no reasons for remanding the prisoner to police custody, as he was required to do, by sub-section 3 of the aforesaid section. The order of the Magistrate is, no doubt, not sufficiently clear in this respect. Although he was not expected to pass any elaborate order, he ought to have briefly indicated his reasons for remanding the prisoner to police custody, as required by the aforesaid section. However, it appears that there were some grounds for

1930

SUNDAR SINGH
 v.
 THE CROWN.
 BHIDE J.

believing that the prisoner was concerned in a serious conspiracy and further information has also been since obtained during the course of the investigation. In the circumstances, the defect in the Magistrate's order cannot be treated as more than an irregularity. The Magistrate had jurisdiction to pass the order and it is not for me to go into the merits of the evidence at this stage for the purpose of this petition under section 491, Criminal Procedure Code. The custody in which the prisoner is detained at present cannot, therefore, be considered to be "illegal."

It may be noted here that the prisoner when produced before me in Court did not complain of any ill-treatment by the police. It was urged by his counsel that the police custody became "improper" as the police refused to allow even the prisoner's "legal adviser" to have access to him. This is, however, a somewhat debatable point and I shall deal with it presently. But although I have come to the conclusion that the police were *not* justified in refusing the prisoner to be interviewed by his legal adviser, I think, this cannot, by itself, be considered to be a sufficient ground for setting him at liberty at once in the circumstances of the case.

As regards bail, the police investigation is still incomplete and I do not wish to anticipate its result. When the period of the present remand is over (as it will be shortly), it will be for the Magistrate to consider very carefully the evidence obtained and to decide whether there is any justification for further detention of the prisoner or whether he should be released forthwith, on bail or otherwise.

The last and the most important point raised is the right of a prisoner in the custody of the police to

have access to legal advice. There is no specific provision in the Code in this respect. The learned counsel for the petitioner who claims this right for his client has relied upon a Division Bench ruling of the Bombay High Court, *viz. In re Evans* (1)—which is certainly in his favour. The learned counsel for the Crown was unable to cite any authority to the contrary, but submitted that the Bombay ruling does not lay down the law correctly. His contention was that a Magistrate acts under section 167, Criminal Procedure Code, in his executive capacity and that section 340 of the Criminal Procedure Code, which gives the right to an accused person to be defended by a pleader, has no application to such proceedings. After carefully considering the matter I am unable to accept this contention. Section 167 requires a police officer to submit his diaries to the Magistrate within 24 hours of the arrest of an accused person, and it is left to the latter to decide whether the accused should be detained in custody (whether of the police or any other custody) any longer. In deciding this question the Magistrate will presumably be guided by the evidence already available and the prospect of getting further relevant evidence as regards the alleged offence. The weighing of such evidence with respect to an alleged offence seems to me to be essentially a judicial function, and it seems to be precisely for this reason that the matter is left to a Magistrate and not a police officer. If the matter were purely executive it could easily have been left to the decision of the investigating officer or his superiors in the police department. It will appear further from other provisions of the Code (see section

1930

SUNDAR SINGH

v.

THE CROWN.

BHIDE J.

(1) (1926) I. L. R. 50 Bom. 741.

1930

SUNDAR SINGH

v.

THE CROWN.

BHIDE J.

497, Criminal Procedure Code), that from the very time of the arrest of an accused person by the police, Magistrates have power to consider the question of his release on bail and their orders in this respect are subject to revision by superior Courts. The position taken up by the learned counsel for the Crown that a Magistrate acts in a purely executive capacity until a formal police report regarding an offence is submitted under section 173, Criminal Procedure Code, cannot, thus, be sustained. There seems, therefore, no good reason why the proceedings before a Magistrate under section 167, Criminal Procedure Code, should not be considered to fall within the provisions of section 340, Criminal Procedure Code, as held by the Bombay High Court in *In re Evans* (1). Section 340 of the Code of Criminal Procedure gives an accused person the right to be defended by pleader and this right necessarily implies the right to previous consultation and advice. The learned Judges of the Bombay High Court have discussed the whole question fully and shown that it is in the interests of justice that an accused person should have access to legal advice even while he is in police custody during the course of an investigation. I respectfully express my entire concurrence in that view. A similar view appears to have been taken by a Single Judge of this Court (Eforde J.) in Criminal Miscellaneous Case No. 99 of 1929, though detailed reasons have not been given in that order.

As pointed out by the learned Judges of the Bombay High Court in *In re Evans* (1), the days are long gone by when the State deliberately put obstacles in the way of the accused defending himself and the

(1) (1926) I. L. R. 50 Bom. 741.

present day trend is entirely in the opposite direction. A prisoner is remanded to police custody merely to facilitate investigation and there can be no justification for curtailing the liberty of an accused person except so far as this may be necessary in the interests of justice and for the purposes of investigation. *Primâ facie*, it does not appear how the interests of justice could be defeated by allowing a prisoner to have access to legal advice. On the contrary the presumption is just the other way. It was suggested that in serious cases there is risk of the privilege being abused by a member of the legal profession. But it can be urged with equal justification that there is also risk of the abuse of their powers by the police. Justice and fair play obviously require that an accused person should have access to proper legal advice when he is accused of a criminal offence.

The right of a prisoner to have access to legal advice must, of course, be subject to such legitimate restrictions as may be necessary in the interests of justice, in order to prevent any undue interference with the course of investigation. For instance, a legal adviser cannot claim to have interviews with a prisoner at any time he chooses. Similarly, although ordinarily a member of the Bar may be presumed to understand his responsibility in the matter, if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege, that pleader may be refused an interview. But, in such cases the police must, of course, be prepared to support their action on substantial grounds.

As regards interviews with friends and relations, the police have expressed their willingness to allow reasonable opportunities for such interviews in the presence of a police officer and I do not consider it

1930

SUNDAR SINGH

v.

THE CROWN.

BRIDE J.

1930
 SUNDAR SINGH
 v.
 THE CROWN.

BHIDE J.

necessary to pass any further order in this respect. The interview with a legal adviser may, however, for obvious reasons, be allowed in the presence, but not within the hearing, of a police officer.

I accept this petition to the extent of directing that the prisoner Dhruvdev shall be allowed reasonable opportunities for interviews with his legal adviser in the manner stated above so long as he remains in custody.

N. F. E.

Revision accepted in part.

MATRIMONIAL REFERENCE.

Before Addison, Abdul Qadir and Currie JJ.

ALLA RAKHA (PLAINTIFF) Petitioner

versus

MST. BARKAT BIBI (DEFENDANT) Respondent.

Matrimonial Reference No. 1 of 1930.

Indian Divorce Act, IV of 1869, sections 11-14—Alleged adulterer—a necessary party—but not the parents of the respondent—Necessity of recording evidence and coming to decision on points set out in the sections.

Held, that the provisions of the Indian Divorce Act must be strictly complied with; under section 11 of the Act the petitioner must make the alleged adulterer a co-respondent to the petition unless excused by the Court on certain grounds, and the father and mother of the respondent cannot be made parties.

Held also, that a decree for dissolution of marriage cannot be made merely on admissions and without recording evidence.

Bai Kamku v. Shiva Toya (1), followed.

And the matters set out in sections 12, 13 and 14 of the Act must be enquired into and considered.