IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2024

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

CRL.O.P No.5577 of 2024
and Crl.MP.Nos.4077 & 4078 of 2024

The State of Tamil Nadu
Rep.by the Inspector of Police
Otteri Police Station
Tambaram. ...Petitioner

Crime No.40 of 2024

.Vs.

1.Muneeswaran

2.Sathyaseelan

3.Sampath Kumar

4.Manikandan

5.Dinesh ..Respondents

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records and quash the order dated 01.03.2024 passed in Crl.MP.No.1519 of 2024 by the learned Judicial Magistrate, Sathyamangalam.

For Petitioners : Mr.Hasan Mohamed Jinnah
Public Prosecutor (State)
Asst.by
Mr.M.Leonand & Joseph Selvam
and
Mr.K.M.D.Muhilan
Government Advocate (Crl.Side)

ORDER

This is a petition under Section 482 Cr.P.C filed at the instance of the State calling into question an order dated 01.03.2024 passed by the Judicial Magistrate, Sathyamangalam in Crl.M.P.No.1519 of 2024 accepting the surrender of four accused persons and remanding them to judicial custody under Section 167(2) Cr.P.C till 06.03.2024.

2. The facts giving rise to this petition are as under:

a. A gory incident took place on 29.2.2024, wherein the Deputy Chairman of Kattankulathur Panchayat Union was waylaid by six persons and brutally murdered, with the arms and legs of the deceased being chopped off. The accused persons also hurled a country bomb in the car in which the deceased was travelling causing extensive damage to the vehicle. It appears that these six persons had fled the scene thereafter. Mr. Jinnah, the learned State Public Prosecutor submitted that the deceased was brought dead on the same day before the Chromepet Government Hospital.

b. On a complaint given by one Sathyanarayanan, a case in Otteri PS Crime No 40 of 2024 was registered by the Tambaram Police on 29.02.2024 for the offences under Section 147,148,302 IPC, Section 3 & 4 of the Explosive Substances Act, and Section 4 of the Prevention of Damage to Public Property Act, 1984. In the complaint, the complainant has stated that he has witnessed the occurrence and can identify the 6 accused persons. Since the complaint did not disclose the names of the assailants, in Column No 7 of the FIR it is mentioned as "*Six identifiable persons*".

c. On 01.03.2024, five persons surrendered before the learned Judicial Magistrate, Sathyamangalam and out of those five, one was a juvenile, aged about 17 years. It is not in dispute that the Sathyamangalam Magistrate Court falls within the Erode Sessions Division whereas the murder had taken place in Chromepet which is under the jurisdiction of the Chengalpet Sessions Division. It was also brought to my notice by Mr. Jinnah, learned State Public Prosecutor that four more persons had surrendered before the Judicial Magistrate, Srivilluputhur, in Virudhunagar District in connection with the said crime. Their surrender petition was accepted pursuant to which they were remanded to judicial custody. The juvenile (A5) was entrusted to the custody of two police constables with a further direction to produce him before the Juvenile Justice Board. A5 has, thereafter, been lodged in the observation home at Kellys, Kilpauk, Chennai.

d. The jurisdictional police station ie., the Tambaram Police had no clue about these developments. It is stated that the Tambaram Police had learnt of the surrender and subsequent developments from the newspapers.

3. Given the aforesaid developments, the State Public Prosecutor had urgently mentioned the matter at 10:30 am on 04.03.2024 seeking permission to challenge the order dated 01.03.2024 passed by the Judicial Magistrate, Sathyamangalam in Cr.M.P 1519 of 2024. I had permitted the matter to be

moved as a lunch motion on the said date and directed the Registry to call for the order. The impugned order reads as follows:

> *"The Petitioners are voluntarily surrender before this court. Copy of Aadhar Card produced. Identification of the accused are verified. On perusal of the copy of FIR produced by the petitioner in Cr.No.40/2024 registered on the file of Otteri Police Station, Tambaram, in coloumn No. 7 of the said FIR, it is mentioned as "பார்த்தால் அடையாளம் காட்டக்கூடிய 6 நபர்கள்" he petitioners name were not reflected in FIR and when i enquired the same with the petitioners, the petitioners are represented that the police officials are searching them and they visited their respective homes and enquired the whereabout of the petitioners with the family members of the petitioners when their absence and filed the affidavit. Head Clerk of this court directed to check with the concern Police Station and Head Clerk make an enquiry with the S.I of Police Namely Mr.Ravikumar through his mobile number 94981 33868 and filed an affidavit form stating that the police officials are investigating the case still. Based on the submissions made by the petitioners with affidavit and reply made by the concern Police Station this court prima facie satisfied that the detention of the 1-4 petitioners namely 1.Muneswaran S/o Nagu, 2.Sathyaseelan Basker, 3.Sampathkumar S/o Rajendran, 4.Manikandan S/o Subramani are necessary. Hence I accept the surrender of above said 1-4 petitioners and I remand the 1-4 petitioners to Judicial Custody till 06.03.2024. On physical examination A1 has old injury on his right side cheek when i enquired the same he replied that before one month he met with an accident and he has also injury on his right leg when i required the same he replied that "நேத்துகம்பிகுத்திகாயம் ஆயிடுச்சு", Jail Authority is directed to produce the 1-4 petitioners before Judicial*

Magistrate Court No.2, Chengalpattu On 06.03.2024. On perusal copy of the Aadhar Card produced by A5 namely Dhinesh S/o Ramamoorthy, he seems to be a Juvenile and the date of birth of juvenile is mentioned as 21.09.2006. Hence this court not accept the surrender of the said juvenile since this court is not Juvenile Justice Board. Hence, the petitioner Dhinesh S/o Ramamoorthy seems to be a juvenile, this court considered the safe of the said juvenile petitioner and in the interst of justice the juvenile is sent with AR Police PC 2988 S.Pandidurai and PC 1239 R.Anandhababuand directed to produce the juvenile before Juvenile Justice Board Chengalpattu forthwith with safe and proper care and caution for further proceedings known to law after due medical examination. The counsel appeared on behalf of juvenile filed an undertaking affidavit stating that he will inform the parents of juvenile and ask them to appear before Justice Juvenile Board, Chengalpattu during the production of said juvenile."

4. In the course of the hearing on 04.03.2024, it was brought to my notice that the entire case records were, thereafter, transmitted to the Judicial Magistrate-II, Chengalpet. After hearing the learned State Public Prosecutor, at length the following order was passed:

"*In the considered view of this Court, a plain reading of Section 167 (1) and 167(2) Cr.PC shows that Section 167(2) Cr.PC cannot stand independently and it is only a consequence of the provision under Section 167(1) Cr.PC. A Magistrate can act upon the accused person only if he is forwarded by the police under Section 167(1) Cr.PC. There is absolutely no indication while reading Section 167(2) Cr.PC that an accused person can straight away surrender before any Magistrate Court without being forwarded by the Police under Section 167(1) Cr.PC. That apart, the judgment of the Hon'ble Apex Court in* ***State of W.B .vs. Dinesh Dalmia*** *reported in* ***2007 5 SCC 773*** *makes it*

abundantly clear that it is a condition precedent under Section 167 Cr.PC that the accused person must be in the custody of police and if the police officer finds that the investigation cannot be completed within a period of 24 hours fixed under Section 57 Cr.P and he is satisfied that the accusation or the information is well founded, the accused has to be forwarded to the Magistrate Court and the accused person thus forwarded can be detained and he can be remanded to judicial custody for a term not exceeding 15 days. The Hon'ble Apex Court in this judgment has made it very clear that a notorious criminal, who may have number of cases pending in various police stations may chose to notionally surrender before some Magistrate Court and adopt it as a device to avoid physical custody of the police and that such device adopted by the accused person cannot be permitted under Section 167 Cr.PC. It was made clear that the precondition under Section 167 Cr.PC is that the accused person must be in the custody of the police.

It is therefore pellucid that from the plain reading of Section 167 Cr.PC and the judgment of the Hon'ble Apex Court referred supra, will certainly have a bearing in the judgment passed by the Division Bench of this Court in Iyyappan case referred supra.

The concern that was raised by the learned SPP has to be attended since it has become a regular practice in this State for notorious criminals to commit serious offences and thereafter mislead the police by making some persons to surrender before different Magistrate Courts having no jurisdiction and invariably, one or two of those persons who surrender also happen to be juveniles. This Court must ensure that the criminal justice is not subverted by adopting these tactics and it is high time that the situation must be brought under control and some guidelines are issued by this Court.

Post this case, under the caption 'for passing final orders" on 8.3.2024 at 10.30 am."

5. Heard Mr. Hassan Mohamed Jinnah, learned State Public Prosecutor. This Court also heard Mr. Mohanakrishnan, the President of the MHAA, who sought to intervene in the matter on behalf of the Bar and has also circulated detailed written submissions opposing the plea of the State. As this Court is not interfering with the impugned order dated 01.03.2024 permitting surrender, it

follows that the accused are not prejudiced in any manner. Notice to the accused is, therefore, dispensed with.

6. The grievance raised by the State is that in many grave offences the accused, who are often habitual criminals, adopt the tactic of surrendering before Judicial Magistrates having no territorial jurisdiction over the case and offer themselves for remand. Based on surrender petitions filed by the accused, Magistrates exercise power under Section 167(2) Cr.P.C to remand the accused. It was submitted that this was a clever device adopted by criminals to get themselves remanded to judicial custody under Section 167(2) thereby precluding police remand as by the time the jurisdictional police become aware of their surrender, the period prescribed under the proviso to Section 167(2) Cr.P.C would have started running. It was submitted that such undesirable practices have seriously impaired the statutory right of the police to effectively investigate cognizable offences under Chapter XII of the Cr.P.C, on account of which criminals have managed to escape from the clutches of the law.

7. It was submitted by Mr. Jinnah, learned State Public Prosecutor that the practice of the accused voluntarily surrendering before the Magistrate having no territorial jurisdiction over the case and offering himself for remand was judicially recognised by a Division Bench of this Court in *Ayyappan v State*, 2015 SCC Online Mad 11389. He also relied upon the decision of the Himachal Pradesh High Court in *Ami Chand v.s. State of Himachal Pradesh* (2020 SCC

Online HP 1840) and *Joseph Thomas v. State of Kerala* (2023 SCC Online Ker 3428) and contended that this Court must urgently examine the issue and issue guidelines as the pernicious practice of surrendering before Courts having no jurisdiction has become a seasoned litigation technique for criminals to deliberately avoid police custody.

8. From a reading of the order dated 01.03.2024, it is unmistakable that the Magistrate has passed the order exercising power under Section 167(2) Cr.P.C. It is not in dispute that the accused persons were not arrested and were not in the custody of the police at any time before 01.03.2024.

9. In this backdrop, the questions that fall for consideration are:

a. Whether a person accused of an offence committed in this State or the UT of Puducherry is entitled to walk into any Magistrate Court in the State of Tamil Nadu or Puducherry and file a surrender petition ?

b. Whether a Magistrate, having no jurisdiction to try the case, can accept such a surrender petition and thereafter remand the accused under Section 167(2) Cr.P.C?

10. The question appears to have incidentally come up before a Division Bench of the Kerala High Court in *Velu Viswanathan v. State*, 1971 KLT 80. It was observed as under:

"*In these cases, we need only consider whether the accused persons, who were not arrested by the police, but who surrendered*

before magistrates, could be handed over to the police for questioning. In such cases, we are of the opinion that the taking into custody of such persons by the magistrates (we do not call it remand) was really under Section 167 of the Code of Criminal Procedure. Otherwise, a person who absconds and surrenders before a magistrate without allowing himself to be arrested by the police cannot be questioned at all by the police. We do not think that the legislature would ever have intended such a consequence. In this connection, we may refer to an old decision brought to our notice by the Public Prosecutor, the decision in Empress v. Ashraf Ali, (ILR 6 All 129). When a criminal case was under investigation, a person who was supposed to have been involved in the case was taken into custody by a magistrate on a private complaint. The magistrate sent him over to the police, from whose custody he escaped subsequently. The question came to be considered by the High Court whether such custody was police custody; and Straight, held that the custody by the police was under Section 167 of the Code. The accused person was not arrested by the police and produced before the magistrate as contemplated by Section 167 : still, the learned Judge held that the custody of the police was under Section 167. Of course, no reason as to how the custody came within Section 167 is indicated in the decision.

16. *No particular provision has been brought to our notice in the Code of Criminal Procedure authorising a magistrate to arrest an accused person or a person suspected of an offence. Still, it will not be disputed that magistrate has power to arrest such a person."*

This decision was a case under the Code of Criminal Procedure, 1898. Under the Cr.P.C, 1973 a Magistrate may effect arrest under Section 44 Cr.P.C when an offence has been committed in his presence. That is, however, not the case here. Furthermore, the observations in paragraph 16 of *Velu Viswanathan's case*, that despite there being no provision there is a general power to arrest cannot be accepted as correct particularly in the light of Section 60-A, as inserted by the Code of Criminal Procedure (Amendment) Act, 2009 which reads as follows:

"60A. Arrest to be made strictly according to the Code.—No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for

arrest."

11. The aforesaid decision of the Kerala High Court was followed by Ratnavel Pandian, J in *Jagannathan v State*, 1983 Cr.LJ 1748 in the context of discussing Section 167(5) Cr.P.C. However, this decision has been overruled in *Japani Sahoo v Chandra Sekhar Mohanty*, (2007) 7 SCC 394.

12. A question, identical to the one under consideration came up before the Gujarat High Court in *State of Gujarat v. Patel Pramukhlal Gordhandas*, 1975 Cri LJ 324, wherein it was observed as under:

> *"The first question which arises to be determined is whether Section 167 has any application to the facts of this case. This section assumes some importance in view of the fact that two High Courts of our country have been of the opinion that even in cases wherein an accused person has voluntarily surrendered to judicial custody an order of remand of that accused to the police custody can be passed under Section 167 of the Criminal Procedure Code. Such a view has been taken by the Kerala High Court in Velu Viswanathan v. State. 1971 Cri LJ 725 (Ker) and by Andhra Pradesh High Court in State of Andhra Pradesh v. GollaRamulu, 1971 Cri LJ 1368 (AndhPra). The learned Sessions Judge has been of the opinion that Section 167 of the Code would have no application to the facts of the case wherein the accused has voluntarily surrendered to the judicial custody and is not forwarded by the police to the Magistrate concerned for taking him on remand. After perusing the above referred two decisions. I am of the opinion that the view taken by the Kerala and Andhra Pradesh High Courts on this point is not acceptable. This is evident from the plain reading of the language employed by the Legislature in Section 167 of the Code. Reference to sub-sec. (1) of this section shows that it contemplates the cases wherein the police is required to "forward the accused" to the concerned Magistrate. Sub-section (2) of this section, which contemplates the power of the Magistrate to authorise the detention of the accused in police custody for a term not exceeding 15 days in the whole, also refers to those Magistrates to whom the "accused person is forwarded under this section". Now it is evident that no accused person, who has voluntarily surrendered to the judicial custody can be*

> *"forwarded" to the concerned Magistrate by the police. The section is invariably connected with the provisions contained in Section 61 which authorises the police to detain an accused person for not more than 24 hours without the special order of a Magistrate. Thus, Sections 61 and 167 of the Code should be read together and if so done, it becomes quite evident that Sec. 167 has no application to the cases wherein the accused person has voluntarily surrendered to the judicial custody and is not "forwarded" by the police to the nearest judicial Magistrate."*

13. The practice of the accused filing surrender petitions directly before the Magistrate came to the notice of a Division Bench of this Court (M. Jaichandren and S. Nagamuthu, JJ) in *Katturaja v State* (2014) 1 MWN (Cri) 517. In that case, the accused were charged with a ghastly murder of four persons that had sent "*shock waves through the State of Tamil Nadu*". A1 had approached PW-33 an Advocate who had requested the former to surrender before the Court. Though the crime was committed at Nanguneri in Tirunelveli District the accused had surrendered before the Magistrate at Madurai. S. Nagamuthu, J rightly pointed out:

> "***criminals have become clever and after the commission of an offence, some fake accused are made to surrender before some other Court thereby misdirecting the investigation***. *Those persons who have nothing to do with the crime are remanded to custody and thereafter, the Investigating Officer has to toil much to rule out the involvement of such persons, who surrendered before the Court. Quite naturally, this will weaken the prosecution case against the real culprits."*

The Division Bench noted that "*the practice of entertaining surrender of accused before a Court, which has got no jurisdiction over the case, has been in vogue for decades*" but expressed no opinion on the correctness or otherwise of the practice.

14. The matter was, however, fully considered in the subsequent decision of another Division Bench (S. Nagamuthu and V.S Ravi, JJ) in *Ayyappan v State*, 2015 SCC Online Mad 11389. Examining Sections 167 (1) and (2) Cr.P.C the Division Bench observed:

> *"A conjoint reading of sub-section (1) and sub-section (2) would, at the first blush, make it appear as though sub-section (2) could be invoked by a Magistrate provided the accused was arrested and forwarded to the Magistrate concerned. In other words, the impression is that the condition precedent for the Magistrate to authorise the detention of the accused is the arrest of the accused first."*

The Division Bench referred to paragraph 48 of the decision of the Hon'ble Supreme Court in *Directorate of Enforcement* v. *Deepak Mahajan*, (1994) 3 SCC 440 wherein it was held as follows:

> *"48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalistic interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences."*

The Division Bench referred to the decision of a Full Bench of this Court in *Rosiah Beevi* v. *Joint Secretary, Government of Tamil Nadu*, 1983 MLW

(Cri) 289, the decisions of the Hon'ble Supreme Court in *Niranjan Singh* v. *Prabhakar Rajaram Kharote*, (1980) 2 SCC 559 *and Sandeep Kumar Bafna* v. *State of Maharashtra*, [2014] 4 SCALE 215, and held as follows:

> "*From the above judgements, it is crystal clear that an accused, by surrendering before a Magistrate, gets into the custody of the Magistrate and thereafter, the Magistrate concerned has to deal with him under Section 167(2) of the Code of Criminal Procedure. It is also crystal clear that such Magistrate before whom the accused surrenders need not be the one having territorial jurisdiction either to try or commit the case for trial. Irrespective of the fact whether he has territorial jurisdiction to try the case or to commit it to the court of session for trial, if the accused, in connection with any case under investigation, surrenders before a Magistrate on his own, the Magistrate has no discretion to refuse to accept the surrender of the accused before him for any reason.*"

15. The Division Bench has referred to Sections 167(1) and (2) Cr.P.C which reads as follows:

> "***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 not 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 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 I.—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."

Section 167 must be read in conjunction with Section 57 Cr.PC. which is as follows:

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*"

16. In ***State v Anupam J Kulkarni***, (1992) 3 SCC 141, the Hon'ble Supreme Court considered the close interrelationship between Sections 57 and Clauses (1) and (2) of Section 167 Cr.P.C and has observed as under:

"*Now coming to the object and scope of Section 167 it is well-settled that it is supplementary to Section 57. It is clear from Section 57 that the investigation should be completed in the first instance within 24 hours; if not the arrested person should be brought by the police before a Magistrate as provided under Section 167. The law does not authorise a police officer to detain an arrested person for more than 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate court. Sub-section (1) of Section 167 covers all this procedure and also lays down that the police officer while forwarding the accused to the nearest Magistrate should also transmit a copy of the entries in the diary relating to the case.* ***The entries in the diary are meant to afford to the Magistrate the necessary information upon which he can take the decision whether the accused should be detained in the custody further or***

> ***not***. *It may be noted even at this stage the Magistrate can release him on bail if an application is made and if he is satisfied that there are no grounds to remand him to custody but if he is satisfied that further remand is necessary then he should act as provided under Section 167. It is at this stage sub-section (2) comes into operation which is very much relevant for our purpose. It lays down that the Magistrate to whom the accused person is thus forwarded may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days in the whole. If such Magistrate has no jurisdiction to try the case or commit it for trial and if he considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. The section is clear in its terms. The Magistrate under this section can authorise the detention of the accused in such custody as he thinks fit but it should not exceed fifteen days in the whole. Therefore the custody initially should not exceed fifteen days in the whole."*

17. It would, therefore, be clear that Section 167(1) & (2) Cr. P.C are dovetailed and closely interlinked. Clause (1) of Section 167 applies when the accused is arrested and is in the custody of the police and the investigation cannot be completed within 24 hours, for it is only then the police are obliged to forward the accused together with the entries in the case diary to the Magistrate to authorize further detention. Detention under Section 167(2) Cr.P.C is authorized only when the accused is "forwarded" to the Magistrate in terms of Section 167(1). Section 167(2) does not contemplate detention pursuant to the accused voluntarily appearing before the Magistrate since the accused is not "forwarded" to such Magistrate in terms of Section 167(1) Cr.P.C. This position is now beyond all doubt in view of the decision in *KA Rauf Sherif v. Directorate of Enforcement*, (2023) 6 SCC 92, wherein it has been observed as under:

> "***15.*** *An order under Section 167(2) of the Code* ***had to be***

passed necessarily by the Magistrate "to whom an accused person is forwarded". *In fact, Section 167(2) contains the words "whether he has or has not jurisdiction to try the case". Therefore, the argument revolving around Section 167(2) of the Code also fails."*

It must follow that a person who has not been forwarded and who voluntarily appears and files a surrender petition cannot be dealt with under Section 167(2) Cr.P.C.

18. That apart, it is clear that remand under Section 167(2) Cr.P.C can be effected by a Magistrate whether or not he has jurisdiction to try the case. This is because the question of territorial jurisdiction is a matter falling under Chapter XIII in the context of inquiries and trials. It is also to be borne in mind that Section 167(1) contemplated the forwarding of the accused to the "*nearest*" Judicial Magistrate. Such a Magistrate may or may not have jurisdiction to try the case. Nevertheless, the Code empowers such a Magistrate to remand the accused under Section 167(2) Cr.P.C as there is a vital safeguard in the form of the entries in the case diary and the remand report forwarded by the police under Section 167(1) Cr.P.C which enables the Magistrate to apply his mind and decide whether remand is really necessary.

19. In *Satvinder Kaur v. State (Govt. of NCT of Delhi)*, (1999) 8 SCC 728, it was held that at the stage of investigation, it cannot be held that the SHO does not have territorial jurisdiction to investigate the crime.

20. The scope of Section 167(1) and (2) and the provisos came up for consideration in *State of W.B. v. Dinesh Dalmia*, (2007) 5 SCC 773**.** The previous decisions in *Niranjan Singh* v. *Prabhakar Rajaram Kharote*, (1980) 2 SCC 559 and *Directorate of Enforcement* v. *Deepak Mahajan*, (1994) 3 SCC 440 were noticed, and it was held as under:

> *"Sub-section (1) says that when a person is arrested and detained in custody and it appears that investigation cannot be completed within 24 hours fixed under Section 57 and there are grounds of believing that accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation not below the rank of Sub-Inspector shall produce the accused before the nearest Judicial Magistrate. The mandate of sub-section (1) of Section 167 CrPC is that when it is not possible to complete investigation within 24 hours then it is the duty of the police to produce the accused before the Magistrate. Police cannot detain any person in their custody beyond that period. Therefore, sub-section (1) presupposes that the police should have custody of an accused in relation to certain accusation for which the cognizance has been taken and the matter is under investigation. This check is on police for detention of any citizen. Sub-section (2) says that if the accused is produced before the Magistrate and if the Magistrate is satisfied looking to accusation then he can give a remand to the police for investigation not exceeding 15 days in the whole. But the proviso further gives a discretion to the Magistrate that he can authorise detention of the accused otherwise than the police custody beyond the period of 15 days but no Magistrate shall authorise detention of the accused in police custody for a total period of 90 days for the offences punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and no Magistrate shall authorise the detention of the accused person in custody for a total period of 60 days when the investigation relates to any other offence and on expiry of the period of 90 days or 60 days as the case may be, and he shall be released if he is willing to furnish bail."**Therefore, the reading of sub-sections (1) and (2) with proviso clearly transpires that the incumbent should be in fact under the detention of police for***

> ***investigation***. *In the present case, the accused was not arrested by the police nor was he in the police custody before 13-3-2006. He voluntarily surrendered before a Magistrate and no physical custody of the accused was given to the police for investigation. The whole purpose is that the accused should not be detained for more than 24 hours and subject to 15 days' police remand and it can further be extended up to 90/60 days as the case may be. But the custody of police for investigation purpose cannot be treated as judicial custody/detention in another case. The police custody here means the police custody in a particular case for investigation and not judicial custody in another case. This notional surrender cannot be treated as police custody so as to count 90 days from that notional surrender. A notorious criminal may have number of cases pending in various police stations in a city or outside the city, a notional surrender in pending case for another FIR outside the city or of another police station in same city, if the notional surrender is counted then the police will not get the opportunity to get custodial investigation. The period of detention before a Magistrate can be treated as device to avoid physical custody of the police and claim the benefit of proviso to sub-section (2) and can be released on bail. This kind of device cannot be permitted under Section 167 CrPC. The condition is that the accused must be in the custody of the police and so-called deemed surrender in another criminal case cannot be taken as starting point for counting 15 days' police remand or 90 days or 60 days as the case may be."*

Thus, it is crystal clear from the decision in *State of W.B. v. Dinesh Dalmia*, (2007) 5 SCC 773, that Section 167(1) requires detention by the police. However, this important decision which directly deals with the issue of remand arising out of IPC offences was very unfortunately not brought to the notice of the Division Bench in *Ayyappan v State*, 2015 SCC Online Mad 11389.

21. The Division Bench has, however, placed reliance on a decision of a Full Bench of this Court in *Roshan Beevi* v *Joint Secretary, Government of Tamil Nadu*, 1983 MLW (Cri) 289, and the decisions of the Hon'ble Supreme Court in *Directorate of Enforcement v. Deepak Mahajan*, (1994) 3 SCC 440, *Niranjan*

Singh v. *Prabhakar Rajaram Kharote*, (1980) 2 SCC 559 *and Sandeep Kumar Bafna* v. *State of Maharashtra*, [2014] 4 SCALE 215.

22. Before examining these cases it is necessary to preface the discussion with certain decisions which offer guidance in understanding the doctrine of precedent. In Madhav *Rao Jivaji Rao Scindia* v. *Union of India***,** (1971) 1 SCC 85, a Constitution Bench observed:

> "*It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.*"

In *Padma Sundara Rao* v. *State of T.N***,** (2002) 3 SCC 533, a unanimous Constitution Bench observed:

> "*9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in British Railways Board v. Herrington [1972 AC 877 : (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.*"

> In ***Delhi Airtech Services (P) Ltd. v. State of U.P.*****, (2011) 9 SCC 354,** the Hon'ble Supreme Court pointed out that a point in respect of which no argument was advanced and no citation of authority was made is not binding and would not be followed.

23. Keeping the aforesaid principles in mind, the decisions in *Roshan Beevi* v. *Joint Secretary, Government of Tamil Nadu*, 1983 MLW (Cri) 289, and the decision of the Hon'ble Supreme Court in *Directorate of Enforcement v.*

Deepak Mahajan, (1994) 3 SCC 440**,** *Niranjan Singh* v. *Prabhakar Rajaram Kharote*, (1980) 2 SCC 559 *and Sandeep Kumar Bafna* v. *State of Maharashtra*, [2014] 4 SCALE 215 will now be examined.

24. In *Roshan Beevi* v. *Joint Secretary, Government of Tamil Nadu*, 1983 MLW (Cri) 289, a reference arose out of a prosecution under the Customs Act, 1962. The following were questions that fell for consideration before the Full Bench of this Court:

> "*(1) When is a person said to be under arrest?*
>
> *(2) Are the terms 'custody' and 'arrest' synonymous?*
>
> *(3) Are the customs officials vested with powers under the Customs Act, 1962 to detain any person for any period and at any place for the purpose of an inquiry, interrogation or investigation?*
>
> *(4) Will the detention of a person by the customs officers for the purpose of inquiry, interrogation or investigation, amount to an 'arrest' of the said person?*
>
> *(5) Is detention of a person by the customs officers for the purpose of inquiry or interrogation or investigation beyond 24 hours without producing him before a Magistrate, violative of Article 22 of the Constitution of India?"*

In *State of Haryana v. Dinesh Kumar*, (2008) 3 SCC 222**,** the Hon'ble Supreme Court has pointed out that the interpretation of "*arrest*" and "*custody*" in *Roshan Beevi's* case cannot be imported to prosecutions under the IPC. The Hon'ble Supreme Court observed:

> "*The interpretation of "arrest" and "custody" rendered by the Full Bench in Roshan Beevi case [1984 Cri LJ 134 (Mad)] may be*

> *relevant in the context of Sections 107 and 108 of the Customs Act where summons in respect of an enquiry may amount to "custody" but not to "arrest", but such custody could subsequently materialise into arrest. The position is different as far as proceedings in the court are concerned in relation to enquiry into offences under the Penal Code and other criminal enactments. In the latter set of cases, in order to obtain the benefit of bail an accused has to surrender to the custody of the court or the police authorities before he can be granted the benefit thereunder."*

It would, therefore, be inapposite for the Court to place reliance on *Roshan Beevi* v. *Joint Secretary, Government of Tamil Nadu*, 1983 MLW (Cri) 289, which was a decision which had nothing to do with a prosecution for offences under the IPC.

25. The next case is the decision of the Hon'ble Supreme Court in *Directorate of Enforcement v. Deepak Mahajan*, (1994) 3 SCC 440 which arose out of prosecutions under the Customs Act, 1962 and the FERA, 1973. It must be expressly pointed out that the Hon'ble Supreme Court was not dealing with an IPC case where an accused voluntarily appeared before a Magistrate and offered to surrender. On the contrary, the question before the Hon'ble Supreme Court was

> "*Whether a Magistrate before whom a person arrested under sub-section (1) of Section 35 of the Foreign Exchange Regulation Act of 1973 which is in pari materia with sub-section (1) of Section 104 of the Customs Act of 1962, is produced under sub-section (2) of Section 35 of the Foreign Exchange Regulation Act, has jurisdiction to authorise detention of that person under Section 167(2) of the Code of Criminal Procedure?*

Deepak Mahajan *case*, arose out of a decision of a five-judge bench of the Delhi

High Court which had held that since the authorised officers under the FERA/Customs Act were not police officers Section 167(1) Cr.P.C would not apply, the result was that the Magistrate had no power to remand an accused produced by such officers invoking powers under Section 167(2) Cr.P.C. The Hon'ble Supreme Court examined the provisions of Section 35(2) of FERA and the *in parimateria* provision in Section 104(2) of the Customs Act, 1962 which is as follows:

> "*Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.*"

Though obvious, it should nonetheless be pointed out that prosecutions under the Customs Act, 1962 and the FERA involve authorised officers who are not police officers. In this context, the Hon'ble Supreme Court proceeded to "*examine the primary question whether Section 35(2) of FERA or Section 104(2) of the Customs Act serves as a substitute to Section 167(1) of the Code. To say in other words, whether Section 167(1) is replaced or substituted by the abovesaid provisions of two special Acts.*"

Ultimately the Court concluded as follows:

> "***106.*** *In our considered opinion, the view taken in O.P. Gupta [(1990) 2 Del Lawyer 23 (FB)] and M.K.S. Abu Bucker [1989 LW (Cri) 325] and also of the Kerala High Court and Gujarat High Court is the logical and correct view and we approve the same for the reasons we have given in the preceding part of this judgment. We, indeed, see no imponderability in construing Section 35(2) of FERA and Section 104(2) of Customs Act that the said provisions replace Section 167(1) and serve as a substitute thereof substantially satisfying all the required basic*

conditions contained therein and that consequent upon such replacement of sub-section (1) of Section 167, the arrested person under those special Acts would be an accused person to be detained by the Magistrate under sub-section (2) of Section 167. In passing, it may be stated that there is no expression 'police officer' deployed in Section 167(1) nor does it appear in any part of Section 167(2). The authority for detaining a person as contemplated under Section 167(2) is in aid of investigation to be carried on by any prosecuting agency who is invested with the power of investigation."

In *Deepak Mahajan,* the Hon'ble Supreme Court invoked the principle of "*legislative casus omissus*" and held that the word "police" in Section 167 Cr.P.C would include officers of other investigation agencies who are empowered by law to arrest. This was because Section 35(2) of FERA and the in pari materia provision in Section 104(2) of the Customs Act, 1962 did not expressly authorize remand though it cast a duty on the arresting officer to take the arrestee before the Magistrate without unnecessary delay. It is in this context, that the Hon'ble Supreme Court had discussed the legal provisions**.** It should also be pointed out that even in *Deepak Mahajan,* the accused was produced by the authorised officer under the Customs Act, 1962 and FERA, 1973 seeking remand. The was no occasion for the Hon'ble Supreme Court to envisage a situation where the accused, of his own volition, appeared before the Magistrate and surrendered.

26. The Division Bench in *Ayyappan v State*, 2015 SCC Online Mad 11389, has referred to paragraph 48 of the decision in *Directorate of Enforcement v. Deepak Mahajan*, (1994) 3 SCC 440. A close reading of the aforesaid passage

shows that the Hon'ble Supreme Court has relied upon the observations made in *Roshan Beevi* v. *Joint Secretary, Government of Tamil Nadu*, 1983 MLW (Cri) 289. This was because both *Roshan Beevi* and *Deepak Mahajan* were cases under the the economic offences laws (Customs Act, 1962 and FERA, 1973) which is not the case here. In any event, as the Hon'ble Supreme Court has subsequently clarified in *State of Haryana v. Dinesh Kumar*, (2008) 3 SCC 222, the interpretation in *Roshan Beevi* v. *Joint Secretary, Government of Tamil Nadu*, 1983 MLW (Cri) 289 cannot be applied to prosecutions for IPC offences.

27. The Division Bench has also referred to *Niranjan Singh* v. *Prabhakar Rajaram Kharote*, (1980) 2 SCC 559, wherein Krishna Iyer, J had stated as follows:

> "*9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions.*"

Unfortunately, the Division Bench has not noticed that the aforesaid observations were made by Krishna Iyer, J in the context of Section 439 Cr.P.C and not Section 167 Cr.P.C. The Division Bench while extracting paragraph 9 has missed the all-important preceding paragraph 8 wherein it is stated as follows:

> "***8. <u>Custody, in the context of Section 439,</u>*** *(we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the*

court."

Comparing Section 439 Cr.P.C to Section 167 Cr.P.C would be comparing chalk and cheese.

28. The Division Bench has then referred to *Sandeep Kumar Bafna* v. *State of Maharashtra*, [2014] 4 SCALE 215 which is once again a case under Section 439 Cr.P.C and not under Section 167 Cr.P.C.

29. In *State of W.B. v. Dinesh Dalmia*, (2007) 5 SCC 773, the Hon'ble Supreme Court has considered the decisions in *Niranjan Singh* v. *Prabhakar Rajaram Kharote* [(1980) 2 SCC 559] , *CBI* v. *Anupam J. Kulkarni* [(1992) 3 SCC 141] *Directorate of Enforcement* v. *Deepak Mahajan* [(1994) 3 SCC 440]. In paragraph 18, the Hon'ble Supreme Court has held that the decision in ***Niranjan Singh* v. *Prabhakar Rajaram Kharote*** [(1980) 2 SCC 559, is of no use since it concerned custody with reference to Section 439 Cr.P.C. After referring to Section 167(1) & (2) Cr.P.C the Court concluded as follows:

> "*Therefore, the reading of sub-sections (1) and (2) with proviso clearly transpires that the incumbent should be in fact under the detention of police for investigation."*
>
> "*Therefore, it is very clearly mentioned that the accused must be in custody of the police for the investigation"*

30. However, in *Ayyappan v State*, 2015 SCC Online Mad 11389, Nagamuthu, J has observed:

"*A conjoint reading of sub-section (1) and sub-section (2)*

> *would, at the first blush, make it appear as though sub-section (2) could be invoked by a Magistrate provided the accused was arrested and forwarded to the Magistrate concerned. In other words, the impression is that the condition precedent for the Magistrate to authorise the detention of the accused is the arrest of the accused first."*

As pointed out earlier, attention of the Division Bench was unfortunately not drawn to *State of W.B. v. Dinesh Dalmia*, (2007) 5 SCC 773 which would have dispelled all doubt that in the context of offences under the IPC, the requirement of arrest and custody of the police under Section 167(1) is not a "*first blush*" but is a *sine qua non*-requirement under Section 167(1) Cr.P.C. For these reasons, and with very great respect to the learned judges, I am unable to follow the course of action sanctioned in *Ayyappan v State*, 2015 SCC Online Mad 11389, particularly in the light of the authoritative decisions of the Hon'ble Hon'ble Supreme Court in *State of W.B. v. Dinesh Dalmia*, (2007) 5 SCC 773, *Manubhai Ratilal Patel v. State of Gujarat*, (2013) 1 SCC 314and *KA Rauf Sherif v. Directorate of Enforcement*, (2023) 6 SCC 92.

31. There is yet another reason why I respectfully cannot subscribe to the decision in *Ayyappan v State*, 2015 SCC Online Mad 11389. In the context of remanding persons who voluntarily surrender before the Magistrate the Division Bench has observed:

> "*It may be argued that at that time the Magistrate may not have any material to authorise such detention. Though there is some force in the said apprehension, it cannot be simply said that it is correct. To illustrate, in the event, the accused, while surrendering before the court, produces a copy of the FIR or any other document relating to the case and the identity of the person concerned is also not in doubt, he may get a prima facie*

satisfaction that his further detention is necessary. Similarly, as soon as the surrender of the accused, the investigating officer or any other police officer acting on his instructions may inform the Magistrate that the person who has surrendered before the court is the one who was involved in the case and that may be suffice for him to get the satisfaction that his further detention is necessary. These situations are only illustrative and not exhaustive. On the contrary, if no material at all is available for the Magistrate to get the satisfaction that the further detention of the person who has surrendered before him is necessary, then, he has no option but to record that his further detention is unnecessary and so, he has to simply forward him to the jurisdictional Magistrate who has jurisdiction either to try or to commit the case for trial to the court of session."

When an accused voluntarily surrenders before a Magistrate having no territorial jurisdiction over the case and files a surrender petition, the Court would obviously be handicapped for want of the remand report and copies of the case diary. In such circumstances, a question would arise as to how a Magistrate is supposed to exercise power under Section 167(2) Cr.P.C without looking into the copies of the case diary? Section 167(1) mandates that while forwarding the accused to the Magistrate, the police shall transmit copies of the case diary to the Magistrate so as to enable him to apply his mind to decide whether a case for remand is made out.

32. The decision in *Ayyappan v State*, 2015 SCC Online Mad 11389 envisages a situation where the accused walks into a Court with an FIR in hand (as in the instant case) or the IO supplying information which is then used as material to remand the accused under Section 167(2) Cr.P.C. I am afraid such material cannot form the basis on which an order of remand can be passed under Section 167(2) Cr.P.C. Such a procedure is illegal and is directly in the teeth of the judgment of the Hon'ble Supreme Court in *Manubhai Ratilal Patel v. State of Gujarat*, (2013) 1 SCC 314, wherein it was observed as follows:

"***24.*** *The act of directing remand of an accused is*

fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. ***The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all.*** *It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner."*

In fact, in *State v. K.N. Nehru*, 2011 SCC OnLine Mad 1984 : (2012) 1 MWN (Cri) 4, speaking for a Division Bench, S. Nagamuthu, J has very rightly pointed out as under:

"***11.*** *As is mandated under Article 22(2) of the Constitution of India and under Section 57 of the Code of Criminal Procedure, for getting the authorisation from the Court for detention, either in judicial custody or Police custody, the Accused has to be physically produced before the Magistrate under Section 167, Cr.P.C. Section 167(1) of Cr.P.C. is the law which regulates and empowers a Magistrate to authorise the detention of the Accused either in Police custody or in judicial custody, as the case may be. It is too well settled that while passing an order of remand, either judicial custody or Police custody, as mandated in Section 167(1) of Cr.P.C., since the said detention deprives the personal liberty*

guaranteed under Article 21 of the Constitution of India, such order of remand shall not be passed in a mechanical fashion. ***The learned Magistrate is required to apply his mind into the entries in the Case Diary, representation of the Accused and other facts and circumstances, and only on satisfaction that such remand is justified, the learned Magistrate shall pass such order of remand.*** *[vide Elumalai v. State of Tamil Nadu, 1983 LW (Crl) 121].”*

The decision in *State v Anupam J Kulkarni*, (1992) 3 SCC 141, which has already been adverted to earlier in paragraph 16, *supra*, reiterates the same position.

33. From the aforesaid, it is clear that unless the case diary and the remand report are transmitted to the Magistrate, he would not be in a position to apply his mind to effectively determine whether a case for remand is made out under Section 167(2) Cr.P.C. Consideration of the remand report and case diary are jurisdictional conditions for authorizing detention under Section 167(2) Cr.P.C. Where the accused voluntarily surrenders before the Magistrate, the Magistrate is left with only a surrender petition or at the most an FIR. Ex-facie, remand based on such *ipse dixits* without perusing the relevant material forwarded under Section 167(1) Cr.P.C would be clearly illegal and without jurisdiction.

34. As pointed out by the Hon’ble Supreme Court in *Manubhai Ratilal Patel v. State of Gujarat*, (2013) 1 SCC 314, there are two provisions in the Code which provide for remand i.e. Sections 167 and 309 Cr.P.C. Section 309 Cr.P.C will come into application only post cognizance. Thus, at the stage of investigation, unless the case falls within Section 167 Cr.P.C as there is no

inherent power of remand (See *NatabarParida v. State of Orissa*, (1975) 2 SCC 220).

35. Section 167 Cr.P.C is a provision that authorises deprivation of personal liberty. Two cardinal principles must be followed while construing a law which authorises deprivation of personal liberty (i) the letter of the law must be construed strictly and (ii) the power conferred by such law must be scrupulously within the bounds laid down in such a law (See *Kishori Mohan Bera v. State of W.B.*, (1972) 3 SCC 845). It is, therefore, not possible to invent fancied ambiguities to distort the clear and plain language of Section 167 Cr.P.C thereby providing a novel avenue for the accused to voluntarily surrender and get remanded under Section 167(2) Cr.P.C. The Division Bench in *Katturaja v State* (2014) 1 MWN (Cri) 517 had also taken notice of this pernicious practice which was craftily designed to achieve the following result:

> *"criminals have become clever and after the commission of an offence, some fake accused are made to surrender before some other Court thereby misdirecting the investigation. Those persons who have nothing to do with the crime are remanded to custody and thereafter, the Investigating Officer has to toil much to rule out the involvement of such persons, who surrendered before the Court. Quite naturally, this will weaken the prosecution case against the real culprits."*

36. Mr. Mohanakrishnan, learned counsel who represented the Madras

High Court Advocates Association submitted that this practice of the accused voluntarily surrendering before the Magistrate and offering themselves for remand is followed only in Tamil Nadu and Puducherry. He added that this unique practice has been in vogue for several decades. This submission is noticed only to be rejected since there cannot be one set of laws functioning in Tamil Nadu and Puducherry and another set for the rest of the country. This strange and dubious practice of doubtful or non-existent legal ancestry is found only in this State and Puducherry and is perhaps unknown to the rest of this country. There is no iota of doubt that this specious practice has grown up only for the purposes of countering arrest and custody of the police by obtaining a remand before the Magistrate. This has been severely deprecated by the Hon'ble Supreme Court in *State of W.B. v. Dinesh Dalmia*, (2007) 5 SCC 773 wherein it is observed:

> "*The period of detention before a Magistrate can be treated as device to avoid physical custody of the police and claim the benefit of proviso to sub-section (2) and can be released on bail. This kind of device cannot be permitted under Section 167 CrPC..*"

37. This leaves us with the residual question: What is the procedure to be followed when the accused voluntarily surrenders before a Magistrate who has no jurisdiction to try the case? From the discussion above, the position of law *vis-a-vis* IPC offences is that in such cases the Magistrate has no power to cause arrest nor can he take the accused into custody to remand him under Section 167(2) Cr.P.C in the absence of the accused being forwarded to him under

Section 167(1) Cr.P.C. It is, however, necessary to notice Police Standing Orders 559 framed by the Government of Tamil Nadu and have been notified vide G.Os.Ms.No.362, Home (Pol.12) Department, Dated: 28.09.2020 and 438, Home (Pol.12) Dept. Dated: 29.10.2020. Clauses (3)-(5) of PSO 559 reads as follows:

> *"(3) If a crime committed in the jurisdiction of another Police Station within the State is reported to the Station House Officer of a Police Station, a First Information Report should be issued and its substance entered in the Station House Diary.*
>
> *(4) If the place of occurrence is near and is easily accessible from the Station House, the Station House Officer will at once proceed to the spot, take up investigation and continue it till relieved by the police having jurisdiction. Simultaneously, action will be taken to send immediate intimation to the police having jurisdiction over the place. When the investigation is taken over by the latter, the First Information Report should be transferred.*
>
> *(5) If the place of occurrence is far off, immediate intimation should be sent to the police having jurisdiction over the place by the quickest possible means and the First Information Report transferred to them simultaneously. If any of the persons, who are reasonably believed to have taken part in the offence, are found in the limits of the station where the offence is reported and if the offence alleged against them is of a serious nature and there is reasonable apprehension that they will abscond unless immediately taken into custody, they should be arrested and produced before the court having jurisdiction, intimation of their arrest being promptly sent to the Police Station within the jurisdiction of which the offence occurred."*

From the above, it is clear that a police officer attached to the police station falling within the jurisdiction of the Court where the accused surrenders can, if necessary, take the accused into custody and thereafter have him produced before the Court having jurisdiction, with due intimation being promptly sent to the Police Station within the jurisdiction of which the offence occurred. Thus, where an accused voluntarily surrenders before a Magistrate having no jurisdiction to try the case, it would be open to the Magistrate to direct the

Station House Officer, in whose territorial jurisdiction the Court is situated, to take the accused into custody and deal with him in accordance with the procedure set out in Clauses (3) to (5) of PSO 559.

38.At the risk of repetition, this Court is constrained to reiterate that the words "*whether he has or has not jurisdiction to try the case*" appearing in Section 167(2) Cr.P.C are not standalone expressions. The word "jurisdiction" used therein refers to the territorial jurisdiction of the Magistrate. To satisfy the commands of Section 57 Cr.P.C and Article 22 of the Constitution an arrestee should be produced before a Magistrate within 24 hours of hours of his arrest and detention whether he has jurisdiction or not. Thus, a Magistrate, irrespective of whether he has jurisdiction to try the case or otherwise, acquires legal jurisdiction to remand the arrestee only on the satisfaction of the following conditions (a) That the investigation cannot be completed within 24 hours (b) there are grounds for believing that the information or the accusation is well founded (c) transmission of the copy of the entries in the case diary and (d) forwarding of the accused to the Magistrate by the police. In the absence of the cumulative satisfaction of all of the above conditions, the Magistrate does not acquire legal jurisdiction to remand. It was for this reason that the Hon'ble Supreme Court in *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273, had held as follows:

> "***11.4.*** *The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate*

will authorise detention"

If the interpretation of the expression "*whether he has or has not jurisdiction to try the case*" by the Division Bench in *Ayyappan v State*, 2015 SCC Online Mad 11389, is accepted, nothing would prevent an accused who commits an offence in Andhra Pradesh from surrendering before a Magistrate in border Taluk of Tamil Nadu, and the Magistrate would have to perforce accept his surrender.

39. The order impugned in this petition remands the accused to judicial custody till 06.03.2024. This Court is informed that the papers have already been transmitted to the jurisdictional Court ie., the Judicial Magistrate, Chengalpet. Therefore, the order of remand having worked itself out no useful purpose will be served in interfering with the impugned order dated 01.03.2024.

40. In view of the above discussion, the criminal original petition is disposed of with the following directions:

a. Surrender petitions filed by the accused, who have voluntarily surrendered before a Magistrate having no jurisdiction to try the case, are not maintainable. No order of remand can be passed by the Magistrate under Section 167(2) Cr.P.C on such petitions, in the light of the decisions of the Hon'ble Hon'ble Supreme Court in *State of W.B. v. Dinesh Dalmia*, (2007) 5 SCC 773, *Manubhai Ratilal Patel v. State of Gujarat*, (2013) 1 SCC 314and *KA Rauf Sherif v. Directorate of Enforcement*, (2023) 6 SCC 92**.**

b. To be precise, in the context of cases concerning offences under the

Indian Penal Code, 1860, a person accused of an offence, who has not been forwarded under Section 167(1) Cr.P.C, and who voluntarily appears and files a surrender petition before the Magistrate cannot be dealt with under Section 167(2) Cr.P.C.

c. Consequently, the period for the purpose of the proviso to Section 167(2), the period of 15 days police custody or 60/90 days custody will commence only from the date on which he comes into the custody of the Court, upon being forwarded by the police under Section 167(1) Cr.P.C.

d. In the event an accused voluntarily appears before the Magistrate having no jurisdiction to try the case, it would be open to the Magistrate to direct the Station House Officer of the nearest police station under his jurisdiction to take the accused into custody and deal with him in accordance with the procedure set out in Clauses (3) to (5) of PSO 559.

e. The discussion made, hereinabove, relates to matters arising out of offences under the Indian Penal Code, 1860. Though obvious, it is clarified that this Court has not expressed any opinion on the legal position arising in this case *vis-a-vis* economic offences under Special Acts like Customs Act, 1962, FEMA, 1999 etc.

f. The above directions shall be followed scrupulously by all Magistrates in the State of Tamil Nadu and Puducherry. The Registrar General is directed to place this order before the Hon'ble Chief Justice, and upon approval circulate a copy of this order to all Principal District Judges/Chief Judge, Puducherry who, in turn, will bring these directions to the immediate notice of the Magistrates in

their respective Sessions Divisions.

08.03.2024

Index: Yes
Speaking Order
kp

To
..
1.The Registrar General
High Court, Madras.

2.Magistrates in the State of Tamil Nadu
and Puducherry.

3.Judicial Magistrate,
Sathyamangalam.

4.The Public Prosecutor,
High Court of Madras,
Madras.

N.ANAND VENKATESH.J.,

kp

CRL.O.P No.5577 of 2024