

PETITIONER:
RAJ NARAIN

Vs.

RESPONDENT:
SUPDT. CENTRAL JAIL, NEW DELHI.

DATE OF JUDGMENT:
11/09/1970

BENCH:
HIDAYATULLAH, M. (CJ)
BENCH:
HIDAYATULLAH, M. (CJ)
SHELAT, J.M.
BHARGAVA, VISHISHTHA
MITTER, G.K.
VAIDYIALINGAM, C.A.
RAY, A.N.
DUA, I.D.

CITATION:
1971 AIR 178 1971 SCR (2) 147
1970 SCC (2) 750
CITATOR INFO :
F 1971 SC 186 (7,13)
R 1972 SC 711 (7)
F 1973 SC 850 (1)
R 1974 SC 871 (3)

ACT:
Code of Criminal Procedure, 1898, s. 344-Magistrate remanding arrested person to judicial custody-Further remand when not made in presence of prisoner whether illegal.

HEADNOTE:
R was arrested on August 20, 1970 under ss. 107/117 of the Code of Criminal Procedure and was remanded to judicial custody by the City Magistrate Lucknow. A petition for a writ of habeas corpus was filed in this Court and on August 22, 1970 this Court ordered him to be transferred to Tihar Central Jail Delhi for personal appearance before the Court. R's original remand as ordered by the City Magistrate was till August 28, 1970. On that date at 4 p.m. the Superintendent Central Jail. Delhi sought directions from the court in view of the fact that the remand was due to expire at midnight. The court ordered that in the situation that had arisen R should be remanded back to the custody to which he belonged, that he may be taken to U.P. if so desired to be produced before the court at the next hearing, and that if no fresh remand orders were received by midnight R was to be set at liberty at midnight. The same day a wireless message was received by the Superintendent Delhi Central Jail from the District Magistrate Lucknow, informing him that the City Magistrate Lucknow had extended R's remand up to September 1, 1970. The following day a telegraphic message was received from the City Magistrate Lucknow informing the Superintendent that R was ordered to be remanded to judicial custody till September 10, 1970. Simultaneously this Court was informed by the District Magistrate that the remand of R was extended up to September

10, 1970. R filed another petition before this Court challenging the legality of the fresh remand orders mainly on the ground that they were made behind his back.

HELD : Per Hidayatullah, C.J., Bhargava, Mitter, Ray and Dua, JJ.-Even if it be desirable for the Magistrates to have the prisoner produced before them when they remit him to further custody, a magistrate can act only as the circumstances permit. Indeed courts trying cases may find it necessary to order a remand in the absence of an accused e.g. when an accused is so seriously ill that the trial has to be adjourned and he cannot be brought to court and in such case an order made without production of accused in court will not be invalid. [151 H]

Prisoners who are under trial, are brought before- this Court on 'rule nisi and are kept in custody of this Court. This is a transferred custody on behalf of the Magistrate. The Magistrate cannot recall the prisoner from this Court's custody by his order and he is only required to intimate to the jail authorities the prisoner, and this Court that the original remand has been extended while adjourning the case. This is sufficient compliance with the requirements of the law in such special circumstances. To expect the Magistrate to do more under s. 344 of the Code in such

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circumstances is to expect an impossibility from him and the law does not contemplate an impossibility. [152 F]

In the present case the prisoner did not want bail or seek to appear by counsel. He relied only on the technical plea that he was not produced before the Magistrate. There was no reason for this Court to order his release when he was held on proper remand by a Magistrate, and there were no circumstances justifying his release. [151 G; 152 D]

In re Venkataraman, 49 Cr. L. J, 41, Anonymous case, 2 Weir 209 and Ram Narain Singh v.State of Delhi, [1953] S.C.R. 652, referred to.

Per Shelat and Vaidialingam, JJ. (dissenting) : It stands to reason that an order of remand will have to be passed in the presence of the accused. Otherwise the position will be that a magistrate or court will be passing orders of remand mechanically without having heard the accused for a considerably long time. When the accused is before the Magistrate when the remand order is passed he can make representation that no remand order should be passed and also oppose any move for a further remand. The fact that the person concerned does not desire to be released on bail or that he can make representations to the Magistrate are beside the point. For instance in cases where a person is sought to be proceeded against under Ch. VIII of the Criminal Procedure Code, it would be open to him to represent that the circumstances had materially changed and a further remand had become unnecessary. [160 H-161 D]

It was no answer that in the present case the petitioner was brought to New Delhi under the orders of this Court and hence the City Magistrate had to pass the remand order at Lucknow.. The U.P. authorities had made no representation on August 27, 1970 when the writ petition was adjourned. They also did not take the prisoner to Lucknow as permitted by this Court. In the result it must be held that the orders of remand dated 28th and 29th August, 1970 passed by the City Magistrate, Lucknow were illegal. [161 F-162 A]

Case law referred to.

ORIGINAL JURISDICTION : Writ Petition No. 330 of 1970.
Petition under Art. 32 of the Constitution of India for a writ in the nature of habeas corpus.
D. P. Singh, for the petitioner.
The respondent did, not appear..

ORDER

By majority, we hold that the custody of Mr. Raj Narain is valid and that he is not entitled to release on his fresh petition. We shall give our reasons later.

The Judgment of M. HIDAYATULLAH, C.J., V. BHARGAVA, G. K. MITTER, A. N. RAY and I. D. DUA, JJ. was delivered by HIDAYATULLAH, C.J. Dissenting Opinion of J. M. SHELAT and C. A. VAIDIALINGAM, JJ. was given by VAIDIALINGAM, J. Hidayatullah, C.J. Mr. Raj Narain M.P. was arrested on August 20, 1970 under ss. 107/117, Criminal Procedure Code, 149

and was remanded to jail custody under warrant issued by the City Magistrate, Lucknow. A petition for a writ of habeas corpus for his release is pending in this Court, and under our orders, August 22, 1970, he has been transferred to Tihar Central Jail Delhi. His original remand,, as ordered by the City Magistrate, was till August 28, 1970.

On August 28, 1970, we were informed at 4 p.m. that his remand would expire at midnight of the 28th August,, 1970, and that the Superintendent, Central Jail, Delhi would not be able to detain Mr. Raj Narain thereafter. The following intimation from the Superintendent was received in this connection by the Registry :

"Sub : Production of Shri Raj Narain,
M.P. in the Supreme Court, Writ
Petition No. 315 of 1970.

Sir,

I have the honour to state, that Shri Raj Narain, M.P. was received in this jail on transfer from District Jail, Lucknow, for production in Supreme Court in connection with his Writ Petition in the nature of Habeas Corpus. He was produced in the Court on 25th, 26th and 27th August 1970. Now it has been ordered by the Supreme Court" dated 27-8-70 that he is not to be produced in the Court and that he may be kept in Delhi. Orders of the Court are reproduced below :

"Shri Raj Narain's petition is not to be listed tomorrow and he is not to be produced in Court tomorrow. He may however be kept in Delhi."

2. Judicial remand of Shri Raj Narain has been granted upto 28-8-70 by the City Magistrate and Magistrate 1st Class, Lucknow, vide enclosure copy of the order dated 21-8-70. In other words his judicial remand expires today. You are, therefore, requested kindly to intimate whether Shri Raj Narain is to be kept in Delhi Jail after 28-8-70 as per your orders or his further judicial remand is to be taken from the said Court.

Clarification sought may kindly be given today per bearer.

Yours faithfully,"

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The Court, thereupon, made the following order :

"It has been represented to us by the Superintendent of Jail that Mr. Raj Narain's remand expires at midnight and that as he has

been ordered to be kept in Delhi, it would be necessary for us to say in whose custody and under whose orders he has to be detained. A similar situation had arisen in the case of Mr. Madhu Limaye when his remand expired and, he became a free man, because we could not keep him under our orders in detention beyond the period originally fixed by the Magistrate. The same situation has arisen now and we can only make this order that he shall be remanded back to the custody to which he belongs and that he may be taken to U.P. if so desired, to be produced before us on the next date of hearing to be fixed in this case. If the fresh remand order is not received by the Superintendent of the Jail by midnight, the petitioner shall not be detained as directed by this Court, and he shall be set at liberty at midnight."

The, same day a wireless message was received by the Superintendent, Tihar Central Jail from the District Magistrate Lucknow. It stated :

"Habeas Corpus Petition No. 315/70 Date, 28-3-70. Shri Raj Narain M.P. remanded to further jail custody upto September 1st (1-9-70) under orders of C.M. Lucknow dated 28-8-70. Note in the Jail Warrant and inform him."

The following day the message was corrected to read September tenth instead of September first. The City Magistrate Lucknow also telegraphed to the Superintendent, Tihar Central Jail the following message:

". . . Reference Habeas Corpus Petition No. 315/ 70 dated August 28, 1970 Tiem (sic) PM Shri Raj Narain M.P. remanded to further jail custody upto Sept. Ten Nineteen Seventy. Note in the jail warrant and inform him."

simultaneously this Court was informed by District Magistrate that remand of Mr. Raj Narain M.P. was extended to September 10, 1970 by the City Magistrate.

Mr. Rajnarain made an application in the nature of a habeas corpus petition stating that the remand orders were communicated to him on the morning of the 29th and therefore his detention after midnight of 28th was illegal and unsupported by any order

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of remand. Further, that in any case, as he was remanded behind his back, his remand is illegal and he is entitled to be released. The question is whether the custody of Mr. Raj Narain became illegal at midnight of August 28, 1970. In our opinion it did not.

Mr. Raj Narain's counsel relied upon the case reported in *In re Venkataraman*, (1) where it was held that an illegality was committed by a Magistrate in remanding a prisoner without having him before him and asking him whether he wished anybody to represent him and giving him an opportunity of showing cause why he should not be further remanded. The ruling restates, what was said in an old case reported in *Anonymous* (2) where it was ruled that just as commitment required the presence of a prisoner, so did recommitment. The earlier case contains no discussion and its opinion stated on a reference by the Magistrate.

In *Ram Narain Singh v. State of Delhi* (1) it was ruled that an adjournment required an order in writing and so did an order of remand. The case dealt with an adjournment under s. 344 of the Code of Criminal Procedure and as there was

nothing to show that the Magistrate had made an order remanding the prisoner to custody, the detention was held to have become illegal. In that case the last order by the Magistrate adjourning the case, was made on 9th March, 1953 but there was no order of remand. The only order was an endorsement on the warrant 'Remanded to Judicial (sic) till 11th March 1953'. This warrant was not produced earlier and there was nothing on the court's record to show an order of remand. All that the Court had done was to adjourn the case. This Court refused to take notice of the warrant produced after the Court rose for the day because it was not produced earlier and there was no order on the Court's record showing a remand. The detenues were, therefore set at liberty.

The facts here are different from the case cited. Mr. Raj Narain did not want bail or seek to appear by counsel. He complained of nothing except his detention which he described as illegal for the technical reason that he was not produced before the Magistrate. If he wanted bail he could have asked us as he was in our custody. There is nothing in the law which required his personal presence before the Magistrate because that is a rule of caution for Magistrates before granting remands at the instance of the police. However, even if it be desirable for the Magistrates to have the prisoner produced before them, when they recommit him to further custody, a Magistrate can act only as the circumstances permit. Where the prisoner's custody is transferred to a

(1) 49 Cr. L.J. 41.

(3) [1953] S.C.R. 652.

(2) Weir 209.

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superior Court such as this the Magistrate can only adjourn the case at the same time extending the period of remand. It is for this Court to see that the custody by it continues under proper orders and if this Court is satisfied that the prisoner is in proper custody under a proper order of remand,, the prisoner will not be released. This Court does not order detention and cannot extend the remand. Its custody is coterminus with the remand ordered by the Magistrate. If the Magistrate extends the period of remand and communicates the order to the person having the immediate custody of the prisoner with intimation to this Court and the prisoner, nothing more is expected of him. The object of production of the prisoner before the Magistrate is more than answered by his production before this Court because the prisoner has the protection of his interests transferred from the Magistrate to this Court. There is no reason why we should order the release of Mr. Raj Narain when we are satisfied that he is held on a proper remand by a Magistrate and there are no circumstances justifying release by us. To expect the Magistrate to do more under s. 344 of the Code in such circumstances is to expect an impossibility from him and the law does not contemplate an impossibility. Indeed, similarly courts trying cases may find it necessary to order a remand in the absence of an accused, e.g. when an accused is so seriously ill that the trial has to be adjourned and he cannot be brought to court and in such case the order made without production of accused in court will not be invalid.

Prisoners, who are under trial, are brought before this Court on rule nisi and are kept in custody of this Court. This is a transferred custody on behalf of the Magistrate. The Magistrate cannot recall the prisoner from our custody by his order and he is only required to intimate to the jail

authorities, the prisoner and this Court that the original remand has been extended while adjourning the case. This is sufficient compliance with the requirements of the law in such special circumstances.

It was for these reasons that we held the present custody of Mr. Raj Narain pending the decision of his main petition to be proper and rejected the application for his instant release.

Vaidialingam J. We regret our inability to agree With the order just pronounced by the learned Chief Justice with regard to the validity of the remand order dated August 28, 1970, in question. We now proceed to give our reasons for such disagreement.

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In this petition for Habeas Corpus the petitioner prays for immediate release on the ground that the remand order dated August 28, 1970, passed by the City Magistrate, Lucknow is invalid and that his detention after the midnight of the 28th August, 1970, is illegal. He further attacks his detention on the ground that it is contrary to the directions given by this Court on August 28, 1970, in Writ Petition No. 315 of 1970.

The circumstances leading to the filing of the present petition may be briefly stated thus : The petitioner has already filed a writ petition No. 315 of 1970 for Habeas Corpus challenging his arrest on August 20, 1970 and his detention in the District Jail, Lucknow. He raised various grounds against the legality of his arrest and detention and prayed for being released forthwith. He also prayed for striking down certain sections of the Criminal Procedure Code as violative of the Constitution. The City Magistrate, Lucknow in his counter-affidavit has stated that he had issued the warrant for the arrest of the petitioner under ss. 107 and 112 Cr.P.C. and that when the petitioner was produced before him on August 20, 1970 at 9 A.M. he orally explained to the petitioner the contents of the notice under s. 112 Cr.P.C., a copy of which had already been served on him; and that the petitioner filed a lengthy reply thereto. It is further stated by the City Magistrate that as the petitioner did not make any application for being released on bail during pendency of the inquiry, he was remanded to jail. The City Magistrate has also maintained that the proceedings initiated against the petitioner are legal and valid and the provisions of the Criminal Procedure Code challenged by the petitioner are also valid. The contentions raised by the parties in this writ petition are pending adjudication by this Court. But it may be stated that the order of remand passed on August 20, 1970 was effective till August 28, 1970.

In Writ Petition No. 315 of 1970, the petitioner impleaded the State of U.P., the District Magistrate, Lucknow, the Superintendent of District Jail, Lucknow and the Union of India as respondents. On August 21, 1970 when the said writ petition came up for preliminary hearing, this Court directed "issue of rule nisi returnable on August 25, 1970" and further ordered that the petitioner was to be produced before the Court on that day. The petitioner accordingly was transferred from the District Jail, Lucknow, to the Central Jail, New Delhi, for being produced before this Court. He was produced in this Court on the 25th, 26th and 27th August, 1970. On August 27, 1970, this Court passed the following order:

"Shri Raj Narain's petition is not to be listed tomorrow and he is not to be produced in Court tomorrow. He may, however, be kept in

Delhi."

235 Sup. C.I./71

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Though the State of Uttar Pradesh appeared before us through Counsel on August 27, 1970, when the above order was passed, it was not brought to our notice that the remand order passed by the City Magistrate, Lucknow, on August 20, 1970 was expiring by midnight of August 28, 1970 nor were any directions in that connection sought for from this Court at that time. It was only on August 28, 1970, at 4 P.M. when the Court was about to rise for the day that a letter of the Superintendent, Central Jail, New Delhi of the same date, received by the Assistant Registrar of this Court, seeking directions regarding detention of the petitioner, was brought to our notice. That letter has been set out by the learned Chief Justice in his order. It is clear from that letter that the judicial remand of the petitioner ordered by the City Magistrate, Lucknow would expire on that day and orders were solicited whether the petitioner is to be detained further under orders of this Court or whether his further judicial remand is to be taken from the City Magistrate, Lucknow.

When a person under detention has come with a grievance that his detention is illegal and invalid and seeks a writ of Habeas Corpus and is produced before this Court, the prisoner comes directly under the custody of this Court. But no orders would be passed by this Court which would have the effect of detaining, a prisoner beyond the period of detention already ordered and which order is complained off. In an appropriate case, during the operation of the detention order under challenge this Court may release the prisoner on bail or otherwise either with or without conditions, pending adjudication of his grievance by this Court.

On the letter of August 28, 1970, of the Superintendent, Central Jail, New Delhi, this Court made an order on the same day which has been set out in full in the order of the learned Chief Justice. From that order the following points emerge:

- (i) Mr. Rai Narain was remanded to the custody to which he belongs, namely, the U.P. authorities;
- (ii) The U.P. authorities were at liberty to take the petitioner to Lucknow pending fixation of the further date for the hearing of his writ petition.
- (iii) If the Superintendent of the Central Jail, New Delhi, does not receive the fresh order of remand by midnight of August 28, 1970, the petitioner should not be detained as directed by this Court and that he should be set at liberty at midnight.

At this stage it may be stated that if the respondents in Writ Petition No. 315 of 1970, who were represented by counsel, had

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brought to our notice on August 27, 1970 (when this Writ Petition was adjourned to a later date) that the remand order of the City Magistrate was expiring on August 28, 1970 and had sought directions, this Court would have, on that date itself, passed an order similar to the one, which was actually passed in the evening of August 28, 1970. In that case the respondents would have had ample opportunity to take the petitioner to Lucknow, for producing him before the City Magistrate for a further order of remand, if he

considered it necessary.

However, the position is that the petitioner was not taken to Lucknow nor produced before the City Magistrate. Instead, he was kept in the Central Jail, New Delhi. The City Magistrate, Lucknow, passed two orders, viz., one on August 28, 1970 and another on August 29, 1970. Both the orders have been quoted in the order of the learned Chief Justice. By the first order, which is stated to have been communicated by wireless message, the petitioner was remanded to further jail custody upto September 1, 1970. By the second order which was communicated by telegram, he was remanded to further jail custody upto September 10, 1970.

The petitioner has in the present writ petition prayed for the issue of a writ of Habeas Corpus directing his release on the ground that his further detention is illegal. He has attacked his detention after midnight of August 28, 1970 as illegal and contrary to the directions given by this Court. He has stated that no orders of remand were communicated to him before midnight of August 28, 1970 and that the two remand orders are quite inconsistent with each other. The more serious ground of challenge in respect of the remand orders is that they are illegal as they have been passed by the City Magistrate, without his being produced before the City Magistrate and behind his back.

On August 31, 1970, this Court issued a notice to the Superintendent, Central Jail, New Delhi, to produce before the Court on September 1, 1970, the warrants under which "Mr. Raj Narain is presently detained." On September 1, 1970, on behalf of the jail authorities, the wireless message received on August 28, 1970 and the telegram of August 29, 1970 were brought to our notice.

As we were inclined to hold that the remand orders had not been passed according to law and in consequence the further detention of the petitioner was illegal, this Court passed on the same day the following order:

"By majority, we hold that the custody of Mr. Raj Narain is valid and that he is not entitled to release on his fresh petition. We shall give our reasons later."

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The petitioner's grievance that the two orders passed by the City Magistrate on 28-th and 29th August, 1970 are inconsistent, has considerable force. It is strange that a remand order extending the petitioner's custody upto September 1, 1970, was followed within hours by another order extending it to a still further period upto September 10, 1970. There is nothing to show why this became necessary. Prima facie, it looks as if the Magistrate had not judicially applied his mind on the question of how long the petitioner's custody should be extended. Prima facie, it would also, show that the magistrate was passing an order of remand in a mechanical manner without even considering the period for which his remand orders are to have effect. This certainly shows non-application of judicial mind even where the personal liberty of a citizen is involved.

But we are not prepared to rest our decision on the above circumstance alone. The petitioner has further stated in his petition that he received intimation only in the morning of August 29, 1970 about the order of remand passed by the City Magistrate, Lucknow.

If the City Magistrate was in law entitled to pass an order of remand on August 28, 1970, without the person detained being produced before him, the mere fact that it was made known to the petitioner in the morning of August 29, 1970 may not make the order of detention invalid. But we are upholding the contention of

the petitioner that the City Magistrate had no power to pass an order of remand without the person in detention being produced before him, and as such the order passed on August 28, 1970 is illegal, irrespective of the time as to when it was made known to the petitioner.

Now coming to the question of the legality of the order passed by the Magistrate remanding the petitioner in detention, without his being produced before him, it is necessary to refer to certain provisions of the Criminal Procedure Code. Such a question came up before this Court in *Tlaangdingliana v. State of Assam*(1) but was not decided as it was not necessary in that case to do so.

The Criminal Procedure Code contemplates the period for which a person can be detained in custody prior to the commencement of an inquiry or trial and that is broadly divided into two stages. The first stage is the maximum period of 24 hours. (See Sec. 61 Cr.P.C.) For this period the Police have the power to detain a person during investigation. Under Art. 22(2) of the Constitution, however, every person who is arrested and detained

(1) W.P. No. 171 of 1969 decided on Sept. 25.1969.

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in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time mentioned therein and no such person shall be detained in custody beyond the said period without the authority of the magistrate. If the investigation cannot be completed within 24 hours, the person arrested and detained in custody must be forwarded to the nearest magistrate as provided under s. 167(1) Cr.P.C. Under s. 167(2) when, accused person is so forwarded, the magistrate, whether he has or has no jurisdiction to try the accused may authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days in the whole. This is the second stage of detention for 15 days. If the magistrate to whom the accused has been forwarded has not jurisdiction to try the case or commit it for trial, and if he considers further detention unnecessary, that magistrate has to forward the accused magistrate having such jurisdiction. Under s. 167(3) the magistrate authorising detention in the custody of the Police is bound to record his reasons for so doing.

But the fact to be noted in s. 167(2) is, that the accused who is suspected or alleged to have committed an offence and who has to be tried by a court has to be forwarded to the nearest magistrate whether he has jurisdiction to try the case or not. For the purpose of enabling the Police to complete the investigation, the magistrate before whom the accused is so be produced has got power to authorise the detention of the accused for the maximum period mentioned therein. If the aforesaid magistrate considers further detention unnecessary, the accused has to be forwarded to the magistrate having jurisdiction. Before both the magistrates referred to in this sub-section, production of the accused is essential. And this is the position in respect of a person against whom the commission of an offence is alleged.

It may happen that the 15 days detention ordered under s. 167(2) is not found sufficient for completing the investigation. It could not have been contemplated by the Legislature that under such circumstances the arrested person must be released. Therefore it must have made provisions for continuing the arrested person's detention after 15 days in suitable cases and there is no provision permitting further remand barring that contained in s. 344 Cr. P. C. We have already referred to the fact that the

City Magistrate has in his counter-affidavit in writ Petition No. 315 of 190 stated that the petitioner did not offer any bail during the pendency of the inquiry in which case s. 344 squarely applies. Section 170 Cr.P.C. also refers to the accused under custody being forwarded to a magistrate empowered to take cognisance of the offence upon a police report. This section

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also, insists upon the production of the accused before the magistrate.

A remand under S. 344 Cr.P.C. is to be distinguished from a remand under s. 167(2) Cr.P.C. Section 344 is more general than s. 167(2). But s. 344 itself contains the limitations for passing an order of remand under that provision. Section 344 gives power to the court to postpone or adjourn the inquiry or trial under the circumstances and in the manner indicated therein. The first proviso to s. 344 states that no magistrate shall remand an accused Person to custody under that section for a term exceeding 15 days at a time. The accused is entitled to participate, in the inquiry or trial and he will be present before the court concerned and it is in his presence that the order of remand under the first proviso will be made by the Court or magistrate concerned. The accused being present at the inquiry or trial before a magistrate or court, in our opinion, it is implicit in s. 344 that the order of remand under the first proviso has to be made in his presence.

The matter can be considered from another aspect. We have already stated that even in respect of an accused who is alleged to have committed an offence and with reference to which offence investigation is being conducted by the police, the production of the accused before the magistrates mentioned in s. 167(2) Cr.P.C. is absolutely essential for the purpose of the police obtaining the necessary orders for detaining the accused, beyond the period of 24 hours referred to in s. 61 Cr.P.C. Under s. 344 Cr.P.C., which deals with inquiry or trial in respect of an offence alleged to have been committed by an accused, the remand order under the proviso is to be passed in the presence of the accused. In this case even according to the averments made by the City Magistrate in his counter-affidavit in Writ Petition No. 315 of 1970, the petitioner had been arrested on the basis of a warrant issued by him under ss. 107 and 112 Cr.P.C. and that the petitioner did not offer to be released on bail pending- the inquiry. A reading of s. 107 Cr.P.C. will clearly show that the inquiry referred to by the City Magistrate with reference to the petitioner is not in respect of an offence alleged to have been committed already, but is only for the purpose of deciding whether action is to be taken for prevention of the offence referred to therein. When an accused who is alleged to have committed a crime has to be produced before the magistrate when an order of remand is passed under s. 344 Cr.P.C., in our opinion, it stands to reason that a person who has not committed any offence but is sought to be proceeded against under Chapter VIII Cr.P.C. and is proposed to be detained, must be before

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the court at the time when the latter passes an order of remand under s. 344 Cr.P.C.

We will now refer to the case law on this aspect., In 1867 2 Weirs 409 the Madras High Court had to answer a reference made by a magistrate whether a person has to be placed before a magistrate on each occasion of fresh remand being given. The names of the parties are not given in the

Report. In High Court dated June 10, 1867 it is stated as follows :

"The High Court observe that to remand is to recommit to custody and that a magisterial commitment requiring the presence of the prisoner, the recommitment of the prisoner also requires that presence."

This decision was given under s. 344 of the Criminal Procedure Code as it then stood.

In *Crown v. Shera and others*(1) it was held that it was illegal to remand person on the application of the police, when the prisoner is not produced in Court.

In *Re. M. R. Venkataraman and others*(2) a Division Bench of the Madras High Court had to consider the legality of a remand order passed by the magistrate under ss. 167 and 344 Cr.P.C. without the prisoners having been produced before him. In dealing with this question the High Court observes at page 281 as follows :

"..... it does seem certain that an illegality was committed by the Magistrate in issuing an order of remand without having the prisoners produced before him and asking them whether they wished anybody to represent their cause and giving them an opportunity of showing cause why they should not be further remanded. We trust that the Sub-Magistrate issued this order through oversight and because as he later said, the prisoners were at Trichinopoly and he did not have much notice that a request for a further remand would be made. However that may be, we agree with the learned Counsel for the petitioners that an illegality involving a breach of the provisions of the Criminal Procedure Code was committed; and we trust that our order will serve as a warning to the Magistrate not to re-peat this illegality."

In *Ram Narayan Singh v. The State of Delhi and ors.* (3) this Court had to deal with the validity of the detention of an

(1) 1867 Punjab Record-Judicial 72.

(3) [1953] S.C.R. 652.

(2) I.L.R. [1948] Madras 279.

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accused. Even at the outset we may state that in that decision, this Court was dealing with a case, where no order of the magistrate remanding the accused to custody was placed before this Court. Therefore, on facts that case stands on a different footing, but the principle laid down by that decision, in our opinion, is apposite. At page 654 this Court observes as follows :

"This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law."

It will be noted that this Court has emphasised that when the personal liberty of a person is sought to be restricted or curtailed, rules of the law, as well as the forms must be scrupulously observed.

More recently the Delhi High Court in the decision reported in *Ram Rishi Anal v. Delhi Administration, Delhi and others*(3) had to deal with the legality of an order of remand passed by the magistrates without the accused being produced before them. There were certain other illegalities

pointed out in that judgment. The learned Chief Justice has held in that decision that passing of remand order behind the back of an accused, is illegal. In the judgment of the Delhi High Court there is no reference to the decision cited by us earlier except the decision of this Court in Ram Narain Singh v. The State of Delhi and others(4).

From the decision of this Court, referred to above, it is clear that the authorities seeking to curtail the liberty of a subject must strictly and scrupulously observe the forms and rules of the law. The various provisions of the Criminal Procedure Code, referred to by us, as also the decisions quoted above lead to the conclusion that the accused must be present before the magistrate or court when an order of remand is passed. In fact the decisions quoted by us clearly lay down that an order of remand passed without the accused being produced, is illegal. We are in agreement with those decisions.

It stands to reason that an order of remand will have to be passed in the presence of the accused. Otherwise the position will be that a magistrate or court will be passing orders of remand mechanically without having heard the accused for a considerably long time. If the accused is before the magistrate when a

(1) 1967 Delhi Law Times,, 126.

(2) [1953] S.C.R. 652.

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remand order is being passed, he can make representations that no remand order should be passed and also oppose any move for a further remand. For instance he may rely upon the inordinate delay that is being caused by the prosecution in the matter and he can attempt to satisfy the court that no further remand should be allowed. Again it may be that an accused, on a former occasion may have declined to execute a bond for getting himself released; but on a later occasion when a further remand is being considered, the accused may have reconsidered the position and may be willing to execute bond, in which case a remand order will be totally unnecessary. The fact that ,the person concerned does not desire to be released on bail or that he can make written representations to the magistrate are, in our opinion, beside the point. For instance, in cases where a person is sought to be proceeded against under Chapter Vill of the Criminal Procedure Code, it would 'be open to him to represent that circumstances have materially changed and a further remand has become unnecessary. Such an opportunity to make a representation is denied to a person concerned by his not being produced before the magistrate. As the magistrate has to apply his judicial mind, he himself can take note of all relevant circumstances when the person detained is produced before him and decide whether a further remand is necessary. All these opportunities will be denied to an accused person if he is not produced before the magistrate or the court when orders' of remand are being passed.

It is no answer that the petitioner was brought to New Delhi under the orders of this Court and hence the City Magistrate had to pass the remand order at Lucknow. We have already mentioned that no representation was made nor any directions asked on August 27, 1970, on behalf of the respondents when Writ Petition No. 315 of 1970 was adjourned. Under orders of August 28, 1970" this Court released the petitioner from its custody and restored him to the original custody and even permitted him to be taken to Lucknow. pending fixation of a fresh date of bearing of his case. The Uttar Pradesh authorities concerned did not avail themselves of the

opportunity to take him back to Lucknow for being produced before the magistrate concerned. On the other hand, they were content to have an order of remand of the prisoner in New Delhi passed by the magistrate sitting in Lucknow. Such an order, as we have held, is illegal and hence the detention of the petitioner on the authority of such an illegal order of remand is also illegal. Such a situation has 'been brought about by the Uttar Pradesh authorities for which they have to thank themselves.

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Li the result we hold that the orders of remand dated 28th and 29th August, 1970 passed by the City Magistrate, Lucknow, are illegal. We further hold that the detention of the petitioner in the Central Jail, New Delhi, after the midnight of August 28, 1970 on the authority of the illegal orders of remand is also illegal. In consequence the petitioner should be set at liberty forthwith. The writ petition is allowed.

G.C.

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