

**IN RE THE DETENTION OF S. SIVARASA & ORS.**

HIGH COURT MALAYA, KUALA LUMPUR

K.C. VOHRAH J

[CRIMINAL REVISION NO: 43-25-96]

20 NOVEMBER 1996

**CRIMINAL PROCEDURE:** Remand order - Legality - Non-production of Investigation Diary before Magistrate - Whether fatal - Sections 117 and 119 Criminal Procedure Code - Whether required strict compliance.

**CRIMINAL PROCEDURE:** Remand order - Further detention of suspects - Duty of Court - Reasons given for detention - Whether subject to judicial scrutiny - Whether Magistrate to satisfy himself as to necessity of order - Criminal Procedure Code ss. 117, 119 - Indian Criminal Procedure Code s. 167.

This was an application for a revision of an omnibus remand order, wherefore the learned Magistrate extended the detention of the 10 persons herein on the grounds that she was satisfied with the reasons given by the police, and the Investigation Diary as submitted to her. The facts showed that in their said application, the police, whilst making a reference to s. 27A(i)(c) of the Police Act 1967, had not condescended to details as to the reasons for the respective arrests, or the circumstances that made it necessary to extend the remand of each of the persons. The reasons forwarded, rather, were only that they had arrested the 10 suspects together with some 57 others, and so needed more time to complete the investigation. The facts further showed that the Investigation Diary referred to and relied upon by the learned Magistrate, turned out to be 3 sheets of typewritten paper entitled "Pergerakan Soalsiasat Tahanan" or "Suspects' Interrogation Movement", showing a timetable of the times the 10 suspects were taken out and brought in. Based on these background facts, the applicants contended that the remand order did not comply with the strict provisions of s. 117 Criminal Procedure Code and was therefore fatally defective.

**Held:**

[1] The learned Magistrate had not appreciated the strict nature of the provisions of s. 117 of the Criminal Procedure Code and the case law on the matter.

[2] The application is an omnibus application for the detention of 10 named persons and there is no condescension to details as to what each of them was arrested for and why it was necessary to extend the remand of each of them. In these circumstances, the reference to s. 27A(1)(c) of the Police Act is of no help.

- a* [3] Section 117 CPC requires “a copy of the entries in the diary hereinafter described” relating to the case be transmitted to the Magistrate when producing a suspect before him. The duty of a police officer to transmit to a Magistrate a copy of the entries in the diary prescribed under s. 119 is couched in clear mandatory terms under s. 117(i) of the CPC.
- b* [4] By no stretch of the imagination can the time table listed in the three sheets of paper be considered as copies of the entries as prescribed under s. 119 CPC. The three sheets of paper submitted to the Magistrate clearly do not contain the prescribed copies “of entries in the diary”, and certainly do not relate to “the day to day” proceedings of the officer making the police investigation which were entered into his diary.
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- [5] There was thus in the instant case no copies of the entries in the diary transmitted to the Magistrate. This failure was fatal to the application before the Magistrate, as it meant that the Magistrate did not have the prescribed material, especially that referred to in s. 119(i)(d), to act upon in her judicial enquiry whether to order further remand. The Magistrate had no jurisdiction to make the order of remand in question.
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- [6] Section 117 CPC requires that there be “grounds for believing that the accusation or information” is well founded for the police officer to make his application for detention. These grounds are subject to judicial scrutiny. This being the case, it follows that a Magistrate ought not give a remand order without his satisfying himself as to its necessity and that the period of remand ought also to be restricted to the necessities of the case. If the necessities of the case for remand or further remand are not shown
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- f* no remand order should be made.
- [7] The three paragraphs in the application herein set out vague and general statements from which it is not possible to make any coherent inference. Even if one were to assume that a copy of the entries of the diary had been produced to the Magistrate, there was nothing in the application that showed a basis for the arrest and detention of each of the 10 persons be it even on a “reasonable suspicion”.
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- [8] The Magistrate’s reasons for making the order were not in compliance with the strict requirements of s. 117. The order made by her was clearly misconceived and the omnibus order, therefore, ought to be set aside.
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*[Remand order set aside]*

**Cases referred to:**

*Saul Hamid v. PP [1987] 2 MLJ 736 (refd)*

*i Polis DiRaja Malaysia v. Keong Mei Cheng Audrey [1994] 3 CLJ 362 (foll)*

*Re Burla Jayarami & Others [1957] Cr. LJ 1062 (refd)* *a*  
*Nabachandrar v. Manipur Administration AIR [1964] Man 39 (foll)*  
*Krishna v. Emperor AIR [1931] Lah 99 (foll)*  
*Shaaban & Ors. & Chong Fook Kam & Anor. [1969] 2 MLJ 219 (refd)*  
*Hariharamand v. The Jailor [1954] Cr. LJ 1317 (cit)*

**Legislation referred to:** *b*  
Criminal Procedure Code, ss. 117, (1), (3), (i), 119(1)(d), 323  
Criminal Procedure Code (India), s. 167  
Evidence Act 1950, ss. 160, 259  
Federal Constitutions, Art. 5(4)  
Police Act 1967, s. 27A(1)(c) *c*

*For the Public Prosecutor - Azahar Mohamed DPP (Mohd Yusof Zainal Abidin with him)*  
*For the applicants - Sulaiman Abudullah (Dominic Puthucheary, M. Puravalen, R. Kesavan & Malik Intiaz with him)*

**JUDGMENT** *d*

**K.C. Vohrah J:**

On 14 November 1996 acting in revision I set aside the remand order made by a Magistrate under s. 117 of the Criminal Procedure Code ('CPC') where she allowed the detention of ten persons by the police for another three days. I gave some short reasons for setting aside the remand order and I now give my written grounds for making such an order. *e*

The hearing of the case was as a result of an urgent application made on the afternoon of 13 November 1996 at 3.15p.m. for the order of the Magistrate made that afternoon to be revised by the High Court under s. 323 of the CPC. The complaint was that the omnibus remand order made on the ten persons by the Magistrate was not in compliance with s. 117 of the CPC. *f*

I perused the record of proceedings and the documents which the Magistrate purported to rely on when she made the order of detention on ten persons that afternoon. *g*

It is unfortunate that the learned Magistrate had not appreciated the strict nature of the provisions of s. 117 of the Criminal Procedure Code (CPC) and the case law on the matter. *h*

The arguments on law in open Court on 14 November 1996 related purely to the record of proceedings and the documents attached to the record.

***Reasons of Magistrate***

Under s. 117(3) of the CPC the Magistrate is under a mandatory duty to give her reasons for making the remand order. At the end of her notes of proceedings, this is what she stated: *i*

- a* I am satisfied with the reasons as appear in the application and also in the investigation diary that was given. As a result I allow all suspects (ten persons) to be detained for three days under s. 117 Criminal Procedure Code starting from today.

*Application before the Magistrate*

- b* The application referred to by the Magistrate is a typewritten application addressed to the Magistrate at Kuala Lumpur requesting for an extension of the detention period under s. 117 CPC in respect of ten named persons. Against these names is a typewritten note "Section 27(1)(c) Akta Polis 1967." All
- c* Counsel agree that the section should read as s. 27A(1)(c) of the Police Act 1967.

- d* What were the reasons that the Magistrate was satisfied with? The "reasons" in the application are set out immediately after the list of ten names under the heading "Alasan-alasan" ("Reasons"). There are three paragraphs. The certified translation of these three paragraphs reads as follows:

On 9 November 1996 a demonstration took place at Asia Hotel, Jalan Haji Hussin, Kuala Lumpur. 60 people involved were arrested by the police. The suspects were remanded under s. 117 CPC from 10 November 1996 till 13 November 1996.

- e* During the period the police were unable to complete their investigation due to several reasons such as:

1. Many people were arrested. Police also arrested seven others making a total of 67. A large number of arrests and the short period of detention was insufficient for the police to continue to investigate.

- f* 2. Two groups were involved in the incident, i.e. the promoter of the conference, the NGO, and those who opposed it (Barisan Bertindak Rakyat Malaysia).

A thorough investigation to co-ordinate and to identify them is very important and needs to be synchronised.

- g* 3. Investigation until now has not been able to realise the true motive and it is felt that the suspects above are the most qualified people to help the police in solving this problem.

- h* 4. The police are having difficulties as the suspects had refused as stated above to give full co-operation in the investigation. The police had made every effort to complete this investigation whereas until today the number of 57 witnesses had been released on police bail after they had given their co-operation in this investigation.

- i* 5. The police are of the opinion that the co-operation of the above suspects is very badly needed in order to identify the persons responsible as the

puppet-master and the persons behind those responsible for the outbreak of this demonstration. a

Based on the reasons above, I apply that the remand on all suspects named above i.e. the ten of them be extended under s. 117 of the CPC for another ten days from 13 November 1996 until 22 November 1996.

It will be noted that the application is an omnibus application for the detention of ten named persons and there is no condescension to details as to what each of them was arrested for and why it was necessary to extend the remand of each of them and the reference to s. 27A(1)(c) in the margin is of no help. I will say more about the nature of the application later. b

***The Investigation Diary*** c

Section 117 requires, “a copy of the entries in the diary hereinafter prescribed” relating to the case to be transmitted to the Magistrate when producing a suspect before him. d

The nature of the diary is prescribed under s. 119(i) of the CPC which reads:

**Diary of proceedings in investigation.**

119(1) Every police officer making a police investigation under this chapter shall day by day enter his proceedings in the investigation in a diary setting forth: e

- (a) the time at which the order, if any, for investigation reached him;
- (b) the time at which he began and closed the investigation;
- (c) the place or places visited by him; and f
- (d) a statement of the circumstances ascertained through his investigation.

Three sheets of typewritten paper with the heading “Pergerakan Soalsiasat Tahanan” (“Suspects’ Interrogation Movement”) and showing a timetable of the times the ten suspects were taken out (‘Keluar’) and brought in (‘Masuk’), presumably in reference to their being taken out from and being sent back to the cells where they were detained, appeared in the record of proceedings. These papers were apparently shown to the Magistrate and it was the view of DPP Azahar that these papers were the so-called Investigation Diary and referred to in the Magistrate’s notes. I think that is what the Magistrate probably had in mind. But these three sheets of paper do not contain copies “of entries in the diary” prescribed under s. 119 and certainly do not relate to “the day by day” proceedings of the officer making the police investigation which were entered into his diary and by no stretch of the imagination, if he or other officers had entered any, can the time table listed in the papers be considered as copies of the entries prescribed under s. 119. g

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- a* In these modern times with photocopying or photostating machines being readily available it is hard to see why copies of the entries cannot be made and transmitted to the Magistrate. As was pointed out there is no fear of premature disclosure to the defence as the arrested person cannot call for or inspect the diary unless the police officer concerned refers to it for purposes of
- b* ss. 259 or 160 of the Evidence Act 1950, in which case, only such parts of it as are referred to shall be shown to the arrested person. This is so provided in s. 119(i). As was remarked by Edgar Joseph Jr. J (as he then was) in *Saul Hamid v. PP* [1987] 2 MLJ 736 at 739, after reference to s. 119:

- c* Consequently, subject to the very limited exceptions mentioned, neither the arrested person nor his Counsel (if present) would have any means of knowing of the entries in the diary unless, of course, the Magistrate or the police officer makes disclosure thereof during the proceedings – events I would regard as most unlikely.

- d* It has to be noted that the duty of a police officer to transmit to a Magistrate a copy of the entries in the diary prescribed under s. 119 is couched in clear mandatory terms under s. 117(i) which reads:

**Procedure where investigation cannot be completed within twenty-four hours.**

- e* 117(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 s. 28 and there are grounds for believing that the accusation or information is well-founded the police officer making the investigation shall forthwith transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such Magistrate.

- f* In *Polis Di Raja Malaysia v. Keong Mei Cheng Audrey* [1994] 3 CLJ 362 at p. 365; [1994] 3 MLJ 296 at 303 Syed Ahmad Idid J commented on the requirement under s. 117(i) after discussing the format of the diary and the details needed therein thus:

- g* ... These details provide the true proceedings in the investigation in compliance with what is required by s. 119(1) of the CPC. A copy of this is what the officer must supply the Magistrate under s. 117. This to obviate the necessity of the Magistrate having to examine the complainant and recording the examination (see Ch. XV and s. 133; compare s. 117(3) with s. 135(2) of the CPC). So I have at this stage to say that the police in this case did not transmit to the Magistrate a copy of the proper entries in the diary. This goes against the requirements of s. 117. How then could the Magistrate (or Registrar in our case) make any decision to continue detention of the respondent? As a matter of law, not only must the diary be in the form specified by s. 119 of the CPC but it must also be replete with grounds indicating that the information against the accused (or respondent)
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- i* is well-founded ... .

In this case no copy of the entries in the diary was transmitted to the Magistrate. The failure to transmit to the Magistrate a copy of the entries was fatal to the application before the Magistrate as it meant that the Magistrate did not have the prescribed material (especially that referred to in s. 119(i)(d)) to act upon in her judicial enquiry whether to order further remand (see *In re Burla Jayarami & Others* [1957] Cr. LJ 1062 in respect of the equipollent section, s. 167 of the Indian Criminal Procedure Code). She had no jurisdiction to make the order of remand.

Commenting on s. 167 of the Indian Criminal Procedure Code this is what Tirumalpad JC had to say in *Nabachandrar v. Manipur Administration* AIR [1964] Man 39 at 45:

This Court has given instructions in many judgments to the police and to the Magistrates that the provisions of s. 167 Cr. P.C. should be scrupulously observed, that the copy of the police diary should be produced when the accused is brought to the Court, and that the Magistrate cannot remand the accused without satisfying himself that a remand was necessary on a perusal of the said diary. The learned advocate, who appeared for the petitioner stated that the decision of this Court, *Gaibidingpao Kabui v. Union Territory of Manipur*, AIR [1963] Manipur 12, was brought to the notice of the Magistrate in the course of the arguments in this case, in which in para. 13, this Court had pointed out that if the police do not transmit to the Court a copy of the entries in the diary relating to the case, to satisfy the Magistrate that there are grounds for believing that the accusation or information is well-founded, and that a remand is absolutely necessary for the purpose of investigation, the Magistrate has no jurisdiction to direct the detention of the arrested person ... .

I think it is apposite to set out what the learned Judge had to further state in order to prevent a lapse in performing a judicial duty arising from the thinking that the Magistrate's function is merely routine and cursory. The liberty of an individual after arrest is at stake and Article 5(4) of the Federal Constitution reposes an onerous judicial duty on a Magistrate to decide whether a person should be detained or detained further. The learned Judge reminds us:

... There is an impression among the police ... that the remand of an arrested person should be done by the Magistrate as a matter of course. The sooner this impression is got rid of, the better it will be. I wish to impress on all the Magistrates as well as on the police that it is the duty of the police to comply with the provisions of s. 167(1) Cr. PC and that the Magistrate should insist on such strict compliance and if the police do not satisfy the Magistrate with the documents that a remand was necessary, for the purpose of investigation, the Magistrate may release the accused.

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*a* **Grounds Subject to Judicial Scrutiny**

I need to deal further with s. 117 on other aspects of the case before me. Section 117 also requires that there be, “grounds for believing that the accusation or information” is well-founded for the police officer to make his application for detention. These grounds, needless to say, are subject to judicial scrutiny.

What is the accusation or information against each of the ten named persons? The three paragraphs in the application set out vague and general statements from which it is not possible to make any coherent inference.

*c* What is it each of the suspects was arrested for? For being a member of “demonstration” by the Barisan Bertindak Rakyat Malaysia mentioned in the opening paragraph and para. 2.2 under the heading “Alasan-alasan” or for being a member of the meeting of the NGO at Hotel Asia? There was nothing to show that either the demonstration or the meeting was banned by the Government. What was the offence or suspected offence each of the ten was arrested for? In other words why was there a need to detain each and every of the ten suspects? Why was there a need to detain each for a further period?

*e* It has to be stressed that a Magistrate ought not give a remand order in police custody without his satisfying himself as to its necessity and that the period of remand ought also to be restricted to the necessities of the case (see *Bal Krishna v. Emperor* AIR [1931] Lah 99). If the necessities of the case for remand or further remand are not shown no remand order should be made.

*f* I cannot anywhere see anything in the application, even if one were to assume that a copy of entries of the diary had been produced to the Magistrate, to show a basis for the arrest and detention of each of the ten persons be it even on a “reasonable suspicion” (see *Shaaban & Ors. and Chong Fook Kam & Anor.* [1969] 2 MLJ 219 at 221 on the test of “reasonable suspicion”).

*g* There was no first information report produced and there was no statement of the circumstances ascertained through the officer’s investigation (see s. 119(i)(d)). Whatever vague reasons shown on the application (which do not show any nexus between the suspects and a suspected offence or offences) for the continued detention of each of them are without any foundation.

*h* It will be noted that ss. 28 and 117 have been inserted into the CPC for a good reason, so that the detention by the police of a person beyond 24 hours after his arrest is not as a result of an Executive act but as a result of a judicial decision in consonance with Article 5(4) of the Federal Constitution (see also *Hariharanand v. The Jailor* [1954] Cr. LJ 1317 at 1321). It is

*i* unfortunate that the Magistrate did not advert to what was required of her

under s. 117. Her reasons for making the order were not in compliance with the strict requirements of s. 117. Admittedly the language of s. 117 is terse and brief but there is case law on it and the learned Magistrate perhaps did not appreciate the full import of the section. The order made by her was misconceived and I therefore set aside the omnibus order made by her.

Reported by W.A. Sharif

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