

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 24TH DAY OF MAY 2023 / 3RD JYAISHTA, 1945

CRL.MC NO. 1638 OF 2023

IN CRIME NO.262/2023 OF MARADU POLICE STATION

PETITIONER/1ST ACCUSED:

JOSEPH THOMAS,
AGED 56 YEARS,
S/O THOMAS, THEKKEPOLAYIL HOUSE,
HOUSE NO 51 OF 681 CC, THYKKOODAM,
VYTILA, ERNAKULAM DISTRICT,
PIN - 682019

BY ADVS.
SRI.T.N.SURESH
SRI.DHANUJA VETTATHU

RESPONDENT/COMPLAINANT:

- 1 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031
- 2 STATION HOUSE OFFICER,
MARADU POLICE STATION, P A ULLAHAN RD,
NEAR GOVT. VHSS, MARADU, KOCHI,
PIN - 682304

BY ADV PUBLIC PROSECUTOR
SRI.G SUDHEER,PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
24.05.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

CR

K.BABU, J.

Crl.M.C.No.1638 of 2023

Dated this the 24th day of May 2023

ORDER

The prayer in this Crl.M.C. is as follows:

“.... to direct the Judicial First Class Magistrate Court-VIII, Ernakulam, to positively consider the Annexure A4 surrender memo and Annexure A5 bail application filed by the petitioner/1st accused on a particular day that may be fixed by this Hon’ble Court.”

2. The petitioner is accused No.1 in Crime No.262/2023 of Maradu Police Station registered alleging offences punishable under Sections 451, 354, 323, 509 & 34 of IPC.

3. On 23.02.2023, the petitioner surrendered before the Judicial First Class Magistrate Court-VIII, Ernakulam, the Jurisdictional Court. He submitted a bail application along with a surrender memo. The bail application was numbered as Crl.M.P. No.862/2023. After hearing the learned counsel for the petitioner and the learned Assistant Public Prosecutor, the learned Magistrate refused permission to surrender before the Court. The learned Magistrate declined to consider the bail application moved by the petitioner, holding that the petitioner was not

permitted to be in the custody of the Court. The learned Magistrate orally directed the petitioner to appear before the SHO concerned.

4. The course adopted by the learned Magistrate is under challenge in this Crl.M.C.

5. This Court obtained a report from the Court below. The learned Magistrate submitted that the petitioner had filed a surrender memo and bail application. Number was assigned to the bail application. The learned Magistrate further stated that he suggested the petitioner to appear before the SHO. In the report, the learned Magistrate concluded that as the petitioner was not permitted to be in the custody of the Court, the bail application filed by him was not taken into consideration.

6. Heard the learned counsel for the petitioner, the learned Public Prosecutor, and Sri. John S. Ralph, the learned Amicus Curiae.

7. The learned counsel for the petitioner contended that the act of the learned Magistrate refusing permission to the petitioner to surrender when he submitted to its jurisdiction is illegal.

8. The learned Amicus Curiae submitted that the course adopted by the Court below was incorrect. The learned Amicus

Curiae further submitted, as per Sections 436 and 437 of the Cr.P.C., that a person accused of an offence is at liberty to surrender before the Magistrate or the Court concerned, and when a person surrenders before the Magistrate or the Court, the course to be adopted is either release him on bail or remand him to custody. The learned Amicus Curiae relied on **Niranjan Singh and Another v. Prabhakar Rajaram Kharote and Ors. [(1980) 2 SCC 559]**.

9. The learned Public Prosecutor submitted that the concern of the prosecution is only that the Police would not be deprived of getting the custody of the petitioner, if required, for the investigation.

10. The issue under consideration:

Can a Magistrate refuse permission to surrender to its jurisdiction to a person accused of an offence?

11. Chapter XXXIII of the Cr.P.C. deals with the Provisions as to Bail and Bonds, of which Sections 436 and 437 are relevant.

12. For convenience of reference, Sections 436 and 437 are extracted below:-

“436. In what cases bail to be taken. (1) When any person other than a person accused of a non- bailable offence is arrested or detained without warrant by an

officer in charge of a police station, or **appears** or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

XXX XXX XXX
XXX XXX XXX
XXX XXX XXX

437. When bail may be taken in case of non-bailable offence.- (1) When any person accused of, or suspected of, the commission of any non- bailable

offence is arrested or detained without warrant by an officer in charge of a police station or **appears** or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a [a cognizable offence punishable with imprisonment for three years or more but not less than seven years]:

XXX XXX XXX
XXX XXX XXX
XXX XXX XXX”

13. Sections 436 and 437 of Cr.P.C. permit appearance before the Jurisdictional Court by the person accused of an offence.

14. The meaning of the term ‘custody’ has significance in the given facts.

15. The terms custody, detention, or arrest have not been defined in the Cr.P.C. These concepts are cognate. Black’s Law

Dictionary, (9th Edition 2009) deals with the term 'custody' as follows:

"Custody - The care and control of a thing or person for inspection, preservation or security"

16. The Corpus Juris Secundum (Escape and Related Offenses; Rescue: Volume 30A, Pages 404 - 405) deals with custody in the following words:-

"The meaning of custody within an escape statute varies depending on the context in which it appears. A departure by a prisoner from mere custody constitutes the crime of escapes and custody, within the meaning of statutes defining the crime, has been said to consist of the detention or restraint of a person against his will, or of the exercise of control of one person over another to confine the other person within certain physical limits, or of a restriction of ability or freedom of movement. This custody must be actual and not constructive; in any event it is necessary and sufficient that there be actual or constructive custody in order to have escape from that custody, but there must have been at least constructive custody. "

17. The broader meaning of 'custody' is that the law has taken control of a person accused of an offence or suspected of the commission of an offence. In **Niranjan Singh and Another v. Prabhakar Rajaram Kharote and Ors. [(1980) 2 SCC 559]**, the accused appeared before the Magistrate and applied for bail. The Magistrate refused bail but did not remand the accused, granting time for moving the Sessions Court. While constructing the term 'custody' within the meaning of Section 439 of Cr.P.C. in **Niranjan Singh (supra)** the Supreme Court

observed thus:

“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. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and maybe, enabled the accused persons to circumvent the principle of Section 439 CrPC. We might have taken a serious view of such a course, indifferent to mandatory provisions, by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We, therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but, sitting under Article 136, do not feel that we should interfere with a discretion exercised by the two courts below.”

18. Following **Niranjan Singh (Supra)** in **Directorate of Enforcement v. Deepak Maharjan and Another [(1994) 3 SCC 440]**, the Apex Court held thus:-

“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 legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide *Roshan Beevi*"

19. In **Sundeep Kumar Bafna v. State of Maharashtra and Anr. (AIR 2014 SC 1745)**, the Supreme Court held that the person is in custody no sooner he surrenders before the police or before the appropriate Court. In **Nirmal Jeet Kaur v. State of M.P. and Anr. [(2004) 7 SCC 558, Sunita Devi v. State of Bihar [(2005) 1 SCC 608, Adri Dharan Das v. State of West Bengal [(2005) 4 SCC 303]**, the Supreme Court opined that since an accused has to be present in Court in the moving of a bail petition under Section 437, his physical appearance before the Magistrate tantamounts to surrender.

20. While referring to the practice of the Subordinate Magistrates not to permit persons accused of offences to surrender when they make such request, the Allahabad High Court in **Devendra Singh Negi v. State of U.P. and Others [1994 Cri LJ 1783 = 1993 SCC OnLine All 90]** held thus:

"10. ...when an accused surrenders in court and makes an application stating that he is wanted in the crime, his prayer should be accepted. The

practice of postponing surrender application is not fair..."

21. In the present case, the petitioner/accused appeared before the Court and moved a bail application. The petitioner has, therefore, surrendered before the Court. The petitioner has voluntarily submitted to the jurisdiction of the learned Magistrate. He came to be in judicial custody when he surrendered. The learned Magistrate was wrong in concluding that the petitioner was not in the custody of the Court when he voluntarily surrendered to its jurisdiction. The learned Magistrate ought to have taken the petitioner in custody and dealt with him as per law.

22. When the Code permits a person accused of an offence to surrender before the Court having jurisdiction over the subject matter, it cannot refuse permission. When an accused appears before the Court and applies for surrender, his prayer shall be accepted.

23. When an accused surrenders before the Magistrate, the course to be adopted is either to release him on bail or remand him to custody for investigation or for any other purpose like keeping the prisoner safe.

24. The position may, however, stand differently if the accused surrenders before a Court having no jurisdiction in the

case. Then the Magistrate may refuse to take cognizance of his surrender on the ground that he has no jurisdiction in view of Section 56 of Cr.P.C.

25. The concern of the prosecution, as mentioned above, projecting the requirement of the custody of the petitioner for investigation, has no foundation since the provisions of Section 167 Cr.P.C. are equally applicable to cases where the accused surrenders before the Court or is arrested and produced.

26. The course adopted by the learned Magistrate is found to be irregular.

27. The petitioner shall appear before the learned Magistrate within one week from this date. The learned Magistrate shall consider his plea for surrender and entitlement to bail as per law.

The Crl.M.C. is disposed of as above.

Before parting with the case, this Court places on record its appreciation to the learned counsel Sri.John S. Ralph, for his valuable assistance as Amicus Curiae.

Sd/-
K.BABU
JUDGE

APPENDIX OF CRL.MC 1638/2023

PETITIONER ANNEXURES

Annexure A1 THE TRUE COPY OF THE FIR IN IN CRIME NO:
262/2023 OF MARADU POLICE STATION

Annexure A2 THE TRUE COPY OF THE COMPLAINT DATED
11/02/2023 SUBMITTED BY THE WIFE OF THE
PETITIONER/1ST ACCUSED TO THE 2ND
RESPONDENT AGAINST THE DEFACTO
COMPLAINANT

Annexure A3 THE RECEIPT ISSUED BY THE 2ND RESPONDENT

Annexure A4 THE TRUE COPY OF THE SURRENDER MEMO
DATED 23/02/2023

Annexure A5 THE TRUE COPY OF THE BAIL APPLICATION
FILED AS CMP NO: 862/2023