

1976 *Present : Sirimane, J., and Wanasundera, J.*

A. GUNATUNGA—Suspect-Petitioner *and* THE ATTORNEY-GENERAL—Complainant-Respondent

S. C. Application—85/76

Criminal Procedure—Administration of Justice Law S. 75(5)—Right of Police Officer to have access to suspect during investigation.

75(5) of the Administration of Justice Law reads, "During the period that a suspect is in the lawful custody of a Superintendent of prisons, a Magistrate may upon application made by the police officer in charge of the investigation authorize such officer to

have access during reasonable hours to such suspect for the purpose of the continuation of the investigation and may likewise authorize such officer to take the suspect from place to place if in the opinion of the Magistrate such action is considered necessary for the purpose of the investigation”.

Held: that these provisions do not empower a Magistrate to authorize a police officer to take the suspect out of prison to a police station or a Criminal Investigations Department office for the purpose of questioning. When the section lays down that a Magistrate may authorize the police officer “to have access during reasonable hours to such suspect” it clearly means that the police officer may be permitted to have access to the suspect who will remain in the prison.

The second part of the section does provide for a situation where a suspect may be taken out of the prison “from place to place”. This, however, can be permitted by the Magistrate only if upon sufficient material in his opinion such action is considered necessary for the purpose of the investigation.

Per Sirimane J: “Under the earlier law there was no specific provision to permit a police officer to have access to a suspect who has been remanded. The new Administration of Justice Law however has made such provisions so that the police may not be hampered in their investigations but has at the same time provided adequate safeguards to ensure that a suspect may not be subjected to any undue influence or coercive methods to make any statement by providing that a Magistrate should consider such an application on its merits and satisfy himself that such “access” or the taking of the suspect “from place to place” is necessary for the purpose of the investigation. This new section does not empower a Magistrate to make any order which would result (as it did in this case) to handover the factual custody of a suspect to the police by enabling them to take such suspect to a police station or Criminal Investigation Department Office”.

Per Wanasundera, J: “S. 75(5) seeks to strike a balance between the rights of the police conducting an investigation in the interests of society and the rights of freedom and liberty enjoyed by every subject in this country. For the purpose of an investigation the police are clearly entitled to meet the suspect and record his statement. Normally this would be a case where a suspect surrenders to Court and is remanded to Fiscal’s custody before the police had an opportunity of questioning him. When the law lays down that the Magistrate can authorize the police officer in charge of the investigation to have access during reasonable hours to such suspect, it can only mean that the police officer is given the right to approach and come into the presence of the suspect in whatever prison or place of custody the suspect is lodged and to have his statement recorded at that place.....”

Likewise, in respect of an application to take out a suspect, the Magistrate should satisfy himself that such a taking out is necessary. An order under this section should be specific and so drawn as to restrict to the actual needs of the Police investigation.”

Application in Revision.

Eardley Perera with I. Mohamed for Suspect petitioner.

D. S. Wijesinghe, Senior State Counsel, with *P. Ramanathan*, State Counsel for complainant, respondent.

March 25, 1976. SIRIMANE, J.—

This is an application for revision of an order dated 6.2.76 made by the Magistrate of Gangodawila in case No. B|2144.

The petitioner in this case had surrendered to the Magistrate's Court in connection with an alleged offence of murder as he feared to go to the Police Station because "the police would use coercive pressure and third degree methods on him to get a confession." The Magistrate remanded him to Fiscal's custody. Thereafter the Criminal Investigations Department had taken over the investigation and made an application to the Magistrate to take the petitioner out of the remand prison and to the fourth floor of the Criminal Investigations Department for the purpose of questioning him and continuing further investigations. This application was allowed by the learned Magistrate by his order of 6|2|76 and consequently it is admitted that the petitioner was taken from the prison to the fourth floor of the Criminal Investigations Department for questioning. The validity of the order of the learned Magistrate and the subsequent action depends on the interpretation of Section 75(5) of the Administration of Justice Law which reads :

"75(5). During the period that a suspect is in the lawful custody of a superintendent of prisons, a Magistrate may upon application made by the police officer in charge of the investigation authorise such officer to have access during reasonable hours to such suspect for the purpose of the continuation of the investigation and may likewise authorize such officer to take the suspect from place to place if in the opinion of the Magistrate such action is considered necessary for the purpose of the investigation."

This section empowers a Magistrate when a suspect is in the lawful custody of the Superintendent of Prisons upon an application made by the Police Officer in charge of an investigation,

- (1) to authorise such officer to have access during reasonable hours to such suspect for the purpose of the continuation of the investigation, and
- (2) to authorise such officer to take the suspect from place to place if in the opinion of the Magistrate such action is considered necessary for the purpose of the investigation.

These provisions do not empower a Magistrate to authorise a police officer to take the suspect out of prison to a police station or Criminal Investigations Department office for the purpose of questioning. Learned Senior State Counsel submitted that the first part of the section which refers to "access" is wide enough to allow a police officer to take the suspect to a police station or Criminal Investigations Department office for questioning. I am unable to agree with this submission as in my view that is indeed

what is expressly sought to be prohibited by these provisions. When the section lays down that a Magistrate may authorise the police officer "to have access during reasonable hours to such suspect" it clearly means that the police officer may be permitted to have access to the suspect who will remain in the prison. It is only the second part of the section that provides for a situation where a suspect may be taken out of the prison "to take the suspect from place to place." This however can be permitted by the Magistrate only if in his opinion such action is considered necessary for the purpose of the investigation. In other words an application to take the suspect from place to place must have sufficient material to enable the Magistrate to consider the reasons for such application and form an opinion as to whether it is necessary that the suspect should be taken out of prison to any place or from place to place. Thus for instance if a suspect surrenders to Court (as in this case) and is remanded to Fiscal's custody and the police have not been able to record his statement, then the earlier part of this section may well apply and if an application is made for "access" for that purpose it would normally be allowed. The police officer will then be in a position to visit the prison where the suspect is confined during reasonable hours and record his statement. If again for instance the statements so recorded (or any other statements recorded in the course of the investigation) require that the suspect be taken "from place to place" to point out a particular place or recover something from a particular place, then an application can be made under the second part of the section. There must however be sufficient material placed before the Magistrate in such an application to enable such Magistrate to consider such material and form the opinion that it is necessary for the purpose of the investigation to take the suspect out of prison to one or more particular places. In either case the suspect must continue to remain in the custody to which he has been remanded. The learned Senior State Counsel submitted that though the suspect was taken to the Criminal Investigation Department office he was in Fiscal's custody as a prison officer accompanied the suspect. Though that may be technically so, still, when a suspect is taken to the police station or Criminal Investigation Department office he is factually in the custody of the police though there may be a prison officer present who accompanied the suspect from the prison. This is no guarantee that such officer would be in the immediate presence of the suspect throughout his stay at such police station or Criminal Investigations Department office. The police officer may well take the suspect into a room or some other place at such station or office for questioning and though the accompanying Fiscal's officer may know that the suspect is within the premises of such station or office he

would be totally unaware of what is happening to the suspect. Even the presence of a large number of police officers may well overawe the suspect in such circumstances.

Under the earlier law there was no specific provision to permit a police officer to have access to a suspect who has been remanded. The new Administration of Justice Law however has made such provision so that the police may not be hampered in their investigation but has at the same time provided adequate safeguards to ensure that a suspect may not be subjected to any undue influence or coercive methods to make any statement by providing that a Magistrate should consider such an application on its merits and satisfy himself that such "access" or the taking of the suspect "from place to place" is necessary for the purpose of the investigation. This new section does not empower a Magistrate to make any order which would result (as it did in this case) to handover the factual custody of a suspect to the police by enabling them to take such suspect to a police station or Criminal Investigations Department office.

The provisions of Section 75 and other similar provisions of the Administration of Justice Law are of great importance in that they not only provide the necessary assistance to the police in the continuation of an investigation in the interests of justice but also ensure to the suspect the safeguard that the police will not be in a position to use undue influence, coercive or torturous methods in the course of such investigation. The learned Senior State Counsel submitted that there is no reason to assume that all police officers will resort to such methods. Whilst I agree that the large majority of police officers especially the more senior officers act with a due sense of responsibility and propriety the same unfortunately cannot be said of all of them and hence the need for these salutary provisions. Even the Evidence Ordinance enacted in 1895 prohibits the proof of a confession made to a police officer (as there may be instances (isolated though they may be) of such confession being obtained by undue influence or coercive methods. These provisions are still necessary safeguards in the larger interests of justice. The trend in recent times has not helped to inspire any greater degree of confidence as the abuse of power, especially by the more subordinate officers has become increasingly frequent. In these circumstances the very salutary provisions of Section 75 and other similar provisions of the Administration of Justice Law enacted by the legislature must be carefully noted by Magistrates as it is their responsibility to see that these provisions are translated into meaningful action for the benefit of both the inquiring officers on the one hand and the safety and protection of the suspect on the other. It is therefore the duty of Magistrates to examine and

consider each application under this section on its merits before they exercise the discretion vested in them and not to allow such applications as a matter of course without much scrutiny.

The learned Magistrate was of the view that though there is no specific provision in the Administration of Justice Law to authorise the suspect to be taken to the Criminal Investigation Department office, still the provisions of Section 74 which require a Magistrate to assist the conduct of an investigation when application is made to him, were wide enough to justify the order he made. It is sufficient to state that the assistance referred to in that section is to make and issue "appropriate orders and processes of Court." It is needless to state that such orders must be ones that a Magistrate is empowered by law to make and not any order.

For these reasons I am of the view that the order made by the learned Magistrate dated 6.2.76 permitting the suspect to be taken by the police to the fourth floor of the Criminal Investigation Department for questioning is not warranted under Section 75 aforesaid and I therefore set aside that order.

WANASUNDERA, J.—

While I agree with the judgment of my brother and the order he proposes to make, I think this is a matter of some importance in the administration of criminal justice, that it may be useful if I were to add my own views to what he has stated.

The facts are briefly stated in my brother's judgment, and there is no need for me to recapitulate them. This matter concerns the powers of the Police conducting an investigation in respect of a person who is suspected of committing an offence and is remanded to fiscal custody. This is provided for in section 75 (5) of the Administration of Justice Law.

Senior State Counsel who appeared for the Police stated that in this matter, on the authority of an order made by the learned Magistrate, the suspect had been taken out of the prison to the office of the C.I.D. on more than one occasion for interrogation, and his statement recorded at such latter place.

It would appear that the State claimed this power before the learned Magistrate and sought to justify it before us on the basis that the provisions of section 75 (5) were wide enough to allow it. Learned Senior State Counsel argued that the right of access to the prisoner and the right to take him from place to place enabled the Police to remove the suspect from

the precincts of the prison to their own office for the purpose of the investigation, and this would include the interrogation and the recording of his statement.

Such an argument is not warranted by the plain meaning of the words in section 75 (5), nor does it take into account the reform this law seeks to achieve in comparison to what obtained prior to it.

Section 75 (5) seeks to strike a balance between the rights of the Police conducting an investigation in the interests of society and the rights of freedom and liberty enjoyed by every subject in this country. For the purpose of an investigation the Police are clearly entitled to meet the suspect and record his statement. Normally this would be a case, as my brother points out, where a suspect surrenders to court and is remanded to fiscal custody before the Police had an opportunity of questioning him. When the law says that the Magistrate can authorise the police officer in charge of the investigation to have access during reasonable hours to such suspect, it can only mean that the police officer is given the right to approach and come into the presence of the suspect in whatever prison or place of custody the suspect is lodged and to have his statement recorded at that place.

In the course of his submissions, Mr. Wijesinghe argued that as the suspect was accompanied by a prison official when he was removed to the C.I.D. headquarters for questioning, the suspect continued to remain *de jure* in fiscal custody. We indicated to counsel that in a matter of this nature we would like to view it realistically in the light of experience rather than go by appearances, and mere concepts. Section 75 (5) must be considered against the background of the imperative provisions of the law which declare that the maximum period a suspect can be allowed to remain in the custody of the Police is 24 hours exclusive of the time taken for the journey to the nearest Magistrate. Section 75 (5) gives the Police only certain limited rights in respect of the suspect. An order under this section cannot effect a change of custody so as to return the suspect back to the custody of the Police. A Magistrate must therefore be careful to see that the order he makes complies with the law and will not leave room for the Police to exercise *de jure* or *de facto* custody over the suspect.

Section 75 (5) also enables the Police to get authority from a Magistrate to take a suspect from place to place. These are necessary powers for the purposes of a thorough and efficient investigation. The Police owe a duty to the community, and the lack of proper investigation may even militate against the interests of the suspect. Apart from the recording of the sus-

pect's statement, there are other steps which are adjuncts to a proper inquiry, such as the checking of statements and the search for other evidence. The Legislature mindful of these needs has in its wisdom provided for a suspect to be taken from place to place for these purposes. But this is a limited power and cannot be allowed to be used as a lever for gaining wider powers than permitted by the law.

Those salutary provisions of our law, which ensure that a suspect will not be detained by the Police but should be placed in fiscal custody, will be nullified if Magistrates deal with these matters cursorily in a routine manner. In exercising these powers it is not intended that the Magistrate should act mechanically like a cog in a machine on the mere application of the Police, once proceedings are set in motion. In this section the Magistrate is interposed as an arbiter over competing rights and it is his duty to bring to bear an independent judgment when called upon to exercise the powers reposed in him. To safeguard the citizen from being deprived of his constitutional and lawful rights is a duty of the Courts and this has a bearing not only in regard to the administration of justice, but go to the foundation of our civil and political institutions.

A Magistrate should realise that a weighty and serious responsibility is cast on him in the exercise of these discretionary powers. He should remind himself that it is incumbent on those who may be called upon, in the discharge of their duties, to make orders, which may have the effect of encroaching on the personal liberty of others, to see that those duties are performed carefully and conscientiously as intended by the Legislature.

Accordingly, when an application is made under the provisions of section 75 (5), the Magistrate must scrutinise that application and see whether the material placed before him justifies the making of an order. Where access to the suspect is sought, he should, as far as possible, ascertain the purpose for which, and the period during which, access is required. Likewise, in respect of an application to take out a suspect, the Magistrate should satisfy himself that such a taking out is necessary. An order under this section should be specific and so drawn as to restrict it to the actual needs of the Police investigation.

The order of the learned Magistrate in this case falls short of these standards. Since the Police have already taken action in pursuance of the order, I would *pro forma* set aside the order dated 6th February 1976.

Order set aside.