

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 27th MAY, 2022

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.34 of 2020

Petitioners : Rajesh Rai and Another

versus

Respondents : State of Sikkim and Others

and

WP(C) No.35 of 2020

Petitioners : Prakash Gurung and Another

versus

Respondents : State of Sikkim and Others

Applications under Articles 226/227
of the Constitution of India

Appearance

Mr. Nawin Kiran Pradhan and Mr. Dhiren Subba, Advocates for the Petitioners.

Mr. Sudesh Joshi, Additional Advocate General with Mr. Yadev Sharma, Government Advocate for the Respondents.

J U D G M E N T

Meenakshi Madan Rai, J.

1. These two Writ Petitions are being disposed of by this common Judgment as the instant matters pivot around the alleged non-compliance of the provisions of Section 41A of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") by the Investigating Officer (I.O.) of the Sikkim Police in terms of the directions of the Hon'ble Supreme Court in *Arnesh Kumar vs. State of Bihar and Another*¹.

¹ (2014) 8 SCC 273

2. In **WP(C) No.34 of 2020**, the matter has its genesis in an FIR lodged by one Tseten Tashi Bhutia, dated 06-08-2020, informing the Station House Officer at the Sadar Police Station, that a fake Facebook account had been created in the name of one Simran Gurung and posts uploaded on 02-08-2020 and on 04-08-2020 which had aroused hatred against the Complainant, put his life at risk, defamed him and created communal hatred and tension between the Bhutia and the Nepali communities in Sikkim. It is the contention of Learned Counsel for the Petitioners that pursuant to the FIR dated 06-08-2020 lodged by Tseten Tashi Bhutia, which was registered by the Sadar PS under Sections 153A/505(1)(2)/506/120B of the Indian Penal Code, 1860 (for short, "IPC"), being FIR No.123/2020, on 02-11-2020, at about 10 a.m., four Policemen from the Sikkim Police of whom one was the Respondent No.5 (I.O.) and Respondent No.6 (PI, Criminal Investigation Department) barged into the Petitioners' home, manhandled his family members including his aging father and forcefully took the Petitioner No.1 into their custody. The same afternoon at about 12.30 p.m. the same Police Officials returned to the Petitioners' house and conducted a search therein without so much as furnishing a search warrant. The Police then proceeded to seize one Laptop, one Vodafone SIM card, one Kingstone 4 GB HD Card and one Pen Drive, vide Property Seizure Memo (**Annexure P3**). The family of the Petitioners were not informed about his whereabouts and he was brought to the Sadar PS at 05.30 p.m. while the Arrest Memo came to be handed over to his family members only on the next date. The Respondent No.5 then sought Police custody of the Petitioner No.1 and the Learned Judicial

Magistrate, at Gangtok, remanded him to police custody on 03-11-2020 up to 06-11-2020 which was extended on 06-11-2020 up to 11-11-2020.

3. In **WP(C) No.35 of 2020**, it is revealed that an FIR was lodged by one Kalpana Chettri, dated 12-08-2020, informing the CID In-Charge, Police Headquarters, that posts against her had been uploaded from fake Facebook accounts, making baseless allegations about her character, with the purpose of defaming her and her husband which had mentally disturbed her and her family as the material was not only defamatory but also attempted to outrage her modesty and bring her disrepute. It is the contention of Learned Counsel for the Petitioners that pursuant to the FIR dated 12-08-2020 lodged by Kalpana Chettri, which was registered by the CID under Sections 354/509 of the IPC and Section 67A of the Information Technology Act, 2000, being FIR No.12/20, on 02-11-2020 between 2 to 3 pm., the Petitioner No.1 received multiple calls on his cell phone from the Respondent No.3 (Superintendent of Police) asking him to visit the CID Office. On reaching there, the Petitioner No.1 was immediately taken into custody and his family were not informed about his whereabouts. He was brought to the Sadar PS at 05.30 p.m. while the Arrest Memo was handed over to his family members only on the next date. The Respondent No.4, the I.O., then sought Police custody of the Petitioner No.1 and the Learned Judicial Magistrate, at Gangtok, remanded him to police custody on 03-11-2020 up to 06-11-2020 which was extended on 06-11-2020 up to 11-11-2020.

4. It was contended that due to non-compliance of the COVID-19 Standard Operating Procedure (SOP) by the

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Investigating Agency the Petitioner No.1 of both Petitions (hereinafter referred to "Petitioner No.1") tested positive for COVID-19 on 06-11-2020 and on the same date they were forwarded for isolation at the Mount Hotel, Gangtok. It was urged that the Petitioner No.1 in both cases were subjected to illegal arrest and detention for ten days and besides contracting COVID-19 faced mental and physical torture. That, in fact the offences under which they were booked were punishable with imprisonment for less than seven years, making it obligatory upon the I.O. to serve a Notice under Section 41A of the Cr.P.C. in terms of the directions of the Hon'ble Supreme Court in **Arnesh Kumar (supra)** which having been circumvented has violated the fundamental rights of the said Petitioners. That surprisingly, in the additional affidavit dated 11-11-2021 filed by the State-Respondents a "Check List" was appended thereto which had never found mention at any time prior to the filing of the additional affidavit, neither was it ever brought to the knowledge of the Petitioners or the remanding Court. Even assuming that the Check List existed, it is required to be prior in time to a Notice under Section 41A of the Cr.P.C. Relying on the decision of **Rini Johar and Another vs. State of Madhya Pradesh and Others**² it was contended that arrest in violation of due procedure cannot be countenanced and that in the case *supra* compensation was granted to the Petitioners. That, there cannot be violation of guidelines laid down in **D. K. Basu vs. State of W.B.**³ by the Prosecuting Agency. Strength was also garnered from the ratio in **Madhu Limaye and Others**⁴ wherein the Supreme Court

² (2016) 11 SCC 703

³ (1997) 1 SCC 416

⁴ AIR 1969 SC 1014

expressed the view that when the arrest by the Police is illegal and such fact is brought to the Notice of the Magistrate, the accused cannot be detained under the authority of Section 167(2) of the Cr.P.C. That, in light of the flagrant violation of the specific directions of the Hon'ble Supreme Court in the catena of decisions settled *supra*, the prayers in both the Writ Petitions be granted. It was conceded by Learned Counsel for the Petitioners in both the Writ Petitions that Prayers (ii), (iii) and (v) are infructuous, while Prayer (iv) is not pressed for the reasons that Respondent No.7 and Respondent No.5 respectively were deleted from the array of Respondents as the Petitioners opted not to pursue the matter against the said Respondents. That, Prayers (ix) and (x) are the prayers seeking reiteration of the directions laid down in **Arnesh Kumar** (*supra*) and hence not being pressed.

5(i). *Per contra*, while disputing the allegations made against the Prosecution, the Learned Additional Advocate General in **WP(C) No.34 of 2020** contended that on the lodging of the FIR and its registration investigation commenced to trace the identity of the person using the name of "Simran Gurung". That, it was a formidable task trying to locate the culprit given that the correct name of the user was concealed. In addition, the entire operations was being carried out on Facebook using VPN/Proxy Server. Ultimately, by digital mapping of finger prints, the Prosecuting Agency identified the user through his IP address and other digital parameters. The Petitioner No.1 was thus identified as the person uploading the mischief.

(ii) That, in **WP(C) No.35 of 2020**, the Learned Additional Advocate General contended that on the lodging of the FIR and its

registration, investigation commenced to trace the identity of the person using the name "Devika Chettri". That, a constant vigil was kept over the Facebook account of Devika Chettri via Messenger and Chats/Video Chats. The entire operations were being carried out on Facebook for which Internet Protocol Data Records (IPDR) was requisitioned. Ultimately, on arranging Know Your Customer (KYC) from the Internet Service Provider, the Prosecuting Agency learned that the connection was registered in the name of the Petitioner No.1 who was using Devika Chettri's account. The said Petitioner was thus identified as the person uploading the mischievous posts.

(iii) That, immediate arrest of the Petitioners were warranted as the entire operation was being carried out by the Petitioners in a clandestine manner in a digital environment and while conceding that no Notice had been issued under Section 41A of the Cr.P.C. it was urged that had the Petitioner No.1 been sounded by issuance of a Notice in all likelihood they would have taken steps to destroy the electronic evidence including password, page, hard disk, mobile phone and other storage devices, completely thwarting the investigation. There was also likelihood of the Petitioners absconding from the State apart from which the Respondents had strong reasons to believe that should the arrest not be affected the Petitioners would create a new Facebook account and repeat the offence. Taking into account all the aforesaid circumstances and the sensitivity and the urgency of the matter the arrest of the Petitioners were effected on 02-11-2020 and a search of the Petitioner No.1 house later in the day led to recovery of several digital devices. That, the law laid down

by the Hon'ble Supreme Court in **Arnesh Kumar** (*supra*) has been fully complied with. That, the family members of the Petitioners' were duly informed of them being taken to the Sadar P.S. and on preliminary investigation, the State-Respondent decided that custodial interrogation of Petitioners were imperative and hence they were formally arrested [Petitioner No.1 in **WP(C) No.34 of 2020** at 19.45 hours, while the Petitioner No.1 in **WP(C) No.35 of 2020** at 2000 hours] on 02-11-2020. The Petitioner No.2 in both Petitions were duly informed of the arrest of the Petitioners.

(iv) The Learned Additional Advocate General sought to convince this Court that the Police is under no obligation to serve a Notice under Section 41A of the Cr.P.C. when the offence complained of is punishable with imprisonment for less than or up to seven years if the conditions laid down under Section 41(1)(b)(ii) of the Cr.P.C. are satisfied.

(v) It was next contended that the Petitioners indulged in a criminal act by concealing their identity on Facebook and in the **WP(C) No.34 of 2020** attempted to create communal disharmony in an otherwise peaceful State and in **WP(C) No.35 of 2020** to outrage the modesty of a woman. That, detention was ordered by the Learned Judicial Magistrate, East, only after recording her satisfaction that correct steps had been taken by the I.O. That, as there is no violation of any right of the Petitioner No.1 or violation of the directions laid down in **Arnesh Kumar** (*supra*) the Writ Petitions deserve to be dismissed.

6. Having heard the rival contentions of the Learned Counsel and perused the documents on record, the only question

that falls for consideration is whether the Petitioners are entitled to the reliefs claimed?

7(i). It is pertinent to note here that on 22-10-2021 when the matter was taken up for hearing, it was found that although the State-Respondents had in their Counter-Affidavit stated that they are aware of the Judgment of **Arnesh Kumar** (*supra*) and that they had duly complied with the directions therein they had not produced any materials in support thereof. Learned Additional Advocate General sought two weeks' time to file an additional affidavit along with relevant materials to confirm compliance of the Judgment *supra*. Accordingly, an additional affidavit came to be filed on 11-11-2021 in which the Respondent No.3 appended Annexure R1 purported to be the certified copy of a "Check List" furnishing the reasons and materials which necessitated the arrest of the Petitioners No.1 duly forwarded to the Learned Judicial Magistrate, East, at Gangtok, when they were produced before the Magistrate.

(ii) On 07-03-2022, when the matter was taken up for further hearing, clarifications on two factual issues arose. The Learned Additional Advocate General sought for some time to clarify these aspects, towards which, on 29-04-2022 the Case Diary in the matter was filed in sealed cover before the Court.

8(i). Before arriving at a decision on the question formulated above, for clarity in the matter relevant reference is to be made to the ratio in **Arnesh Kumar** (*supra*) wherein the Supreme Court elucidated in detail the role of the Police as required under Section 41 of the Cr.P.C. and Section 41A of the Cr.P.C. In order to understand the pith and substance of the ratio, it is essential to

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firstly extract the provisions of Section 41 of the Cr.P.C. hereinbelow;

"41. When police may arrest without warrant.—(1)

Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

- (a) who commits, in the presence of a police officer, a cognizable offence;
- (b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—
 - (i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;
 - (ii) the police officer is satisfied that such arrest is necessary—
 - (a) to prevent such person from committing any further offence; or
 - (b) for proper investigation of the offence; or
 - (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
 - (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
 - (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

- (ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;

and

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- (c) who has been proclaimed as an offender either under this Code or by order of the State Government; or
- (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
- (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
- (f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
- (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
- (h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or
- (i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate." [emphasis supplied]

(ii) The Supreme Court in Paragraphs 7.1, 7.2 and 7.3 of the Judgment of **Arnesh Kumar** (*supra*) while considering the provisions of under Section 41 of the Cr.P.C observed that –

"7.1. From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in

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any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.

7.2. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest.

7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 CrPC.”

[emphasis supplied]

(iii) Thereafter, while addressing the issue of remand granted by a Magistrate under Section 167 Cr.P.C. the Supreme Court went on to observe that in many cases detention is authorized in a routine, casual and cavalier manner. The following observations were made in Paragraphs 8.2, 8.3 and 8.4 of **Arnesh Kumar (supra)**;

“8.2. Before a Magistrate authorises detention under Section 167 CrPC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty-bound not to authorise his further detention and release the accused. In other words, when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition precedent for arrest under Section 41 CrPC has been satisfied and it is only thereafter that he will authorise the detention of an accused.

8.3. The Magistrate before authorising detention will record his own satisfaction, may be in brief but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement, etc. the police officer shall furnish to the Magistrate the facts, the reasons and materials on the

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basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the accused.

8.4. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.” [emphasis supplied]

(iv) The Supreme Court then proceeded to discuss the provisions of Section 41A of the Cr.P.C. the Section is extracted hereinbelow for clarity;

“41A. Notice of appearance before police officer.—

(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.”

With regard to the above provision, it was observed by the Supreme Court that Section 41A made it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.P.C. the Police officer is required to issue Notice directing the accused to appear before him at a specified place and time. That, law obliges such an accused to appear before the Police officer and it further mandates that if such an accused complies with the terms of Notice he shall not be arrested, unless for reasons to be

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recorded, the Police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.P.C. has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

(v) The Supreme Court elucidated that the endeavour in the Judgment was to ensure that Police officers do not arrest the accused unnecessarily and Magistrates do not authorize detention casually and mechanically. *Ex consequenti*, the following directions were issued by the Hon'ble Supreme Court for compliance of all concerned;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/ producing the accused before the Magistrate for further detention;

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

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A IPC or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine."

9. On the edifice of the ratio referred to hereinabove, it is necessary to examine the documents furnished before this Court and assess whether the directions *supra* have been duly complied with.

10(i). In **WP(C) No.34 of 2020, Annexure P4**, the Arrest/Court Surrender Memo (in short, "Arrest Memo"), reveals that the Petitioner No.1 was arrested on 02-11-2020, at 1445 hours, for the offences under Sections 153A/505(1)(2)/506/120B of the IPC, while in **WP(C) No.35 of 2020, Annexure P3**, the Arrest Memo reveals that the Petitioner No.1 was arrested on 02-11-2020, at 2020 hours, for the offences under Sections 354/509 of the IPC read with Section 67A of the Information Technology Act, 2000. Serial No.7 of both the Arrest Memos respectively read as follows;

"7. Injuries/Cause of injuries and physical condition of the accused person at the time of arrest:

As per medical Report."

(ii) The Petitioners filed their respective Medical Reports (OP Sheets). Annexure P8 [**WP(C) No.34 of 2020**] in two pages dated 06-11-2020 was filed, while Annexure P7 [**WP(C) No.35 of 2020**] was also filed in two pages of the same date. The State-Respondents filed Annexure R2 in four pages in **WP(C) No.34 of 2020** being the Medical Reports of the Petitioner No.1 dated 02-11-2020, 04-11-2020 and 06-11-2020. In **WP(C) No.35 of 2020**, Annexure R3 in three pages was filed by the State-Respondents dated 02-11-2020, 04-11-2020 and 06-11-2020 pertaining to the Petitioner No.1 therein. The reports reveal that the Petitioners were medically examined on the date of their arrest, no injuries were found their respective persons, RTPCR tests were conducted and on

testing positive for COVID-19 they were prescribed the medication and isolated as per the required medical protocol.

(iii) Serial No.8 of the Arrest Memos in both the Petitions read as follows;

"8. The accused, after being informed of the grounds of arrest and his legal rights, was duly taken into custody on (date) at (hours) at (place). The following article/s was/were found on physical search conducted on the person of the accused and were taken into possession for which a receipt was given to the accused:*

signed

signed

Necessary wearing apparels were left on the accused for the sake of human dignity and body protection. The accused was cautioned to keep himself/herself covered for the purpose of identification. Information is given to the relationship about his/her arrest.

* **If no articles is found, 'NIL' may be indicated in the blank space provided."**

This was followed by the signatures affixed on the respective documents by both the Petitioners No.1 and the Petitioners No.2 of both Petitions respectively. The time of the arrest of the Petitioner No.1 in **WP(C) No.35 of 2020** is reflected in Serial No.2 of the document as "2000 hours", while "1945 hours" is reflected in **WP(C) No.34 of 2020**. The Arrest Memos of both the accused persons thus reveal that the Petitioner No.2 respectively in both cases were intimated about the arrest of the Petitioners No.1, contrary to the allegations of the Petitioners No.1 that the family members of the Petitioners were not informed about their whereabouts.

(iv) At Serial No.12, the format of the Arrest Memo, reads as follows;

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"12. Whether the accused person, as per the observations and known police records, is:

- | | | |
|------------------------------|----------|--|
| (a) Dangerous | Yes/No ✓ | (b) Previously escaped any bail : Yes/No |
| (c) Generally armed | Yes/No ✓ | (d) Operates with accomplices : Yes/No |
| (e) Has past criminal record | Yes/No ✓ | (f) Recidivist : Yes/No |

and

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- (g) **Likely to escape bail** Yes/No (h) If released on bail whether likely to
 (i) Is wanted in any other case Yes/No commit another crime immediately
 or threaten victims/witnesses
 Yes/No"

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"12. Whether the accused person, as per the observations and known police records, is:

- (a) Dangerous Yes/No (b) Previously escaped any bail : Yes/No
- (c) Generally armed Yes/No (d) Operates with accomplices : Yes/No
- (e) Has past criminal record Yes/No (f) Recidivist : Yes/No
- (g) **Likely to escape bail** Yes/No (h) If released on bail whether likely to
 ,(i) Is wanted in any other case Yes/No commit another crime immediately
 or threaten victims/witnesses
 Yes/No"
- ↳ Chargesheeted

A perusal of the Paragraph 7(ii) of **Arnesh Kumar** (*supra*) reveals that the Police Officer is to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid while making such arrest. The Police by the tick marks at Serial No.12 in **WP(C) No.34 of 2020** have recorded that the Petitioner No.1 was generally armed, he was likely to escape bail, if released on bail was likely to commit another crime immediately or threaten victims/witnesses. On such conclusion, the Police resorted to arrest the Petitioner No.1. In **WP(C) No.35 of 2020**, the I.O. was satisfied that the Petitioner was likely to escape bail, the Petitioner No.1 was wanted in another case and was also likely to commit another crime immediately or threaten victims/witnesses and operated with accomplices. These grounds are sufficient to satisfy the I.O. to arrest the Petitioner No.1.

(v) It would do well to notice that the Supreme Court has spelt out in detail the requirements under the provisions of Section 41 of the Cr.P.C. in Paragraph 7.1. of its Judgment in **Arnesh Kumar** (*supra*). The Section also reveals that the Police is empowered to

arrest a person if the person commits a cognizable offence in the presence of a Police Officer or reasonable complaint has been made against such person or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years if the conditions in Section 41(1)(b)(ii)(a) to (e) are fulfilled, but the Police Officer is to record his reasons while making such arrest.

(vi) Relevantly, on perusal of Section 41 of the Cr.P.C. the word employed at the end of every sub-Section is "or" meaning thereby that the Police Officer can arrest when necessary if he is satisfied that arrest is necessary for any "one" reason or "more" as laid down in Section 41(1)(b)(ii)(a) to (e). It does not mean that all the reasons enumerated in (a) to (e) of the Section *supra* have to be fulfilled. This is also evident from the interpretation given by the Supreme Court in Paragraph 7.1 of its Judgment in **Arnesh Kumar** (*supra*) already extracted hereinabove.

(vii) Although a Check List as envisaged in Paragraphs 11.2 and 11.3 of its Judgment in **Arnesh Kumar** (*supra*) containing specified sub-clauses under Section 41(1)(b)(ii)(a) to (e) of Cr.P.C. evidently finds no place in the police records nevertheless the fact that the Arrest Memo itself makes out reasons for the arrest of the accused cannot be ignored and cast aside for the reasons that not only were the Petitioners No.1 informed of the grounds of their arrest but the reasons that necessitated their arrest and custody have also been tick marked as discussed *supra*.

(viii) After the arrest was made **Annexure P5** addressed to the Learned Judicial Magistrate reflects that the I.O. informed the

and

Learned Judicial Magistrate that during investigation of the case in **WP(C) No.34 of 2020** the handler of Simran Gurung's fake Facebook account was being operated by the Petitioner No.1 and he was arrested on 02-11-2020 after observing all legal formalities vide the Arrest Memo. In **WP(C) No.35 of 2020** Devika Chettri's fake Facebook account was being operated by the Petitioner No.1 which is revealed at **Annexure P4**. Both **Annexure P4** and **Annexure P5** reveal that during interrogation some important clues were provided by the Petitioners No.1 which were to be pursued and since the allegations against the accused were grave and serious in nature their custodial interrogation respectively was required to unearth the truth. That, the accused were required to be subjected to custodial interrogation in the interest of proper, fair, free and full investigation of the case and hence a remand of six days was sought individually for the Petitioners No.1.

(ix) Reverting at this juncture to Paragraph 8.3 of **Arnesh Kumar** (*supra*) the Supreme Court has laid down that the Magistrate before authorizing detention will record his satisfaction which may be brief, but the satisfaction must reflect from his Order. The Magistrate in her Orders in both cases indicate that she had duly perused the documents placed before her and recorded her satisfaction for granting police custody as follows;

Sadar PS FIR Case No.123/2000, dated 06-08-2020
[WP(C) No.34 of 2020] and **CID PS FIR Case**
No.12/2000, dated 02-11-2020 [WP(C) No.35 of 2020]

ORDER DATED 03-11-2020

"I.O. of the case files an application stating that in connection with Case No....., dated, under Sections, he apprehended the accused, aged about years on 02.11.2020.

Accordingly, I.O. of the case prays for 04 days of police remand w.e.f. 03.11.2020 to 06.11.2020.

I.O. of the case further submits that the relatives of the accused has been informed about his apprehension.

and

WP(C) No.35 of 2020 : Prakash Gurung and Another vs. State of Sikkim and Others

On perusal of the above mentioned application file by the I.O. wherein it is seen that the alleged accused was arrested on 02.11.2020.

Accused is apprised of free legal aid.

Accused has no complaints so far.

Heard.

On perusal of the relevant case records and the documents produced by the I.O. of the case, I am satisfied that there are sufficient materials to show the involvement of the accused in the present case.

Accordingly, accused produce before me by the I.O. of the case is hereby forwarded to police custody till **06.11.2020.**"

ORDER DATED 06-11-2020

"Accused is produced before me from police custody.

Ld. Remand lawyer absent.

Accused person has no complaint so far.

I.O. has filed an application praying further extension police remand of the accused person on the ground that the investigation is not yet completed.

P.C. extended till **11.11.2020.**"

ORDER DATED 11-11-2020

"Accused is produced before me from police custody.

Ld. Remand lawyer absent.

Accused person has no complaint so far.

I.O. has filed an application praying further extension police remand of the accused person on the ground that the investigation is not yet completed.

P.C. extended till **13.11.2020.**"

It is also relevant to notice that the Magistrate has enquired from both the Petitioners No.1 if they had any complaints and both Petitioners on both dates viz., 03-11-2020 and 06-11-2020, informed that they had no complaints to make to the concerned Magistrate.

(x) In the light of the facts revealed hereinabove, it concludes that the Magistrate was circumspect while granting remand in police custody and after taking due caution and in compliance of **Arnesh Kumar (supra)** ratiocination has permitted remand being satisfied that custodial interrogation was necessary suffice it to state that the Order is brief but encompasses requirements of the directions laid out in **Arnesh Kumar (supra)** and hence due compliance thereof.

(xi) By the additional affidavit dated 11-11-2021, a Check List was submitted by the Prosecution. However, since this was not in the knowledge of the accused concerned and considering that the Memo of Arrest itself records the reasons for the necessity of arresting the Petitioners and the requirement for his custodial interrogation, there is no requirement to consider this document.

(xii) It is however relevant to point out that the Additional Advocate General had furnished the Case Diary in sealed cover in response to this Court's query as to whether day by day investigation had been conducted in the matter (reference Order of this Court dated 07-03-2022). A photocopy of Case Diary was furnished sans certification that it was a true copy. There was no explanation as to why the original copy of the document were not furnished before this Court. In such circumstances, the documents could well be a *faux* document. I decline to consider this document while at the same time reminding the Prosecuting Agency that this Court under Section 172(2) of the Cr.P.C has unfettered powers to examine the entries in the Case Diary to consider whether there is any inconsistency or contradictions arising in the entries therein and ultimately it is for this Court to consider whether the required statutory safeguards have been complied with. In future they shall desist from furnishing photocopies of documents in their possession for reference by this Court and ensure that there is no repetition of such conduct.

(xiii) While addressing the issue of search and seizure it may be noticed that in ***State of H.P. vs. Pirthi Chand and Another***⁵ the Hon'ble Supreme Court while considering whether the mandatory

⁵ (1996) 2 SCC 37

and

provisions of search and seizure were adhered to, held that, whether the authorized officer violated the mandatory requirement is a question of fact to be proved at the trial. This Court need state no further.

11. In light of the above discussions, I am of the considered opinion that the directions in *Arnesh Kumar* (*supra*) have been duly complied with by the Investigating Officers and consequently the Petitioners in both matters *supra* are thus not found entitled to any of the reliefs claimed.

12. The Writ Petitions are dismissed and disposed of accordingly.

(**Meenakshi Madan Rai**)
Judge
27-05-2022

Approved for reporting : **Yes**