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Case Comment: Gautam Navlakha vs NIA - A New Dimension to Custody under Section 167, CrPC

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FACTS OF THE CASE

On August 28, 2018, several human rights activists including Gautam Navlakha, a renowned journalist struggling for Dalit and Adivasi rights, were arrested by the Maharashtra Police for inciting caste-based violence. Their speeches were held responsible for causing violent clashes in Bhima Koregaon and surrounding villages in the State of Maharashtra. Authorities also alleged that these activists also had ties with some banned Maoist groups and were accordingly charged under various sections of the Indian Penal Code as well as the Unlawful Activities (Prevention) Act (UAPA).

Since the matter fell within the jurisdiction of the court in Pune, a transit remand application was filed before the Magistrate in Delhi. Following this, Navlakha moved to Delhi HC calling the legality of his arrest into question. The Delhi HC put a stay on the Magistrate's order and Navlakha was ordered to be kept under house arrest until further orders were passed. On 29 August 2018, based on a writ petition, the Supreme Court extended Navlakha's arrest to 4 weeks and he was allowed to seek any remedy available to him under the law.

On October 01, 2018, Navlakha's house arrest came to an end by the order of Delhi HC following which Navlakha approached Bombay HC seeking the FIR against him to be quashed. The Bombay HC dismissed the plea after incriminating evidence was found against Navlakha and he was ordered house arrest for 3 weeks. No anticipatory bail was granted to him by Supreme Court, instead, his house arrest was increased to 4 weeks with the liberty to seek anticipatory bail from the suitable Session Court.

The session court refused to grant anticipatory bail and Navlakha was again embroiled in a series of appeals to the Supreme Court which ended with him being ordered to surrender to NIA which Navlakha eventually did. Navlakha spent a total of 11 days in police custody after which he was sent to judicial custody for 48 days. Following the series of arrests, Navlakha applied for default bail under Section 167 CrPC,¹ contending that 34 days spent in house arrest along with the police and judicial custody entitled him to default bail. The bail application was rejected by the lower court and consequently, Navlakha appealed to Supreme Court. The matter was heard by the Supreme Court on 12 May 2021 in *Gautam Navlakha v NIA* by a 3- judge bench

ISSUE

Can House arrest be considered a form of police/judicial custody under Section 167, Code of Criminal Procedure?

ARGUMENTS

- **Petitioner**

Petitioner argued that his house arrest did amount to police custody as, during this period, his liberty was curtailed. Further, investigation on the charges of IPC and UAPA continued throughout his period of detention by the Pune Police. Even though Delhi HC on October 01, 2018, decided to terminate Navlakha's house arrest on the ground that it was illegal, this decision of the Delhi HC does not make the period of house arrest non-est. Therefore, the days

¹ Code of Criminal procedure 1973, s 167

spent in house arrest must be counted as custody and Navlakha should be entitled to default bail.

- **Respondent**

The National Investigating Agency, i.e., the respondents argued that house arrest could not be considered as police custody according to Section 167, CrPC. The concept of house arrest is unknown to the Criminal Code. Further, during the period of house arrest, the NIA had no access to the petitioner. The very purpose of Police custody is to allow the police to interrogate the accused. If this facility was not available to NIA, then house arrest cannot be regarded as police custody. It was further contended that custody comes to an end only when bail is provided. However, on October 01, 2018, when Delhi HC terminated Navlakha's house arrest, no bail order was passed signifying that he was never in custody.

ANALYSIS

The court was concerned with multiple issues in the judgement. The order date 28.08.2018 passed by the Delhi High Court read, "The petitioner shall, in the meanwhile, be kept at the same place from where he was picked up with two guards of the Special Cell, Delhi Police along with local Police that was originally here to arrest the petitioner, outside the house. Barring his lawyers, and the ordinary residents of the house, the petitioner shall not meet any other persons or step out of the premises till further orders."

Following this order of the Delhi High Court, Navlakha was prevented from being removed from Delhi and he subsequently remained under house arrest for 34 days. Meanwhile, CMM at Saket settled an application that demanded transit remand for 2 days. This order by CMM was later found to be unsustainable by law as there were several non-compliances as far as Articles 22(1)² and 22(2)³ are concerned. It was set aside by the High Court of Delhi in 01.10.2018

² Constitution of India, art 22(1)

³ Constitution of India, art 22(2)

While demanding default bail, Navlakha argued that these 34 days must be included while calculating the period of 90 days for Section 167 of CrPC⁴. It was pleaded on the behalf of the petitioner that when the High Court of Delhi passed the order for house arrest, it amounted to modification of remand from police custody to house arrest and therefore, it shall be very well included within the ambit of Section 167, CrPC. The NIA argued that they did have the opportunity to interrogate the accused while he was on house arrest and therefore, it cannot be considered to be covered under Section 167, CrPC

The Supreme Court here was faced with an immense dilemma. While Navlakha's house arrest amounted to a deprivation of his liberty, the house arrest ordered by Delhi High Court cannot strictly be construed to be within Section 167 of CrPC. Section 167, CrPC demands that an order of detention must be passed by the Magistrate authorised to do so. In the present case, house arrest was ordered by Delhi High Court. Right to default bail is subject to conditions under Section 167 being fulfilled. Moreover, as far as custody under NIA was concerned, the respondents pleaded that they had no access to the petitioner for the period of his house arrest. The only people who were allowed to interact with the petitioner were his family members inside the House and his lawyer. Therefore, it cannot be construed as Police custody. Owing to this reason, the Supreme Court held that the petitioner cannot be held to be eligible for default bail and the 34 days of house arrest, in this case, cannot be included in the calculation of 90 days for demanding the default bail.

Although Gautam Navlakha did not receive any relief in this case, the Supreme Court did discover a new dimension of Police Custody and Judicial Custody. It held that although the concept of House arrest is alien to custody in India, there appears to be no reason why it cannot be considered to be a valid form of custody if such an order is passed by an authorised magistrate. However, the court did provide that such a decision shall be based on the severity of the offence, age, and health conditions of the accused and shall be decided on a case-to-case basis.

⁴ Code of Criminal Procedure 1973, s 167(2)(i)

IMPLICATIONS OF THE SUPREME COURT'S DECISION

The Supreme Court's decision to accept house arrest as a new dimension of Police/Judicial custody was widely welcomed in India. It is also seen as a solution to the problem of overcrowding prisons in India. It will also reduce the cost of running and maintaining jails which are currently very high in India. However, will house arrest be as successful as it is expected to be? As a new concept, the Supreme Court gave a very brief idea of what house arrest would look like. The court held, "As to its employment, without being exhaustive, we may indicate criteria like age, health condition and the antecedents of the accused, the nature of the crime, the need for other forms of custody, and the ability to enforce the terms of the house arrest."⁵ The court itself has held that the list is not exhaustive. This gives immense power to the hands of the magistrate, which can be abused.

Reports suggest that marginalised communities in India make up the bulk of Indian prisons. While two-thirds of Indian prisoners are Dalits, tribals, or Other Backward Classes, 19% of them are Muslims⁶. The court in *Gautam Navlakha v NIA* allowed for continued police surveillance outside the house of the accused put under house arrest. This can be used as a potential weapon for mass surveillance as a chunk of marginalised communities in India dwells in closely packed ghettos or basis.

This would also amount to a violation of the Right to personal liberty and privacy of other people residing in the area of the accused. In *Kharak Singh v State of U.P.*⁷ where the accused was kept under police surveillance which included domiciliary visits at night and a constant eye on the movements of the accused, Ayyangar J had held that personal liberty is not restricted to "freedom from physical restraint or freedom from confinement within the bounds of a prison". Therefore, in a case where the accused has been put on house arrest, while his liberty is being

⁵ *Gautam Navlakha v NIA* 2021 (4) SCJ 236

⁶ 'Data published by NCRB' (*National Crime Records Bureau*) <<https://ncrb.gov.in/en/prison-statistics-india-2018-0>> accessed 12 September 2022

⁷ *Kharak Singh v State of UP* 1963 AIR 1295

curtailed by the procedure established by law, others in the residential area will suffer from unwarranted encroachment of constant police surveillance into their personal space.

Secondly, as the courts held there is no exhaustive list of circumstances where house arrest would be the chosen form of custody, it will also be a violation of Article 14. The court may come up with completely new, different criteria for allowing arrest or vice-versa. Since the power is more or less discretionary in nature, there can be no qualifying criteria for the same. A most outstanding example of this would be that on 5 April 2022, on the request of NIA, the Bombay High Court denied allowing house arrest to Gautam Navlakha himself who previously on the orders of the Delhi High Court had already undergone house arrest. The court did allow the medical condition of the accused to be taken into consideration while deciding whether or not house arrest can be the chosen form of custody, however, Navlakha's counsel's plea that the former suffers from diabetes, hypertension his old age. Responding to this contention, Additional Solicitor General remarked, "Today, issues like hypertension, and diabetes are common. Where is the question of house arrest? Tomorrow, this court will be flooded, it will become like a market with thousands of jail inmates asking for house arrest." Can a disorder be too common to be a ground for refusal of house arrest? It can be for the Bombay High Court accepting the plea of ASG did not allow house arrest to Navlakha and provided that medical facilities will be made available to Navlakha by the prison authorities.

Another problem that was realised by the Bombay High Court was that Navlakha cannot be ordered house arrest as it would not prevent him from using social media. This will be the problem in every case where house arrest will be awarded. Social media today has become an active weapon that is commonly available to the masses. It has been previously abused for inciting violence or spreading fake news. If there is no way to prevent an accused from using social media, the entire objective of custody will fail. These issues remain unaddressed by the judiciary and a clearer and more efficient guideline is necessary.

CONCLUSION

House arrest has been notoriously known to the criminal justice system in India. However, till now it has been mostly used to detail political leaders, most recently Mehbooba Mufti in 2019 when Article 370 was abrogated. It is house arrest as a form of judicial/police custody that comes as news to us. Allowing house arrest as a form of custody will require very efficient and active police machinery which India lacks at the moment. Most of the police workforce is overworked and the crime rate in India is at an all-time high. In this scenario, if the police are given the additional responsibility to approach the accused detained in the house, it would add to the work burden of the police and does not appear to be a feasible option. In the USA, the accused awarded house arrest is usually the first-time offender who have committed petty, non-serious crimes. However, no such guideline has been provided in India.

House arrest cannot reasonably be a solution to the overcrowding of jails and rising expenditure on the maintenance of prisons in India. A rather reasonable argument had already been propounded by the court in *Arnesh Kumar v State of Bihar*⁸ where the Supreme court laid down certain guidelines relating to arrests. In this case, the court held that arrest should be made only in cases where it is “necessary”. An effort should be made that arrest is an exception in cases where imprisonment is less than 7 years as provided in the IPC. This guideline is much more definite and reasonable as compared to one propounded in *Gautam Navlakha’s* case.

⁸ *Arnesh Kumar v State of Bihar* 2014 8 SCC 273