

Duties and powers of Judicial Magistrates to examine prima facie case and compliance of Section 41(A) Cr.P.C/Sec.35(3) to 35(6) BNSS by Magistrate at the time of remand with reference to Arnesh Kumar's case.

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VI.Addl. District Judge,
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The new Bharatiya Nagarik Suraksha Sanhita, 2023 replaces Code of Criminal Procedure, 1973. A criminal case in India, either under the Code of Criminal Procedure (Cr.P.C) or under the new Bharatiya Nagarik Suraksha Sanhita (BNSS) progresses through distinct stages such as: pre-trial stage, trial stage and post trial stage. The pre-trial phase involves reporting the crime, investigation, arrest and potentially bail proceedings. The trial stage includes framing of charges, evidence presentation and judgment. Finally, the post trial stage allows for appeals and other remedies. A criminal case's pre-trial phase is an essential time when many significant choices are taken that could influence how the trial turns out. Pre-trial issues can generally provide the Indian criminal justice system with major difficulties, especially when it comes to protecting the rights of an accused and the fairness of the judicial system.

One of the most significant stages in pre-trial phase is 'arrest' and 'remand'. No doubt, arrest is legally justified to investigate a crime, prevent further offences or secure evidence. In the normal course, following provisions deal with the after effect of the arrest of any person:

Sec.56 Cr.P.C/Sec.57 BNSS: Person arrested to be taken before Magistrate or officer-in-charge of police station:

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take

or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer-in-charge of a police station.

Sec.57 Cr.P.C/Sec.58 BNSS: Person arrested not to be detained more than twenty-four hours:

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Sec.167 Cr.P.C/Sec.187 BNSS: Procedure when investigation cannot be completed in twenty-four hours:

(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 section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as the Magistrate thinks fit, for a term not exceeding 15 days in whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

Provided-----

- (3) xxxxx
- (4) xxxxx
- (5) xxxxx
- (6) xxxxx

Article 22(2) of the Indian Constitution:

Article 22(2): Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

I. Duties and powers of Judicial Magistrates to examine prima-facie case at the time of remand:

When an accused person is brought before a Magistrate for remand, the Magistrate's role is to ensure the detention is lawful and necessary for investigation under section 167 Cr.P.C./Sec.187 BNSS. No doubt, the act of directing remand of an accused is fundamentally a judicial function, but the Magistrate does not act in executive capacity while ordering detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate/Judge to satisfy himself whether the materials i.e., case diary, F.I.R etc., placed before him justify such a remand or, to put it differently, whether there exist prima-facie case and reasonable grounds to commit the accused to custody and extend his remand. It is obligatory on the part of the Magistrate/Judge to apply his judicial mind and not to pass an order of remand automatically or in a mechanical manner. **(Manubhai Ratilal Patel Tr.Ushaben Vs State of Gujarath and others, AIR 2013 SC 313).**

After perusal of the case diary, the Magistrate/Judge can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. If the Magistrate/Judge opines that the detention is lawful and necessary for investigation under section 167 Cr.P.C./Sec.187 BNSS, he can commit the

accused to custody and extend his remand. On perusal of the material placed before him by the police, if the Magistrate/Judge comes to a conclusion that there exists no prima-facie case for any offence, he can reject the accused to commit any custody and then release him once for all. Besides, if there exists a prima-facie case against the arrestee but finds no reasonable ground to commit him to any custody, or if the police have not complied with the provisions of Secs.41 and 41(A) Cr.P.C (Sec.35 BNSS), the Magistrate/Judge can reject the custody of accused and release him on any condition for his appearance during trial.

It is settled law that the Magistrate can alter or add new penal sections in the remand order to be passed under Section 167 Cr.P.C/Sec.187 BNSS as the Magistrate is not bound by the opinion of the investigating officer (**Arshad vs. State of UP, 2008(61)ACC 863(All)**, **Harihar Chaitanya vs. State of UP, 1990 (CrI.LJ) 2082(All)**).

II. Duties and powers of Judicial Magistrates to examine compliance of Sec.41(A) Cr.P.C/Sec.35(3) to 35(6) BNSS at the time of remand with reference to Arnesh Kumar's case:

Section 41(A) of the Code of Criminal Procedure was introduced in the year 2010 through the Criminal law (Amendment) Act, 2008 to prevent unnecessary arrests in cases where the offence is punishable with imprisonment up to 07 years, and Section 35 (3) to (6) of BNSS mirrors the provisions of Section 41(A) Cr.P.C. Though it has been 15 years since the date of amendment to criminal procedure code, we are still in confuse of understanding the purport of Section 41(A) Cr.P.C/Sections 35(3) to (6) of BNSS, and the reason for that is unwanted or arbitrary arrests by the police mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.P.C for effective arrest. There have been instances where the police have made arrests without a warrant even though such arrest are not permitted by law. The right to

personal liberty is recognized by the Hon'ble Apex court as a basic right guaranteed by the constitution of India and any restriction on that right must be legal.

In ***Jogendra Kumar VS. State of AP***, the Hon'ble Apex court ruled that the right to make an arrest must be used strictly in accordance with law and that any deviation would make arrest unlawful.

From a plain reading of Section 41 Cr.P.C/Section 35 (1) and (2) of BNSS, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than 07 years or which may extend to 07 years with or without fine, cannot be arrested by the police officer unless on his satisfaction that such person had committed the offence punishable as aforesaid. In such cases, the police officer before arrest, 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 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.

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 Cr.P.C/Section 35(1) of BNSS, follow the procedure contemplated under Sec.41(A) Cr.P.C/Sec.35(3) to (6) of BNSS.

Section 41(A) Cr.P.C/Section 35(3) to (6) of BNSS:

(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.

Therefore, Sec.41(A)Cr.P.C/Sec.35(3) to (6) of BNSS makes it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.P.C/Sec.35(1) & (2) of BNSS , the police officer is duty bound to issue notice directing the accused to appear before him at a specified place and time. On receiving notice, if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be 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 Sec.41 Cr.PC/Sec.35(1) & (2) of BNSS has to be complied and shall be subject to the same scrutiny by the Magistrate/Judge as aforesaid.

Sub-section 7 of Section 35 of BNSS is a new provision which was not there in Section 41A Cr.P.C. As per Section 35 (7) of BNSS, without prior permission of an officer not below the rank of Deputy Superintendent of Police, the police shall not arrest a person accused of an offence punishable with the

imprisonment of less than three years and such person is infirm or is about 60 years of age. Therefore, at the time of authorizing detention of a person accused of an offence punishable with the imprisonment of less than three years and if such person is infirm or is about 60 years of age, the Magistrate/Judge is duty bound to see whether the police have obtained prior permission from the officer of not below the rank of Deputy Superintendent of police.

In ***Arnesh Kumar vs. State of Bihar and another***, the Hon'ble Apex court intricately discussed the purport and scope of Secs.41 and 41(A) Cr.P.C, and held as follows:

“Our endeavor in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 Cr.PC;

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

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

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;

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;

Notice of appearance in terms of Section 41A of Cr.PC 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;

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 High Court having territorial jurisdiction;

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

We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. 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”.

Therefore, while authorizing detention of a person accused of an offence punishable with imprisonment for a term which may be less than 07 years or which may extend to 07 years with or without fine, the Magistrate/Judge's role is

to ensure strict compliance of Sec.41(A)Cr.P.C/Sec.35 (3) to (6) BNSS. The magistrate shall peruse the report furnished by the police officer in terms aforesaid and authorise detention of accused only after recording its satisfaction. In the above verdict, the Hon'ble Apex Court observed that authorizing detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by appropriate High Court.

In **Satender Kumar Antil vs. Central Bureau of Investigation and another**, the Hon'ble Apex Court highlighted the importance of Sec.41A of Cr.P.C and directed the Investigating Agency as well as the courts to follow the guidelines issued in Arnesh Kumar's case. Later on 21.01.2025, in **Satender Kumar Antil vs. Central Bureau of Investigation and another** (in Miscellaneous application No.2034 of 2022 in M.A.No.1849 of 2021 in SLP(CrI)No.5191/2021), the Hon'ble Apex court observed that notice under Section 41(A) Cr.P.C/Section 35 of BNSS must be issued only through the mode of service as prescribed under the Cr.P.C/BNSS. It is made amply clear that service of notice through Whats app or other electronic modes cannot be considered or recognized as an alternative or substitute to the mode of service recognized and prescribed under the Cr.P.C/BNSS.

In **K.Ranjith vs. The State of AP.**, the Hon'ble High Court of AP clearly held that there is no absolutely legal bar to apply the procedure contemplated under section 41(A) Cr.P.C to the offence under NDPS Act.

On the issue of multiple cases registered across different police stations over one social media post/comment, the Hon'ble High Court of AP issued the following circular No.8/2025 dt.05.07.2025:

HIGH COURT OF ANDHRA PRADESH:: AMARAVATI**ROC.NO.99/SO/2023****Date. 05.07.2025****CIRCULAR NO. 8 /2025**

Sub: High Court of Andhra Pradesh – Multiple cases registered across different police stations over one social media post/comment for which maximum sentence prescribed is less than seven years -- Strict adherence to the principles laid down in "**Armesh Kumar v. State of Bihar and another**" by the Magistrates remanding the accused – Certain Instructions – Issued.

Ref: Judgment, dated, 02.07.2014 in Criminal Appeal No. 1277 of 2014 (Special Leave Petition (Crl.) No. 9127 of 2013) in **Armesh Kumar v. State of Bihar and another.**

* * *

It has been brought to the notice of the High Court that most of the Judicial Magistrates are remanding the accused in cases pertaining to social media postings/comments without adhering to the principles laid down in **Armesh Kumar v. State of Bihar** case.

In a decision held between **Imran Pratap Gadhi v. State of Gujarath**, (March 28th, 2025) the Hon'ble Supreme Court of India with a aim to prevent misuse of criminal law to stifle free expression, while quashing FIR, held that the police before registering an FIR involving speech, writing or artistic expression (where the offences carry 3-7 years of imprisonment) must conduct a preliminary enquiry under Section 173 (3) of B.N.S.S. that such enquiry shall be preceded by an approval from Deputy Superintendent of Police that such enquiry must be concluded within fourteen (14) days.

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Therefore, all the Judicial Magistrates are hereby instructed to satisfy themselves before ordering remand, particularly in cases relating to social media postings/comments that the Investigating Officer complied with the law laid down in '**Arnesh Kumar**' and '**Imran Pratap Gadhi**' cases that the accused had committed repeated and multiple offences, that the accused, if not ordered to be remanded to judicial custody, may influence the witnesses or tamper evidence that the police require custodial investigation.

All the Judicial Magistrates shall follow the circular instructions, scrupulously, and any deviation in this regard will be viewed very seriously. The Judicial Magistrates who violate the circular would render themselves liable for contempt of the High Court besides facing departmental enquiry.


REGISTRAR (JUDICIAL)
 5/1/15

To: .

1. The Registrar (I.T. cum C.P.C.) with a request to direct the concerned to upload the said circular in the High Court's website.
2. All the Unit Heads in the State of Andhra Pradesh, with a request to cause circulation of the same among all the Judicial Officers working in their respective units.

While issuing the above circular, the Hon'ble High Court of AP instructed all the Judicial Magistrates to satisfy themselves before ordering remand, particularly cases related to social media postings/comments that the investigating officer complied with the law laid down in "**Arnesh Kumar**" and "**Imran Pratap Gandhi**" cases. Any deviation in this regard will be viewed very seriously. The judicial Magistrate who violate the circular would render themselves liable for contempt of the Hon'ble High Court besides facing departmental enquiry.

Finally, I conclude that the object and purport of Sec.41(A) Cr.P.C./Sec.35(3) to (6) of BNSS is only to provide safe guard against unnecessary arrests of persons accused of an offence punishable with imprisonment up to 07 years. The right to personal liberty is recognized by the Hon'ble Apex court as a basic right guaranteed by the constitution of India and any restriction on that right must be legal. While authorizing the detention of an accused, if the Magistrate finds out no reasonable ground to commit him to any custody, or if the police have not complied with the provisions of Secs.41 and 41(A) Cr.P.C./Sec.35 BNSS, the Magistrate/Judge must definitely reject the custody of accused and however, while releasing the accused, he can impose any conditions for his appearance during trial.
