



REVIEWING the views

POLICE REMAND

Concerns and realities for judicial magistrates

Even the High Court Division cannot supervise the exercise of remand power. This is because once the order of remand is granted, there remains no scope of cancelling the same and it is not possible to challenge an order of remand because of time constraint in obtaining certified copies and the fact that the order of remand has already been executed.

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WHEN a magistrate remands an accused person, he is under a duty to decide whether the accused person should be released on bail or kept in police custody or in jail custody. Remanding, in other words, may be of three types: remand on bail, remand in police custody, and remand in prison custody or jail.

The most objectionable remand in Bangladesh is remanding on police custody since police uses unlawful torture on the accused person in the pretext of extracting information from the accused. Police remand in Bangladesh has become synonymous with violent torture, degrading treatment and inhuman punishment leading to many custodial deaths in recent times.

It has been reported in an international journal that in Bangladesh unholy nexus exists between law enforcing agencies and empowering magistrates in dealing with cases of suspicious arrest without warrant, which has been causing custodial deaths and injuries to numerous innocent citizens. It has been very open secret that police indiscriminately arrest innocent civilians merely on the basis of suspicion and without any warrant primarily for receiving bribes and those of the arrestees who cannot pay bribes for quick release are being put in remand where they are subjected to barbarous treatment resulting in custodial death. According to reports of the human rights organizations the number of death in the custody of the law enforcement agency is about 70 per year (Amader Somoy, 4th July, 2010).

In addition to harassing innocent civilians, this draconian power of policed remand is also indiscriminately used to nab political opponents by the government in the power. It is frequently seen that police arrests political leaders belonging to the opposition and they are shown arrested in more than one case with the prayer for remand in police custody and the empowering magistrates just grant such remand without almost any exception. If the magistrates grant wholesale remand in the police custody in the same manner as police arrests

innocent people indiscriminately, question is raised whether there is at all any benefit of remand power of the magistrates. It is a guarantee ensured by the Constitution that every arrested person must be produced before the nearest magistrate within 24 hours and he must not be kept in police custody without an order of a magistrate. Why is this guarantee provided? The avowed aim is to check and control arbitrary executive power exercised by the police. However, to the utter dismay to civil societies in this country we have seen that magistrates have traditionally failed to exercise their so-called judicial power on granting remand. Previously remand power was used to be exercised by the executive magistrate who, it was argued, did not have either experience or education in criminal justice and as a result, they were accustomed to follow a parrot-like order on the forwarding letter of the police officer authorising detention in the police resulting ultimately in innumerable custodial deaths.

More than two years have passed since the judiciary has been separated from the clutches of the executive in November, 2007. However, our judicial magistrates who have education in criminal justice system have also not been able to make any difference. They are also following the blind footsteps of executive magistrates in granting wholesale remand power. Question obviously comes to the mind of every citizen with minimum civic sense where does the real problem lie? Does it lie with the judicial magistrates themselves or with the law on remand power itself?

Existing provision of remand

Section 167 of the CrPC read with Regulation 324 of the PRB provide the basic outlines of remand power. This provision provide, inter alia;

(i) While asking for remand, the police officer must state the reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the accusation or information received against the person is well-founded.

(ii) The police officer also shall transmit to the Magistrate the copy of the entries in the case diary.

(iii) If the magistrate gives order of remand, he must state the reason for such order.

(iv) Application for remand should be carefully scrutinized and should only be granted when it is shown that the presence of the accused with the police is necessary for the identification of property or the like special reason.

(v) While asking for remand the police must also send a copy of the case diary and report the matter to the Superintendent.

Limitations in granting remand and drawbacks in remand law

As discussed above, the exercise of remand power which is not any routine work of the magistrate should be exercised only in exceptional circumstances. However, the moot question before an empowering magistrate is- if the police officer makes application with reasons for remand along with a copy of case diary and there are cogent reasons mentioned in the application, can magistrate refuse such prayer? This is important because of the fact that granting remand is not a full judgmental power, although the magistrate has to apply his judicious mind. In granting or refusing remand the magistrate has no scope to examine anything but the case diary and the application for remand and the statement of the accused, if any, the magistrate here does not try the truthfulness or falsehood of the allegation.

In other words, if there is prima facie case for remand, the magistrate cannot but grant remand. Let me mention the name of Ehsanul Hoque Milon, a state minister during the 4 party alliance rule was arrested some days ago in an extortion case. However, when such a political person is arrested and produced before court, usually the police, at the dictation of the government, brings more than one serious allegations like sedition and application is forwarded before the magistrate along with case diary. In such a situation an empowering magistrate does have no option but to grant remand. In view of the above realities it is often criticized that such power of an empowering magistrate is unable to provide any balance between judicial independence and police power. How to get over from this situation? In fact there are some important drawbacks in the law of remand which need to be remedied.

First, the laws of remand as enacted during British regime in section 167 of the CrPC and regulation 324 of PRB are mostly in the nature of executive oriented compared to judicial power. When a police officer submits application for remand along with a case diary, which standard will the empowering magistrate adopt to justify or refuse remand? Is it objective satisfaction or the subjective satisfaction of the action of the police which he will adhere to? In fact there is little scope for a

magistrate to follow objective satisfaction principle as he has no scope to travel beyond the limits of case diary and application for remand. Thus although the statute guarantees discretionary powers, the exercise of such power is almost impossible in fact.

Secondly, there is no specific guideline to be followed by magistrates while exercising the power of remand. Nowhere is it indicated the situation when magistrate shall not grant remand. When a person is surrendered willingly before a court, section 167 does not permit for any remand, although police frequently apply for remand and magistrates grant such power. Again, a person is arrested under section 54 and then police shows that person arrested in some other cases and apply for remand. However, section 167 per se does not permit such power.

Third, regulation 324 of PRB specifies that the police must send a copy of the case diary and application to the Superintendent of police but nobody knows why that provision exists. Likewise, section 167 specifies that if remand is granted, by any of the magistrates other than CJM or CMM, a copy of remand order along with its reasons must be sent to the Metro Sessions Judge or District Judge. There are mounting uncertainties with regard to this. Why is there the provision of sending copy of remand order to the higher authority? What is the consequence if not sent? The order of remand has already been passed and executed and sending copy after execution of remand order does not seem to bear any significance. There being no guideline before a magistrate regarding this, he has to act mechanically following his predecessors.

Fourth, even the High Court Division cannot supervise the exercise of remand power. This is because once the order of remand is granted, there remains no scope of cancelling the same and it is not possible to challenge an order of remand because of time constraint in obtaining certified copies and the fact that the order of remand has already been executed.

The remand power and BLAST v Bangladesh case

The abuse of power under sections 54 and 167 by the police and magistrates have been elaborately discussed by the High Court Division in BLAST v Bangladesh case in 2003. In this decision the High Court Division has given 15 directives to the government to follow along with recommendations to implement by way of amending CrPC. The judgment of this case has been stayed by the Appellate Division and the government has not taken any step



to proceed with the hearing the matter in last seven years.

What needs to be done?

Empowering judicial magistrates are not strangers to this society; they cannot act going beyond the environment created by the government in the state mechanism. In its 40 years history of independence no government sincerely acted to separate judiciary from the executive; every government has tried to use the judiciary to protect their interest. Although judiciary is separate now, still influences are pressed into by the government in power in different ways. For instance, in cases of posting, promotion and transfer still the Ministry of Law interferes indirectly by not issuing GO (Government Order) in time and as a result a concerned judicial officer is to suffer. Still the appointment in the Supreme Court is made on political consideration. We have seen, to our utter dismay, in the recent past that even the Chief Justice of the country acted in favour of the Government in power stigmatising the impartial role of the judiciary as a whole. In such a downturn environment in the Supreme Court, we cannot expect to see prospective judicial activism in the lower judiciary. Thus the imperatives of the government of the day would be as follows:

(i) Decision in the BLAST case must be proceeded with hearing in the Appellate Division as soon as possible and necessary judicial recommendations for amendment of laws and rules must be completed. As per the decision in the BLAST case the provisions of remand under CrPC must be removed and special provisions for remand in jail custody must be introduced.

(ii) Proper and effective guidelines must be framed by the apex court for the judicial magistrates to follow while granting remand in police custody if any in special circumstances.

(iii) Appointment of a judicial ombudsman under the leadership of a retired chief justice is long overdue in view of rampant procedural injustice throughout the judiciary. For instance, granting remand or refusing remand is a discretionary power of the magistrate and to check the abuse of this power is almost impossible by the High Court Division. This is because such abuse of power may traditionally be challenged by way of revision application, 561A application or through writ application. However, hearing and dispensation of such a petition takes as long as 8-10 years and to get all remedies exhausted from the Appellate Division it usually takes another 7-8 years and in the meantime the concerned judge or magistrate might have gone into retirement and as such this type of judicial control is almost meaningless. However, these problems may easily be remedied by creating an office of judicial ombudsman.

(iv) Bangladesh signed the Convention Against Torture (CAT) on 5th October, 1998. However it has not framed any law by declaring 'torture in police custody' as an offence. Sooner the Government makes such law better for judicial magistrates. This is because once such law is made, police and other law enforcement agencies will be less interested to make application for remand let alone torturing in custody.

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LAW campaign

Accountability key to protecting civilians in conflict



THE targeting of civilians, sexual violence and the denial of humanitarian access remain widespread in armed conflict, senior United Nations officials told the Security Council on July 7, 2010, urging greater efforts to end impunity for such acts.

"The conduct of parties to conflict is inevitably affected by their sense of susceptibility to punishment and accountability to their victims, and clear signals that impunity will not be tolerated," UN humanitarian chief John Holmes said during the debate on the protection of civilians in armed conflict.

He told the meeting, which heard from 40 speakers, including Secretary-General Ban Ki-moon and High Commissioner for Human Rights Navi Pillay, that the danger is that the normative framework has outpaced the enforcement will and capacity of the international community.

"So I urge the Council to take a robust approach to accountability," said Mr. Holmes, who addressed the 15-member body for the last time as Under-Secretary-General for Humanitarian Affairs and UN Emergency Relief Coordinator.

He noted that while national justice systems must remain the first line of defence, the international community must explore alternative means when those systems prove unable or unwilling to bring perpetrators to justice and provide remedies to victims.

He welcomed the commission of inquiry launched by the Secretary-General for crimes committed during violence in Guinea last September, as well as the panel set up to advise Mr. Ban on accountability for violations of humanitarian and human rights law in Sri Lanka, especially in the last stages of the conflict in that country, and the mechanism recently set up by the

Government of Sri Lanka itself.

"The point is that this scrutiny needs to become the norm," Mr. Holmes stated. "Actual and would-be violators need to understand that they have nowhere to hide. Politics must not always win out where powerful States or vocal States with powerful protection are involved."

He suggested that a permanent mechanism be established somewhere in the UN system to conduct inquiries on serious allegations, more or less automatically, noting that this would prevent calls for investigations from being politicised from the start.

"Accountability of perpetrators is key for the protection of civilians," stated Ms. Pillay, who noted that among the most significant actions taken by the Council for the protection of civilians is the establishment of commissions of inquiry.

She noted that States bear the primary responsibility for carrying out investigations and prosecutions regarding genocide, war crimes, crimes against humanity and gross human rights violations. Several countries have established national commissions of inquiry, which are welcome demonstrations of a State's willingness to seek justice.

"True accountability can only be achieved," she stressed, "if national inquiry mechanisms are credible, independent and impartial."

Such national commissions should have the power of access to all relevant authorities, persons and information, as well as adequate financial and human resources. "It is these conditions that will instil confidence and trust in these national initiatives," she said.

The Council has acted to promote

accountability, Ms. Pillay added, noting that it has explicitly made its support for the military operations of national armed forces conditional on their observance of human rights law, humanitarian law and refugee law.

"We need to ensure that the UN and bilateral support to military operations and security sector reform is tied to promoting respect for human rights," she stated.

For his part, the Secretary-General said the Council has adopted important measures designed to put civilians first, but there is more that it can and must do, including maximizing the impact of peacekeeping missions in protecting civilians.

He welcomed the Council's efforts to increase the emphasis on the protection of civilians in designing peacekeeping mandates. However, he added, that for peacekeeping operations to successfully implement these mandates, the Council must provide them with the sustained political support they require.

"The Council's engagement is vital to make certain that peacekeeping operations are adequately resourced, and to ensure that mission leadership is fully empowered to take forward this complex mandated task on the international community's behalf," said Mr. Ban.

The other key challenges the Council must address are increased compliance by non-State armed groups with international law, and ensuring accountability. "More must be done to increase the expectation that violators will have to face the consequences of their actions," the Secretary-General stated.

Source: UN News Service/ Human Rights Education Associates (HREA).

RIGHTS monitor

Protests against UN echo anti-justice campaign

DEMONSTRATIONS led by a Sri Lankan government minister to protest a United Nations expert panel show the government's open hostility to investigations of alleged war crimes in the Tamil Tiger conflict that ended last year, Human Rights Watch said July 11, 2010.

UN Secretary-General Ban Ki-moon's creation of and support for the three-person Panel of Experts on justice mechanisms despite persistent Sri Lankan government opposition shows important new resolve to promote accountability for war crimes, Human Rights Watch said.

"The demonstrations against the UN's Colombo compound are a threatening new turn in the Sri Lankan government's campaign against the UN Panel of Experts," said Elaine Pearson, acting Asia director at Human Rights Watch. "Anyone who ever thought this government would get serious about investigating wartime atrocities should look at the ruckus being raised over three advisors to the UN secretary-general."

Since July 6, 2010, the minister for housing and construction, Wimal Weerawansa, has led what were initially several hundred protesters who surrounded the UN compound in Colombo and harassed UN staff, blocking their arrival and departure. The crowds

were protesting Ban's forming of an expert panel to advise him on accountability mechanisms for violations of international human rights and humanitarian law during the final stages of the conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE).

On July 8, Ban issued a statement finding it "unacceptable that the Sri Lankan authorities have failed to prevent the disruption of the normal functioning of the United Nations offices in Colombo as a result of unruly protests organized and led by a cabinet minister of the Government." He recalled the UN's ranking official in Sri Lanka, Neil Buhne, for consultations in New York and closed the UN Development Program's Asia and Pacific Regional Office in Colombo as a "direct response" to the situation affecting the UN compound.

On July 10, the United States, the European Union, and eight European heads of mission in Colombo issued a joint statement that "Peaceful protest is part of any democracy, but blocking access to the United Nations ... as well as intimidating and harassing UN personnel is a breach of international norms and harmful to Sri Lanka's reputation in the world."

"That Secretary-General Ban is standing his ground against the anti-UN protests in Colombo is a strong endorsement of the need for justice and accountability in Sri Lanka," Pearson said. "It's time the Sri Lankan government started working with Ban, rather than against him."

Source: Human Rights Watch.