

Section 190 of the Bharatiya Nagarik Suraksha Sanhita, 2023 – Journey to the promised land of liberty

*By Atul Menon (Senior Associate),
Shubhangni Jain (Senior Associate)
and Akash Ray (Associate)*

Introduction

The Bharatiya Nagarik Suraksha Sanhita, 2023 ('**BNSS**') repeals and replaces the Code of Criminal Procedure, 1973 ("**CrPC**") and has come into effect from 1 July 2024.

Section 190 of the BNSS deals with forwarding of an accused to a Magistrate if the investigating agency finds sufficient evidence or reasonable grounds for trial of the accused.

Prior to the introduction of Section 190 of the BNSS, Section 170 of the CrPC (corresponding to Section 190 of the BNSS) was being misapplied and misinterpreted by the subordinate courts and investigating agencies in many states. In such states, it was a prevalent practice that, despite not being arrested during the investigation, if a chargesheet was filed, the accused was sent to custody and thereafter, presented before the concerned Magistrate.

Section 190 of the newly introduced BNSS solves this problem and corrects an incorrect reading of the law.

This article analyses how Section 170 of the CrPC was being misinterpreted and practically applied at the ground level, the changes brought about by judgments of the Supreme Court and High Courts, and the statutory culmination of the same in Section 190 of the BNSS - reinforcing and protecting the right of life and liberty.

Position before the judgments in Siddharth v. State of Uttar Pradesh¹ and Satender Kumar Antil v CBI²

Section 170(1) of the CrPC provides that if after investigation, the police finds sufficient evidence against an accused, then it shall forward the accused under custody to a Magistrate (non-bailable offences). Section 170(1) of the CrPC reads as under:

"If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed."

Prior to the judgment in *Satender Kumar Antil* and *Siddharth*, the system prevalent in various states, especially in Uttar Pradesh, was that despite not being arrested during the investigation,

¹ (2022) 1 SCC 676.

² (2022) 10 SCC 51.

if a chargesheet was filed, the accused was sent to custody. Thereafter, the accused was presented before the concerned Magistrate from custody. This was on account of the misinterpretation of Section 170 of the CrPC. The police and subordinate courts misinterpreted the phrase '*forward the accused under custody*' in Section 170 as first arresting the accused, and thereafter presenting the accused before the Magistrate. Therefore, even if the accused was never arrested during investigation and had cooperated with investigation, he / she was still arrested for the purposes of filing the charge-sheet before the Magistrate.

While in the cases of *High Court of Delhi vs. CBI*³, *High Court of Delhi vs. State*⁴ and *Deendayal Kishanchand vs. The State of Gujarat*⁵, it had already been clarified that it is not essential in every case involving a cognizable and non-bailable offence that an accused be taken into custody when the charge sheet/final report is filed, the police and trial court's misapplication of Section 170 continued in many states, especially in Uttar Pradesh.

The Supreme Court took note of this practice during one of the initial hearings in *Satender Kumar Antil*⁶ and found such a practice to be unacceptable. Thus, the Court thought it appropriate to lay down some principles in this regard.

Judgments in Siddharth and Satender Kumar Antil

During the pendency of the case in *Satinder Kumar Antil*, another case, *Siddharth v. State of U.P.*, came before the Supreme Court wherein the trial court had refused to take the chargesheet on record without first arresting the accused in view of Section 170 of the CrPC. The Supreme Court was of the view that Section 170 of the CrPC does not impose an obligation on the investigating agency to arrest an accused at the time of filing of the chargesheet. It held that the word "*custody*" appearing in Section 170 of the CrPC does not contemplate police or judicial custody but merely presentation of the accused before court while filing the chargesheet.

The Supreme Court further held that unless the investigating officer does not believe that the accused will abscond or disobey summons, he/she is not required to be produced in custody. The Supreme Court clarified that subordinate courts cannot refuse to accept a charge sheet, simply because the accused has not been arrested and produced before the court.

The judgment in *Siddharth* was then re-affirmed by the Supreme Court in its judgment in *Satender Kumar Antil* and the following law was laid down:

- a. The Supreme Court relied upon the judgment in *Siddharth* to reiterate that "*custody*" appearing in Section 170 of the CrPC does not contemplate either police or judicial custody. It merely connotes the presentation of the accused by the investigating officer before the court at the time of filing of the charge sheet.
- b. The power under Section 170 of the CrPC is to be exercised by the court after the completion of the investigation by the agency concerned. It is thus a procedural

³ 2004 SCC OnLine Del 53.

⁴ 2018 SCC OnLine Del 12306.

⁵ 1982 SCC OnLine Guj 172.

⁶ Order dated 28.07.2021 in Special Leave Petition (Crl.) No. 5191 of 2021.

compliance from the point of view of the court alone. The investigating agency has a limited role to play in this regard.

- c. In a case where the prosecution does not require custody of the accused, there is no need for an arrest when a case is sent to the Magistrate under Section 170 of the CrPC. There is not even a need for filing a bail application, as the accused is merely forwarded to the court for the framing of charges and issuance of process for trial.
- d. If the court is of the view that there is no need for any remand, then the court can secure the presence of the accused in the manner provided under Section 88 of the CrPC⁷. In case a remand is required, an opportunity will have to be given to the accused persons to be heard.

Even in complaint cases, the Supreme Court has recently, in the case of *Tarsem Lal v. Enforcement Directorate*,⁸ held that where an accused appears before the Court pursuant to summons under Section 204 of the CrPC, then he shall not be treated as being in custody, and he need not apply for bail. The Court can however direct the accused to furnish bonds in terms Section 88 of the CrPC. Section 91 of the BNSS corresponds to Section 88 of the CrPC and provides for taking bond or bail for securing appearance of a person in Court.

Position post the judgments in Satender Kumar Antil and Siddharth

Despite passing of the judgments in *Satender Kumar Antil* and *Siddharth*, there continued to be multiple instances, where orders were passed in breach of the said judgments and the subordinate courts and investigating agencies continued to arrest persons prior to filing of a chargesheet⁹.

The Supreme Court noted¹⁰ these aberrations, which continued despite the judgments being brought to the notice of the trial courts and stated that such orders have dual ramifications i.e. (i) sending people to custody where they are not required to be so sent, and (ii) creating further litigation by requiring the aggrieved parties to move to remedy such wrong.

Section 190 of the BNSS – Panacea for all evils?

Taking into consideration the ground realities, Section 190 of the BNSS incorporates the dicta of *Satender Kumar Antil* and gives it statutory recognition in the form of a proviso to Section 190 (1) of the BNSS. It reads:

“190. (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall

⁷ “88. **Power to take bond for appearance.**—When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial.”.

⁸ 2024 SCC OnLine SC 971.

⁹ *Chandmal v. State of UP*, order dated February 7, 2023, in Criminal Appeal No. 359 & 360 of 2023.

¹⁰ Order dated March 21, 2023 in Miscellaneous Application No. 2034/2022 in MA 1849/2021 in SLP(CrI) No. 5191/2021.

take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed:

Provided that if the accused is not in custody, the police officer shall take security from such person for his appearance before the Magistrate and the Magistrate to whom such report is forwarded shall not refuse to accept the same on the ground that the accused is not taken in custody.”

The proviso clarifies that it is not obligatory for the accused to be taken into custody, especially if the person is not arrested during the investigation. The police officer shall take security from the accused for their appearance before the Magistrate. Additionally, it ensures that the Magistrate receiving such a report should not reject the chargesheet on the ground that the accused has not been taken into custody.

The change introduced by the BNSS clarifies that after completion of investigation but before submission of police report, the police are not mandated to arrest an accused merely to secure his appearance before a judicial magistrate.

The recognition of the mandate regarding police/judicial custody being the exception and not the norm in Section 190 of the BNSS is a welcome change. It bears testament to the fact that personal liberty guaranteed under Article 21 of the Constitution of India is an important aspect of the constitutional mandate. However, only time will tell if the ground realities now improve in light of the statutory recognition of the judicial mandate in *Siddharth* and *Satender Antil* granted under Section 190 of the BNSS.
