

(1991) 04 MAD CK 0032
In the Madras High Court
Case No : Writ Petition No. 16530 of 1990

Krishnaswamy

APPELLANT

Vs

Inspector of Police and others

RESPONDENT

Date of Decision : 23-04-1991

Acts Referred:

Constitution of India, 1950 — Article 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 167, 170, 2, 207, 209
Penal Code, 1860 (IPC) — Section 324, 380, 394, 395, 397

Citation : (1992) CriLJ 2998

Hon'ble Judges : Mishra, J;Janarthanam, J

Bench : Division Bench

Advocate : R. Sankara Subbu, for the Appellant; Public Prosecutor, for the Respondent

Judgement

Mishra, J.—The Petitioner herein has moved for a Writ of Habeas Corpus, on behalf of his friends (1) Ravi alias Puli Ravi alias Kaveti S/o.

Ramaiah (2) Ganga Rao (3) Narayana (4) Durga Rao and (5) Lakshmiah, who it is not known why, were arrested on 18-7-1988 and remanded

to custody on 31-9-1988. Their remand was extended from time to time.

2. It is said in the affidavit filed in support of the petition and that is all, which, if stated, would give us an idea of the legal rights pleaded by the

petitioner :

The charge-sheet was not filed within ninety days and as such the remanding Magistrate ought to have released the detenus on bail. Hence the

detention is violative of Article 21 of the Constitution of India and contrary to 167(2), Cr.P.C. and totally illegal".

3. The contents of the cryptic petition had been returned by the respondents in the same cryptic way, except that in one counter-affidavit we find a

statement that the abovenamed persons have been committed to the Court of Principal Sessions Judge, Vellore in PRC No. 9/90 for offences

under sections 457(2), 394, 395, 397, 324 and 459, I.P.C. and the case is pending trial and in the other two affidavits, a statement that they have

already been convicted by a Magistrate for the offences under sections 457 and 380, I.P.C. and they are undergoing sentence of rigorous

imprisonment for a period of one year.

4. On this set of facts and pleadings before us, we have to answer the contention that, since a charge sheet was not submitted within a period of

ninety days, as contemplated under S. 167(2) of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974 - for short "the Code"), the

abovenamed accused persons become entitled to bail and hence entitled to a Writ of Habeas Corpus.

5. We would have chosen to dismiss this petition in limine for the reason inter alia that the facts are so stated that it is not possible to know whether

the petitioner has rightly asserted that, there being no charge-sheet submitted within a period of ninety days, the abovenamed accused persons

became entitled to be released on bail under S. 167(2) of the Code. But we do not do so, for we find ourselves confronted with a Judgment of a

learned single Judge of this Court on the power of a Magistrate to remand an accused to jail custody under S. 309 of the Code.

6. Before the learned single Judge, who was dealing with the petition to call for the records in bail, in a case in which it was pleaded by learned

counsel for the petitioner that the charge-sheet had been filed after the expiry of the prescribed time-limit of ninety days and contended that, in that

situation any further remand was not permissible in view of the provisions of S. 167(2) of the Code read with Article 21 of the Constitution of

India, Mr. R. Sankarasubbu, who has appeared before us, was the counsel appearing for the petitioner. In the said case of Judu alias Daswaran v.

State of Tamil Nadu, 1990 LW (Crl) 53, learned single Judge accepted his contention concluding that the net result of the analysis was that the

accused was entitled to bail, which must be deemed to have been made on the expiry of ninety days and, since this was the conclusion, he ordered

for the release of the petitioner on bail on his executing a bond and furnishing sureties.

7. Soon thereafter, however, one of us had the opportunity to deal with the same question in Crl. M.P. No. 10755 of 1990 and Crl. M.P. SR.

No. 61754/90, (Sankar alias Gowri Sanker v. State of Tamil Nadu) (unreported). Raising a similar contention and contending that, u/s 167(2)(a)

of the Code, the accused had become entitled to bail, which must be deemed to have been made on the expiry of ninety days, learned counsel for

the petitioners contended that the petitioners therein were entitled to bail. Rejecting the argument on the basis of the statement of law in the

judgment of the Supreme Court in State of Uttar Pradesh Vs. Lakshmi Brahman and Another, , it was observed that the attention of the learned

single Judge, who decided the case of Judu alias Daswaran, 1990 MLW 53, had not been drawn to the judgment of the Supreme Court and that

the law on the subject, as decided by the Supreme Court was that by submission of a charge-sheet, the investigation comes to an end and the

enquiry commences and, therefore, the accused cannot claim to be released on bail on account of the default committed in filing the final report

within the prescribed time.

8. On the basis of the said Judgment, came an unreported decision of a Division Bench of this Court in Panchalingam v. Inspector of Police, CB,

CID, Tiruchirapalli in Writ Petition No. 6268 of 1990 dated 21-12-1990 this time in a petition under Article 226 of the Constitution of India,

similar to one before us for a Writ of Habeas Corpus. A Bench of this Court was confronted with the judgment in the case of Judu alias Daswaran,

1990 MLW 53, on the one hand and the judgment in the unreported case of Sankar alias Gowri Sanker (Crl. M.P. No. 10755/90 and Crl.

M.P.S.R. No. 61754/90.) on the other hand, but found that the statement of law in Judu alias Daswaran's case, 1990 MLW 53, was wrong in

view of the judgment of the Supreme Court in the case of State of Uttar Pradesh Vs. Lakshmi Brahman and Another, .

9. Learned Counsel for the petitioner has once again however, argued with some vehemence that the entitlement for bail under S. 167(2) of the

Code, if not respected in Courts in any proceeding, enquiry or trial of a criminal case, would render any subsequent remand under S. 309 of the

Code invalid. We thought, unless we decided to differ with the view expressed by a Bench of this Court in Writ Petition No. 6268 of 1990 we

were bound to follow the course adopted by the Bench and decline to issue any Writ of Habeas Corpus. Since, however, we find that there is

confusion in regard to the entitlement for bail and actual release on bail u/s 167(2) of the Code, we make our endeavour to examine the legitimacy

of the contention raised on behalf of the petitioner.

10. Before the present Code of 1973 came into effect, procedure for remand of an accused to judicial custody was to be found in Section 344 of

the old Code, 1898. Under that section, a Magistrate was given the power to remand an accused to jail custody in cases pending investigation.

There was no limitation of any kind upon the jurisdiction of the Magistrate to remand an accused to judicial custody. This power could be

exercised as and when necessary to aid the investigation and collection of evidence. The new Code however introduced in Section 167 a

comprehensive provision to take care of the matters in Court concerning an accused during investigation of a case; and made some drastic

departures by splitting old Section 344 into Section 167(2) of the new Code, taking care of remand to judicial or police custody during

investigation and Section 309 of remand to judicial custody during the course of any enquiry or trial.

11. Section 167 of the new Code runs as follows :

167. 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 such Magistrate thinks fit, for a term not exceeding fifteen days in the 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 that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days

if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this

paragraph for a total period exceeding, -

(i) ninety days, where the investigation relates to an offence punishable with death imprisonment for life or imprisonment for a term not less than ten

years :

(ii) sixty days, where the investigation relates to any other offence and on the expiry of the said period of ninety days, or sixty days, as the case

may be, the "accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-

section shall be deemed to be so released under the provisions of Chapter XXXIII for the purpose of that Chapter.

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specifically empowered in this behalf by the High Court, shall authorise detention in the custody of the

police.

Explanation I. For the avoidance of doubts it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (A) the

accused shall be detained in custody so long as he does not furnish bail.

Explanation II : If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the

production of the accused person may be proved by his signature on the order authorising detention.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer

making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest

Executive Magistrate, on when the powers of a Judicial Magistrate or a

Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2);

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this Section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice in the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation in to an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section

(5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify".

12. We are not required to go into a comparison of the provisions in Section 344 of the old Code and Sections 167 and 309(2) of the new Code,

as the Supreme Court of India in the case of Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of

Orissa, , has already done it after taking notice of the relevant provisions of the two Codes. The Supreme Court has said (at page 1216 of Cri LJ)

:

The law as engrafted in proviso (a) to Section 167(2) and Section 309 of the New Code confers the powers of remand to jail custody during the

pendency of the investigation only for the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been

taken or commencement of trial has proceeded. In such a situation, what is the purpose of ""Explanation - I in Section 309 is not quite clear. But

then the command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish

bail and cannot be kept in detention beyond the period of 60 days (the period of 60 days" has since been amended and made "90 days" where the

investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years) even if the

investigation may still be proceeding, In serious offences of criminal conspiracy - murders, dacoities, robberies by inter-State gangs or the like it

may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the

period of 60 days (the period of 60 days" has since been amended and made "90 days" where the investigation relates to an offence punishable

with death, imprisonment for life or imprisonment for a term of not less than ten years). Yet the intention of the Legislature seems to be to grant no

discretion to the Court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the

accused released on bail u/s 167 will be deemed to be so released under the provisions of Chapter XXXIII and for the purpose of that Chapter.

That may empower the Court releasing him on bail, if it considers necessary so to do, to direct that such person be arrested and committed to

custody as provided in sub-section (5) of S. 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance the power of

remand is to be exercised u/s 309 of the new Code. But if it is not possible to complete the investigation within a period of 60 days (the period of

60 days" has since been amended and made "90 days" where the investigation relates to an offence punishable with death, imprisonment for life or

imprisonment for a term of not less than ten years) then even "in serious and ghastly types of crimes the accused will be entitled to be released on

bail. Such a law may be a "paradise for the criminals", but surely it would not be so, as sometimes it is supposed to be, because of the Courts. It

would be so under the command of the Legislature".

13. But the question in *Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa*, was whether during

the pendency of the investigation, which started before coming into force of the New Code, the appellants therein could press into service proviso

(a) to S. 167(2) of the new Code and claim to be released on bail as a matter of right when they were prepared to furnish bail. The Court

concluded that the benefit of the proviso (a) to S. 167(2) of the New Code could not be claimed by an accused proceeded against under the old

Code.

14. Section 309 of the new Code which comes into play-and rather evidently came into play after the submission of the charge-sheet in the instant

case -, reads as follows :

309 Power to postpone or adjourn proceedings

(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible

(2) If the Court, after taking cognizance of an offence, finds it necessary or advisable to postpone the commencement of, or adjourn, any

inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for time as it

considers reasonable and may by a warrant remand the accused if in custody;

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time;

Provided further".

15. All that is necessary for a remand under sub-sec. (2) or S. 309 of the new Code is that it should be found necessary or advisable to postpone

the commencement of, or adjourn, any inquiry or trial and that the accused was in custody. It is obvious that a person, who is not released on bail

and has been remanded to custody under S. 167(2) of the Code would/will continue to be in custody and the Court, while postponing or

adjourning the inquiry or trial would/will be required to take recourse to sub-sec. (2) of S. 309 of the Code, to order a remand not exceeding

fifteen days at a time.

16. Most of the Courts in India have taken the view that the provisions of S. 167(2) and the provisions of S. 437 of the new Code operate in

different fields, the latter being a provision about bail in base of non-bailable offence. Yet as we have noticed, it is always accepted as if a person

released under S. 167(2) is also released under S. 437 of the Code.

17. In *Bashir and Others Vs. State of Haryana*, , the Supreme Court considered this aspect of the matter and said (at pages 175 and 176 of Cri

LJ) :

As under S. 167(2) a person who has been released on the ground that he had been in custody for a period of over sixty days is deemed to be

released under the provisions of Chapter XXXIII, his release should be considered as one under S. 437(1) or (2). S. 437(5) empowers the Court

to direct that the person so released may be arrested if it considers it necessary to do so. The power of the Court to cancel bail if it considers it

necessary is preserved in cases ""where a person has been released on bail under S. 437(1) or (2) and these provisions are applicable to a person

who has been released under S. 167(2). u/s 437(2) when a person is released pending inquiry on the ground that there are not sufficient grounds to

believe that he had committed a non-bailable offence may be committed to custody by Court which released him on bail if it is satisfied that there

are not sufficient grounds for so doing after inquiry is completed. As the provisions of S. 437(1), (2) and (5) are applicable to a person who has

been released under S. 167(2), the mere fact that subsequent to his release a challan has been filed is not sufficient to commit him to custody. In

this case, the bail was cancelled and the appellants were ordered to be arrested and committed to custody on the ground that subsequently a

charge-sheet had been filed and that before the appellants were directed to be released under S. 167(2) their bail petitions were dismissed on merits by the Sessions Court and the High Court. The fact that before an order was passed under S. 167(2), the bail petitions of the accused were dismissed on merits is not relevant for the purpose of taking action under S. 437(5). Neither is it a valid ground that subsequent to release of the appellants a challan "as filed by the police. The Court before directing the arrest of the accused and committing them to custody should consider it necessary to do so under S. 437(5). This may be done by the Court coming to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody. It may also order arrest and committal to custody on other grounds such as tampering of the evidence or that his being at large is not to the interests of justice. But it is necessary that the Court should proceed on the basis that he has been deemed to have been released under S. 437(1) and (2).".

18. It is the above statement of law that a person released under S. 167(2) will be deemed to be so released under S. 437(1) or (2) and cannot be taken in custody until the bail is cancelled under S. 437(5) of the Code, that created some confusion and it seems it is on this basis that "entitlement for bail" under S. 167(2), but "not actually released on bail" is sought to be used as if "entitlement ipso facto" amounted to "release" and such a person thus could not be remanded to jail custody under S. 309(2) of the Code after the submission of a charge-sheet.

19. Bashir's case, (4) is not an authority for the position that a person, who had not been released on bail, after the expiry of the period of 60/90 days as contemplated under S. 167(2), although charge-sheet had not been submitted within the stipulated period, would ipso facto be released and this right would continue even if the charge-sheet is filed after the expiry of the period so prescribed pending inquiry or pending trial.

20. In the case of State of Uttar Pradesh Vs. Lakshmi Brahman and Another, a Division Bench judgment of the Allahabad High Court, which had expressed the opinion that, after the charge-sheet had been submitted under S. 170, Cri.P.C., the Magistrate had no jurisdiction to authorise

detention of an accused in custody under S. 170, Cr.P.C. and, therefore, the authority to remand the accused to custody after the charge-sheet

had been submitted, had to be gathered from other provisions of the Code, fell for consideration. The High Court had posed the question whether

in a case instituted upon a police report exclusively triable by the Court of Session, the Magistrate while committing the accused to the Court of

Session under S. 209, Cr.P.C. had, after the accused was brought before him and before the order committing the accused to the Court of

Session was made, jurisdiction to remand the accused to custody other than police custody and answered, since after the enactment of the Code

of Criminal Procedure, 1973, the proceeding before the Magistrate under Chapter XVI of the Code would not be an enquiry within the meaning of

the expression in S. 2(g) and, therefore, S. 209 would not confer power on the Magistrate to commit the accused to custody. The Supreme Court,

in this context also examined the scope of S. 309(2) of the Code and that of S. 167(1) and (2) with the proviso thereto and observed :

Magistrate under S. 207 is something other than a judicial function and while discharging the function the Magistrate is not holding an inquiry as

contemplated by the Code. If the Magistrate is holding the inquiry obviously S. 309 would enable the Magistrate to remand the accused to the

custody till the inquiry to be made is complete. Sub-section(2) of S. 309 provides that if the Court, after taking cognizance of an offence or

commencement of trial, find it necessary or advisable to postpone the commencement or adjourn any inquiry or trial, it may, from time to time, for

reason to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant

remand the accused if in custody. There are three provisions to sub-sec. (2) which are not material. If, therefore, the proceedings before the

Magistrate since the submission of the police report under S. 170 and till the order of commitment is made under S. 209 would be an inquiry and if

it is an inquiry, during the period, the inquiry is completed, S. 309(2) would enable the Magistrate to remand the accused to the custody"".

21-23. It is worth noticing that in State of Uttar Pradesh Vs. Lakshmi Brahman and Another, the investigating officer had failed to submit the

charge-sheet against the accused persons within the statutory period as contemplated by sub-sec. (2) of S. 167 of the 1973 Code. The Division

Bench of the Allahabad High Court had not accepted the argument that, since the charge-sheet had not been submitted within the stipulated

period, the accused had ipso facto become entitled to be released on bail. The High Court had, however, taken the view that it was on account of

the absence of any inquiry contemplated in a case exclusively triable by a Court of Session under the 1973 Code that no valid order of remand

could be made. The Supreme Court on the one hand approved the law as stated by the Allahabad Court saying that the High Court rightly

concluded that on the expiry of 60 days from the date of the arrest of the accused, his further detention did not become ipso facto illegal or void,

on the other hand overruled the law as stated by the Allahabad High Court that there was no power to remand an accused to jail custody before

the trial commenced in a case exclusively triable by the Court of Session.

24. A Full Bench of the Gujarat High Court has in *Shardulbhai Lakhmanbhai Pancholi and Another Vs. State of Gujarat*, made a fresh exercise

and referred to several judgments of the High Courts and the Supreme Court including the law, as stated in the case of *State of Uttar Pradesh Vs.*

Lakshmi Brahman and Another, . It has referred to almost every relevant judgment till date, besides a few which have been brought to our notice

including the Full Bench judgment of the Patna High Court in the case of *Rabindra Rai Vs. State of Bihar*, . The Patna Full Bench has expressed

itself in these words (at page 1416 of Cri LJ) :

There is an impression in some section that if an accused was entitled to bail under proviso (a) to sub-sec. (2) of S. 167 of the Code at one stage,

or if for some time his detention was not under a valid order of remand, then he can enforce his right to be released on bail even at a later stage of

the proceeding. In my view, this is misconceived stand. When proviso (a) to sub-sec. (2) of S. 167 says that after expiry of the period of ninety

days/or sixty days, as the case may be, an accused, who is in custody, shall be released on bail, it does not mean to say that, thereafter, his

detention in custody is illegal or without an authority of law. If detention of an accused after the statutory period is held to be illegal or without

authority of law, then there is no question of his releasing on bail on furnishing security to the satisfaction of the Court concerned. He has to be

released outright. Does proviso (a) to sub-sec. (2) of S. 167 contemplate release

of an accused after the statutory period of detention where the accused concerned fails to furnish security to the satisfaction of the Court ? The answer is in negative. This aspect has also been examined by the

Supreme Court in the aforesaid case of State of U.P., State of Uttar Pradesh Vs. Lakshmi Brahman and Another, and it has been observed :

It is well known that even in application for writ of Habeas Corpus where challenge on behalf of the petitioner is that his detention in custody is

without any authority of law, that question has to be examined with reference to the date fixed for return of rule. Reference in this connection may

be made to one of the decisions of the Supreme Court in the case of Talib Hussain Vs. State of Jammu and Kashmir, .

Same thing had been pointed out in the Full Bench decision of the Patna High Court in Babu Nandan Mallah Vs. The State, "".

25. The case law, referred to in the case of Jadu alias Daswaran (supra), we have noticed, does not support the conclusion that the entitlement to

bail of the accused must be deemed to mean that the accused could not be detained in custody after the expiry of 90 days or 60 days, as the case

may be, because S. 167(2) of the Code has not envisaged a compulsory Bail.

26. In Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa, while considering the scope of the

proviso (a) to sub-sec. (2) of S. 167 of the Code, the Supreme Court has observed :

But if it is not possible to complete the investigation within a period of 60 days (as explained at bottom of page 13.) then even in serious and

ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "paradise for the criminals", but surely it would not

be so, as sometimes it is supposed to be, because of the Court. It would be so under the command of the Legislature"".

This only recognised the right of the accused that he would be entitled to be released on bail and never meant that even though bail is not asked for

and no sureties are offered, the Court would acknowledge that accused would be deemed to have been released on bail.

27. In Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , the Supreme Court held that when an undertrial prisoner was

produced before a Magistrate and he had been in detention for 90 days or 60

days, as the case may be, the Magistrate must, before making an order of further remand to judicial custody, point out to the undertrial prisoner that he is entitled to be released on bail. This again is the reiteration of law, as stated in the case of Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa, and no more. The Magistrate may remind the accused of his right. He cannot however release him on bail unless it is asked for and sureties are offered.

28. In Rajnikant Jivanlal and Another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, the Supreme Court once again said :

An order for release on bail under proviso (a) to S. 167(2) may appropriately be termed as an order on default. Indeed, it is a release on bail on

the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under S. 167(2) proviso (a) thereto is absolute. It

is a legislative command and not Court's discretion. If the investigating agency fails to file charge sheet before the expiry of 90/60 days as the case

may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined at all. In fact, the

Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the

same to the accused to furnish the requisite bail bonds.

This however, does not mean that even though the accused is not released on bail, he will be deemed to have been so released and thus, after

submission of charge-sheet, there would be no order for remand under S. 309 of the Code.

29. The judgment of the Supreme Court in the case of Raghubir Singh v. State of Bihar, 1988 Mad LW (Crl) 304 SC : (1987 Cri LJ 157) has

also not gone any further than stating that the order for release on bail made under proviso S. 167(2) of the Code cannot be defeated even if the

charge-sheet were to be filed beyond 60/90 days, as the case may be, for bail can be cancelled in such cases only under S. 437(5) or S. 439(2) of

the Code, Once bail is granted under S. 167(2) it is as if granted under S. 437 of the Code and all consequences, which apply to an order made

under S. 437 must be applied to an order for release of the accused on bail under S. 167(2) of the Code.

30. The observations of the Supreme Court that an order for release on bail

made under the proviso to S. 167(2) is not defeated by lapse of time, the filing the charge-sheet or by remand to custody under S. 309(2) has to be understood in this light. The law, as stated by the Delhi High Court in the case of Noor Mohd. v. State, ILR (1978) Del 442 : 1980 Cri LJ 27 and the Full Bench of the Gujarat High Court in Prataprai Arjandas Dhameja and Another Vs. Bhupatsing Gagji (by Lrs.) and Others, are thus to be understood as limited to the question whether a person released on bail under S. 167(2), Cri.P.C. can be, after submission of a charge sheet, remanded under S. 309(2) of the Code or not.

31. Indubitably, a correct statement of law has been made by a Full Bench of the Gujarat High Court in the case of Shardulbhai Lakhmanbhai

Pancholi and Another Vs. State of Gujarat, and the ratio of the case of State of Uttar Pradesh Vs. Lakshmi Brahman and Another, has been

understood in the same way as we have understood it. In this judgment, it is also said that the statement of law in the earlier Full Bench judgment of

the Gujarat High Court in Babubhai Parshottamdas Patel Vs. State of Gujarat, case is contrary to the ratio of the decision of the Supreme Court in

State of Uttar Pradesh Vs. Lakshmi Brahman and Another, .

32. We thus find that even though charge sheet is filed under after the expiry of the statutory period of 90/60 days, as the case may be, if the

accused is not released on bail, under S. 167(2), the Magistrate after submission of charge sheet may pass an order of remand under S. 309(2) of

the Code. Such an order of remand will not be invalid for the reason of the accused having not been released on bail under S. 167(2) and the

charge-sheet not been submitted within the period of 90/60 days as prescribed therein. This, however, will not mean that the accused cannot

invoke his right to claim bail, which will depend not only upon the incident that the charge sheet was submitted after the expiry of the period of

90/60 days, but also upon the nature of the evidence and the Court's examination of other circumstances to decide whether the accused should be

deemed to be entitled to bail for the reason of a delay in the submission of the charge sheet.

33. For the reasons aforesaid, there is no merit in the petition and the petition is accordingly dismissed.

34. Petition dismissed.