

(1991) 02 RAJ CK 0039

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 74 of 1990

Nawab Khan and Others

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 25-02-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 167, 170, 173, 176
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (1991) 1 RLW 608 : (1991) 1 WLN 70

Hon'ble Judges : B.R. Arora, J

Bench : Single Bench

Judgement

B.R. Arora, J.—This miscellaneous petition is directed against the order dated January 30, 1990, passed by the Munsif and Judicial Magistrate, First Class, Ladnu, by which the learned Magistrate rejected the bail application filed by the petitioners and refused to enlarge them on bail u/s 167(2) Cr.P.C.

2. Gordhan Gurjar, on October 19, 1989, filed a written report at Police Station, Ladnu, to the effect that the accused-petitioners along with other co-accused armed with sword, Barchhis as Lathis, passed through the lane where the complainant along with his brother Bhagirath and son Ladu Lal was sitting. After sometime, he heard a noise that some persons are burning the ice factory. When he went there, forty to fifty Mohammedan persons were destroying his factory bringing the wood from inside the factory and were burning the wood. On seeing the complainant party, the accused party tried to kill them, but complainant party rescued themselves by hiding themselves in the house of one Sanwat Ram and saw the incident from the roof of the house Sanwat Ram. In the meanwhile, his son Kailash Gurjar came on a bicycle. The rioter encircled him and exclaimed to kill him, whereupon Nawab Khan inflicted sword blow on Kailash Gurjar and Kailash on receiving the injuries, fell down. Forty-fifty persons of the accused-party including the 17 named persons, after inflicting injuries on Kailash, went away. After they had gone, Kailash Gurjar was taken to the hospital, where he died. On the basis of this report, a case u/s 147, 148, 149, 307, 302 and 450

I.P.C. was registered against the accused-petitioner Nawab Khan, Anish Ahmad, Mahboo Ali, Sumer Khan, Sardar Khan, Aazam Ali, Babu Khan, Iqbal Khan, Fattu Khan, Chand Khan, Banne Khan, Aziz Khan, Babu Khan S/o Shri Alladeen Khan, Aamin Khan, Iliyas Khan, Mustak Khan and Ayub Khan. During the course of investigation, the accused Nawab Khan, Aziz Khan, Anish Ahmad, Mahboo Ali, Sumer Khan, Sardar Khan, Aazam Ali, Babu Khan, Iqbal Khan, Fattu Khan, Chand Khan, and Banne Khan were arrested on October 20, 1989. The accused Babu Khan S/o Alladeen Khan, Aamin Khan and Iliyas Khan were arrested on October 21, 1989 and the remaining accused Ayub Khan and Mustak Khan were arrested on October 22, 1989. The police, after necessary investigation, presented the challan against the 17 accused-petitioners on January 8, 1990 in the Court of the Munsif and Judicial Magistrate, First Class, Ladnu, in which it was, also mentioned that the investigation with respect to the other accused is going on and further report u/s 173(8) Cr.P.C. will be submitted after completion of the investigation. The learned Magistrate, by his order dated January 23, 1990, took cognizance against the present accused petitioners though the challan was presented by the police on January 8, 1990. The petitioners, on January 27, 1990, moved an application u/s 167(2) Cr.P.C. to release them on bail. The learned Magistrate dismissed the bail application filed u/s 167 Cr.P.C. by his order dated January 30, 1990, as according to the learned Magistrate, the provisions of Section 167 Cr.P.C. were not available in the case of the petitioner. It is against this order that the present petition u/s 482 Cr.P.C. has been filed for releasing the accused-petitioners on bail.

3. Heard learned Counsel for the petitioners, the learned Counsel for the complainant and the learned Public Prosecutor.

4. It is contended by the learned Counsel for the petitioners that since the police has failed to submit the charge-sheet within ninety days from the date of the arrest of the accused-petitioners and as such the accused persons are entitled to be released on bail under proviso (a) to Section 167 of the Code of Criminal Procedure. Alternatively, it is, also, submitted that even if we take into account that the challan was presented within ninety days, even then as it was not a complete challan, therefore, it cannot be said to be a "challan" in the eye of law. It was, also, submitted that as the learned Magistrate did not take cognizance within ninety days from the date of the arrest of the accused, they are, therefore, entitled to be released on bail. According to the learned Counsel for the petitioners, the right to bail u/s 167(2) proviso (a) Cr.P.C. is an absolute right and has a legislative command, and the Court has no discretion in the matter and if the investigating agency fails to file the charge-sheet within ninety days, then the petitioners are entitled to be released on bail. The learned Counsel for the petitioners, in support of his arguments, has placed reliance on T.V. Sarma Vs. Smt. Turgakamala Devi and Others, Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , Manta Majoomdar and Anr. v. The State of Bihar AIR 1980 S.C. 817 , State of Uttar Pradesh Vs. Lakshmi Brahman and Another, , Shishpal and Anr. v. The State of Rajasthan 1984 R.L.R. 474 Powell

Nwawa Ogechi Vs. The State (Delhi Administration), Raghubir Singh and Others Vs. State of Bihar, , Rajnikant Jivanlal and Another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, and Hira Ram and Anr. v. The State of Rajasthan 1989 R.C.C. 285. The learned Public Prosecutor, on the other hand, has supported the order passed by the learned lower court and has submitted that the charge-sheet in the present case was submitted on January 8,1990, i.e., within 90 days of the arrest of the accused and it was a complete charge-sheet. He has, also, submitted that the learned Magistrate took cognizance against the accused-petitioners on January 23,1990, and the bail application u/s 167(2) Cr.P.C. was filed by the petitioners on January 27,1990 and, therefore, the provisions of Section 167 Cr.P.C. had no application in the case, as after the submission of the charge-sheet, the question: whether the release the petitioners on bail or to remand them to judicial custody, had to be decided by the learned Magistrate in the light of the provisions contained u/s 309 Cr.P.C. having regard to the facts and circumstances of the case. In support of his contention, the learned Public Prosecutor has placed reliance over the judgment rendered in Umed Singh Wakmatji Jaleja and Ors. v. The State of Gujarat AIR 1977 S.C. 11, Dada Saheb Krishna Rao Patil v. Sarupajiyabher Charap and Ors. 1979 CL.R 80 , State of Uttar Pradesh Vs. Lakshmi Brahman and Another, , Rabindra Rai Vs. State of Bihar, Raghubir Singh and Others Vs. State of Bihar, , Nawal Sahni v. The State of Bihar 1989 Cr.L.J. 733 and Shardulbhai Lakhmanbhai Pancholi and Another Vs. State of Gujarat,

5. In order to appreciate the scope of the respective contentions made by the learned Counsel for the parties, it is essential to briefly refer to the law relating to the controversy.

6. Sections 167(2), 209(b) and 309 of the Code of Criminal Procedure, confer powers on the Magistrate to order detention of the accused from time to time since the beginning of the investigation till the conclusion of the trial. These three provisions deal with the detention of the accused when he has not been released on bail u/s 437 or 438 or 439 Cr.P.C. Section 167(2) Cr.P.C. is applicable during the investigation of the offence while Section 209(b) Cr.P.C. is attracted during the pendency of the Sessions trial and Section 309(2) Cr.P.C. is applicable during the inquiry or trial other than the Sessions trial. Section 167 of the Code of Criminal Procedure finds place in Chapter XII. Chapter XII of the Code of Criminal Procedure, which covers Sections 154 to 176 Cr.P.C., deals with information to the police and their powers to investigate. Section 167(2) Cr.P.C. which is relevant for the present controversy is reproduced here, which reads as under:

167-Procedure when investigation cannot be completed in twenty- four hours-

(1)... ..

(2) The Magistrate to whom an accused 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 of period of fifteen days if he is satisfied that adequate grounds exist for doing so, but on 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 relate to an offence punishable with death, imprisonment for life or imprisonment for a term of 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 if he is prepared to and does furnish bail, and every person shall be released on bail if Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purpose of that Chapter;)

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.

In *T.V. Salma v. Durga Kamla Devi and Ors.* (1967 Cri.,L.J. 1247) the question that came-up for consideration before the Andhra Pradesh High Court was that whether the preliminary charge-sheet, which was submitted by the police before the completion of the investigation can be said to be a charge-sheet as envisaged u/s 173(2) Cr.P.C. and the Court came to the conclusion that incomplete charge-sheet submitted by the police without completion of the investigation cannot be said to be a charge-sheet as envisaged u/s 173(2) Cr.P.C. and as the charge-sheet was not submitted within the period provided u/s 167 of the Code of Criminal Procedure, the accused-petitioners were, therefore, entitled to be released on bail as per proviso (a) to Section 167 Cr.P.C, In the case in hand, the complete charge-sheet was submitted by the police after necessary investigation against the accused- petitioners and on the basis of that complete charge-sheet, the cognizance was taken by the learned Magistrate. This case, cited by the learned Counsel for the petitioners, is, thus of no help to the petitioners.

7. In *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna,* . The controversy before the Hon''ble Supreme Court was that certain under-trial prisoners remained in jail without bail for the maximum term for which they

could have been sentenced if convicted and such persons had been in detention for the period longer than the maximum term of sentence as prescribed in proviso to Section 167(2) Cr.P.C. when their trial having been commenced and the Supreme Court, after considering the various provisions, held that if the accused is in detention for 60 days or 90 days, the Magistrate before making an order for further remand to judicial custody point out to the undertrial prisoner that he is entitled to be released on bail. In that case before the Supreme Court, the accused remained in jail without trial for a period longer than the maximum term for which they could have been sentenced and even in that case the cognizance was not taken and, therefore, the Hon''ble Supreme Court ordered for the release of the accused forthwith from detention. This authority is, thus, also, of no help to the petitioners as it is not applicable in the facts and the circumstances of the case.

8. In *Mantoo Majumdar and Another Vs. State of Bihar*, , the Hon''ble Supreme Court held that Section 167(2) Cr.P.C. empowers the Magistrate to authorise the detention of an accused in such custody as he thinks fit for a term not exceeding 15 days in the whole, more importantly there is a precious interdict protective of personal freedom which states that no Magistrate shall authorise the detention of an accused person exceeding ninety days in grave case and sixty days in lesser cases. The case before the Supreme Court was that the accused had been kept in custody for six years and the Magistrate concerned had been mechanically authorising repeated detention oblivious of the provision which obligated him to monitor the proceedings which warranted such detention. In those circumstances, the accused was ordered to be released on bail. But in the present case, the challan against the accused was filed within ninety days of their arrest and the cognizance was taken by the learned Magistrate before filing of the application. This authority, cited by the learned Counsel for the petitioners is, therefore, not applicable in the case of the petitioners and is of no help to them.

9. In *the State of Uttar Pradesh Vs. Lakshmi Brahman and Another*, the police filed to submit the charge- sheet against the accused within the period of sixty days of their arrest as contemplated Under Sub-section (2) of Section 167 Cr.P.C. and the respondent moved an application u/s 439 Cr.P.C. for the grant of bail before the Allahabad High Court. The Division Bench of Allahabad High Court, which dealt with the application, was of the opinion that after the charge-sheet has been submitted u/s 170 of the Code of Criminal Procedure, the Magistrate has no jurisdiction to authorise the detention of the accused in custody u/s 167 Cr.P.C. and, therefore, the authority to remand the accused to custody after the charge-sheet has been submitted, has to be gathered from other provisions of the Code. The Allahabad High Court, after examining the scheme of Section 167(1) and (2) with proviso (a), concluded that on the expiry of sixty days from the date of the arrest of the accused, his further detention does not become ipso facto illegal or void, but if the charge-sheet submitted within 60 days then notwithstanding anything contained in Section 461 Cr.P.C, the accused shall be entitled to be released on bail if he is prepared to and does furnish the bail

bonds. The State of Uttar Pradesh preferred an appeal before the Supreme Court and the Supreme Court up-held the view taken by the Allahabad High Court and held that as the respondents did not apply for bail on the expiry of sixty days from the date of their arrest, their arrest or continuous detention would not be illegal or without the authority of law. The Supreme Court, also, in this case, approved the view of the Allahabad High Court to the effect that the jurisdiction to grant bail in the case where the investigation is not completed within the prescribed time limit as incorporated in Section 167 Cr.P.C, vests in the Magistrate if the accused applies and is prepared to furnish the bail bonds. The Supreme Court, also, observed that Section 167 Cr.P.C. envisages a stage when a suspect is arrested and the investigation is not completed within the prescribed period. The investigation would come to an end the moment the charge-sheet is submitted as required u/s 170 Cr.P.C. unless the Magistrate directs further investigation. The Supreme Court, in the result, allowed the appeal of the State of Uttar Pradesh and set-aside the order of the Allahabad High Court granting bail to the respondents. The view taken by the Supreme Court in this case, thus, does not help the petitioners; on the contrary, it helps the prosecution and plays down a law that Section 167 Cr.P.C. has application only at the stage when the investigation is not completed within the prescribed period and has no application when the investigation is completed and the charge-sheet has been submitted, as after submission of the charge-sheet there is the commencement of the inquiry and Section 309 Cr.P.C. thereafter enables the Magistrate to remand the accused to the custody till the inquiry to be made, is completed.

10. In *Shishpal and Anr. v. The State of Rajasthan* (1984 R.L.R. 474), the charge-sheet was filed by the police after ninety days and the cognizance of the offence was taken after ninety days and, before filing the charge-sheet and taking the cognizance, the accused filed an application u/s 167(2) Cr.P.C. to release them on bail and showed their intention to furnish the bail bonds, and, therefore, the Court held that the accused is entitled for bail. In that case, the application for bail was filed by the accused prior to the filing of the charge-sheet and taking of the cognizance and as the charge-sheet was not filed within 90 days and the cognizance was not taken on the date when the application was filed, therefore, the Court ordered for the release of the accused on bail. The facts of that case are distinguishable with the facts of the present case. In the present case, the bail application was already been taken by the learned Magistrate after submission of the charge-sheet by the police. This case, thus, also, does not help the petitioners as it is distinguishable on the facts.

11. In the case of *Powell Nwawa Ogechi Vs. The State (Delhi Administration)*, the Delhi High Court took the view that right of the accused u/s 167 Cr.P.C. to be released on bail is an absolute and indefeasible right unless he fails to furnish the bail. The Delhi High Court further held that the right of the accused persons u/s 167 Cr.P.C. does not cease to apply even if the charge-sheet is submitted after ninety or sixty days as the case may be, and the accused is entitled to ask for bail as of right, the right which has already accrued to him. This judgment of the

Delhi High Court is contrary to the judgment of the Supreme Court rendered in the case of the State of Uttar Pradesh v. Laxman Brahmin (supra).

12. In the case of Raghubir Singh and Others Vs. State of Bihar, , the accused were arrested in the intervening night of November 29/30,1984 but the charge-sheet was filed on December 4,1985 and the learned Magistrate took the cognizance against the accused on December 18,1985, but before the filing of the charge-sheet the accused, on March 1,1985 moved an application u/s 167 Cr.P.C. to release them on bail. As by that time the investigation was not completed and the charge-sheet was not filed, the accused were, therefore, directed to be released on bail under proviso (a) to Section 167 Cr.P.C. for the default of the prosecution in not completing the investigation within sixty days. The Supreme Court, after considering the law on the point, observed as under:

The result of our discussion and the case law is this "an order for release on bail under proviso (a) to Section 167 Cr.P.C. is not defeated by lapse of time, the filing of the charge-sheet or by remand to the custody u/s 309. The order for release on bail may however, be cancelled u/s 437 or Section 439(2).....where bail has been granted under proviso (a) to Section 167 for the default of the prosecution in not completing the investigation within sixty days. After the defect is cured by filing of the charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable ground to believe that the accused has committed a non-bailable offence and it is necessary to arrest him to commit him to custody.

The Supreme Court, further, observed that the order for release on bail was not an order on merit but was what one may call an order in default and an order that can be rectified for special reason after the defect was cured. As the order was passed long back and for one reason or the other the accused failed to take advantage of the order for several months, and probably for that reason the prosecuting agency did not move in the matter for cancellation of the bail and, therefore, the Supreme Court did not interfere in the matter but directed the trial to be expedited. This authority, also, does not help the accused-petitioners, because in that case the accused was ordered to be released on bail before the charge-sheet was filed and the accused were in custody before the period of 90 days.

13. In Rajnikant Jivanlal and Another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, , the Supreme Court observed as under:

An order for release on bail under proviso (a) to Section 167 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 u/s 167 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.

Not at all. In fact, the Magistrate has no power to remand 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. The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed the bail granted under proviso (a) to Section 167 could be cancelled.

14. In this case, the Police failed to submit the challan within the stipulated period of ninety days and the application for grant of bail was moved before the filing of the challan. In these circumstances, there is a legislative mandate for releasing the accused on bail as on that day, the detention of the accused could not have been ordered under any of the provisions of the Code and looking to the legislative mandate, the accused had to be released on bail. In the present case, the application for grant of bail was moves when the charge-sheet was already filed and the cognizance was already taken and at this stage, the provisions of Section 167 Cr.P.C. had no application. This authority, also, does not help the petitioners.

15. In *Hira Ram v. The State of Rajasthan* (1989 R.C.C. 285), the same question came-up for consideration before this Court and while placing reliance over the judgment of the Supreme Court rendered in *Raghubir Singh and Others Vs. State of Bihar*, and *State of Uttar Pradesh Vs. Lakshmi Brahman and Another*, this Court has held that the view that by filing the challan after the expiry of ninety days, the right of the accused is curtailed for entitling the accused to be released on bail, cannot be sustained.

16. In *Umaid Singh Wakmatji Jaleja and Ors. v. The State of Gujarat* AIR 1977 S.C.11, the Division Bench of Gujarat High Court considered the case where an application was made u/s 167 Cr.P.C. for grant of bail by the accused persons who were detained in custody pending investigation for a period exceeding sixty days. The Court held that he is entitled to bail but if during the pendency of such an application for bail, a charge-sheet is filed in the Court, the investigation comes to an end and so, also, the power of the Magistrate for granting bail to the accused under the provisions of Section 167 Cr.P.C. and the Magistrate can then exercise the power of granting bail only u/s 437 Cr.P.C. and not u/s 167 Cr.P.C.

17. Similar point came-up for consideration before the Full Bench of Patna High Court in the case of *Rabindra Rai Vs. State of Bihar*, In that case the matter for consideration was that the Magistrate, before whom the charge-sheet was submitted, did not take cognizance of the offence on the day it was submitted but took the cognizance on a later date. It was argued before the Full Bench that the Magistrate, after submission of the charge-sheet passed an order of remand till cognizance was taken, had no authority to keep the accused under detention. The Full Bench, placing reliance over the judgment of the Supreme Court in *State of Uttar Pradesh Vs. Lakshmi Brahman and Another*, negated the plea raised by the accused and held that an enquiry within the meaning of Section 2 shall be deemed to have commenced since the submission of the police report and shall

continue till an order of commitment is made u/s 209 Cr.P.C. The Full Bench of the Patna High Court further observed since it is held that the enquiry stands completed with the submission of the charge-sheet, there should not be any difficulty in holding that the Magistrate had, during the period, power to remand the accused in terms of the provisions u/s 309 Cr.P.C. The Full Bench further considered the question whether the accused is entitled to bail u/s 167 Cr.P.C. after the submission of the challan beyond a period of sixty/ninety days, as the case may be. The Full Bench, in that case observed as under:

There is an impression in some section that if an accused was entitled to bail under proviso (a) to Sub-section (2) of Section 167 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. This is a misconceived stand.

In holding this, the Patna High Court placed reliance over the judgment of the Supreme Court rendered in *State of Gujarat Vs. Naginbhai Dhulabhai Patel and Others*,

18. An identical question again came-up for consideration before the Patna High Court in *Nawal Sahni v. The State of Bihar* (1989 Cr.L.J. 733). In that case, the charge-sheet was submitted by the police after the prescribed period and an application for bail was moved, which was considered after submission of the charge-sheet. The matter was considered by the Division Bench of Patna High Court and after considering the law on the point, the Division Bench of Patna High Court observed as under:

Even in a case where charge-sheet has been submitted beyond the statutory period but if the prayer for grant of bail is being considered after submission of such charge-sheet then the stage of applicability of Section 167(2) proviso (a) is over. With the submission of the charge-sheet an enquiry shall be deemed to have commenced, as such, there is no question of lack of power in the Magistrate to remand such an accused; he can remand in exercise of power u/s 309. Of course, if the prayer of the statutory period and before the submission of the charge-sheet there is no option with the Magistrate except to release the accused on bail if he furnishes bail bonds.

19. A similar question: whether the accused person has an absolute right to be released on bail under proviso (a) to Section 167 Cr.P.C. 1973 even after submission of the police report/charge-sheet if the charge-sheet has been submitted after the period prescribed under the said proviso, came-up for consideration before the Full Bench of Gujarat High Court in the case of *Shardulbhai Lakhmanbhai Pancholi and Another Vs. State of Gujarat*, and the Full Bench of Gujarat High Court, after considering and discussing the law on the point, held that the right of being released on bail, which the accused has under proviso (a) to Section 167 Cr.P.C. is not an absolute right in the sense that it could be exercised at any stage and the investigation comes to an end the

moment the charge-sheet is submitted and in case of offence triable by the Sessions Judge, the inquiry within the meaning of Section 2 of the Code of Criminal Procedure would commence on submission of the charge-sheet and when once the inquiry commences, proviso (a) to Section 167 has no application.

20. The result which, thus, follows, from the consideration of these authorities cited and discussed above is that Section 167 has application at the stage when the investigation is not completed within the prescribed period but if subsequently the charge-sheet is submitted before the Court and the cognizance has been taken and till that day no application has been moved, then the provisions of Section 167 are not applicable to the case. Section 167 Cr.P.C. is available only during the period when the investigation is not completed and it has no relevance after the investigation is completed. After the submission of the charge-sheet and taking the cognizance by the Magistrate, the investigation comes to an end and the enquiry within the meaning of Section 2 of the Code commences and once the enquiry commences, proviso (a) to Section 167(2) Cr.P.C. is not a provision for grant of bail during investigation but a restriction on the power of the Magistrate to remand an accused during the investigation, but with the submission of the charge-sheet, that restriction comes to an end as Section 309(2) Cr.P.C. gives power to the Magistrate to grant remand after the cognizance has been taken and after the submission of the charge-sheet the stage of applicability of the proviso (a) to Section 167 Cr.P.C. is over and if any application is moved for the grant of bail then the Magistrate had to examine the prayer not in the background of Section 167 but in the light of Section 309 because with the filing of the charge-sheet an enquiry, as envisaged u/s 2 Cr.P.C. shall be deemed to have commenced and, therefore, there is no question of enforcing on that day any right which had accrued to such an accused on expiry of the statutory period before filing of the charge-sheet. The accused has to be released on bail during this period only on account of the fact that the Magistrate during this period, had no right to grant any remand but as soon as the enquiry is started after submission of the charge-sheet, the Magistrate gets powers u/s 309 to remand the accused to custody till enquiry to be made is completed. The detention of the accused after the expiry of 90 days from the date of their arrest does not ipso facto become illegal or void but as the charge-sheet has not been submitted within the prescribed period then the petitioners are entitled to be released on bail as there is a legislative mandate behind Section 167 Cr.P.C. and not the discretion of the Court. The Explanation-I added to Sub-section (2) of Section 167 Cr.P.C, which was added by the Cr.P.C. (Amendment) Act, 1978, made it clear that the accused shall be detained in custody so long as he does not furnish bail. The question, therefore, which requires consideration, is which is the date relevant for consideration. According to me, the detention of the accused on the date of submission of the bail application is relevant as on that day he shows his intention to furnish bail. If on the date of making the application the accused is in lawful custody under the valid order then the accused cannot be released on "bail u/s 167(2) Cr.P.C. The right of accused to be

released on bail after 60/90 days, as the case may be, after his arrest, is only on account of the default of the prosecution not to conclude the investigation within the stipulated period and this right is in default but this right cannot be said to be an absolute right. The legislative mandate behind the provisions of Section 167 is only to safeguard the interests of the accused so that the investigation should be completed within the prescribed period and if the investigation is not completed within the stipulated period then the accused should not suffer for the laches on the part of the investigating agency and the accused may be released on bail u/s 167. But this right of the accused is not an absolute right in the sense that even after the submission of the charge-sheet and taking cognizance by the learned Magistrate, the accused has still got a right to be released on bail. As soon as the charge-sheet is submitted and the cognizance is taken, this right comes to an end. Even the person who has been released on bail u/s 167 of the Code, his bail can be cancelled u/s 437 Cr.P.C. after the defect is cured if it is found that there are reasonable grounds to believe that the accused has committed non-bailable offence and that it is necessary to arrest him and to commit to custody. Proviso (a) to Section 167 is not available to the accused at this stage. Section 167 of the Code envisages the stage only when a suspect is arrested and the investigation is not completed within the prescribed period. Once the investigation is completed by submission of the charge-sheet, there is commencement of enquiry. It has been held by the Supreme Court in the case of *Dada Sahib Krishna Rao Patil v. Sarupjiyabher Charapal and Ors.* (1979 C.L.R 80) as under:

The Sessions Judge shall, also, not be deterred by the provisions of proviso (a) to Sub-section (2) of Section 167, which is not applicable to the accused after they are committed to the Court of Sessions.

As like the present case, that was a matter triable by the Sessions Judge and the commitment order had already been passed. Thus, after the submission of the charge-sheet and taking of the cognizance, enquiry within the meaning of Section 2 of the Code, commences and, thereafter, Section 309 Cr.P.C. enables the Magistrate to remand the accused to the custody till the enquiry is made and completed and the Code does not envisage a stage of compulsory bail. In this view of the matter, the accused do not hold an absolute right to be released on bail at any stage on account of the failure of the police to submit the challan and when once the charge-sheet is filed and the cognizance has been taken and if after that an application for release on bail is filed then the application cannot be considered u/s 167 Cr.P.C, but that has to be considered u/s 437 Cr.P.C.

21. As the matter involved in this case is an important one and the view taken by me is contrary to the view taken by Hon"ble A.K. Mathur, J., in *Him Ram v. The State of Rajasthan* (1989 R.C.C.285), I, therefore, think it proper that the matter may be decided by a larger Bench.

22. I, therefore, refer the following question of law for the opinion of the larger Bench:

Whether the accused who has not made an application for his release on bail, after expiry of period prescribed by proviso (a) to Section 167 Cr.P.C. and before filing of the charge-sheet or before taking the cognizance has a right to claim to be released on bail after filing of the charge-sheet solely on the ground that the charge-sheet not submitted within the prescribed period?

23. The matter maybe placed before Hon''ble the Chief Justice for referring the matter to a larger Bench.