
(1976) 08 BOM CK 0024

In the Bombay High Court

Case No : Criminal R. Application No. 90/76 with Cri. R.A. No. 889/76

Shrawan Hanaji Undirwade and another

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 13-08-1976

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2), 167(2)(a), 173, 209
Penal Code, 1860 (IPC) — Section 302

Citation : (1976) MhLj 654

Hon'ble Judges : P.B. Sawant, J;C.S. Dharmadhikari, J

Bench : Division Bench

Advocate : V.S. Sirpurkur in Cr. R.A. No. 90 of 1976 and Miss N.D. Deshpande in Cr. R.A. No. 889 of 76, for the Appellant; M.P. Badar, Asstt. Govt. Pleader for State, for the Respondent

Final Decision : Dismissed

Judgement

C.S. Dharmadhikari, J.—The accused persons in Criminal Revision Application No. 90 of 1976 were arrested on 10-2-1976 as an offence u/s 302 of the Indian Penal Code was registered against them. Thereafter they were remanded to the Magisterial custody from time to time. As the period of detention authorised by the Magistrate exceeded 60 days, the accused filed an application for bail before the Sessions Judge, Chandrapur. on 20-4-1976. It appears from the record that vide order dated 9-4-1976 the Judicial Magistrate, First Class, Gadchiroli had granted a remand upto 23-4-1976. The Sessions Judge vide his order dated 20 4-1976 directed the Public Prosecutor to give his say regarding the said application for bail. The Public Prosecutor vide his endorsement dated 5 5-1976 stated that he had no instructions till that day and he is seeking instructions from the: Police Sub-Inspector concerned and therefore the matter should be adjourned. It appears that thereafter matter was adjourned to 15-5-1976. On 15-5-1976, the Advocate for the applicants remained absent. The application filed by the accused was opposed by the Sate and therefore the said application was rejected by the Sessions Judge, Chandrapur. Against this order, the present

Criminal Revision Application is filed. It further appears from the record that in the meantime i. e. on 10-5-1976 a chargesheet was presented by the police before the Judicial Magistrate, First Class, Gadchiroli and the Judicial Magistrate, First Class, Gadchiroli passed an order committing the case to the Sessions Court on 14-5-1976.

2. So far as Criminal Application No. 889 of 1976 is concerned, it appears that the incident took place on the night between 29-2-1976 and 1-3-1976 and the police registered a case against the accused for an offence punishable u/s 302 of the Indian Penal Code on 1-3-1976. The accused was arrested on 2-3-1976 for the offence of murder and thereafter he was produced before the Judicial Magistrate, First Class, Wardha. From time to time remands were taken for completing the investigation. The police took the last remand on 26-4-1976 which was granted by the Magistrate and the case was adjourned to 10-5-1976. On 10-5-1976, the police filed the chargesheet and then the papers were transferred to the file of Chief Judicial Magistrate, Wardha. On the same day, the accused filed an application u/s 167 (2) of the New Criminal Procedure Code, 1973, for releasing him on bail. In this application, he alleged that since police did not file the chargesheet within 60 days he should be released on bail. On 10-5-1976, the Chief Judicial Magistrate, Wardha, adjourned the case to 11-5-1976 and he passed an order committing the accused to stand his trial before the Sessions Court u/s 302 of the Indian Penal Code, on 11-5-1976.

3. It appears from the record that thereafter the accused filed an application for grant of bail before the Sessions Judge, Wardha, on 25-5-1976 under sections 437 and 439 read with section 167 (2) of the Criminal Procedure Code for releasing him on bail. It further appears from the record that since the case was fixed for passing a committal order, the earlier application for bail filed by the accused was rejected by the trial Court. The learned Sessions Judge on the basis of the material placed before him came to the conclusion that the accused had filed an application for bail u/s 167 (2) of the Criminal Procedure Code after the police had filed a chargesheet in the case. He further found that the remand was granted by the trial Court till 10-5-1976 as 8th and 9th of May 1976, were holidays. As according to the learned Sessions Judge, Wardha, the application for bail itself was filed after the chargesheet was presented by the State the Chief Judicial Magistrate was right in rejecting the said application and thereafter in passing the committal order. In this view of the matter according to learned Sessions Judge it could not be said that the detention of the accused is in any way illegal or unauthorised. On the merits of the matter, he came to the conclusion that having regard to the facts and circumstances of the case, it would not be proper to release the accused on bail. Therefore, vide an order dated 14-6-1976 the learned Sessions Judge, Wardha, rejected the bail application filed by the accused. Against this order, the present criminal application has been filed by the accused praying that he should be released on bail. Initially, these matters came up for hearing before the single Judge of this Court and as they involved an important questions of law they were referred to

the Division Bench and therefore they were, placed before us for hearing.

4. Shri Sirpurkar, the learned counsel for the applicants in Criminal Revision Application No. 90 of 1976 contended before us that in view of the provisions of section 167 (2) of the Criminal Procedure Code, the accused persons were entitled to be released on bail on the expiry of the period of 60 days and the learned Sessions Judge has committed an error in not releasing the accused on bail. He further contended that by virtue of the said provisions of the Code as soon as the period of 60 days is over a vested right is conferred upon the accused and he is entitled to be released on bail. According to Shri Sirpurkar it is the duty of the Magistrate to enquire from the accused as to whether he is prepared to furnish the bail as soon as the period of 60 days is over and even an application in that behalf is not necessary. In the present case, the accused were arrested on 10-2-1976 and therefore it is quite obvious that no chargesheet was filed by the State within the said period of 60 days and obviously therefore the accused was entitled to be released on bail. According to the learned counsel the subsequent filing of the chargesheet on 10-5-1976 or passing of the committal order committing the accused to stand his trial before the Sessions Court for an offence punishable u/s 302 of the Indian Penal Code on 14-5-1976 is of no consequence so far as the right of the accused to be released on bail u/s 167 (2) Proviso (a) of the Criminal Procedure Code, is concerned. In support of his contention he has relied upon a decision of this Court in Ramsaran Rajaram Kurmi V. State of Maharashtra 1976 Mh. LJ 432 Prem Raj and Another Vs. The State of Rajasthan, and Lakshmi Brahman and Another Vs. State,

5. So far as the Criminal Case bearing No. 889 of 1976 is concerned, the learned counsel Miss Deshpande appearing on behalf of the accused contended that the detention of the accused beyond the period of 60 days is illegal according to the learned counsel, the Magistrate has no authority or jurisdiction to grant a remand beyond a period of 60 days. The Magistrate granted a last remand on 16-4-1976 upto 10-5-1976 which was obviously beyond the period of 60 days. Therefore, according to her, the detention of the accused beyond the period of 60 days was itself illegal. She further contended that the Magistrate further committed an error in adjourning the case on 10-5-1976 for 11-5-1976. According to her, the Magistrate should have passed the order of committal as soon as the chargesheet was presented before him i. e. on 10-5-1976 itself. She further contended that the learned Sessions Judge committed an error in holding that an application for bail was filed by the accused after the chargesheet was filed on 10-5-1976. In this context, she has relied upon the order passed by the learned Judicial Magistrate, First Class in this behalf which clearly indicates that an application for bail was filed earlier though on 10-5-1976 itself and a chargesheet was received later on on the same day. The learned counsel further contended that no application as such as is at all necessary as it is the duty of the Magistrate to enquire from the accused as to whether he is prepared to furnish bail. In this context, Miss Deshpande has relied upon a decision of the Punjab High Court in Baldev Singh Vs. State of Punjab, and a decision of the Rajasthan

High Court in Rewat Dan and Others Vs. State of Rajasthan, She has also adopted the arguments advanced by Shri Sirpurkar in this behalf.

6. On the contrary, it is submitted by Shri Badar, the learned Assistant Government Pleader appearing on behalf of the State that even u/s 167 (2) of the Criminal Procedure Code the detention of the accused beyond the period of 60 days is not illegal. The said provisions merely create a right in favour of the accused to be released on bail if he is prepared to and does furnish the bail. He further contended that an application in that behalf indicating his preparedness to furnish the bail is necessary. If such an application is rejected by the learned trial Court, the order rejecting the bail might become illegal and could be set aside in a revision petition. But this will not mean that the detention itself is anyway illegal. He further contended that section 167 of the Criminal Procedure Code deals with the procedure when the investigation cannot be completed within a specified time. It deals with the stage when proceedings are pending before the Magistrate. Therefore, the application in this behalf could be filed only before the Magistrate and not before the higher Courts. According to the learned Assistant Government Pleader only because a right is created u/s 167 (2) of Code neither the nature of the offence nor its gravity is changed. An offence which is not bailable is not ipso facto converted into a bailable offence. He further contended that as soon as a charge-sheet is filed by the police, the matter is not governed by section 167 of the Code but the remand thereafter could be granted by the Magistrate by exercising his power u/s 309 of the Criminal Procedure Code. He further contended that even otherwise u/s 209 of the Criminal Procedure Code if the Magistrate comes to a conclusion that the offence is triable exclusively by the Court of Sessions then while passing an order of committal he can cancel the bail of the accused. According to Shri Badar even the provisions of section 167 of the Code are subject to the provisions of sections 437 and 439 of the Criminal Procedure Code. So far as the merits of the matter are concerned, it is contended by Shri Badar that in Criminal Application No. 889 of 1976 an application for bail was filed by the accused after the chargesheet was filed. Moreover, the application filed by the accused before the Sessions Court for grant of bail was u/s 437 read with section 439 and was not u/s 167 (2) of the Code. In the meantime order of committal was passed by the Chief Judicial Magistrate, and therefore, the learned Sessions Judge was right in rejecting the application after considering the merits of the case. So far as an application in Criminal Revision Application No. 90 of 1976 is concerned, he contended that such an application was never filed by the accused persons before the Magistrate concerned. They only filed an application before the Sessions Judge on 20-4-1976 and that too without approaching the concerned Magistrate. The said application was rejected by the Sessions Judge on 15-5-1976 as the Counsel for the accused remained absent which clearly indicated that the accused was not prepared to furnish the bail. According to Shri Badar, the application u/s 167 (2) of the Code was not maintainable as the same was not filed before the Magistrate concerned but was filed before the Sessions Court who was not seized

of the matter as till then no committal order was passed. In support of his contention, he has relied upon a decision of the Gujarat High Court in *Umeasinh Vakamatji v. State* 1975 Guj. L R 572, *Kapoor Singh Nidhan Singh and Others Vs. The State of Haryana*, *Mishrilal v. Judicial Magistrate, Raigarh* 1975 MPLJ 325 and *Basant Kaur v. Smt. Gurdyalo* 1975 Punj. L R 772.

7. For properly understanding the controversy raised before us it will be worthwhile to reproduce the relevant provisions of section 167 of the Code:

S. 167. (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 7, 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 detention of the accused person otherwise than in custody of the police, beyond the period of 15 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 section for a total period exceeding sixty days, and on the expiry of the said period of sixty days, 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 section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes 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 specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation:--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.

(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.

Section 167 appears in Chapter XII of the New Criminal Procedure Code which deals with the information to the police and their powers to investigate. Section 173 then deals with the report of the police officer on completion of the investigation. Chapter XIII thereafter deals with the jurisdiction of the criminal Courts in the matter of inquiries and trials. In view of the provisions of section 167 of the Code a person cannot be detained in police custody beyond 24 hours of his arrest without producing him before the Magistrate. The Magistrate before whom he may be produced may be a Magistrate having jurisdiction to try the case or may be a Magistrate having no such jurisdiction. Either of the aforesaid Magistrates can authorise detention of the accused in the custody for a term not exceeding 35 days as a whole. The provisions of section 167 of the Code will also apply to the cases where a person is accused of an offence punishable with death or imprisonment of life or Otherwise. Provisions of section 167 (2) then provides that the Magistrate may authorise detention of the accused person in a custody which is other than the police custody even beyond the period of 15 days if he is satisfied that adequate grounds exist for doing so. It is obvious that before passing such an order, the Magistrate is expected to apply his mind to the facts and circumstances of the case and then exercise his discretion judiciously. The power of the Magistrate to authorise detention of the accused during investigation is "limited by the wordings of the proviso itself. On the expiry of a total period of 60 days, the accused person is entitled to be released on bail if he is prepared to and does furnish bail. The proviso (a) to section 167 (2) of the Code is not a general provision dealing with the grant of bail. As a matter of fact, Chapter XXXIII specifically deals with the provisions as to bail and bonds. General powers regarding grant of bail are concerned they are incorporated in section 437 of the Code, so far as non-bailable offences are concerned. In section 167, therefore, a fiction is created by laying down that, "every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;" The Supreme Court had an occasion to consider as to what should be the true scope of the deeming fiction in a Code of Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another, In that case, the Supreme Court was concerned with the phraseology used in section 484 of the Criminal Procedure Code creating a deeming fiction. In this context, in paragraph 3 of the Judgment, the Supreme Court has observed as under:

It is now well settled law that where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion. To quote the words of Lord Asquith in *East End Dwellings Co. Ltd v. Finsbury Borough Council* 1952 A C

109 at p. 132.

If you are bidden to treat an imaginary State of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs".

If the legal fiction created in section 167 (2) is given full effect and is carried to its logical conclusion then it is quite obvious that the provisions of Chapter XXXIII shall apply to a case in which bail has been granted under the provisions of section 167 (2) proviso (a) of the Code. Therefore, obviously the provisions of section 437 and section 439 of the Code will also apply to a case where bail is granted u/s 167 (2) of the Code. It is further clear from the bare reading of section 167 of the Code that it deals with the stage when the investigation is pending and the chargesheet is not filed by the police. Once the chargesheet is filed and the Court takes cognizance of an offence then the matters regarding postponement and adjournment of the proceedings are governed by section 3(j)9 of the Criminal Procedure Code. In this context, a reference could usefully be made to the following observations of the Supreme Court in *Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa*,

Let us now examine the position of law under the New Code. No police officer can detain a person in custody arrested without a warrant, for a period longer than 24 hours as maintained in section 57 corresponding to section 61 of the Old Code. Section 167 occurring in Chapter XII bearing the heading "information to the police and their powers to investigate" the same as in Chapter XIV of the Old Code--has made some drastic departure. Similar is the position in regard to Section 309 of the New Code corresponding to section 344 of the Old Code. While retaining the provision of forwarding the accused to the nearest Magistrate (of course under the New Code to the Judicial Magistrate), and while authorising the Magistrate to remand the accused to either police or judicial custody for a period not exceeding 15 days, proviso (a) has been added in these terms;

Provided that:

(a) the Magistrate may authorise detention of the accused person, otherwise than in 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 section for a total period exceeding sixty days and on the expiry of the said period of sixty days, 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 section shall be deemed to be

so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

The expression "the Magistrate" in the proviso would mean the Magistrate having jurisdiction to try the case. Section 309 (2) says:

If the Court, after taking cognizance of an offence, or commencement of trial, 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 such time as it considers reasonable and may by a warrant remand the accused if in custody.

Although, the expression "reasonable cause" occurring in sub-section (1A) of section 344 is nowhere to be found in section 309 of the New Code, the explanation to section 344 of the Old Code has been retained as Explanation 1 to section 309 in the identical language.

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.

The expression taking cognizance of an offence has not been defined in the Code. The same will obviously depend upon the facts and circumstances of a particular case including the mode in which the case is sought to be instituted, the nature of the preliminary action if any, taken by the Magistrate and the nature of the further proceedings contemplated in that behalf. Section 173 of the Code deals with the report of the police officer on completion of the investigation. According to this section every investigation under Chapter XII is to be completed without unnecessary delay. Then sub-section (2) of section 173 provides that as soon as the said investigation is completed the officer-in-charge of the police station has to forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating various things enumerated in section 173. Then comes section 209 which deals with the commitment of a case to the Court of Sessions when the offence is triable exclusively by it. As per the said section when a case is instituted on a police report or otherwise, and the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, then he has to commit the case to the Court of Sessions. Section 209 reads as under:

When in a case instituted on a "police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall:

(a) commit the case to the Court of Session;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

From the bare reading of this section and particularly clause (b) of section 209 it is quite obvious that subject to the provisions of the Code relating to bail, the Magistrate while passing the committal order can remand the accused to custody during, and until the conclusion of the trial. Therefore, it is quite obvious that in a given case even if the accused is released on bail by virtue of the provisions of section 167 (2) of the Act, it is open to a Magistrate to remand him to the Jail custody by exercising his powers under sub-section (5) of section 437 of the Code. In view of the deeming fiction created in section 167 (2) proviso (a) of the Code, in our opinion, the provisions of subsection (5) of section 437 would obviously apply to such case also. Similarly, after the committal order is passed and accused is committed to stand his trial before the Sessions Court u/s 209 of the Code it is open to a Court of Sessions or the High Court to exercise its special powers regarding bail under sub-section (2) of section 439 of the Code. As to when and in what circumstances these powers should be exercised will obviously depend on the facts and circumstances of each case. This appears to be the general scheme of the Code. In our opinion, when a chargesheet is presented before the Magistrate concerned u/s 173 of the Code and he applies his mind to it, obviously he takes cognizance of the offence. The provisions of section 209 of the Code cannot be reduced to an empty formality. While passing such an order the Magistrate is not expected to act mechanically. The Magistrate while exercising his power u/s 209 of the Code is expected to apply his judicial mind to the facts and circumstances of each case and then to pass an order of committal u/s 209 of the Code. The application of the mind by the Magistrate concerned and passing of an order u/s 209 of the Code is not merely an empty formality nor the Magistrate is expected to act as a mere post office in this behalf. Even from sub-section (2) of section 167 of the Code, it is quite obvious that before passing an order of remand beyond the period of 15 days the Magistrate should scrutinize the papers and then grant further order of remand if he is satisfied that the adequate grounds exist for doing so. Even an order of remand in this behalf cannot be passed without application of a mind either in a routine course or mechanically. Section 167 (2), proviso (a) of the Code creates a right in favour of the accused to be released on bail if he is prepared to and does furnish bail. If the accused is not prepared to and does not furnish the bail then even if no chargesheet is filed, it is open for the Magistrate to remand him for such further period as he deems fit which according to him is necessary for completing the investigation. The detention of the accused beyond the period of 60 days is not ipso facto illegal. Unless the accused expresses his willingness to furnish the bail there is no occasion for the Magistrate to exercise the jurisdiction u/s 167 (2) of the Code. In each and every case the written application may not be necessary. In a given case a person accused of an offence can either himself or through his

lawyer might apply for bail even orally. However, it is not possible for us to hold that no application at all, either oral or written, is necessary in this behalf. From the bare reading of the said proviso, it is further clear that mere preparedness of the accused is also not enough, but a further duty is enjoined upon him to furnish the bail if he wants to get himself released on bail under proviso (a) to sub-section (2) of section 167 of the Code. In a given case having regard to the fact that the accused is not represented by a counsel or is otherwise an illiterate person who is not aware of his right, the Magistrate might apprise him of his right in this behalf but it is not possible for us to lay down a general rule that in each and every case a duty is cast upon the Magistrate to automatically, (without anything further), release the accused person on bail as soon as the 60 days period is over. It is not the law that the accused person is entitled to walk out of the jail as soon as 60 days period is over. His further detention cannot be termed to be illegal unless he actually applies to the Court expressing his willingness to furnish bail and does furnish the bail. Further it is quite clear from the reading of the various provisions of the Code, including section 173 of the Code, that after the completion of the investigation the Officer-in-charge of the Police Station has to forward to the Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed. The remand order contemplated u/s 167 of the Code relates to the period when the investigation is yet to be completed. Therefore, in our opinion, as soon as the chargesheet is filed by the police officer before the Magistrate the right of the accused to be released on bail under proviso (a) to section 167 (2) of the Code will normally come to an end though in a given case he could be released on bail under the provisions of Chapter (sic) of the Code including section 437 of the new Code.

8. So far as the decision of this Court in *Ramsaran v. State of Maharashtra* is concerned, in that case the learned Judge was not concerned with such a controversy. In that case, the application for bail itself was filed before the competent Magistrate even before the chargesheet was filed. In that case, the accused No. 1 Ramsaran was arrested on 22-6-1975 and accused No. 2 Namdeo was arrested on 29-6-1975. After arrest the investigating agency did not file any chargesheet even though the period of 60 days was over. In this view of the matter, an application for bail was filed by the applicant on 4-9-1975. It is pertinent to note that till then also no chargesheet was filed by the police. In spite of this, the said application for bail was rejected by the Judicial Magistrate on 7-9-1975 and it is said order which was challenged in those proceedings.

9. That was not a case where the application for bail was filed before the competent authority after the chargesheet was filed. Therefore, in our opinion, the said decision is obviously distinguishable on facts.

10. So far as the Full Bench decision of the Punjab and Haryana High Court in *Baldeosingh v. State of Punjab* on which reliance is placed by the learned counsel for the applicant is concerned, in our opinion, the said decision is also distinguishable on facts. However, a strong reliance is placed by the learned

counsel for the applicants on certain observations in the said decision which are to the effect that it is not necessary for the accused to file any application for bail u/s 167 (2), proviso (a) of the Code. It appears from the reading of the said decision that these observations were made by the Full Bench in the context of controversy raised before it. In that case a controversy was raised as to whether to the case before the Full Bench the provisions of new Code or old Code will apply. We are not concerned with such a controversy in the present case because it is an admitted position before us that the present cases are governed by the new Code. Further, as already observed it is not possible for us to agree with the contention raised on behalf of the applicants that they are entitled to be released on bail automatically after the expiry of a period of 60 days without any application in that behalf either oral or written. In this context a reference could usefully be made to a Division Bench decision of the Allahabad High Court in *Lakshmi Brahman v. State*. Moreover, the case before the Full Bench of Punjab and Haryana High Court was decided on 15-4-1975 and thereafter came the decision of the Supreme Court in *Natabar Paridas's* case. In this case in terms, it is held by the Supreme Court that "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. 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 section 437 occurring in Chapter XXXIII. It is also dear that after the taking of the cognizance the power of remand is to be exercised u/s 309 of the new Code." In para 5 of the Division Bench decision in *Lakshmi Brahman v. State*, the Allahabad High Court has observed as under :

According to section 167, whenever any person is arrested and is detained in custody and it appears that the investigation cannot be completed within a period of 24 hours fixed by section 57 and there are grounds for believing that the accusation or information are well-founded the officer incharge of the Police Station is required to forthwith transmit to the nearest judicial Magistrate a copy of case diary entries and also to forward the accused to such Magistrate. The Magistrate, to whom an accused person is forwarded can either enlarge the accused on bail in accordance with the provisions of section 436 of the Code or he can direct that the accused be placed in such custody as he thinks fit, for a term not exceeding 15 days. In case the Magistrate to whom the accused is forwarded happens to be a Magistrate competent to try the accused or to commit him for trial, he can further authorize the detention of such an accused otherwise than in police custody, even for a period beyond 15 days, subject, however to the condition that the total period of detention is not to exceed to 60 days,

whereafter, the accused, if he is prepared to furnish bail, becomes entitled to be released from custody.]t is evident that an order u/s 167 of the Code, remanding the accused to custody, is made in order to facilitate the investigation and that such power to remand an accused to jail custody or to release him on bail is to be exercised during the investigation of an offence by the Police. The section contemplates that in case the investigation is not completed within 60 days and the accused person is prepared to offer bail he shall be released on bail and it will be considered that he has been so released in accordance with the provisions contained in Chapter XXXIII of the Code. In the context, what the expression, "but no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding 60 days, and on the expiry of the said period of 60 days the abused person shall be released on bail if he is prepared to and does furnish bail in section 167 (2) (a) means is that a Magistrate cannot during investigation, remand an accused to custody beyond a period of 60 days if the accused is prepared to and does furnish bail. This necessarily implies that even after expiry of 60 days if the accused does not offer and furnish bail, the Magistrate can, in no case, authorise the detention of an accused person beyond a period of 60 days. Since in this case it has not been shown by the applicants that they made any application to the learned Magistrate for being released on bail after the period of 60 days was over, it cannot be said that the remand orders made during the investigation, but after the expiry of 60 days, were illegal as such, or that the Magistrate was bound to enlarge them on bail even though they did not apply for it.

So far as the decision of the Rajasthan High Court in Prem Raj v. State of Rajasthan is concerned, the learned Judge in that case has chosen to follow the earlier decision of same Court in Khinvdan v. State of Rajasthan 1975 Cri. L J 1985, in preference to the decision of Allahabad High Court in Heeraman Vs. State of U.P., which was subsequently approved by the Division Bench of the same High Court in Lakshmi Brahman v. State. We have already made a detailed reference to this later Division Bench decision of the Allahabad High Court. In the view which we have taken therefore it is not necessary to deal with these decisions of Rajasthan high Court in detail.

11. So far as another decision of Rajasthan High Court in Rewat Dan v. State of Rajasthan, on which reliance is placed by Miss Deshpande is concerned, in our opinion it is not relevant for deciding the controversy involved in this petition. It deals with the power of Magistrate to cancel the bail u/s 209 read with section 437 of the Code at the time of committing the case to the Sessions Court. To the similar effect is the decision of Punjab and Haryana High Court in Kapoor Singh v. State of Haryana on which reliance is placed by the learned Assistant Government Pleader. In the view which we have taken it is also not necessary to deal with the decisions of M. P. High Court in Mishrilal v. Judicial Magistrate, Rajangora or of Punjab and Haryana High Court in Basant Kaur v. Smt. Gurdyalo, on which reliance is placed by Shri Badar, the learned Assistant Government Pleader.

12. Therefore, it is quite obvious that the right created u/s 167 of the Code could be exercised by the accused before the completion of the investigation and filing of the chargesheet in that behalf. Once the chargesheet is filed then the Magistrate can exercise his power of granting bail only u/s 437 of the Code of Criminal Procedure. Such a view seems to have been taken also by a Division Bench of the Gujarat High Court in *Umedsingh v. State*.

13. So far as the cases before us are concerned, in Criminal Application No. 889 of 1976 the application for bail itself was filed by the accused on 10-5-1976 and on the same day the chargesheet was also produced by the police. On 10-5-1976 the police filed a chargesheet and the case was then transferred to the file of the Chief Judicial Magistrate who was the competent Magistrate to deal with the matter. The Chief Judicial Magistrate thereafter adjourned the case to 11-5-1976 for passing an order of committal and in view of this he rejected the bail application tiled by the accused. Thereafter an independent application for bail was filed before the Sessions Court by the accused on 25-5-1976. It further appears from the record that after the chargesheet was filed by the police the accused filed the application for bail by invoking--his right u/s 167 (2) of the Code before the Chief Judicial Magistrate. As by then the investigation was already completed and a chargesheet was also presented before the Court, in our opinion, the accused had no right to be released on bail u/s 167 (2), proviso (a) of the Code. The subsequent application filed before the Sessions Court was, therefore, rightly considered by the Sessions Court having regard to the provisions of section 437 and section 439 of the Code of Criminal Procedure. Therefore, in our opinion, having regard to the facts and circumstances of the case, the learned Sessions Judge was right in coming to the conclusion that it would not be proper to release the accused on bail.

14. So far as Criminal Revision Application No. 90 of 1976 is concerned as already observed no application for bail was ever filed before the competent Magistrate. As a matter of fact, no request was ever made to the Judicial Magistrate, First Class, to release the accused on bail under the provisions of section 167 (2) proviso (a) of the Code Without approaching the Judicial Magistrate the accused directly filed an application before the Sessions Court. From the bare wording of section 167 of the Code it is quite obvious that the power to release the accused on bail during the course of investigation by virtue of the provisions of section 167 of the Code is vested in the Magistrate who is empowered to authorise the detention of the accused by granting remand. Even before the Sessions Court though the accused filed such an application his counsel remained absent on the date of hearing. Before the matter came up for consideration before the Sessions Court the chargesheet was already filed by the police on 10-5-1976 and even the order of committal was passed by the competent Magistrate on 14-5-1976. On the date of hearing, namely, 15-5-1976 the Advocate for the accused remained absent. As the counsel for the accused remained absent on the date of hearing the said application was also not pressed by anybody. The said application was opposed on behalf of the prosecution and,

therefore, in our opinion, the learned Sessions Judge was right in rejecting the same. More so when by then the committal order was already passed committing the accused to stand his trial before the Sessions Court for an offence u/s 302 of the Indian Penal Code. Therefore, in the view which we have taken, both the applications fail and are dismissed.