

ACHPAL @ RAMSWAROOP & ANOTHER

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v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1218 of 2018)

SEPTEMBER 24, 2018

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**[ABHAY MANOHAR SAPRE AND UDAY UMESH LALIT,  
JJ.]**

*Code of Criminal Procedure, 1973 – s.167(2) – Investigation not complete within the period prescribed under – Right of an accused in custody, to be released on bail – FIR registered against appellants-accused– Appellants arrested and remanded to police/magisterial custody – Petition filed by the complainant praying for fair and impartial investigation– High Court passed order dtd. 03.07.18 inter alia directing that investigation be conducted by a gazetted police officer, not below the rank of Additional Superintendent of Police (ASP)– On 05.07.18 charge-sheet filed by the police officer lower in rank than ASP– Magistrate returned the charge-sheet to the police for due compliance– Immediately after the expiry of 90 days, the appellants filed application for bail u/ s.167(2) – Rejected– Held: In terms of s.167(2), the stage of investigation ought to be confined to 90 or 60 days, as the case may be– On the expiry of the period stipulated, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in completion of the investigation within the period stipulated – Since, the appellants were in custody from 08.04.18, in terms of s.167(2) the investigation had to be completed by 07.07.18 – However, in the present case, on completion of 90 days of prescribed period, there were no papers of investigation before the concerned Magistrate– Appellants were thus denied protection established by law– Appellants entitled to bail in terms of s.167(2).*

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*Code of Criminal Procedure, 1973 – s.167(2) – Period under, for investigation – If can be extended by the High Court – Held: Provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality.*

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A **Allowing the appeal, the Court**

**HELD: 1.1** On the expiry of the period stipulated under Section 167(2), Code of Criminal Procedure, 1973 an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period stipulated and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate. [Para 11] [334-E-F]

**1.2** The letter of and spirit behind enactment of Section 167 of the Code mandates that the investigation ought to be completed within the period prescribed. Ideally, the investigation, going by the provisions of the Code, ought to be completed within first 24 hours itself. Further in terms of sub-section (1) of Section 167, if “it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57” the concerned officer ought to transmit the entries in the diary relating to the case and at the same time forward the accused to such Magistrate. Thereafter, it is for the Magistrate to consider whether the accused be remanded to custody or not. Sub-Section (2) then prescribes certain limitations on the exercise of the power of the Magistrate and the proviso stipulates that the Magistrate cannot authorize detention of the accused in custody for total period exceeding 90 or 60 days, as the case may be. It is further stipulated that on the expiry of such period of 90 and 60 days, as the case may be, the accused person shall be released on bail, if he is prepared to and does furnish bail.[Para 16] [339-D-G]

**1.3** The provision has a definite purpose in that; on the basis of the material relating to investigation, the Magistrate ought to be in a position to proceed with the matter. It is thus clearly indicated that the stage of investigation ought to be confined to 90 or 60 days, as the case may be, and thereafter the issue relating to the custody of the accused ought to be dealt with by the Magistrate on the basis of the investigation. Matters and issues relating to liberty and whether the person accused of a charge ought to be confined or not, must be decided by the Magistrate and not by the Police. Further custody of such person ought not to be guided by mere suspicion that he may have committed an

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offence or for that matter, to facilitate pending investigation. In the present case as on the 90<sup>th</sup> day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the concerned Magistrate to assess the situation whether on merits the accused was required to be remanded to further custody. Though the charge-sheet in terms of Section 173 came to be filed on 05.07.2018, such filing not being in terms of the order passed by the High Court on 03.07.2018, the papers were returned to the Investigating Officer. The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the concerned Magistrate. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the concerned Magistrate and they could not be simply remanded to custody de hors such consideration. The submission advanced by the appellant therefore has to be accepted. [Paras 17, 18] [339-G-H; 340-B-C, E-F]

1.4 The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and Maharashtra Control of Organised Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no Court could either directly or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated 03.07.2018 was the submission that the investigation would be completed within two months by a Gazetted Police Officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. Thus, the submissions in that behalf advanced by the State and the complainant are rejected. The accused having shown their willingness to be admitted to the benefits of bail and having filed an appropriate

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- A application, an indefeasible right did accrue in their favour. Appellants are entitled to be admitted to bail in terms of Section 167(2) of the Code on such conditions as the trial Court may deem appropriate. However, it would not prohibit or otherwise prevent the arrest or re-arrest of the accused on cogent grounds in respect of charge in question and upon arrest or re-arrest the accused would be entitled to petition for grant of regular bail which application would then be considered on its own merit. [Para 18-20] [340-F-H; 341-A-C, F-H; 342-A]

- C *Uday Mohanlal Acharya v. State of Maharashtra* (2001) 5 SCC 453; [2001] 2 SCR 878; *Rakesh Kumar Paul v. State of Assam* (2017) 15 SCC 67 – relied on.

- D *Hitendra Vishnu Thakur and Others v. State of Maharashtra and others* (1994) 4 SCC 602 : [1994] 1 Suppl. SCR 360; *Sanjay Dutt v. State through C.B.I., Bombay (II)* (1994) 5 SCC 410 : [1994] 3 Suppl. SCR 263; *Bipin Shantilal Panchal v. State of Gujarat* (1996) 1 SCC 718 : [1996] 1 SCR 193; *State of W.B. v. Dinesh Dalmia* (2007) 5 SCC 773 : [2007] 5 SCR 561; *Sanjay Kumar Kedia v. Intelligence Officer, Narcotics Control Bureau and Another* (2009) 17 SCC 631 : [2010] 1 SCR 555; *Union of India v. Nirala Yadav* (2014) 9 SCC 457 : [2014] 6 SCR 148; *Ranbeer Shokeen v. State (NCT of Delhi)* (2018) 4 SCC 405 – referred to.

#### Case Law Reference

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|---|-------------------------|-------------|---------|
| F | [2001] 2 SCR 878        | relied on   | Para 10 |
|   | [1994] 1 Suppl. SCR 360 | referred to | Para 10 |
|   | [1994] 3 Suppl. SCR 263 | referred to | Para 10 |
|   | [1996] 1 SCR 193        | referred to | Para 10 |
| G | [2007] 5 SCR 561        | referred to | Para 11 |
|   | [2010] 1 SCR 555        | referred to | Para 11 |
|   | [2014] 6 SCR 148        | referred to | Para 11 |
|   | (2018) 4 SCC 405        | referred to | Para 11 |
| H | (2017) 15 SCC 67        | relied on   | Para 14 |

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1218 of 2018 A

From the Judgment and Order dated 23.07.2018 of the High Court of Judicature for Rajasthan Bench at Jaipur in S.B. Criminal Miscellaneous Bail No. 9035 of 2018.

Siddhartha Dave, Rishi Matoliya, Ms. Sumati Sharma, Mahaveer Jat, H. D. Thanvi, Purushottam Lal Goyal, Milind Kumar, M. C. Dhingra, Gaurav Dhingra, Piyush Kant Roy, Vikrant Yadav, Advs. for the appearing parties. B

The Judgment of the Court was delivered by

**UDAY UMESH LALIT, J.** 1. Leave granted. C

2. This appeal challenges the correctness of the judgment and order dated 23.07.2018 passed by the High Court of Judicature for Rajasthan Bench at Jaipur in SBCRMB No.9035 of 2018.

3. FIR No.16 of 2018 was registered on 24.03.2018 with Police Station Baharwanda Kalan, Distt. Sawai Madhopur for offences punishable under Sections 143, 341, 323, 452, 336, 302 read with Section 149 of the Indian Penal Code against 18 persons. The appellants were named as Accused Nos.1 and 2 in said crime and came to be arrested on 08.04.2018. They were subsequently remanded to police/magisterial custody from time to time. D E

4. Later, Criminal Misc. Petition No.3517 of 2018 was filed by the complainant praying for fair and impartial investigation in the matter, in which an order came to be passed by the High Court on 03.07.2018. Said order recorded the submission of the Public Prosecutor as under: F

“The learned Public Prosecutor for the State, to allay the apprehension of the petitioner, at the outset, has submitted that not only fair investigation shall be conducted by a gazetted police officer, not below the rank of Additional Superintendent of Police but the report of the investigation along with the opinion of the Investigating Officer shall be submitted in the concerned Court within a period of two months from the date of receipt of certified copy of this order by the Investigating Officer.” G

The petition was disposed of in terms of the submissions so recorded. H

A 5. Since the appellants had been in custody from 08.04.2018, the  
investigation, in terms of Section 167 of the Code of Criminal Procedure  
(the Code for Short) had to be completed by 07.07.2018. On 05.07.2018  
a report under Section 173 of the Code was filed by the police before  
the concerned Judicial Magistrate. Since said report was filed by a  
B police officer lower in rank than an ASP and was thus contrary to the  
order passed by the High Court on 03.07.2018, an application was filed  
by the complainant placing certified copy of the aforesaid order dated  
03.07.2018. The Magistrate having noted the contents of said order,  
returned the charge-sheet with certified copy of the order dated  
03.07.2018 to the police for due compliance. Thus as on the expiry of  
C 90<sup>th</sup> day i.e. on 07.07.2018 no report under Section 173 of the Code was  
on record with the Magistrate.

6. Immediately after the expiry of 90 days the appellants filed an  
application for bail under the provisions of Section 167(2) of the Code.

D 7. The Judicial Magistrate, Khandar, Distt. Sawai Madhopur by  
his order dated 09.07.2018 rejected the prayer for benefit under Section  
167(2) of the Code. It was observed that since the charge-sheet filed  
on 05.07.2018 was not in compliance of the order passed by the High  
Court, the charge-sheet was returned due to technical fault. It was  
further observed that the effect of the order dated 03.07.2018 passed by  
E the High Court was extension of period within which the investigation  
could be completed.

8. The rejection as aforesaid came to be challenged by filing SB  
Crl. Misc. Bail No.9035 of 2018 and the High Court while rejecting said  
petition on 23.07.2018 stated as under:

F “No case for grant of bail under Section 167(2) Cr.P.C. is made  
out, as the time was extended by the High Court in Criminal  
Miscellaneous (Petition) No.3517 of 2018 and Investigating Officer  
was afforded two months time to file charge-sheet. It is also  
important to note that the Investigating Officer had produced the  
charge-sheet before the concerned Court prior to 90 days but the  
G same was returned in view of the order of the High Court.”

9. The order passed by the High Court is presently under appeal.  
We heard Mr. Siddhartha Dave, learned Advocate for the appellants,  
Mr. Milind Kumar, learned Advocate for the State and Mr. M.C. Dhingra,

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learned Advocate for the complainant. It was submitted by Mr. Dave, learned Advocate that the report filed under Section 173 of the Code on 05.07.2018 having been returned by the Magistrate for due compliance of the High Court order dated 03.07.2018, as on the expiry of 90 days, there was no charge-sheet for the consideration of the Court. He further submitted that the Code does not contemplate any extension of period within which the investigation could be completed and as such the High Court order dated 03.07.2018 can never be construed to have extended the period for investigation. In his submission, the appellants having shown their willingness to be admitted to the benefit of bail and preferred appropriate application, in view of the law laid down by this Court they were entitled to be released on bail. The learned Advocates for the State and the complainant on the other hand submitted that the investigation was completed and appropriate charge-sheet was filed on 05.07.2018 and the return of the papers in compliance of the order dated 03.07.2018 ought to be construed as a step towards further investigation in the matter.

10. The law on the point as to the rights of an accused who is in custody pending investigation and where the investigation is not completed within the period prescribed under Section 167(2) of the Code, is crystallized in the judgment of this Court in *Uday Mohanlal Acharya v. State of Maharashtra*<sup>1</sup>. This case took into account the decision of this Court in *Hitendra Vishnu Thakur and Others v. State of Maharashtra and others*<sup>2</sup>, *Sanjay Dutt v. State through C.B.I., Bombay (II)*<sup>3</sup> and *Bipin Shantilal Panchal v. State of Gujarat*<sup>4</sup>. Justice Pattanaik (as the learned Chief Justice then was) speaking for the majority recorded conclusions in para 13 of his judgment. For the present purposes, we may extract conclusions 3 and 4 as under:-

“ .....

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

<sup>1</sup>(2001) 5 SCC 453

<sup>2</sup>(1994) 4 SCC 602

<sup>3</sup>(1994) 5 SCC 410

<sup>4</sup>(1996) 1 SCC 718

A 4. When an application for bail is filed by an accused for  
 enforcement of his indefeasible right alleged to have been accrued  
 in his favour on account of default on the part of the investigating  
 agency in completion of the investigation within the specified  
 period, the Magistrate/court must dispose of it forthwith, on being  
 B satisfied that in fact the accused has been in custody for the period  
 of 90 days or 60 days, as specified and no charge-sheet has been  
 filed by the investigating agency. Such prompt action on the part  
 of the Magistrate/court will not enable the prosecution to frustrate  
 the object of the Act and the legislative mandate of an accused  
 being released on bail on account of the default on the part of the  
 C investigating agency in completing the investigation within the period  
 stipulated.

..... “

D 11. The principles laid down in *Uday Mohanlal Acharya* (supra)  
 have been consistently followed by this Court namely in *State of W.B. v.*  
*Dinesh Dalmia*<sup>5</sup>; *Sanjay Kumar Kedia v. Intelligence Officer,*  
*Narcotics Control Bureau and Another*<sup>6</sup>; *Union of India v. Nirala*  
*Yadav*<sup>7</sup> and in *Ranbeer Shokeen v. State (NCT of Delhi)*<sup>8</sup>. It must  
 therefore be taken to be well settled that in terms of 3<sup>rd</sup> conclusion as  
 E recorded in *Uday Mohanlal Acharya* (supra), on the expiry of the period  
 stipulated, an indefeasible right accrues in favour of the accused for  
 being released on bail on account of default by the investigating agency  
 in the completion of the investigation within the period stipulated and the  
 accused is entitled to be released on bail, if he is prepared to and furnishes  
 the bail as directed by the Magistrate.

F 12. The questions however arise in the present matter are slightly  
 of different dimension. Here investigation was completed and Challan  
 under Section 173 was filed on 05.07.2018. However, just two days  
 before that, an order had been passed by the High Court recording  
 submission of the public prosecutor that investigation in the matter would  
 be conducted by a Gazetted Police Officer. The investigation which led  
 G to the filing of the report on 05.07.2018, was not in conformity with the  
 statement made before the High Court. It was for this reason that the

<sup>5</sup> (2007) 5 SCC 773

<sup>6</sup> (2009) 17 SCC 631

<sup>7</sup> (2014) 9 SCC 457

<sup>8</sup> (2018) 4 SCC 405

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papers were returned by the Magistrate. All this happened before the expiry of 90<sup>th</sup> day. Can it be said that the investigation was complete for the purposes of Section 167(2) of the Code so as to deny the benefit to the accused in terms of said provision. Additionally another issue which arises for consideration is whether the order passed by the High Court could be construed as one under which the period for completing the investigation was extended.

13. We may at this stage extract the relevant provisions namely Section 167 (1) & (2) of the Code:

“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, authorize 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 of not less than ten years; (ii) sixty days, where the investigation relates to any

A 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 purposes of that Chapter; (b) no Magistrate shall authorise  
B 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.”

C 14. The historical background which led to the enactment of  
Section 167 of the Code, as it presently stands has been dealt with by  
Madan B. Lokur, J. in paragraphs 11 to 15 of his judgment in **Rakesh  
Kumar Paul v. State of Assam**<sup>9</sup>. Paragraphs 11 and 12 extract portions  
from the report of Law Commission of India in its 41<sup>st</sup> report, the proposed  
provisions as suggested by the Law Commission and the Statement of  
D Objects and Reasons dated 07.11.1970 while introducing the Code. Said  
Paragraphs 11 and 12 are quoted here:-

E “11. Unfortunately, all laws tend to be misused whenever  
opportunity knocks, and Section 167 of the Code of Criminal  
Procedure, 1898 was no exception. Since there was a practical  
difficulty in completing investigations within the 15-day time-limit,  
the prosecution often took recourse to the provisions of Section  
344 of the Code of Criminal Procedure, 1898 and filed a preliminary  
or incomplete report before the Magistrate to keep the accused in  
custody. The Law Commission of India noted this in its 41<sup>st</sup> Report  
F (after carefully studying several earlier Reports) and proposed to  
increase the time-limit for completion of investigations to 60 days,  
acknowledging that:

G “14.19. ... such an extension may result in the maximum  
period becoming the rule in every case as a matter of routine; but  
*we trust that proper supervision by the superior courts will  
prevent that.*”

(emphasis supplied)

The view expressed by the Law Commission of India and its  
proposal is as follows:

H <sup>9</sup>(2017) 15 SCC 67

“14.19. *Section 167.*—Section 167 provides for remands. A  
The total period for which an arrested person may be remanded  
to custody—police or judicial—is 15 days. The assumption is that  
the investigation must be completed within 15 days, and the final  
report under Section 173 sent to court by then. In actual practice,  
however, this has frequently been found unworkable. Quite often,  
a complicated investigation cannot be completed within 15 days, B  
and if the offence is serious, the police naturally insist that the  
accused be kept in custody. A practice of doubtful legal validity  
has therefore grown up. The police file before a Magistrate a  
preliminary or “incomplete” report, and the Magistrate, purporting  
to act under Section 344, adjourns the proceedings and remands C  
the accused to custody. In the Fourteenth Report, the Law  
Commission doubted if such an order could be made under Section  
344, as that section is intended to operate only after a Magistrate  
has taken cognizance of an offence, which can be properly done  
only after a final report under Section 173 has been received, and D  
not while the investigation is still proceeding. We are of the same  
view, and to us also it appears proper that the law should be clarified  
in this respect. The use of Section 344 for a remand beyond the  
statutory period fixed under Section 167 can lead to serious abuse,  
as an arrested person can in this manner be kept in custody  
indefinitely while the investigation can go on in a leisurely manner. E  
It is, therefore, desirable, as was observed in the Fourteenth  
Report, that some time-limit should be placed on the power of the  
police to obtain a remand, while the investigation is still going on;  
and if the present time-limit of 15 days is too short, it would be  
better to fix a longer period rather than countenance a practice F  
which violates the spirit of the legal safeguard. Like the earlier  
Law Commission, we feel that 15 days is perhaps too short, and  
we propose therefore to follow the recommendation in the  
Fourteenth Report that the maximum period under Section 167  
should be fixed at 60 days. We are aware of the danger that such  
an extension may result in the maximum period becoming the rule G  
in every case as a matter of routine; but we trust that proper  
supervision by the superior courts will prevent that. We propose  
accordingly to revise sub-sections (2) and (4) of Section 167 as  
follows:

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A ‘167. (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 at a time and sixty days in the whole. If  
B 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—

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

(b) 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.

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D (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.”

E 12. The recommendations of the Law Commission of India were  
carefully examined and then accepted. The basic considerations  
for acceptance, as mentioned in the Statement of Objects and  
Reasons dated 7-11-1970 for introducing the (new) Code of  
Criminal Procedure, 1973 were:

F “3. The recommendations of the Commission were examined  
carefully by the Government, keeping in view among others, the  
following basic considerations—

(i) an accused person should get a fair trial in accordance  
with the accepted principles of natural justice;

G (ii) every effort should be made to avoid delay in investigation  
and trial which is harmful not only to the individuals involved but  
also to society; and

(iii) the procedure should not be complicated and should, to the  
utmost extent possible, ensure fair deal to the poorer sections of  
the community.

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The occasion has been availed of to consider and adopt where appropriate suggestions received from other quarters, based on practical experience of investigation and the working of criminal courts.” A

15. As observed by the Law Commission in paragraph 14.19 of its 41<sup>st</sup> Report, a practice of doubtful legal validity had grown up where Police used to file before a Magistrate a preliminary or incomplete report and the Magistrate, purporting to act under Section 344 of the Code of Criminal Procedure, 1898 used to adjourn the proceeding and remand the accused to custody. It was observed that such remand beyond the statutory period fixed under Section 167 would lead to serious abuse and therefore some time limit was required to be placed on the power of the police to obtain remand and as such the maximum period for completion of investigation was suggested. The objects and Reasons for introduction of new Code voiced similar concern. B C

16. The letter of and spirit behind enactment of Section 167 of the Code as it stands thus mandates that the investigation ought to be completed within the period prescribed. Ideally, the investigation, going by the provisions of the Code, ought to be completed within first 24 hours itself. Further in terms of sub-section (1) of Section 167, if “it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57” the concerned officer ought to transmit the entries in the diary relating to the case and at the same time forward the accused to such Magistrate. Thereafter, it is for the Magistrate to consider whether the accused be remanded to custody or not. Sub-Section (2) then prescribes certain limitations on the exercise of the power of the Magistrate and the proviso stipulates that the Magistrate cannot authorize detention of the accused in custody for total period exceeding 90 or 60 days, as the case may be. It is further stipulated that on the expiry of such period of 90 and 60 days, as the case may be, the accused person shall be released on bail, if he is prepared to and does furnish bail. D E F

17. The provision has a definite purpose in that; on the basis of the material relating to investigation, the Magistrate ought to be in a position to proceed with the matter. It is thus clearly indicated that the stage of investigation ought to be confined to 90 or 60 days, as the case may be, and thereafter the issue relating to the custody of the accused G

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A ought to be dealt with by the Magistrate on the basis of the investigation. Matters and issues relating to liberty and whether the person accused of a charge ought to be confined or not, must be decided by the Magistrate and not by the Police. The further custody of such person ought not to be guided by mere suspicion that he may have committed an offence or for that matter, to facilitate pending investigation.

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18. In the present case as on the 90<sup>th</sup> day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the concerned Magistrate to assess the situation whether on merits the accused was required to be remanded to further custody. Though the charge-sheet in terms of Section 173 came to be filed on 05.07.2018, such filing not being in terms of the order passed by the High Court on 03.07.2018, the papers were returned to the Investigating Officer. Perhaps it would have been better if the Public Prosecutor had informed the High Court on 03.07.2018 itself that the period for completing the investigation was coming to a close. He could also have submitted that the papers relating to investigation be filed within the time prescribed and a call could thereafter be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of Section 173(8) of the Code or not. That would have been an ideal situation. But we have to consider the actual effect of the circumstances that got unfolded. The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the concerned Magistrate. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the concerned Magistrate and they could not be simply remanded to custody de hors such consideration. In our considered view the submission advanced by Mr. Dave, learned Advocate therefore has to be accepted. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and Maharashtra Control of Organised Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no Court could either directly

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or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated 03.07.2018 was the submission that the investigation would be completed within two months by a Gazetted Police Officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the learned Counsel for the State and the complainant.

In our considered view the accused having shown their willingness to be admitted to the benefits of bail and having filed an appropriate application, an infeasible right did accrue in their favour.

19. We must at this stage note an important feature. In **Rakesh Kumar Paul** (supra), in his conclusions, Madan B. Lokur, J. observed in para 49 as under:

“49. The petitioner is held entitled to the grant of “default bail” on the facts and in the circumstances of this case. The trial Judge should release the petitioner on “default bail” on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case.”

In his concurring judgment, Deepak Gupta, J. agreed<sup>10</sup> with conclusions drawn and directions given by Madan B. Lokur, J. in paragraphs 49 to 51 of his judgment. According to the aforesaid conclusions, it would not prohibit or otherwise prevent the arrest or re-arrest of the accused on cogent grounds in respect of charge in question and upon arrest or re-arrest the accused would be entitled to petition for grant of regular bail which application would then be considered on its own merit.

20. We, therefore, allow this appeal and direct that the appellants are entitled to be admitted to bail in terms of Section 167(2) of the Code

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<sup>10</sup> Para 86 of the Judgment of Hon’ble Deepak Gupta

- A on such conditions as the trial Court may deem appropriate. The matter shall be immediately placed before the trial court upon receipt of copy of this Judgment. We also add that in terms of conclusions arrived at in the majority Judgment of this Court in *Rakesh Kumar Paul* (supra), there would be no prohibition for arrest or re-arrest of the appellants on cogent grounds and in such eventuality, the appellants would be entitled to petition for grant of regular bail.
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21. The appeal thus stands allowed.

Divya Pandey

Appeal allowed.