

Dorai and Another Vs. State of Karnataka

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Court : Karnataka

Decided On : Jul-27-1994

Reported in : 1994CriLJ2987; ILR1994KAR2391; 1994(4)KarLJ492

Judge : S. Venkataraman, J.

Appeal No. : Criminal Petition No. 989/94

Appellant : Dorai and Another

Respondent : State of Karnataka

Advocate for Def. : Sri Y.B. Jagadeesh, SPP

Advocate for Pet/Ap. : Sri Hasmath Pasha, Adv.

Judgement :

ORDER

1. The petitioners have filed this petition under section 439 Cr.P.C. seeking bail. A charge sheet has been filed against the petitioners for offences under sections 394 and 302 read with Section 34 IPC. The prosecution case is that on 12-9-1993 between 11.30 and 11.45 p.m. when the complainant, his father Puttiah and two others were proceeding in an autorickshaw, the accused persons stopped the same near Seshadripuram Railway bridge, threw chilly powder on Puttaiah's face, forcibly took Puttiah and the complainant in an autorickshaw and near Oklipuram the petitioners and another absconding accused Kutti stabbed Puttiah and robbed

a sum of Rs. 50,550/- along with the bag in which the amount was kept and escaped, and that Puttiah succumbed to the injuries sustained by him.

2. The first petitioner was arrested on 30-10-1993 and the second petitioner was arrested on 11-10-1993 during the course of the investigation of another case by Kengerigate police. They were remanded to judicial custody in that case. On 16-12-1993 the Circle Inspector who was investigating this case, made an application before the Magistrate seeking police custody of the two petitioners for the purpose of interrogation in this case. The Magistrate ordered issue of body warrant for production of the two petitioners before Court on 20-12-1993. This order was passed on 16-12-1993. On 20-12-1993 when the petitioners were produced before court the Magistrate remanded the petitioners to police custody in case till 21-12-1993. From 21-12-1993 the petitioners were remanded to judicial custody in this case also. The remand was being extended from time to time till 22-3-1994. On 19-3-1994 the police submitted the charge sheet against both the petitioners before the Magistrate. The learned Magistrate on the same day has made the following order :

'Registrar, call on 22-3-1994'.

On 22-3-1994 the relevant copies of the charge sheet and other police papers were furnished to the accused and the remand of the petitioners was extended till 4-4-1994. On 4-4-1994 an application was filed for bail both under section 437 Cr.P.C. and under section 167(2) Cr.P.C. That applicant was rejected by the Additional Chief Metropolitan Magistrate and the bail petition filed before the Sessions Judge was also dismissed.

3. The learned Counsel for the petitioners from contended that the petitioner must be deemed to have been in detention in this case from 16-12-1993 when the Magistrate issued the body warrant as the petitioners could not have been released once the body warrant was issued, even if their detention in the case in which they had been remanded had come to an end. According to him the charge sheet is not filed within 90 days from the date of commencement of such detention and as such the petitioners are entitled to bail under the proviso to Section 167(2). He relied on the decisions in Government of Andhra Pradesh v. A. V. Rao, AIR

1977 SC 1096 and Ramu v. State of Karnataka, : ILR 1991 KAR1861 .

4. The learned government pleader contended that the petitioners were remanded to the custody in this case only on 20-12-1993 and that the charge sheet has been filed within 90 days from that date and for the purpose of computing the period of 90 days it is only the date on which the court first granted remand of the accused will have to be taken into consideration.

5. The Supreme Court in Chaganti Sathyanarayana v. State of Andhra Pradesh, : [1986]2SCR1128 has clearly laid down that the period of 90 days or 60 days mentioned in proviso (a) to Section 167(2) Cr.P.C. begins to run from the date of the order of remand and not from the date when the accused was arrested. As such we have to see as to when the petitioner were remanded to custody by the Magistrate in this case.

6. The contention of the learned Counsel for the petitioners that from the date on which the Magistrate issued body warrant for the production of the petitioners, he must be deemed to have remanded the petitioners to custody cannot be accepted. This argument proceeds on the assumption that once the body warrant is issued the petitioners could not have been released, even if the period of detention authorised in the other case had come to an end, and that the jailor was obliged to continue their detention and produce them before the Magistrate. Section 267 Cr.P.C. provides for issue of warrant for production of an accused who is detained in prison for the purpose of any proceedings against him. It is under this provision the body warrant is issued to the jailor for production of the petitioners. Section 269 clearly provides that where the person in respect of whom an order is made under section 267, is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained, the officer in charge of the prison shall abstain from carrying out the court's order and shall send to the court a statement of reasons for so abstaining. As such if the petitioners who had been remanded to custody in another case had been released in the other case or if the period of their detention in the other case had come to an end, the jailor was not obliged to detain the petitioners in order to produce them before the court in this

case. The body warrant only requires the production of the accused, if they had continued in detention in the jail. As such it cannot be said that from the moment the court issued the body warrant for production of the petitioner in this case they must be deemed to have been remanded to custody in this case.

7. In A. V. Rao's case the Supreme Court was dealing with the question of computation of period during which the accused could be said to have been in custody for purposes of Sections 428, 430 and 418 Cr.P.C. It was held in that case that as the accused were already in custody under Preventive Detention Act and Maintenance of Internal Security Act, the authorities could have easily produced them before the Magistrate when the F.I.R. was lodged and they could have produced another accused immediately on dismissal of his appeal by the High Court and that as such the period from the date of the F.I.R. in the date on which the accused was produced after his release from preventive detention could be treated as part of the period during which the accused was under detention. This decision has no application to the point at issue in this case.

8. The decision of this Court in Ramu v. State of Karnataka, : ILR 1991 KAR1861 wherein it is held that even the period during which the police had kept surveillance over the accused in the hospital before formal arrest, must be taken into account for computing the period of 90 days runs counter to the decision of the Supreme Court in Chaganti Sathyanarayana's case. In State of Karnataka v. Babu, 1994 Cri LJ 651 this Court has held that in view of the decision of the Supreme Court, decision of the learned single Judge in Ramu's case cannot be relied upon.

9. In this case, for the purpose of computing the period of 90 days it is only the date on which the Magistrate actually remanded the accused to police custody on 20-12-1993 will have to be taken into account. It is not disputed that the charged sheet has been filed within 90 days from that day.

10. The learned Counsel for the petitioners next contended that when once the charge sheet was filed on 19-3-1994 the power of the Magistrate to remand the accused under section 167 came to an end, that if at all the Magistrate could remand the accused under Section 309 Cr.P.C., that to exercise to power under

section 309 the Magistrate had to take cognizance, that in this case the Magistrate has not taken cognizance of the offence on 19-3-1992 nor has he purported to remand the accused under section 309 Cr.P.C., that as such the detention of the petitioner from 19-3-1994 was illegal and that the petitioners are therefore entitled to bail under the proviso to Section 167(2) Cr.P.C. He cited the decision of the Supreme Court in C.B.I. Special Investigation Cell, New Delhi v. Anupam J. Kulkarni, : 1992 CriLJ2768 wherein it is held that Section 309 comes into operation after taking cognizance and not during the period of investigation. The learned Counsel for the petitioner also referred to an observation in para 9 of the judgment to the effect that the proviso to Section 167(2) clearly lays down that the total period of detention should not exceed 90 days in cases where the investigation relates to serious offences mentioned therein and 60 days in other cases and if by that time cognizance is not taken on the expiry of said periods the accused shall be released on bail as mentioned therein.

11. The judgment of this Court in Gyan Madhu v. State of Karnataka, 1976 (2) KLJ 366 : (1977 Cri LJ 632) and Balappa Kernal v. State of Karnataka, ILR (1985) Kar 3086 : (1986 Cri LJ 653) were strongly pressed into service by the learned Counsel for the petitioners to contend that the detention of the accused after filing of the charge sheet and without cognizance being taken as illegal and that under Section 309 Cr.P.C. an accused who is in illegal custody cannot be remanded. In Gyan Madhu's case the accused had been remanded to judicial custody till 10-9-1976. The charge sheet was filed on 6-7-1976 and the Magistrate took cognizance of the offences on 6-9-1976 itself. An application for enlargement of bail under Section 167(2) Cr.P.C. was filed on 8-9-1976. This Court held that the period of remand under section 167(2) by an order dated 3-9-1976 came to an end on 6-9-1976 when the charge sheet was filed, that the Magistrate not having passed any order of remand under Section 309(2), the period of detention from 6-9-1976 to 10-9-1976 was without any valid or legal order of detention and that the accused were therefore entitled to be enlarged on bail in pursuance of the application which they had filed on 8-9-1976.

12. In Balappa Kernal's case it is held that detention of the accused after expiry of 90 days under section 167(2) being unauthorised remand order under section 309

cannot be made.

13. The learned Counsel for the petitioner also cited the decisions in Premraj v. State of Rajasthan, 1976 Cri LJ 455, Khinvdan v. State of Rajasthan, 1975 Cri LJ 1984, Narayan v. State of Rajasthan, 1982 Cri LJ 2319 and Mahaveer Singh v. State of Rajasthan, 1992 (3) Crimes 479 in support of his contention. In Kim Bahadur Palshiram Thapa v. State of Maharashtra, 1989 (3) Crimes 543 which is also cited by the learned Counsel for the petitioners, it has been held that mere filing of the charge sheet is not taking cognizance and that if the cognizance is not taken within 90 days the accused will be entitled to be released on bail.

14. The learned Counsel for the petitioners also pointed out that this Court following the decision in Gyanu Madhu's case has granted bail in Cr.P. 267/94.

15. The learned Government Pleader contended that the proviso to Section 167(2) would apply only when the police fail to file to charge sheet within 90/60 days as the case may be and once the charge sheet is filed there is no scope for releasing the accused under the proviso, that if the Magistrate does not take cognizance immediately and does not exercise the power under section 309 Cr.P.C. to remand the accused that will not give a right to the accused to get bail without reference to the merits of the case. He relied on the decision in Utchala Jayarami Reddy v. State of A.P., 1993 Cr LJ 3827. In this case it has been held as hereunder :

At page 3827 the High Court observed as follows :

'Delay in taking cognizance of offence after filing of police report under Section 173 will not per se give right to the accused to be enlarged on bail. In the instance case during the period of filing of the police report and taking cognizance of the offence, no application for bail was removed. The application was moved only after cognizance of the offence was taken. On the date the application for bail was moved the accused was in custody pursuant to the order of remand under sub-section (2) of Section 309. In such circumstances accused was not entitled to be released on bail on the ground of not taking cognizance of offence within ninety days. An earlier illegal detention of an accused would not vitiate the order of

remand under Section 309(2). - valid order of remand passed after taking cognizance of the offence will not be vitiated by an earlier order of remand passed without taking cognizance of the offence.'

16. Section 167 Cr.P.C. comes in Chapter 12 which deals with 'information to the police and their powers to investigate'. It is only in 1973 Code of Criminal Procedure a provision is made for grant of bail to the accused after 90 days in detention without reference to the merits of the case. The object of the provision under section 167(2) for grant of compulsory bail is to ensure that the police filed the charge sheet within 90 days. In the decision in *Rajnikanth Jivanlal Patel Anr. Anr. v. Intelligence Officer, Narcotic Control Bureau, New Delhi*, : 1990 CriLJ62 the Supreme Court has pointed out that an order for release on bail under proviso (a) to Section 167(2) may properly be termed as an order on default and that if the police fail to submit the charge sheet within 90/60 days the accused becomes entitled to bail under section 167(2)(a) proviso.

17. In *Aslam Babalal Desai v. State of Maharashtra*, 1992 AIR SCW 2621 : (1992 Cri LJ 3712) the Supreme Court has held that the provisions of the Code, in particular Sections 57 and 167 manifests the legislative interest that once a person's liberty has been interfered with by the police arresting him without a court order of warrant, the investigation must be carried out with urgency and completed within the maximum period allowed by the proviso (a) to Section 167(2), that the prosecuting agency must realise that if it omits or defaults to file a charge sheet within the time prescribed, the accused would be entitled to be released on bail. It is therefore clear that an accused can claim fail as of right under the proviso to Section 167(2) only if the charge sheet is not filed within the period of 90 or 60 days as the case may be.

18. The points that arise for consideration whether the detention of an accused after the filing of the charge sheet and before the Magistrate takes cognizance of the offence is illegal and if so, whether accused gets a right to bail irrespective of the merits of the case.

19. There cannot be any serious dispute about the proposition that once the charge sheet is filed the power of the Magistrate to grant remand under section

167(2) Cr.P.C. comes to an end and that Section 309 which empowers the Magistrate to remand the accused during enquiry or trial comes into operation after the cognizance is taken. This aspect is made clear in Anupam J. Kulkarni's case.

20. This Court in Gyanu Madhu's case and Balappa Karnal's case has proceeded on the basis that the detention of an accused under section 167 Cr.P.C. after the expiry of 90/60 days as the case may be or after the filing of the charge sheet is illegal, that an accused under such illegal detention cannot be remanded under section 309 Cr.P.C. and that as such an accused who is detailed illegally is entitled to be released on bail. But the Supreme Court in *State of U.P. v. Lakupshmi Bhahmana*, : 1983 CriLJ839 : (1983 Cri LJ 839) has clearly held that on the expiry of the period of 60 days, the detention of the accused under Section 167 does not ipso facto become illegal. In that case the accused was remanded to custody on 2-11-1974 when the investigation was in progress. The investigating officer failed to submit the charge sheet against the accused within the period of 60 days as contemplated by sub-section (2) of Section 167 of the 1973 Code prior to its amendment by Amendment Act of 1978 which enlarged the period from 60 to 90 days in respect of certain cases. The charge sheet was filed on 5-2-1965, the accused made an application for bail before the High Court. The High Court took the view that once the charge sheet was filed the Magistrate had no power to grant remand under section 167 Cr.P.C., that the power to grant remand under section 309 Cr.P.C. could be exercised only after passing the order of commitment under Section 207 read with Section 209 and that as in that case the Magistrate had not immediately passed the order of commitment after the filing of the charge sheet the accused were entitled to be released on bail. The Supreme Court in para 5 of the judgment has held as herein :

'In this appeal, we are concerned with Section 167 hereinabove extracted. The High Court after examining the scheme of Section 167(1) and (2) with the proviso rightly concluded that, on the expiry of 60 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 is not submitted within the period of 60 days, then notwithstanding anything to the contrary in Section 437(1), the accused would be entitled to an

order for being released on bail if he is prepared to and does furnish bail. In this case, it is an admitted position that the respondents did not apply to the Magistrate for being released on bail on the expiry of 60 days from the date of their arrest. The High Court was of the opinion that as the respondents did not apply for bail on the expiry of sixty days from the date of their arrest, their continued detention would not be illegal or without the authority of law. So far there is no controversy.'

21. In view of the above dictum of the Supreme Court it can no longer be contended that the detention of the accused under Section 167 Cr.P.C. after the expiry of 90 days or 60 days as the case may be would be illegal or that the accused who is under such detention cannot be subsequently remanded under section 309 Cr.P.C. It is no doubt true that after the filing of the charge sheet the power to remand under the Section 167 comes to an end. The question is as to which is the provision which empowers a Magistrate to detain the accused after the charge sheet is filed. On this aspect the Supreme Court in the above decision has held as hereunder, at para 13 :

'Now, if under section 207, the Magistrate is performing a judicial function of ascertaining whether copies have been supplied or not, it would undoubtedly be an inquiry for the purpose of satisfying himself that Section 207 has been complied with in letter and spirit. That satisfaction has to be judicial satisfaction. It is not a trial but something other than a trial and being judicial function it would necessarily be an inquiry. The making of an order committing the accused to the Court of Session will equally be a stage in the inquiry and the inquiry culminates in making the order of commitment. Thus, from the time the accused appears or is produced before the Magistrate with the police report under section 170 and the Magistrate proceeds to enquire whether Section 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding before the Magistrate would be an inquiry as contemplated by Section 2(g) of the Code. We find it difficult to agree with the High Court that the function discharged by the Magistrate under section 207 is something other than a judicial function the Magistrate is not holding an inquiry as contemplated by the Code. If the Magistrate is holding the inquiry obviously Section 309 would enable the Magistrate to remand the accused to the custody till the inquiry to be made is complete. Sub-

section (2) of Section 309 provides that if the Court, after taking cognizance of an offence or commencement of trial, finds it necessary or advisable to postpone the commencement 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 times as it considers reasonable, and may by a warrant remand the accused if in custody. There are three provisos to sub-section (2) which are not material. If, therefore, the proceedings before the Magistrate since the submission of the police report under section 170 and till the order of commitment is made under section 209 would be an inquiry and if it is an inquiry, during the period, the inquiry is completed. Section 309(2) would enable the Magistrate to remand the accused to the custody.'

22. The above ruling shows that from the time of the filing of the charge sheet till the order of commitment the proceedings before the Magistrate would be an enquiry and that under section 309(2) the Magistrate has power to remand the accused to the custody.

23. The principles laid down by the Supreme Court in Lakshmi Brahman's case has been analysed by the Full Bench of Rajasthan, Gujarat and Patna High Courts. In Rabindra Rai v. State of Bihar, 1984 Cri LJ 1412 the accused was remanded to judicial custody upto 24-1-1983, the charge sheet was filed on 14-1-1983, the cognizance was taken by the Magistrate on 17-1-1983. It was contended in that case that the power under section 167 came to an end on 14-1-1983 when the charge sheet was filed, that the power under section 309 could have been exercised only on 17-1-1983 when the cognizance was taken and that the detention of the accused from 14-1-1983 to 17-1-1983 was illegal and that the accused was entitled to be released on bail the Full Bench of the Patna High Court relying on the decision in Lakshmi Brahman's case, has held as hereunder at page 1415, para 6 :

'In view of the clear enunciation of the position that an inquiry within the meaning of Section 2(g) of the Code shall deem to have commenced since the submission of the police report, and shall continue till an order of commitment is made under section 209, it is difficult for this Court to hold that such inquiry shall commence

only after a formal order is passed by the Magistrate saying that cognizance has been taken. Once it is held that inquiry commences since the submission of the police report/charge sheet there should not be any difficulty in holding that the Magistrate has during that period power to remand the accused in terms of sub-section (2) of Section 309 of the Code.'

24. In *Shardulbhai Lakhmanbhai Pancholi v. State of Gujarat*, 1990 Cri LJ 1275 the Full Bench of the Gujarat High Court after analysing the various propositions of law emerging from the decision of the Supreme Court in *Lakshmi Brahman's* case and other cases has held that the investigation would come to an end the moment the charge sheet is submitted as required by Section 170 unless the Magistrate directs further investigation and that in case of offence triable by the Sessions Court inquiry within the meaning of Section 2(g) of the New Code would commence on submission of the charge sheet.

25. In view of the decision of the Supreme Court in *Lakshmi Brahman's* case it is clear that once the charge sheet is filed the proceedings thereafter must be deemed to form part of the inquiry under section 207 and the detention of the accused must be traced to the power of the Magistrate under section 309 Cr.P.C. The detention of the accused after filing of the charge sheet cannot therefore be held to be illegal merely because the Magistrate has not passed a specific order taking cognizance of the offences or he has not purported to remand the accused under section 309 Cr.P.C. The decision of this Court in *Gyanu Madhu's* case and *Balappa Karnal's* case cannot be followed in view of the decision of the Supreme Court in *Lakshmi Brahman's* case.

26. Another aspect which requires consideration is whether after the filing of the charge-sheet, can the accused seek bail under the proviso S. 167(2) on the ground that the Magistrate has not taken cognizance and as such he had no power to remand him under S. 309, Cr.P.C. It may be noted that the provisions S. 167 are applicable only when the investigation is pending. Once the charge-sheet is filed the investigation comes to an end and with it the applicability of the proviso to S. 167(2) also comes to an end. There is no other provision in the Code which gives the right to the accused to claim bail only on the ground that the Magistrate

had not taken cognizance even after 90/60 days as the case may be though the charge-sheet is filed. The Supreme Court in Lakshmi Brahman's case, dealing with the question as to when the accused is entitled to compulsory bail has in para 9 observed as hereunder :

'We would proceed on the assumption as done by the High Court that the Investigating Officer has submitted the police report as contemplated by S. 170 and as required therein forwarded the accused under custody to the Magistrate to whom the police report is submitted. Now, the High Court is right in holding that the jurisdiction to grant bail, in case investigation is not completed within the prescribed time limit as incorporated in the provision as it then stood, vests in the Magistrate if the accused applies and is prepared to furnish bail. Section 167 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 charge-sheet is submitted as required under S. 170 unless the Magistrate directs further investigation.'

The High Court in that case had granted bail only on the ground that as the Magistrate had not passed an order of commitment immediately after filing of the charge-sheet he had no power to remand the accused to custody. Disagreeing with this view the Supreme Court in the above decision in para 14 has observed as herein :

'The view taken by the High Court introduces a stage of compulsory bail not envisaged by the Code, and, therefore, also the view of the High Court cannot be upheld. According to the High Court after the accused is brought before the court along with the police report, the Magistrate must forthwith commit the accused to the Court of Session because the Magistrate would have no jurisdiction in the absence of any provision to remand the accused to custody till the order committing the case to Court of Session is made. The view, with respect, is wholly untenable and must be set aside.'

This decision of the Supreme Court is an authority for the proposition that the only ground on which the court permits compulsory bail to an accused is the non-filing of the charge-sheet within 90/60 days as the case may be and that if the

compulsory bail is granted for any other reason it would amount to introducing an stage of compulsory bail not envisaged by the Code and that that is not permissible. In view of this proposition of law as laid down by the Supreme Court in Gyanu Madhu's case where this Court held that the accused has to be released on bail even after the filing of the charge-sheet if the Magistrate does not remand him under S. 309, Cr.P.C. can no longer be followed.

27. I may in this connection refer to the decision of the Full Bench of the Rajasthan High Court in Mahesh Chand v. State of Rajasthan, 1985 Cri LJ 301. In that case the Full Bench has considered the different views taken by that court in earlier cases including the decision in Rathi Ram v. State of Rajasthan, 1983 (1) Crimes 299, and has held as hereunder at para 25 :

'We have briefly surveyed above the various provisions of the New Code relating to grant and cancellation of bail at all stages of the proceedings arising out of the arrest of a person accused of the commission of a bailable or non-bailable offence with a view to showing that Legislature has made detailed and exhaustive provisions and left no scope for any court to direct the release of an accused person on a ground not provided for by the Legislature in the New Code. There is no provision in the New Code which, even if it were to be liberally construed, may be said to be conferring a right on the accused to be released on bail by reason of the mere fact that his custody was for some period either unauthorised or not validly authorised by the Magistrate. If the Magistrate is guilty of any act of omission or commission in the exercise of his powers of remanding an accused to custody under sections 167, 209 or 309 of the New Code, the accused may be justified in complaining that his detention was illegal during the relevant period and he may have his legal remedies including the remedy of habeas corpus, against such illegal detention, but illegal, by itself and taken alone, is no ground for bail and has not been recognised as such by the New Code. Even S. 167(2), which provides for bail dehors the provisions of Chapter XXXIII of the New Code, does not lay down that detention of the accused in custody beyond the period of 60 days or 90 days, as the case may be, during the investigation is illegal and therefore a ground for bail. All that S. 167(2) enacts in effect is that though the Magistrate may authorise the detention of the accused in custody extending

beyond the aforesaid maxima, if the accused is during that period prepared to and does furnish bail, he shall be released on bail, and he shall be deemed to be so released under the provisions of Chapter XXXIII for purposes of that chapter.'

The decision in Lakshmi Brahman's case has been cited in support of the above view and the decision in Rati Ram's case relied on by the learned counsel for the petitioners has been expressly overruled by the Full Bench. Though the decision in Narayan v. State of Rajasthan, 1982 Cri LJ 2319, relied on by the petitioners' advocate has not been referred to in the Full Bench decision, in view of that decision the decision of learned single Judge in Narayan's case to the effect that when cognizance is not taken within 90 days though charge-sheet is filed within that period, the detention of the accused after 90 days would be illegal and the accused must be released on bail is no longer good law. In Mahaveer Singh v. State of Rajasthan, 1992 (3) Crimes 479, a single Judge of Rajasthan High Court has referred to some earlier decisions of that court which laid down that if the cognizance is not taken within 90 days the accused gets a right to bail. There is no reference to the Full Bench decision of that court on the point. On facts there was a controversy in that case as to when the accused was arrested and as to when the period of 90 days expired. The learned Judge has ordered release of the accused on bail after recording a finding that charge-sheet was not filed within 90 days. As such that decision can be of no help to the petitioner. Even the Full Bench of the Gujarat High Court in Shardulbhai's case, following the decision of the Supreme Court in Lakshmi Brahman's case has held that the accused does not have a right to release on bail under proviso (a) to S. 167(2) once the investigation comes to an end by filing a charge-sheet and that the Code does not envisage a new stage of compulsory bail.

28. The decision of the single Judge of the Bombay High Court in Kim Bhadur Thapa's case which purports to lay down that even if the charge-sheet is filed within 90 days the accused is entitled to bail under the proviso to S. 167(2) if the Magistrate does not take cognizance within that period cannot be accepted in view of the decision of the Supreme Court in Lakshmi Brahman's case.

29. In the case of Anupam J. Kulkarni, on which strong reliance is placed by the learned counsel for the petitioners in support of his contention that if cognizance is not taken within 90 days the accused is entitled to be released under the proviso to S. 167(2), the question that had arisen for consideration, as mentioned in para 2, was as to whether a person arrested and produced before the nearest Magistrate as required under section 167(1) can still be remanded to police custody after the expiry of the initial period of 15 days. The question as to whether an accused is entitled to compulsory bail under proviso to S. 167(2) even in a case where the charge-sheet is filed within 90/60 days as the case may be, but the Magistrate has not taken cognizance, had not at all arisen for consideration. The earlier decision of the Supreme Court in Lakshmi Brahman's case where it has been specifically laid down that S. 167 envisages a stage when a person is arrested and the investigation is not completed within the prescribed period has not been referred to. The observation in para 9 of the judgment that the proviso S. 167(2) clearly lays down that the total period of detention should not exceed 90 days in cases where the the investigation relates to serious offences mentioned therein and 60 days in other cases and that if by that time cognizance is not taken on the expiry of the said periods the accused shall be released on bail, does not indicate that S. 167 would be applicable even after the filing of the charge-sheet and after the completion of the investigation. This decision does not purport to lay down any proposition contrary to that laid down in Lakshmi Brahman's case to the effect that once the charge-sheet is filed the investigation comes to an end and that S. 167 is applicable at a stage when the investigation is not completed and that there cannot be a stage of compulsory bail not envisaged by the Code.

30. A careful consideration of the provisions of S. 167 and the law laid down by the Supreme Court in Lakshmi Brahman's case and the decisions of the Full Benches of Gujarat, Patna and Rajasthan High Courts makes it clear that an accused is entitled as of right to bail under the proviso to S. 167(2) only if the charge-sheet is not filed within 90 days or 60 days as the case may be, from the date the Magistrate first authorised detention of the accused and that once the charge-sheet is filed within that period S. 167 ceases to apply and the accused cannot seek bail by virtue of proviso to S. 167(2) on any other ground. In the present case the fact that though the charge-sheet was filed within the period of 90 days the

Magistrate had not passed an order taking cognizance within that period does not entitle the accused to seek bail under proviso to S. 167(2) without reference to the merits of the case.

31. Coming to the merits of the case, in the objections filed by the respondent it is stated that two eye-witnesses have implicated the accused in the commission of the offence and that on the information given by the second petitioner the police have recovered two knives and the leather bag of the deceased containing pass-books of the deceased from the possession of the first petitioner. In the F.I.R. the complainant has specifically stated that the culprits had covered half of their faces during the incident which took place in the night. The averments in the petition that in the test identification parade held on 9-11-93 the witnesses failed to identify the first petitioner is not controverted by the respondent. The only other material relied on by the prosecution to connect first petitioner to the offence is that on 21-12-93 i.e., more than 3 months after the incident a bag containing pass-books belonging to the deceased was recovered from his house. It was contended by the learned counsel for the petitioners that the police after coming to know that the first petitioner was not identified in the test identification parade held in November 93 have subsequently taken the first petitioner to police custody in December 93 and have got up some material to show that the bag and pass-books were recovered from the first petitioner, that admittedly when the petitioners were apprehended in Kengerigate police case the petitioner had given information pertaining to this case and as such the question of the first petitioner giving information when he was taken to the police custody in December 93 cannot be believed.

32. It is not necessary to express any opinion at this stage about the reliability of the prosecution case regarding recovery of the bag and pass-books. It suffices to note that the recovery is stated to have been made more than 3 months after the incident. So far as second petitioner is concerned no material object is recovered from him. It is stated that the second petitioner who was arrested on 11-10-93 was identified by the witnesses in the test identification parade held one month later.

33. The averments made in the petition that both petitioners have permanent abodes and reside at the addresses given by them, that one of them is a tailor by profession and another is a carpenter are not denied in the objections. Except routine allegations that the petitioners are likely to abscond and tamper with the evidence if they are released on bail, no basis is laid for such apprehension. Considering the facts and circumstances of the case, the material available on record to connect the petitioners to the commission of the offence, the fact that they have been in custody from October 1993 and the uncontroverted fact that the petitioners have permanent abodes and are carrying on the profession of a tailor and carpenter, I think that this is a fit case where the petitioners could be granted bail subject to certain conditions.

34. For the above reasons this petition is allowed and the petitioners are ordered to be released on their executing self-bond each for Rs. 20,000/- with two solvent sureties in like-sum to the satisfaction of the committal court or the sessions court, if the case is committed, and subject to the following conditions :

- (1) The petitioners shall give attendance before Seshadripuram police on every Monday and Thursday between 10 a.m. to 1 p.m.
- (2) The petitioners should not leave the limits of Bangalore city without express permission of the Committal Court or the Sessions Court, if the case is committed to the Sessions Court.
- (3) The petitioners shall not in any way tamper with the evidence collected in the case.

35. Order accordingly.