Noormohd Vs. State

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Court : Delhi

Decided On : Apr-26-1978

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Judge : T.P.S. Chawla and; Avadh Behari Rohatgi, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 167(2)

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 467 of 1977

Appellant : Noormohd

Respondent : State

Advocate for Pet/Ap. : R.K. Naseem,; R.P. Sharma and; P.P. Malhotra, Advs

Judgement :

T. P. S. Chawla, J.

(1) This is an application for bail which has been referred by a single Judge for decision by a larger bench. The reason is that there is a conflict of Judicial opinion as to the meaning and effect of proviso (a) to section 167(2) of the Code of Criminal Procedure 1973, and the matter is one of considerable importance. Briefly, the relevant facts are as follows.

(2) The petitioner was arrested by the police on 17th April 1977 as it was suspected that he had taken part in committing a murder. Despite the lapse of 60 days, during which the petitioner remained in custody, the investigation was not complete. Consequently, the report envisaged by section 173 of the Code was not sent to the Magistrate by the police within that time. On 17th June, the sixty-first days, the petitioner applied to the Additional Session Judge for bail. This application was rejected on the very next day, 18th June. The reason given by the Additional Sessions Judge was that he had been informed 'that the investigation has been completed and (the) challan will be filed within a day or two'. In these circumstances', he said 'the bail application cannot be accepted', and, accordingly, it was dismissed. Two days later, on 20th June, the police report was filed. Thereafter, the petitioner has been remanded to custody from time to time to stand trial.

(3) On 12th August 1977 the present application for bail was lodged in this court. It has been moved under section 439 of the Code. Although it contains other submissions, the only point on which we were addressed is that, after being in detention for 60 days, the petitioner was, and still is, entitled to bail because of proviso (a) to section 167(2) of the Code. The question is whether that contention is well-founded.

(4) Section 167(2) confers a limited power to remand. It says : '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 ; ..... '.

THENfollows the proviso, which reads : '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

(5) Unencumbered by authority, I should find the proviso simple, straightforward and clear. It means exactly what it says: that on the sixty-first day of his detention the accused 'shall be released on bail provided, of course, 'he is prepared to and does furnish bail'. As a piece of drafting it is impeccable. No doubt or difficulty rises in my mind. And, the result makes perfect sense. It is obvious that the legislature was appalled at the notorious and persistent delays in completing investigations, and, thereforee, placed a limit on the time an accused person could be detained without being brought to trial. Throughout the Code there are scattered provisions which display similar concern for the liberty of the subject. So much so, that even during the progress of an investigation, inquiry or trial the position is required to be reviewed from time to time with the object of seeing whether the accused may not be released on bail ; see sections 437(2) and (7). A similar limit of 60 days is imposed by section 437(6) on detention in the course of a trial, for a non-bailable offence, by a Magistrate. It can be exceeded only for reasons to be recorded in writing'.

(6) Anyone can discern that the proviso is inspired by the general legislative intent, visible at so many places in the Code of 1973, to ameliorate the condition of the accused. It creates, not a 'paradise for criminals', but a sanctuary for the forlorn. There is no reason why the courts should hesitate or be reluctant to give full effect to such a provision. On a plain construction of the proviso, I should have thought, the petitioner was entitled to bail having been in custody for over 60 days, and there was nothing more to be said.

(7) But counsel for the State has presented a formidable argument which needs careful examination. Section 309(2) of the Code says that:

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'.

The argument is that if, for any reason, despite the lapse of 60 days, the accused has not been released on bail under the proviso to section 167(2), and, meanwhile, a police report has been filed, a remand can then be ordered under section 309(2). For example, though an order for bail may have been made under the proviso, the accused may have been unable to furnish security- In that even he would continue to remain in custody as the condition that 'he is prepared to and does furnish bail' would be unfulfilled. The proviso does not forbid further detention in such a case. If, in that state of affairs, the police report is filed, the court 'after taking cognizance of an offence, or commencement of trial' may make an order of remand under section 309(2).

(8) The rest of the argument is as follows. Once an order of remand is made under section 309(2), the proviso passes out of the picture as the stage for its application is gone. Even if the accused was wrongly refused bail under the proviso, that cannot affect the validity of an order under section 309(2). When an application for bail is moved, the court is concerned solely with the last order under which the accused is held. If that order be valid, it is of no avail that there was some previous illegality. So, if an order of remand has been made under section 309(2), it is not a ground for bail that he was earlier deprived of his right under the proviso.

(9) Support for this argument was drawn by analogy from the rule which prevails in habeas corpus proceedings. Dealing with such a proceeding in Basanta Chandra Ghose v. Emperor , the Federal Court said:

'THEanalogy of civil proceedings in which the rights of the parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. If at any time before the cdurt directs the release of the detenue, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the court can direct the release of the petitioner'.

Substantially, same principle is stated in Ram Narayan Singh v. The State of Delhi and others, : 1953 CriLJ113 , and Kami Sanyal v. Dist. Magistrate, Darjeeling and

others, : 1974 CriLJ465 .

(10) Applying this reasoning to the present case, it was contended, that although the order refusing bail made by the Additional Sessions Judge on 18th June 1977 was wholly indefensible (and, indeed, was not defended), yet that would not justify the granting of bail now as the subsequent orders of remand were validly made under section 309(2). The Court, it was said, should look only at the last order and not go researching into the history of the case. thereforee, if the petitioner was not entitled to bail on the merits, he could not get it simply because he had been in detention for more than 60 days.

(11) On first impulse, I was minded to rebuff this whole argument on the short ground that no valid order of remand could be made under section 309(2) if the accused was not in lawful' custody. The power to remand under that section is exercisable only if the accused is 'in custody', as that is what the closing words stipulate. To me it seemed implicit that the custody contemplated by the section must be lawful'. It was inconceivable that the Code would enable or expect the court to sanctify and prolong an unlawful detention by its own order. The section, I felt, was intended to be used only for continuing lawful detention. Hence, if bail and been wrongly refused in the teeth of the proviso to section 167(2), as had happened in the present case, no valid order of remand could be made under section 309(2) as the accused had not been brought up 'in custody' which was lawful'.

(12) Counsel for the petitioner was even able to find direct authority to corroborate the opinion I had expressed extempore. He cited Khinvdan v. The State of Rajasthan . That case holds that 'custody' in section 309(2)

'MAYreasonably be construed to mean custody authorised by law or in pursuance of a valid order directing detention of an accused person. If the custody or detention of a person is illegal.....he cannot be recommitted to custody under sub-section (2) of section 309 of the Code, although the other conditions laid down in the said sub-section are fulfillled.'

'THESEobservations were approved and followed in Gyanu Madhu Jamkhandi and others v. The State of Karnataka .

(13) With further study, counsel for the State produced two authorities to controvert what I had said. In Hidayat Begam v. State Air 1951 M.B. 70 , the accused was produced for remand before a Magistrate after having been kept in custody by the policy for more than 24 hours. Whilst conceding that the custody was illegal, the Judge said : The illegal detention by the police canot affect the power of the Magistrate to act under section 167, Criminal Procedure Code. Almost the same question arose in Saptawna v. The State of Assam, : 1971 CriLJ679 , and the Supreme Court said:

ITseems to us that even if the petitioner had been under illegal detention between January 10 to January 24, 1968 though we do not decide this point the detention became lawful on January 24, 1968 when he was arrested by the Civil Police and produced before the Magistrate on January 25, 1968'.

But, of these cases contains any discussion.

(14) However, on mature deliberation I have come to the conclusion that my initial reaction was wrong. At least at two places, the Code specifically uses the phrase lawful custody'. It occurs in section 41(l)(e) and section 60(1). And, in section 98 it speaks of 'unlawful detention'. There may be other sections, also, in which the same or similar phrases are used. This shows that whenever the legislature wished to qualify the kind of custody it had in mind, it did so expressly. So there is no justification for importing the word lawful' before 'custody' in section 309(2). It cannot be regarded as an inadvertent omission. Without compelling reasons it is not permissible to insert words into a statute: see K. M. Viswanatha Pillai v. K. M. Shanmugham Pillai, : [1969]2SCR896 ; Ajit Singh and another v. The State : AIR1970 Delhi154 and G. P. V. A. Subrahmanyan and others v. Commissioner, Corporation of Hyderaba

(15) Apart from this objection emanating from the rules of interpretation, it is very probable that the word 'custody' was advisedly left at large in section 309(2). It would make endless trouble for the court if, before a remand under that section, it

was obliged to inquire into nice questions of fact and law to ascertain wther the accused was in lawful' custody. More often than not, it would be necessary to record evidence for adjudicating on the point. How is the court to deal with the accased daring the inquiry? Exhypothesi, no order of remand could be made under section 309(2), as it had not yet been found that the custody of the accused was lawful'. There is no other section giving power to remand in a situation such as this. And, the Supreme Court has categorically ruled that there is no inherent power to remand : see Natabar Parida and others v. State of Orissa, : AIR 1975 SC1465 .

(16) These considerations convince roe that the court is not required or expected to go into the lawfulness of the custody of the accused before a remand under section 309(2). The only question with which the court is concerned is whether it is necessary to further detain the accused in custody. It most heed the future and not the past. For purposes of that section it is enough that the accused is physically in custody, as opposed to being free. The legality of the custody is of no moment.

(17) On re-reading the two cases that were cited by counsel for the petitioner, I notice, that the sole reason they provide for holding that the custody should be lawful' is that otherwise the right to bail given by the proviso to section 167(2) will be defeated. That, surely, is begging the question. For, we started with the query whether the right to bail under the proviso can be enforced after an order of remand under section 309(2) has been made. With respect, I think the view stated in those two cases, as regards the point under consideration, is not sound. Moreover, in Santawna's case the Supreme Court seems to have held to the contrary.

(18) The quick retart to the argument for the State having failed, I must go into the matter do novo. All the authorities cited to us are agreed on two points. First, all are agreed that the proviso is mandatory. It says 'the accused person shall be released on bail'. The court has no discretion in the matter: see Natabar Parida and others v. State of Orissa, : AIR 1975 SC1465. Secondly, they are agreed that if the accused is unable to or does not furnish bail he can be further remanded, notwithstanding that he has already been in custody for more than 60 days. Until

the police report is filed and cognizance has been taken of an offence, or the trial has commenced, the remand may be ordered under section 167(2). Thereafter it will have to be under section 309(2).

(19) The conflict in the authorities is as to whether the accused must apply for bail under the proviso to section 167(2) or the court is bound suo moto to make an older for bail as soon as 60 days of custody are up. One view was first expounded obiter by a single Judge of the Allahabad High Court in Heeraman v. State of U.P. . He said:

IFno charge-sheet has been submitted within sixty days, Section 167 only empowers an accused to claim bail as of right. But the detention of an accused will continue to be legal till he actually applies for bail or in other words he 'is prepared to and does furnish bail.

THEconsequences were summed up as follows:

'IN my view, even if it is found that no charge-sheet was submitted within sixty days but charge-sheet was submitted before the accused applied for bail, it Will not be open to the accused to claim that he is entitled to bail as right by invokingg section 167(2)(a) of. the Code because' as soon as the charge-sheet was submitted, the period of remand pending investigation came to an end and provisions of Section 167(2)(a) would cease to apply to such a case and in such a case bail can be granted only on merits under the provisions of Chapter Xxxiii of the Code.'

WHAThe is there saying is that after the police report is filed the case passes to section 309(2).

(20) A division bench of the Allahabad High Court endorsed that view: see Lakshmi Brahman and another, v. State Cri. LJ. 118(15). So did division benches of Gujarat and Maharashtra, the latter with the gloss that the application for bail need not be in writing and may be oral : see Umedsingh Vakmatji Jadeja and others v. The State of Gujarat, : AIR1977 Guj11 , and Shrawan Ranaji Undiravade and another v. State of Maharashtra 1976 Mh. LJ. 654. Single Judges in

Karnataka and Himachal Pradesh also agreed : see Gyanu Madhu Jamkhandi and others v. The State of Karnataka and Parshotam Chand v. The State of H.P. 1977 C.L.R. 51 .

(21) Almost simultaneously, the opposite view was stated in Baldev Singh v. State of. Punjab by a full bench of Punjab. After getting, the proviso, it was said : ..

Indeed, bare reference to the above-quoted provisions would indicate that under this provision there need be no application for 'bail by the accused at all. This provision goes to the power and the very jurisdiction of the Magistrate to grant judicial or police dustody of the person of the acused irrespective of the moving of an application on his behalf. In no uncertain terms, the statute provides that the accused person must be released on bail if he is prepared to furnish the same in case he has already been in custody for ft period of sixty days. The presentation of an application is thus irrelevant to the issue. The Magistrate is himself duty-bound and the accused is entitled as of right to be so released on furnishing bail provided the requisite condition of detention beyond sixty days is satisfied.'

Another full bench of the same court, comprising different judges, reiterated that view: see Surinder Kumar and others v. The State of Punjab, . Later, a single judge of that court followed it in Sukhwinder Singh v. The State of Punjab 1976 C.L.R. 411, and added: In my considered opinion, the custody of the accused becomes illegal after the expiry of sixty days and is not clothed with legality as soon as the challan is put up'.

(22) On three different occasions, two single judges of the Rajasthan High Court came to the same conclusion: see State of Rajasthan v. Bhanwaru Khan and others ; Khinvdan v. The State of Rajasthan andPrem Raj and another v. The State of Rajasthan . In Khinvdan's case of judge said that after 60 days the illegal detention Of the accused could not be validated by taking cognizance of an offence and making an order of remand 'under section 309(2). In Prem Raj's case the judge expressly dissented from the Allahabad view.

(23) The opinion in Delhi is the same. In Mohd. Shafi and another v. The State , Mr. Justice Ansari interpreted the proviso as an 'injunction' to the Magistrate to

release the accused after 60 days provided he furnished bail. Mr. Justice V. D. Misra held likewise in Radhey Shain & others v. The State, Cr. Misc. (M) 25 of 1975, decided on 20th February 1975(25). He was clear that the accused was under no 'duty' to move as , application for bail. In Tanweem Raza v. The State, Cr. Misc. (M) 251 of 1977(26), Mr. Justice F. S. Gill reviewed the case law, and agreed. He went on to say that after the sixtieth day the Magistrate was 'bound to record' an order of bail.

(24) It will be noticed that the Allahabad view lays great stress on the words 'is prepared to and does furnish bail' in the proviso. By doing so, the conclusion is reached that until the accused intimates by an application that he 'is prepared' to furnish bail there is no obligation on the Magistrate to record an order. But this forgets the earlier prohibition that 'no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding sixty days'. It also minimises the command which follows that 'on the expiry of the said period of sixty days the accused shall be released on bail.....'. Those words are no less important.

(25) Reading it as a whole, and giving due weight to all its parts, the proviso, in the form of a converse proposition, means that detention beyond 60 days can be authorised only if the accused is not prepared to furnish bail. thereforee, unless a Magistrate gets a refusal he has no power to detain on the sixty-first day. By keeping quiet, and not applying for bail, the accuse does not refuse. To get a refusal the Magistrate has to make an order for bail, and see. That shows that the order must come first. Besides, as Mr. Justice V. D. Misra pointed out, in the case to which I have already referred, how can the accused say he is willing or not until he knows for what 'amount the bail is required, and what sureties? These are matters which only the order for bail can disclose. The nature of the thing ordains the sequence: first an order, then the bail. The fallacy of the Allahabad view is that it reverses the steps.

(26) One can look for guidance to section 436(1), which, by its identical forebears, has existed on the statute book for nearly a century. It deals with bailable offences, and says that if the accused 'is prepared' to give bail, he 'shall be released on bail'.

No one has ever suggested that it is necessary for the accused to apply for bail under that section. Nor has anyone ever imagined that he should indicate his preparedness' before an order for bail is made. On the contrary, at least in this jurisdiction, so fat as I know, the practice has always been to make an order forthwith when the offence is bailable. There is warrant for this practice in para I, chapter 10, Vol. Iii, of the, Rules and Orders of the Punjab High Court which apply to Delhi. Dealing with bailable cases, the paragraph says:

ITmust be understood that for every bailable offence bail is a right and not a favor. ..... The amount of bail and the offence charged, with the section under which the offence is punishable, should always be stated on the face of an order directing the accused to be detained in the lock-up in default of his furnishing bail. Bail may be tendered and must be accepted at any time before conviction.'

THATpre-supposes that before the accused is remanded to custody all order for ball has been made.

(27) The absence of the words 'and does furnish bail' in section 436(1) is of no significance. No attempt was made to argue that under that section the accused can be released without furnishing bail. The matter is so plain as to make argument impossible. To save the section from being rendered ludicrous, those words have necessarily to be implied.

(28) A little reflection on the scheme of the Codes reveals that the whole notion of an application being made for bail is really msconceived. Neither section 436(1) nor section 437(1) nor any other section dealing with bail enjoys an application. If it is remembered that a remand is not just routine, but a judicial interference with the liberty of the person, the true position immediately emerges. As an interference with liberty, those who seek the remand, must necessarily justify it. If the prayer for a remand fails, the inevitable result is that the accused must be released on bail; for the right to liberty, being unsuppressed by an order of remand, again holds the field. Bail is taken only to ensure that the accused attends at the trial. Thus, the accused can always obtain bail, without an application, by merely snowing that the prosecution has not established sufficient grounds for a remand. The one situation in which an application is needed B when the accused seeks bail during the

currency of a period of remand. Then it is needed because it is the only way in which the attention of the court can be gained. But, when the accused is produced before the court for obtaining a remand, an application is quite unnecessary, unless the purpose be to bring on record matters not otherwise apparent there from. The fact that in practice applications are often made even at the time of remand, should not be allowed to obscure the undrlying fundamental legal principles.

(29) The other part of the Allahabad theory is also fallacious. Here, what is stressed is that, after 60 days, the proviso merely forbids further detention under 'this section'. From that it is inferred that there is no bar to further detention being ordered under some other provision of the Code, in particular, section 309(2). So it is concluded, that after the police report has been filed, an order of remand may be made under that section regardless of the limit of 60 days, imposed by the proviso, being exceeded- Proceeding on these lines, counsel for the State described bail ranted under the proviso as 'interim' in the sense that it was intended to last only till the time that the police report was filed.

(30) No doubt the word 'interim' was used in conection with bail in State of Kerala v. M. K. Pyloth . It apparent from the facts that it was used to denote what has come to be called 'anticipatory' bail. No proposition useful to the State emerges from that case. All orders of bail are 'interim', in that, they are 'interlocutory' and survive only till judgment : see in re. Balasundera Pavalar, : AIR1951 Mad7 and Amar Nath and others v. State of Haryana and others, : 1977 CriLJ1891. There is nothing in the proviso to suggest that it meant 'bail' to have a more transient meaning. On the contrary, in Ram Pal Singh and others v. State of U.P. a condition put in an order of bail, made under the proviso, that it would stand cancelled when the police report was filed, was held illegal.

(31) But, the real flaw in the Allahabad reasoning becomes apparent when one goes to general principles. Let us forget the proviso fora moment. Suppose an order for bail has been made in respect of a -.bailable or non-bailable offence under section 436(1) or 437(1) as the case may be. Such an order can be made at any stage, whether it be investigation, inquiry or trial- Suppose, further, that the

accused is unable to furnish bail, or his sureties are not accepted. Naturally, in that event he win have to be remanded to custody again. Depending upon the stage the matter has reached, the order of remand will be made either under section 167(1) or section 309(2). The order will be repeated till such time as the accused is able to furnish bail. But as soon as he does furnish bail, he is entitled to be released forthwith despite the intervening orders of remand. This demonstrates that an 'order of bail, once made, remains of full effect until cancelled- Subsequent orders of remand are subject to it so long as it subsists.

(32) Now, apply this to the proviso. It directs that after 60 days of custody an order for bail 'shall' be made. Whether actually recorded or not, in law it must be deemed to have been made. If the accused is unable to furnish bail, he will have to be remanded from time to time. Nevertheless, at any time the order of remand can be rendered nugatory by giving the required security. It matters not a wit under which section the order of remand was made. Thus, the filing of a police report is immaterial. For, no order of remands, under whichever section it might have been made, can annul a pre-existing order of bail.

(33) A fortiori, the accused's position is stranger when an order of bail under the proviso has been wrongly denied. That prevents the only possible ground for a further remand, namely inability to furnish bail, from arising-

(34) With respect, it seems to me, that the Allahabad approach misses the whole point of the proviso. The Code divides all offences into two classes : bailable and non-bailable. Below the Code of 1973 these classes were static. An offence could never pass from one class to the other- To achieve the legislative purpose, the device adopted in the proviso is to convert a non-bailable offence into a bailable one on the sixty-first day of custody. Thereafter, the same consequences flow as from a bailable offence. Of course, this may result in persons accused of the most heinous offences being released on bail. Yet, I see no cause for alarm. It is to be remembered that this will happen only after 60 days, and will be wholly due to the slackness of the investigation. After all, there is the liberty of the individual to be weighed on the other side. Moreover, the accused person has not yet been found guilty by any court. Perhaps, in due time the investigating agency will adapt itself

to the new phenomenon. In any case, it is incumbent on the courts to implement the legislative will.

(35) As a last resort, counsel for the State contended that, since bail under the proviso is granted on a technical ground', it should be cancelled when the police report is filed and the default made good. This is really a corollary from his earlier submission that bail under the proviso is 'interim'. In some cases it was held that the filing of the police report was itself a sufficient ground for cancelling bail given under the proviso : see Prem Charan and other v. State of U.P. ; State of Maharashtra v. Tukaram Shiva Patil and others 1977 Cri. LJ. 394 and Dhana Suren vo The State . Other cases maintained that bail under the proviso was no different to bail under any other section, and could be cancelled only if the accused misused it or it was not in the interests of justice that he should be free : see Ram Pal Singh and others v. State of U.P. and Ram Murti and another v. State . Recently, the Supreme Court has accepted the latter view and unequivocally ruled that 'the mere fact that subsequent to his release a challan has been filed is not sufficient to commit him to custody' : see Bashir and others v. State of Haryana, : 1978 CriLJ173. That is a complete answer to the argument.

(36) In passing, I would observe, that a person released on bail under the proviso is 'deemed to be so released under the provisions of Chapter Xxxiii for the purpose of that chapter'. This legal fiction specifies the chapter but not the section under which the bail is deemed to be granted. If the reasoning which I have tried to propound be right, the release should be treated as under section 436(1), since the offence becomes bailable. Hence, cancellation can be had only under section 439(2), and not under section 437(5). The important consequence is that the Magistrate himself cannot cancel the order for bail, as the power under section 439(2) is confined to 'A High Court or Court of Session'. The cases just referred to seem to vary on the point. In some the cancellation was sought under section 437(5), and in others under section 439(2). There are observations by Mr. Justice V. D. Misra in Radhey Sham's case which accord with my view. In Bashir's case, it seems, the application for cancellation was moved by the complainant under section 437(5), and the Supreme Court proceeded on that basis. As the application was moved in the Sessions Court, no question could arise about the

jurisdiction of a Magistrate. Nor was any such point at all convassed. Probably, it is still rest Integra- However, on the present occasion I do not need to dwell on it.

(37) I can now return to the point from which the discussion began. The analogy of habeas corpus proceedings is misleading. There the question is whether the petitioner is being lawfully detained: see Bamardo v. Ford. Cossage's Case (1892) A.C. 326 ; Ex parte Corise (1954) 2 Air 440 and 11(37) Halsbury's Laws (4th End.) 768, 771, paras 1452, 1456. If a valid reason is adduced, that is an end of the matter and the petition is dismissed. In an application for bail the question is entirely different. Normally, it is known that the applicant is lawfully detained under some provision of law or the order of a court. The question to be considered is whether he should be released. For, this purpose the court can, and should, examine every aspect of the matter.

(38) In Taqweem Rasa's case, Mr. Justice P. S. Gill was persuaded to fellow the analogy of habeas corpus proceedings. It appears to me that the matter was, not fully analysed before him. The result is that there is an internal inconsistency in the judgment. On the one hand, he holds, that no application for bail is necessary to be made under the proviso, and 'the Magistrate is bound to record an order of bail' on the expiry of 60 days. On the other, he holds, that a, afterwards, the police report is filed, the right to bail under the proviso is lost. From all that I have said before it should follow that these two propositions are not compatible.

(39) These were any reasons for concurring in the order to release the petitioner on bail, which we made immediately after the conclusion of the arguments.

Avadh Behari Rohatgi, J.

(40) Facts : Noor Mohd. a young boy of 17 years, was arrested on April 17, 1977, as a result bf regrstration of a case under section 302, Indian Penal Code. He remained in custody. Now under section 167(2) of the Code of Criminal Procedure, 1973 (the new Code) no magistrate can authorise the detention of an accused person in custody for a total period exceeding sixty days. The period of sixty days expired on June 16, 1977. On June 17,1977, Noor made an application for bail to the Additional Sessions Judge. The judge dismissed the application on

June 18, 1977. He said:

THEinvestigation has been completed and challan will be filed within a day or two. In these circumstances the bail application cannot be accepted.

(41) The challan was filed on June 20, 1977. Noor made another application for bail on August 9, 1977. This time he moved this court under section 439, Code of Criminal Procedure. The application came before Yogeshwar Dayal J. He noticed a conflict of decisions as to the meaning and effect of section 167(2) of the new Code and referred the case to a larger bench. This is how the matter has come before us.

PRE-TRIALprocedure

(42) The new Code was enacted in 1973 repealing the Code of Criminal Procedure, 1898. The legislature in the light of the experience of the working of the old Code devised a new legal procedure. The principal problems arising in that part of the criminal process which governs events before trial relate to the nature of police powers and procedure in the investigation of offences. The legislature knew that investigation of offences lead to great delay in criminal justice. It was common experience that several months elapsed before trial commepced. The question of police powers in the preliminary stages of investigation inevitably loomed large. Conscious of the need of a speedy public trial the legislature wanted to put an end to what it called 'the chronic malady of protracted investigation'. How is this to be attained? This was the question.

(43) The legislature in the new Code laid down three periods for investigation:

(1)24hours investigation should be completed within 24 hours (s- 57);

(2)15days a period of 15 days in the whole is prescribed for remanding the accused to police custody ; and

(3)60 days the uttermost limit for which the accused can be detained in custody is laid down as 60 days [section 167(2)].

(44) Thus the legislature laid down statutory limits of detention before trial. It also introduced a new provision in the pre-trial procedure. It added a proviso to section 167(2), the material words of which are:.....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;.....'

(45) In plain language it means that custody is without lawful authority if detention is continued beyond 60 days. The accused's pre-trial detention is illegal after the expiry of 60 days.

(46) In criminal trials, justice requires the procedure to be so designed that it holds the balance fairly between the interest of the society as awhole and the interest of the accused. The farmers of the new Code desired to make certain that the citizen should have a square deal when brought to the bar of Justice. Prior to conviction, prima facie a prisoner is entitled to bail, especially before trial. The legislature, thereforee, while enacting the new Code in 1973 erected processual safeguards for the accused. This time it gave him a procedural right a right to be free on condition of bail after the expiry of 60 days.

(47) In this respect the legislature made a radical departure from the old Code of 1880. It clipped the wings of the investigating agency. It took a humane view of the accused. For nearly a century his lot had not improved. In truth he never went out of the bands of the police once the investigation commenced. He languished in Jail weeks, months, and perhaps even years before trial. The accused now pleaded with the legislature. His complaint was Job's complaint to God. It was as if he was saying to the legislature: 'You will set a time limit for me and remember me' (0. T. Book of Job 14: 13). His prayer was answered. A merciful legislature enacted a humanitarian law. It treated him as ahuman being the prisoner in the dock who had the privilege of proving his innocence at the trial. This is why the legislature was not prepared to restrain his liberty and abride his freedom for more

than what was absolutely necessary. 60 days was a necessary period in the sight of the legislature at the pre-trial stage. But beyond this it was not prepaved to go under any circumstances.

LAWof Scotland : a comparative study

(48) No feature in the new Code has awakened so much curiosity in the legal mind, caused so much discussion, received so much admiration and been so frequently misunderstood as this procedural protection of the accused. Yet there is really no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side. We find a precedent in the law of Scotland. The Criminal Procedure (Scotland) Act, 1887, section 43 provides that a person detained on suspicion of crime may, after 60 days, demand release or the service of an indictment on him. It unposes a limit of 110 days from the date of commital until the conclusion of the trial. There are very strict rules to prevent an accused person from remaining in custody for an unduly long period without trial. Where an accused has been committed to prison to await trial and his trial is not concluded within 110 days of the date of commital, he must be set free at once and declared immune from further prosecution for the crime charged (See Criminal Procedure according to the Law of Scotland 4th ed. by G. H. Gordon 1972, 86-87).

(49) Our new Code has not gone that far. The nearest analogue to the Scottish procedure is to be found in section 167(5) of the new Code. It says that if the investigation is not completed within a period of six months from) the date on which the accused was arrested, in a case where the offence is not punishable with imprisonment for more than two years, the magistrate may pass an order stopping further investigation and discharging the accused. On the subject of bail the new Code has introduced liberal provisions as would appear from sub-sections (6) and (7) of section 437 which merit particular attention. But that day has not yet come when it would be safe to say that law and order could always be enforced and the public safety protected notwithstanding the grant of immunity from prosecution after a lapse of certain period.

(50) Except in most serious cases e.g. offences punishable with death or imprisonment for life the new Code begins with a bias in favor of giving bail prior to conviction. If the trial is not concluded within sixty days or if after the conclusion of the trial and before judgment likelihood of acquittal is a moral certainty the court may grant bail [See sub-sections (1), (6) and (7) of section 437]. The new provisions are founded on the principle that to deprive a man of liberty pending trial, or even pending sentence is to deprive a certain member of persons of liberty who are going to be acquitted, and to do so is to deprive them of something to which they are absolutely entitled.

A Procedural protection :

(51) No magistrate shall authorise the detention of the accused person in custody beyond 60 days. This is the legislative command. The mandate is in terms of the absolute. There are no exceptions. The prohibition is all inclusive and complete. The word 'no' has a finality in all languages that few other words enjoy. True it is negative instance, but positive in effect. It is a legislative innovation. It is an attempt to establish a just and fair procedure. For the first time the legislature introduced procedural protection of accused persons.

(52) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. This has always seemed to most of us an emotive catchphrase. Obviously, the prosecution should have to prove the guilt of the accused by satisfactory evidence before he can be convicted at his trial. But if a person accused of an offence is detained in custody pending a protracted investigation much before the trial commences, it seems an abuse of language to say that he is presumed to be innocent for all purposes. The legislature was trying to remedy this sorry state of affairs. It enacted a statutory limit on detention before trial.

(53) What is the kind of technique the legislature has adopted? The technique is time. The key-event is the expiry of time. 60 days is the utter most limit. The key words in the proviso are:

ONthe expiry of the said period of 60 days the accused person shall be released on bail'.

(54) The legislature is saying to the court: 'You shall not detain the accused beyond 60 days'. If the police investigation is not complete within 60 days and the challan is not filed the accused is entitled to be released on bail.

(55) The only condition is : 'If he is prepared to and does furnish bail'. These are suggestive words. The word 'does' has a special significance. In legal or parliamentary language it is used for greater emphasis than the corresponding simple tense. In plain language it means that not merely should the accused be prepared to furnish bail but should also perform the act and execute the bail bond. But suppose. he does not. Suppose he is not able to get a man who is prepared to stand surety for him. Then he has to remain in custody. He has to be remanded. This means that unless admitted to bail, the accused has to be kept in custody. But this does not mean that the statute ceases to operate in his favor. True he cannot buy his freedom till he gets a surety in terms of the court's order. But any time before the conclusion of the trial he can do so. 60 days have expired and the challan has not been put in. Be has secured his right to be released on bail. Even if challan is put in after the expiry of 60 days the court cannot refuse bail to the accused. He can say to the court : 'Pray release me. I have now found a surety acceptable to the court'. The statutory protection cannot be waived. It is always available provided its sole condition of furnishing bait acceptable to the court is fulfillled. Till the trial is concluded he can ask for bail by reason of section 167(2). At the and of the trial the bail order dissolves itself in the judgment. If convicted it is converted into sentence. The accused surrenders to his bail. If acquitted, the bail bonds are knocked off and the accused regains his freedom from the criminal process which had held him in restraint.

IS application necessary?

(56) But how can the accused furnish bail? Has he to apply? Or is it the duty of the court to inform the accused on the expiry of 60 days that he can be released if he furnishes bail in a named sum with or without sureties? The Allahabad High Court has held that he has to apply for bail : See Heeraman v. State of U.P .

Lakshmiraman v. State and Prem Charan v. State of U.P. . The Punjab High Court, on the other hand, has held that no application for. bail is at all necessary : See Baldev Singh v State of Punjab 1976 Ch L. R. 409 and Surender Kumar v. State of Punjab. 1976 Ch L.R. 236 . I think the Punjab view is correct. The magistrate himself is duty bound and the accased is entitled as of right to be released on furaishing bail provided the requisite condition of detention beyond 60 days is satisfied. Section 167(2) 'goes to the powers and the very jurisdiction of the magistrate' (Baldev Singh's case supra). The presentation of the application is eatirely irrelevant to the issue. As the Supreme Court has said in Natabar Paride v. State of Orissa, : AIR 1975 SC1465 : 'the intention of the legislature seems to be to grant no discretion to the court and makes it obligatory for it to release the accused on bail'.

(57) On the expiry of 60 days he secures a right, a right founded on 'a procedural provision embeded firmly in the scheme of investigative process'. (See Baldev Singh's case, supra).

(58) The legislature was unhappy with the police because of the long delays in investigation of offences. It, thereforee, laid down : 'Every investigation under this chapter (Ch. 12) shall be completed without unnecessary delay' [S. 173(1)]. The principle underlying the new Code is that the trial must not be protracted in duration by anything that is obstructive or dilatory. Beyond 60 days the accused is not to be detained in custory. The legislature demands of the police to do its duty and put in the challan within 60 days. Suppose the challan is not put in for 60 days and the accused is languishing in jail. The court cannot deny bail. However, heinous the offence, however great his crime, the accused is entitled to be released on bail. As the Supreme Court has said : 'Even in serious and ghastly types of crimes the accused will be entitled to be released on bail'. (Natabar Parida's case supra, at page 1469.).

(59) Under section 167(2) in anon-bailable offence the accused is entitled to bail as of right No matter it may be a case of murder, the accused has a right to be released on bail for the police has failed to complete the investigation within 60 days. The so-called 'practice, of the Indian courts for two centuries and in English

courts for more than seven centuries' of refusing bail in murder cases is no good reason in the eye of the legislature to refuse bail to the accused under section 167(2). The Bombay High Court has held that the 'well established practice' over the centuries should not be ignored. (See State of Maharashtra v. Tukaram Shiva 1977 Cri. L. J. 394. I cannot agree. We must remember that during the centuries the law has not stood still. It has continually been changing. The legislature in an attempt to break away from the traditional past introduced a reform in the new Code. It felt abiding sympathy for the unconvicted and the unsentenced prisoner who had hitherto been under-protected. It thought that the law and practice relating to bail are in need of a thorough overhaul.

(60) In recent times there is a shift in favor of the accused. In enacting the new provisions of bail the legislature was taking a risk. Admission to bail always involves a risk that the accused will take affight. That is a calculated risk which the law takes as price of our system of justice. People do, occasionally, jump their bail. They may run away, get at the witnesses or commit further offences. But the legislature thought it its duty to take the risk rather than remain on the fence. The untried or unsentenced prisoner remains under lock and key. With a view to improve his plight a forward-looking legislature added a new procedural protection to the list of the accused's rights entrenched in the Constitution (See Articles 20, 21 and 22).

(61) Custody is without lawful authority if detention is continued beyond 60 days and no opportunity is given to the accused to furnish bail and secure his release thereby. The question of furnishing bail arises only when an order for bail is made. That is for the court to do. The accused has to do nothing. He has merely to stand and wait. He has not to make an application under section 167(2). The statute does it for him. The statute itself is an active operator in the cause of personal freedom. Once 60 days expire and the investigation into a suspected crime is not complete and the accused is prepared to and does furnish bail he must be released. Such is the explicit command of the legislature. The legislature has made the accused free on condition of bail. We cannot keep him in chains on the specious argument of the practice of the centuries. Fashions in oarliamentary draftsmanship and the attitude of the legislature towards innovation in established

law are not unchanging. Law and practice of bail :

(62) Where do we go from here? We repair to Chapter Xxxiii of the new Code. Section 167(2) says : 'Every person released on bail under this section shall be deemed to be so released under the provisions of Ch. XXXIII'. This means two things. Firstly, that the bail under section 167(2) is in no way different from bail granted on merits under Chapter XXXIII. It is as good a bail as any other. It is not a bail on 'technical grounds' liable to be cancelled on the submission of the challan. An Allahabad decision takes this view (Prem Charan v. State of U.P., supra). This seems to be wrong. Section 167(2) is a new head for granting bail invented by the legislature in 1973. Section 167(2) is an appendix to Ch. Xxxiii, so to speak. By the deeming fiction it is as if it is written with pen and ink in the body of section 437 as an additional ground.

(63) CH. Xxxiii knows no distinction between a bail granted on 'technical ground' and one allowed 'on merits'. Nor is it an interim bail in the sense that it can be cancelled by the court of sessions when the accused is committed to it under section 209 to stand his trialSection 209(b) is expressly 'subject to the provisions of this Code relating to bail'. Similarly, it is not subject to the power of remand contained in section 309(2). Suppose on the 61st day the challan is filed. The court cannot refuse bail to the accused. The dead line is 60th day. Once the statutory limit is crossed the accused is entitled to be released on bail. The prosecution cannot rely on section 309(2) to keep him in custody. Section 309(2) does not override section 167(2). In fact it is subservient to it. It has to be read as subordnate to the statutory protection granted to the accused in Ch. XII. If the accused is unable to furnish bail inspire of an order of the court in this behalf the court has to remand him into custody. But he can find surety later and secure his release by invoking section 167(2). Even where once on merits the bail has been refused and subsequently 60 days expired without submission of challan the accused is entitled to be released on bail. Such was the case in Bashir v. State of Haryana. : 1978 CriLJ173.

(64) Nor is the receipt of the charge-sheet a ground for cancellation of the bail. As the Supreme Court has said:

'.....THEmere fact that subsequent to his release a challan has been filed is not sufficient to commit him to custody'.

(BASHIR'Scase, Supra).

(65) The right to bail and the resultant freedom originate in a procedural Code, it is true. No doubt these are procedural sefeguards. But we must always remember that procedural requirements are as important as matters of substance. The law's unease has always been reflected in the emphasis on defense safeguards in the criminal trial. The core assumption in nearly all of them has been that criminal courts must counter-balance the activities of police agencies in order to prevent mistreatment of citizens accused of crime.

(66) In one sense it is a ball of a unique character. In problems concerning the grant of bail the courts haver to decide who can safely be released and who should be detained in custody. The necessarily discretionary character of grant of bail leads to different practlces in different courts. But under section 167(2) the legislature has more or less standardised the system. It is bail for all who are able to furnish a surety according to the court's order after the expiry of 60 days if police investigation is not complete.

(67) Secondly, bail granted under section 167 can tie cancelled only under section 437(5)' on grounds well known to law. The matters to be taken into consideration while granting bail are (a) the nature of the accusation : (b) the nature of the evidence ; the severity of the punishment involved and (d) likelihood of committing an offence; and (e) whether the sureties are satisfactory. The object of bail is to ensure the appearance of the accused at the trial and that he will submit to sentence if found guilty. In a word it must be an adequate assurance that he will not flee the jurisdiction. But when he tampers with evidence, intimidates or terrorises witnesses his bail can be cancelled. The reason is obvious. An accused when he abuses his bail he abuses his freedom. If the accused abuses his bail the prosecution can move the court for the cancellation of bail under section 437(5). A trial Judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the accused to custody. But this power must be exercised with circumspection. It

may be invoked only when and to the extent justified by danger which the accused's conduct presents or by danger of significant interference with the progress of the trial: [See Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh. : 1978 CriLJ502].

(68) The next question is : Under which section of Ch. Xxxiii will the court cancel bail if it considers necessary so to do? Will it be under s. 437(5) or under s- 439? This question has been the subject of pronouncement by the highest court. The Supreme Court in Bashir's case (supra) has ruled that the bail is to be cancelled under section 437(5). The question directly arose for decision. The court said:

'ASunder section 167(2) a person who has been released on the ground that he had been in custody for a period of over sixty days is deemed to be released under the provisions of chapter Xxiii, his release should be considered as one under section 437(1) or (2). Section 437(5) empowers the court to direct that the person so released may be arrested if it considers necessary to do so.' And again

THEprovisions of s. 437(1), (2) ana. (5)' are applicable to a person who has been released under section (167)

(69) The court pointedly saying that'.sub-sec.(5.) .to S. 437 is important' held that bail can be cancelled under that provision if the accused prevents the fair trial of the case. "

(70) In Natabar Panda the Supreme Court took the same view. It was held that Ch. Xxxiii empowers the court releasing the accused on bail under s. 167 to direct, if it considers necessary so to do, 'that such person be arrested and committed to custody as provided in sub-see. (5) of s. 437 occurring in chapter XXXIII.' (p. 1469).

(71) The necessary concomitant of making section 167 a part of Chapter Xxxiii is to throw the burden on the prosecution. It is for the prosecution to satisfy the court that for reasons a, bore the bail of the accused should be cancelled. And it is no light burden.

(72) To sum up. The accused's detention is illegal after the expiry of 60 days. The Code does not condone the illegality. It remains an illegality throughout. The question of illegality can always be raised. The safeguard for the protection of the citizen does not vanish. There is nothing in section 167 or section 309 to remand him to custody after a period of 60 days. In fact the law does not favor an excessive use of remands in custody.

REVIEWof decided cases:

(73) I now turn to the decisions. Straightway I may say that the Rajasthan decisions in Prem Raj v. State of Rajasthan and in Khinvadan and the Punjab decision in Sukhwinder Singh v. The State of Punjab 1976 L. R. 411 and the Allahabad decision in Madho Singh v. State, Cr. Misc. Bail Application No. 4253 of 1974 decided on September 24, 1974 by K. B. Asthana J. (unreported but noticed in and the decisions of this court in Radhe Sham v. State, Cr. M. (Main) 25 of 1975 decided by V. D. Misra J. on February 20, 1975 (unreported) and Mohd. Shafi v. State decided by M.R.A. Ansari J. seem to have been correctly decided. I respectfully agree with their conclusions.

(74) The Allahabad decision in Heeraman v. State of U.P. supra in my respectful view is .wrong. I know that it was approved by a division bench in Lakshmi Brahman.v. State and was followed by a-learned single judge of that court in Prem Charan v. State of U. P. supra.. The Rajasthan decision in Prem Raj has expressly dissented from Heeraman as being not in conformity with the Supreme Court ruling in Natabar Parida v. State of Orissa, supra. The flaw in the reasoning of Allahabad decisions is that the learned judges hold that an application is necessary and unless he makes an application the accused's detention does not automatically become illegal' and the accused 'cannot be allowed to walk out of the jail'. If the accused does not apply for bail he cannot be released. If he applies for bail release is refused on the ground that on the submission of the charge-sheet section 167(2) has ceased to aply and only bail on merits' can be given. In either case he is condemned to spend his days in prison even before his guilt is determined at the trial. This reasoning is against the plain words of the section. Once the legislature has decided that the risk of release is worth taking, release

has to be ordered by the judges.

(75) The requirement of an application is counter-productive. It deprives the accused of his personal liberty and moreover converts his illegal detention into lawful custody on the view of these authorities. A contrivence devised to liberate the accused from illegal detention becomes an instrument of curtailment of his liberty. This is the very opposite of the desired effect. What a strange result of a provision passed for the personal protection of the prisoner. The legislature would be, or indeed perhaps is, amazed to learn what meaning is sometimes read into its enacted word. A significant contribution to the cause of law reform, section 167(2) protects liberty. The opening words : 'No magistrate shall authorise the detention of the accused in custody under this section for a total period exceeding sixty days' are worth a king's ransom. Insistence on an application for bail, for which I find no warrant in the statute, frustrates the purpose of legislation.

(76) Nor do I subscribe to the view that section 167(2) is 'no! properly worked' (Heeraman, supra per Malik J.) I would say that it is a model of drafting excellence. We do the draftsman less than justice when we lay the blame on him. I think he has done a good job. He has conveyed to the judges in plain and unambiguous words the message of the legislature.

(77) A Himachal decision Parshotam Chand v. The State of H. P. 1977 Ch L. R. 51 follows the Allahabad view in Heeraman's case, supra, and disagrees with Rajasthan decisions* D. B. Lal, J. took the view that section 167(2) ceases to apply as soon as challan is presented in court. This is in direct conflict with the Supreme Court decision in Bashir v. State of Haryana, (supra). It is not, a correct decision, with respect I venture to think.

(78) In a Patna decision in Dhena Suren v. State bail was granted initially but was cancelled later, on challan being filed on the ground that it was not granted 'on merits'. The court held that discovery of further material against the accused and submission af the clarge-sheet were good grounds for cancellation of bail. I cannot accept this view. The recognised grounds of cancellation of bail are these : (1) where the accused fails to attend at the time and place required; (2) where he commits serious offences; and (3) where he otherwise interferes with the course of

justice. But discovery of further material and submission of the charge-sheet have never been good grounds for cancellation of bail.

(79) A Karnataka decision in Gyanu v. State of Karnataka has adopted a composite approach. The learned judge agrees with Allahabad decision in Heeraman, supra. He also accepts the Rajasthan view in Prem Raj and Khinvadan's cases, supra. A perfect blend of two opposing views has certainly produced a just result for in the end the learned judge granted bail. But the reasoning cannot by any means be called impeccable, if I may with respect say so.

(80) One other decision remains to be considered. It is the decision of a learned single judge (F. S. Gill J.) of this court in Tagween Raza v. State, Cr. Misc. 251 of 1977 and 347 of 1977 decided on August 18, 1977(26). Apparently Yogeshwar Dayal J. was not in agreement with Gill J. Sitting singly judicial comity forbade him from taking a contrary view. He, thereforee, referred the case to us.

(81) Following Umedsinh v. State : AIR1977 Guj11 Gill J. held 'that earlier detention even if it is illegal' does not matter 'provided his (ascused's) custody on the date the petition is heard is lawful'. In the two cases which he heard what happened was that before the applications for bail were heard by the lower court police reports under section 173(2) had already been filed and, thereforee, Gill J. ruled that 'the provisions of sec. 167 had ceased to apply. These applications could thereforee be decided on merits alone.' In the result he dismissed the applications for bail..

(82) In the cases before Gill J. challan was filed on the 61st day. The magistrate allowed bail in the sum of Rs. 100,00. The accused could not furnish bail. But after commitment the petitioners produced the surety before the Additional Sessions Judge. The judge declined to release the accused persons on bail. The accused came to the High Court. Gill J. dismissed the applications, as I have said.

(83) Whilst conceding that the magistrate cannot validly authorise detention after the expiry of 60 days and has to release the accused if he furnishes bail and that no application for bail is necessary, the learned judge went on to hold that the

powers of remand under section 309(2) are unrestricted. He said this: 'here is no embargo of restriction placed on the power of a magistrate for remanding an accased under section 309(2) of the Code.

(84) I agree with Gill J. that no application is necessary and that after 60 days an order for release must be passed. But I cannot agree with him that under section 309(2) the court can refuse bail. The Gujarat ruling in Umedsinh v. State (supra) is not a correct decision in view of Bashir Ahmad's case (supra) decided by the Supreme Court. In my view neither under section 209 nor under section 309(2) the court can refuse bail once if is shown that 60 days have expired and the challan has not been filed. Section 309(2), as I have said, is subservient to the overriding provisions of section 167(2). Section 309(2) cannot be used as an additional safety net.

(85) The court has no power to remand the accused under section 309(2) if he has been in custody beyond 60 days. If the police report is filed within 60 days the court may remand the accused if the conditions of section 309 are satisfied. A remand in direct contravention of section 167(2) cannot be made. Nor can the court validate the illegal detention by mating an order of remand, under section 309(2). The touchstone of legality is section 167(2). Section 309(2) confers an ancillary power of remand to facilitate investigation. The decision of the learned single judge must be regarded as incorrect and must be overruled.

SUMMARY

(86) I may now summarise the propositions:

(1)Detention beyond 60 days is unauthorised and unlawful under section 167(2).

(2)On the expiry of 60 days the accused is entitled to bail as of right.

(3)No application for bail is necessary.

(4)It is the coart's duty to make an order for bail.

(5)If he furnishes security acceptable to the court the accused is entitled to be released on bail.

(6)Section 167(2) does not cease to apply even if the chargesheet is submitted after 60 days.

(7)THEREis no distinetion between bail unden section 167(2) and a bail on merits under.Chi XXXIII:

(8)Sections 209 and 309(2) do not override the mandatory provisions of section 167(2). Section 209(b) is expressly subject to the provisions of bail. Simiarly section 309(2) is subservient to section 167(2).

(9)Bail granted under section 167(2) is subject to cancellation under section 437(5); and

(10)Filing of the charge-sheet subsequently in court is not a ground for cancellation of bail.

CONCLUSION

(87) Coming back to the case of Noor Mohd. I hold that his detention beyond 60 days was directly in the teeth of the statute. Plainly he was entitled to be released on bail. The learned Additional Sessions Judge was not right in continuing his detention on the ground that the 'challan will be filed in a day, or two'. The rule of law is the '60-days detention' law. If we go one step beyond that, there is no reason why we should not go fifty. If the challan is filed on the 61st day, as the case befare Gill J the court cannot refuse to admit the accused to bail. Suppose on the 61st day the accused makes the prayer to be released on bail. On the other side the prosecution brings the challan and submits it. Can the court refuse bail on the ground that challan has after all come? I think not. That the challan will be filed in 'a day or two' is no answer to the statutory limit on detention before trial. If one step, why not fifty?

(88) For the reasons I concurred in the order we made at the conclusion of the hearing. On December 7, 1977, we directed Noor Mohd. to be released on bail

provided he furnished a personal bond in the sum of Rs. 5000 with one surety for the like amount

BAILgranted.