

Nitin Nagpal Vs. State

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Court : Delhi

Decided On : Jul-03-2006

Reported in : 2006(90)DRJ745

Judge : Badar Durrez Ahmed, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 2, 154, 161(3), 164, 167, 167(2), 170, 173, 173(1), 173(2), 173(5), 190, 190(1), 193, 204, 207, 209, 226, 227, 293, 293(4), 309, 309(2), 319, 437(1), 437(2), 437(5), 439, 439(1) and 439(2); Indian Penal Code (IPC) - Sections 34, 120B, 186, 302, 307, 332, 353 and 393; [Arms Act, 1959](#) - Sections 25, 27, 39, 54 and 59; [Narcotic Drugs and Psychotropic Substances Act, 1985](#)

Appeal No. : Bail Appln. 559/2006 and FIR No. 419/2005

Appellant : Nitin Nagpal

Respondent : State

Advocate for Def. : Pawan Sharma, Adv.

Advocate for Pet/Ap. : K.B. Andley Sr. Adv. and; Rajesh Khanna, Adv

Disposition : Appeal dismissed

Judgement :

Badar Durrez Ahmed, J.

1. The petitioner seeks release on bail under Section 167(2) read with Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code'). The petitioner's case is that the investigation was not completed within the prescribed period of 90 days and, as such, he became entitled to bail-on-default which has been denied to him by the Courts below. It is also the petitioner's case that cognizance was not taken within the said period of 90 days and, therefore, his detention in custody was illegal and that the taking of cognizance on a subsequent date beyond the period of 90 days, would not cure this illegality. The submissions made by the learned Counsel for the State were: 1) that investigation had, in fact, been completed and the police report had been filed within the period of 90 days and, therefore, the proviso to Section 167(2) would not come into play and the petitioner would not be entitled to bail-on-default; 2) that cognizance was subsequently taken and, thereafter, the petitioner has been remanded to custody from time to time under Section 309 of the Code and, as such, the petitioner is not in illegal custody and is not entitled to bail on these grounds. This, in brief, is the field within which this case requires determination.

2. Since this case involves the question of bail-on-default, dates would be relevant. They are:

23.6.2005: The petitioner was arrested. The case for the prosecution is that on this day at about 12.10 p.m. the accused persons (including the present petitioner) entered House No. E-174, Ashok Vihar New Delhi for committing dacoity and shot at one Giriraj Kishore who died on the spot. It is further alleged that the accused, while they were running away, were chased by the police party but, they opened fire at the police party and as a result of which one ASI was seriously injured. However, other police personnel arrived at the spot and surrounded the assailants. Finding themselves to be trapped, the assailants opened fire indiscriminately upon the police party and as a result of which the Additional SHO, Constable Dharampal and Constable Devinder were seriously injured. The accused (including the present petitioner) were apprehended on the spot. An FIR was registered, being FIR No. 419 dated 23.6.2005 at Police Station Ashok Vihar, against the accused

under Sections 302/307/393/353/186/332/34 IPC and Sections 25/27 of the [Arms Act, 1959](#).

20.9.2005: This was the 89th day after the arrest of the petitioner. On this day, it is alleged that a challan (police report) was filed. However, it is the case of the petitioner that this was not a 'police report' in terms of Section 173(2) of the Code inasmuch as it was incomplete because - (1) the statement of one injured had not been recorded; (2) the Central Forensic Science Laboratory Report had not been obtained/not filed; (3) sanction under Section 39 of the [Arms Act, 1959](#) had not been obtained/not filed. Submissions were made at length with regard to whether the challan was complete or incomplete and the same will be dealt with in detail below. The order passed by the Metropolitan Magistrate on this date reads as under:

Accused are present from J/C. Fresh challan filed today. It be checked and registered. Case be fixed for consideration for 04/10/05.4.10.2005: The petitioner moved an application for bail before the learned Metropolitan Magistrate under Section 167(2) of the Code on the ground that the challan purportedly filed on 20.9.2005 was incomplete, and, therefore, could not be treated as a report under Section 173(2) of the Code. It was contended therein that the petitioner was entitled to bail on default under Section 167(2) of the Code. On the filing of this application for bail under Section 167(2), the Metropolitan Magistrate simply noted on the application itself that the same be put up on 7.10.2005. By a separate order the learned Metropolitan Magistrate noted the presence of the accused in Judicial Custody and directed that:

Accused be sent to J.C. till 18/10/05.7.10.2005: The learned Metropolitan Magistrate noted in the order that the CFSL report was not filed. He directed that the bail application be put up for 18.10.2005.

18.10.2005: Copies of the purported challan were handed over to the accused and the learned Metropolitan Magistrate passed the following order:

Case file perused. I take cognizance for offence Under Sections 302/307/393/353/186/332/120B/34 IPC & 25, 27/54/59 A. Act against accused

persons. Copy supplied. All the three accused persons have moved application for bail.

Case is fixed for filing of the report and all the proceedings as well as bail application for 31/10/05 and CFSL report for 24/10/05.

24.10.2005: The learned Metropolitan Magistrate recorded that the CFSL Report had not been filed and directed that the matter be put up on the date already fixed, i.e. 31.10.2005.

31.10.2005: Arguments were heard on the bail application. However, the counsel for the State sought time to argue the application and prayed that the I.O. be summoned. Further arguments were adjourned to 14.11.2005.

14.11.2005: Arguments were heard at length on the bail application of, inter alia, the present petitioner. However, as counsel for the co-accused Ranbir Singh was not present, the matter was fixed for arguments on his bail application for 17.11.2005.

17.11.2005: The case was adjourned on several occasions and finally was put up for orders on 16.12.2005. In the meanwhile, on 12.12.2005, the learned Metropolitan Magistrate had directed that the accused be sent to judicial custody till 2.1.2006.

16.12.2005: The learned Metropolitan Magistrate rejected the bail application of the petitioner as also the other co-accused, inter alia, in the following manner:

Again in view of the above facts and circumstances of the case and keeping in view the magnitude and gravity of the offence I am not inclined to admit the accused persons namely Nitin Nagpal, Ranvir Singh and Siddarth Bansal on bail so their bail applications are dismissed and DCP/NW is directed to get expedited the filing of CFSL report for the purpose of speedy trial....30.1.2006: Copies of the challan under Section 39 of the [Arms Act, 1959](#) were supplied to the accused.

Meanwhile: Being aggrieved by the order dated 16.12.2005, the petitioner filed an application for bail before the Court of Sessions.

13.2.2006: The learned Additional Sessions Judge dismissed the application for bail. Three points were argued by the petitioner (1) The challan was incomplete as the CFSL report was not filed; (2) The learned Metropolitan Magistrate had not taken cognizance within 90 days; (3) Copies were not supplied within 90 days. Relying, inter alia, on a decision of a Division Bench of this Court in *Taj Singh v. State (Delhi Admn.)* 33 (1987) DLT 3, the learned ASJ held that non-filing of the CFSL report along with the challan did not mean that the challan was incomplete. The learned ASJ also rejected the plea of the petitioner that, cognizance not having been taken within 90 days, he was entitled to bail. He drew support from a decision of this Court in the case of *Vinay Chaudhary v. State* 1989 Cri. LJ 1490. As regards the submission qua non-supply of copies of the challan within 90 days, the learned ASJ held that Section 167 of the Code 'speaks of completion of investigation and not supply of copies.'

25.2.2006: The present bail application was filed in this Court.

27.3.2006: The CFSL Report was filed. The learned Metropolitan Magistrate noted that the offence under Section 302/307 IPC were exclusively triable by the Court of Sessions and, therefore, committed the case to the Court of Sessions.

3. Mr Andley, the learned Senior Counsel who appeared on behalf of the petitioner, referred to the provisions of Sections 167(2), 2(r) and 173 of the Code. Referring to Section 167 of the Code, he submitted that it is an admitted position that the detention of the petitioner could not continue beyond 90 days if the investigation was incomplete. He submitted that the completion of investigation is signalled by the forwarding of a police report to a Magistrate empowered to take cognizance of the offence or offences under Section 173(2) of the Code. The forwarding of such a police report or challan, as it is commonly known, indicates the conclusion of the investigation. It is clear that during the pendency of an investigation the custody of an accused is not permissible beyond the period of 90 days (applicable in the present case). If the investigation is not completed within this period, then an indefeasible right accrues to the petitioner to be released on bail. Mr Andley further submitted that the expression 'police report' is defined in Section 2(r) as a report forwarded by a police officer to a Magistrate under Sub-

Section (2) of Section 173. He submitted that in the present case the purported Challan filed on 20.9.2005 cannot be regarded as a police report as contemplated under the Code. The statement of one injured was not recorded. The CFSL Report had not been obtained. And, the sanction under Section 39 of the [Arms Act, 1959](#) had also not been obtained. thereforee, according to Mr Andley, there was no police report in the eye of law on 20.9.2005. The 90 day period expired on 21.9.2005 and the 'police report' had not been filed. Implying thereby that the investigation had not been completed and, thereforee, the petitioner became entitled to bail-on-default in terms of the proviso to Section 167(2) of the Code. The petitioner had indicated his willingness to furnish bail by moving an application on 4.10.2005. Accordingly, the petitioner ought to have been released on bail straightway. Mr Andley also submitted that when the purported challan was filed on 20.9.2005, the learned Metropolitan Magistrate did not take cognizance on that day nor did he remand the accused to judicial custody. He submitted that cognizance was taken by the learned Metropolitan Magistrate only on 18.10.2005. As such, the petitioner's detention was clearly illegal. Mr Andley referred to the decision of the Supreme Court in the case of Raghbir Singh and Ors. v. State of Bihar 1986 : 1987 CriLJ157 . In paragraph 20 of the said decision, the Supreme Court observed that the proviso to Section 167(2) of the Code entitled an accused person to be released on bail if the investigating agency failed to complete the investigation within the stipulated period which, in the present case, was 90 days. It further observed that a person released on bail under the proviso to Section 167(2) of the Code on the default of the investigating agency is statutorily deemed to be released under the provisions of Chapter XXXIII of the Code for the purposes of that Chapter. It held that an order for release on bail under this provision is effective until an order is made under Section 437(5) or Section 439(2) or, in other words, unless the bail is cancelled. The Supreme Court also repelled the arguments advanced by the counsel for the State that an order for release on bail under Section 167(2) of the Code stood extinguished on the remand of the accused to custody under Section 309(2) of the Code. In this context, the Supreme Court held as under:

Section 309(2) merely enables the Court to 'remand the accused if in custody'. It does not empower the Court to remand the accused if he is on bail. It does not

enable the Court to 'cancel bail' as it were. That can only be done under Section 437(5) and Section 439(2). When an accused person is granted bail whether under the Proviso to Section 167(2) or under the Provisions of Chapter XXXIII, the only way the bail may be cancelled is to proceed under Section 437(5) or Section 439(2).

After discussing earlier decisions in the cases of Matabar Parida Bisnu Charan Parida Batakrushna Parida, Babaji Parida v. The State of Orissa : AIR 1975 SC1465 , Bashir and Ors. v. State of Haryana : 1978 CriLJ173 and Talab Haji Hussain v. Madhukar Purshottam Mondkar and Anr. : 1958 CriLJ701 , the Supreme Court, in the case of Raghubir Singh (supra), concluded as under:

22. The result of our discussion and the case law is this : An order for release on bail made under the proviso to Section 167(2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under Section 309(2). The order for release on bail may however be cancelled under Section 437(5) or Section 439(2)....

4. Mr Andley also referred to the following decisions:

- 1 Shardchandra Vinayak Dongre and Ors. etc v. State of Maharashtra
- 2 Matchumari China Venkatareddy and Ors. v. State of Andhra Pradesh .
3. Sunil Vasantrao Phulbande and Anr. v. State of Maharashtra .
4. Aslam Babalal Desai v. State of Maharashtra : (1989)IILLJ591SC .
5. Natabar Parida and Ors. v. State of Orissa : AIR 1975 SC1465 .
6. Uday Mohanlal Acharya v. State of Maharashtra 2001 (2) RCR (CRi.) 452 (SC).
7. Narayan and Ors. v. State of Rajasthan 1993 Crimes 322 .
8. Mahaveer Singh v. State of Rajasthan 1992 (3) Crimes 479.
9. Khimbhadhur Palshuram Thapa v. State of Maharashtra 1989 (3) Crimes 543.

10. In re: Bail Application 242/1993: 1993 (3) Crimes 955.

5. In *Sharadchandra Vinayak (supra)*, a learned Single Judge of the Bombay High Court held that there is no question of a Magistrate taking cognizance under Section 190(1)(b) of the Code on the basis of an incomplete charge sheet. This is so because an incomplete charge sheet cannot be treated as a police report as contemplated under Section 173(2) to entitle the Magistrate to take cognizance of the offence. In *C. Venkataraddy (supra)*, a learned Single Judge of the Andhra Pradesh High Court, after referring to the decision of the Supreme Court in the case of *Satya Narain Musadi v. State of Bihar* : 1980 CriLJ227 : : 1980 CriLJ227 observed that the police report (charge sheet) is one which is accompanied by the copies thereof to be served on the accused and that the mere filing of the police report under Section 173(2) of the Code without its accompaniments under Section 173(5) of the Code is not a police report at all. The learned Single Judge further observed that it is not sufficient for the prosecution to just file some sort of police report not conforming to the provisions of Section 173(2) and 173(5) of the Code. The learned Judge held that until a charge-sheet with all specifications enumerated under Section 173(2) of the Code and accompaniments under Section 173(5) of the Code is filed in the Court, it cannot be said that a police report as contemplated under Section 173(2) of the Code has been filed. In other words, the police report must be capable of examination for the purposes of taking cognizance which is the next step which the Magistrate is required to take. The Court concluded that the police report under Section 173(2) of the Code is not complete unless it is accompanied by the material papers (statements etc. as contemplated under Section 173(5) of the Code). In *Sunil Vasantrao Phulbande (supra)*, the Bombay High Court was dealing with a case where the police had filed a charge-sheet which was not accompanied by necessary relevant documents including the Chemical Analyser's Report. The question that arose for consideration before the Bombay High Court was whether filing of a charge sheet within the prescribed time, though not accompanied by material papers as contemplated under Section 173(5) of the Code, rendered it incomplete and filing of such a charge- sheet amounted to a failure to file the police report, which, in turn, conferred on the accused, the right to be released on bail under Section 167(2) of the Code since the Court was not competent to take cognizance of the

offence on the basis of such an incomplete charge sheet? The Court observed that this question was no longer rest integra and stood concluded by the decisions in the case of Matchumari China Venkatareddy (supra) and Sharadchandra Vinayak (supra). The Bombay High Court, in Sunil Vasantrao Phulbande (supra) was of the view that the Chemical Analyser's Report was the foundation on the basis of which the Magistrate could proceed to take cognizance of the offences which in that case were under the [Narcotic Drugs and Psychotropic Substances Act, 1985](#). The Court was of the clear view that the charge sheet/report as contemplated under Section 173 of the Code should be such that on the basis of the report, the Magistrate is able to proceed further and take cognizance. The Court further observed as under: The documents, which are required to be accompanied with the charge-sheet/report as contemplated under Sub-section (5) of Section 173 of the Code, therefore, assume importance, without which charge-sheet/report submitted by the Police under Section 173 of the Code would be incomplete and Magistrate also may not be in a position to proceed to take cognizance on the basis of the said report. The concept of filing of charge-sheet by the Police in the Court must fulfill requirement of Section 173(2) and (5) of the Code and it is only after such compliance, report which is filed by the Police in the Court can be construed as complete report under Section 173(2) and (5) of the Code.

6. The Bombay High Court, however, observed that in a given case, where documents which were of a formal nature did not accompany the report/charge-sheet, that may not change the nature of the report/charge-sheet under Section 173(2) of the Code particularly when there was sufficient material for the Magistrate to take cognizance of the offence as per the provisions of the Code. The Court, however, held that in the case before it, the Chemical Analyser's Report was the very foundation of the case and was the basis for deciding whether the substance seized was Ganja or not. And, the Chemical Analyser's Report would determine whether the provisions of the Narcotic Drug and Psychotropic Substances Act 1985 were attracted or not. The Court held that in such a situation the Magistrate undoubtedly could not proceed to take cognizance of the offence in the absence of the Chemical Analyser's Report and, therefore, it concluded that the charge-sheet/report which was submitted by the police minus the Chemical

Analysers's Report could not be construed as a police report as contemplated under Section 173(2) of the Code.

7. In *Aslam Babalal Desai* (supra) the Supreme Court, inter alia, held that the bail granted under Section 167(2) of the Code would be as affective as an order under Section 437(1) or (2) or 439(1) of the Code. It further held that since Section 167 does not empower cancellation of bail, the power to cancel bail can only be traced to Section 437(5) or 439(2) of the Code. The Supreme Court concluded that once an accused is released on bail under Section 167(2), he cannot be taken back in custody merely on the filing of a charge-sheet. In *Natabar Parida* (supra), the Supreme Court observed that the law as engrafted in proviso (a) to Section 167(2) and Section 309 of the Code confers the powers of remand to jail custody during the pendency of the investigation only for the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded. The Court observed that the command of the Legislature in proviso (a) is that the accused has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the stipulated period (60 days or 90 days, as the case may be) even if the investigation is pending. The Court was of the view that in cases of serious offences it cannot be possible for the police to complete investigation within the stipulated period yet, the intention of the Legislature seems to be to grant no discretion to the Court and to make it obligatory for it to release the accused on bail. In *Uday Mohanlal Acharya* (supra), the Supreme Court, in the context of Section 167(2) of the Code held that on the expiry of the stipulated period of 60 days or 90 days (as the case may be) an indefeasible right accrues in favor of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and does furnish the bail, as directed by the Magistrate. In *Narayan and Ors.* (supra) the Rajasthan High Court was of the view that once the period of 90 days or 60 days, as the case may be, mentioned in Section 167(2) of the Code expire before taking cognizance of the offences by the court, the accused get a valuable right to be released on bail and their detention in such cases after the expiry of the stipulated period would be illegal. The Court also observed that this illegality could not be validated by an

order of remand subsequently made under Section 309(2) of the Code. This latter view is of course not in consonance with the view taken by this Court in the case of Sunil Kumar Sharma v. State (supra). In Mahaveer Singh (supra) the Rajasthan High Court also took the view that if cognizance has not been taken within 60 days or 90 days as provided under Section 167(2) of the Code, the accused, after the expiry of the said period, has an absolute right to be released on bail. In Khimbhadhur Palshuram Thapa (supra) the Bombay High Court was of the view that the mere mechanical adjournment of a case after a charge-sheet is filed would not amount to taking cognizance of the offence. The Madhya Pradesh High Court in the case reported as In Re: Miscellaneous Bail Application 242/1993 (supra) directed the accused to be released on bail under Section 167(2) of the Code inasmuch as copies of the challan were supplied to the accused beyond 90 days of his arrest.

8. Mr Pawan Sharma, the learned Counsel appearing for the State submitted that in the present case the report/challan filed on 20.9.2005 within 90 days of the arrest of the petitioner was a complete one and was in terms of Section 173(2) of the Code. He submitted that, therefore, the investigation was completed within 90 days and the petitioner could not invoke the proviso to Section 167(2) of the Code for the purpose of being released on bail. He submitted, with reference to the provisions of Section 173(2), that only the details specified in Clauses (a) to (g) of Section 173(2)(i) were necessary for the purposes of constituting a police report. All these details were available in the challan filed on 20.9.2005. With regard to the CFSL Report not having been filed, he submitted that this did not imply that the investigation had not been completed. For this proposition, he placed reliance on a decision of a Division Bench of this Court in the case of Taj Singh v. State (Delhi Administration) 33 (1987) DLT 3 . The Division Bench was confronted with the question of law as to whether an investigation of a case could be said to have been completed in terms of Section 173(2) of the Code when the investigating officer submits a challan without appending thereto the report of the Central Forensic Science Laboratory? The Division Bench, inter alia, held as under:

6. Reading together Sub-sections (1) and (2) of Section 173 of the Code the stage and the point of time at which the police report or the challan is to be filed before a

Magistrate by the police officer is clearly made out in the sense that the police report or the challan is to be filed before a Magistrate as soon as the investigation of the offence is concluded. Sub-section (2)(i)(a) to (g) of Section 173 further details the requirements by way of particulars to be mentioned in police report. It would, thus, mean that when a police officer is able to complete his report by filling up therein the above mentioned particulars as required under Sub-section (2)(i)(a) to (g), the investigation of the offence can be said to be complete because if the investigation is not complete, he would not be able to make his report with the aforesaid requisite particulars, and so that supplies to us the acid test for determining, whether the investigation of the offence is complete or not. The relevant requirements would be the ones contemplated in Clause (c) and (d) of Sub-section 2(i) of Section 173 which pertain to the names of the persons who appear to be acquainted with the circumstances of the case and whether any offence appears to have been committed and, if so, by whom. When the Investigating Officer is ready with these requirements, the other requirements being not very difficult to know, the police report is complete as per its definition given in S. 2(r) as per Sub-section (2) of Section 173 of the Code. The persons contemplated in Clause (c) of Sub-section 2(i) of Section 173 appear to be the witnesses of the occurrence or who are otherwise in the know of the facts of the case but do not appear to include an expert of CFSL or any other Government Scientific Expert mentioned in Sub-sect (4) of Section 173 of the Code whose reports have been made admissible under Section 293 by tendering the same in evidence without any formal proof thereof. The following are the Government Scientific Experts mentioned in Sub-section (4) of Section 293.

- (a) any Chemical Examiner or Assistant Chemical Examiner to Government;
- (b) the Chief Inspector of Explosives;
- (c) the Director of the Finger Print Bureau;
- (d) the Director, Haffkeine Institute, Bombay;
- (e) the Director, (Deputy Director or Assistant Director) of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) The Serologist to the Government.

7. Even if the Investigating Officer had not received the report of the CFSL, so far as his job of collecting the evidence is concerned, that is over the moment he collects the material exhibits and dispatches the same for the opinion, of the CFSL and this position remains unaltered even though he relies upon the CFSL report in his own report. In this view of the matter it will not be correct to say that the police report which did not include the CFSL report, would not be a complete police report as envisaged in Sub-section (2) of Section 173 of the Code which is prepared and forwarded to the magistrate only after the conclusion of the investigation.

9. Mr Pawan Sharma next submitted that the statement of the injured had not been recorded inasmuch as the doctor had opined that the said injured was not fit to make any statement. In these circumstances, therefore, the non-filing of the statement of the injured could not be regarded as an incomplete challan been filed and/or the investigation not having been completed. He also submitted that the factum that the Sanction under Section 39 of the Arms Act had not been obtained did not mean that an incomplete challan had been filed. According to him, the investigation had been completed and the question of sanction did not come in the way of the filing of the police report/challan which had been done within 90 days. Insofar as these submissions with regard to the statement of the injured not being recorded as he was medically unfit and the non-filing of the sanction under the [Arms Act, 1959](#), I am in agreement with the learned Counsel for the State and no further discussion is necessary. The statement would not be taken as it was not possible. The non-obtaining of sanction under the [Arms Act, 1959](#) may have a legal effect qua the prosecution but would not entail that the challan was incomplete or that investigation was not over. However, the aspects of the case with regard to the CFSL Report and the question of cognizance not having been taken till 18.10.2005 requires further discussion.

10. With regard to the submission that cognizance itself had been taken by the learned Metropolitan Magistrate only on 18.10.2005, Mr Sharma, appearing for the State, submitted that the custody of the present petitioner was, in any event,

legitimized by the said taking of cognizance and subsequent remand under Section 309(2) of the Code. He submitted that the ratio of the decision in the case of Sunil Kumar Sharma v. State in Bail Application 1244/2005 decided on 27.6.2005 would apply. Mr Sharma also referred to the provisions of Section 207 and 209 of the Code. Under Section 207 the Magistrate is required to supply to the accused, without any delay and free of cost, a copy of the police report and other documents such as, the First Information Report recorded under Section 154, Statements recorded under Section 161(3), confessions and statements, if any, recorded under Section 164 and other documents forwarded to the Magistrate with the police report under Section 173(5) of the Code. Section 209 of the Code provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall (a) commit, the case to the Court of Session and subject to the provisions of the Code relating to bail, remand the accused to custody until such commitment had been made; (b) subject to the provisions of the Code relating to bail, remand the accused to custody during and until the conclusion of the trial; (c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence; and (d) notify the Public Prosecutor of the commitment of the case to the Court of Session. With reference to this provision, the learned Counsel for the State pointed out that while committing the case to the Court of Session the Magistrate can remand the accused to custody. thereforee, the custody of the present petitioner at no point of time was illegal.

11. In this context, Mr Sharma referred to the decision of the Supreme Court in the case of State of U.P. v. Lakshmi Brahman : 1983 CriLJ839 . He referred to paragraphs 12, 13 and 14 thereof which read as under:

12. Section 170 obligates the Investigating Officer to submit the police report if in the course of investigation sufficient evidence or reasonable ground is made out for the trial or for commitment of trial of the accused, to the Magistrate empowered to take cognizance of the offence upon a police report. On this report being submitted the Magistrate takes cognizance of the offence disclosed in investigation as envisaged by Section 190. It is indisputable that taking cognizance of an offence under Section 190 is a purely judicial function subject to judicial

review by court of appeal or revision to which the Magistrate is subject. Cognizance of an offence even if exclusively triable by the Court of Session has to be taken by the Magistrate because Section 193 precludes it from taking cognizance of any offence when it provides that no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the accused has been committed by the Magistrate under the Code. Thus even in case of an offence exclusively triable by the Court of Session, the police report on completion of investigation has to be submitted to the Magistrate having jurisdiction to commit the accused for trial. It is the Magistrate who takes cognizance of the offence and not the Court of Session though the case is one exclusively triable by the latter. Section 170 directs that if the accused in respect of whom police report is being submitted in the police custody, he has to be forwarded along with the police report to the Magistrate. When the Magistrate receives the report and the accused is produced before him it is necessary for him to pass some order for his further detention subject to provisions contained in Chapter XXXIII as to bails and Bonds. The view taken by the High Court makes it a necessity for the Magistrate to release the accused on bail even if the accused is not otherwise entitled to the discretionary order of bail nor he applies for nor is ready to furnish bail only because the Magistrate has no jurisdiction to keep the accused in custody till an order committing the accused for trial is made. The High Court referred to Section 209 which provides that the Magistrate shall commit the accused to Court of Session and subject to the provisions of the Code relating to bail, remand the accused to custody during and until the conclusion of the trial. This according to the High Court implies that the Magistrate can exercise power to release on bail or remand to the custody the accused only after making the order of commitment but the Magistrate has no such power anterior to the order of commitment and during the interregnum since the receipt of the charge-sheet. This dichotomy read by the High Court in Sections 207 and 209 is certainly not borne out by the provisions of the Code. Section 207 as it then stood made it obligatory for the Magistrate to supply free of costs, copies of the documents set out in the section. The duty cast on the Magistrate by Section 207 had to be performed in a judicial manner. To comply with Section 207 which is cast in a mandatory language, when the accused is produced before the Magistrate, he has to enquire from the accused by

recording his statement whether the copies of the various documents set out in Section 207 unless the Magistrate fully complies with the provisions of Section 207. And if it is shown that the copies of relevant documents or some of them are not supplied, the matter will have to be adjourned to get the copies prepared and supplied to the accused. This is implicit in Section 207 and Section 209 provides that on being satisfied that the requisite copies have been supplied to the accused, the Magistrate may proceed to commit the accused to the Court of Session to stand his trial. The statutory obligation imposed by Section 207 read with Section 209 on the Magistrate to furnish free of cost copies of documents is a judicial obligation. It is not an administrative function. It is a judicial function which is to be discharged in a judicial manner. It is distinctly possible that the copies may not be ready. That makes it necessary to adjourn the matter for some time which may be spent in preparing the copies and supplying the same to the accused. The Magistrate can proceed to commit the accused for trial to the Court of Session only after he judicially discharges the function imposed upon him by Section 207. This conclusion is fortified by the provisions contained in Chapter xviii which prescribed the procedure for trial of a case by Court of Session. Section 226 provides for provides for opening the case for the prosecution. Section 227 confers power on the Court of Session to discharge the accused if upon consideration of the record of the case and the documents submitted therewith, the Judge considers that there is no sufficient ground for proceeding against the accused. No duty is cast on the Court of Session to enquire before proceeding to hear the case of the prosecution under Section 226 to ascertain whether the copies of the documents have been furnished to the accused because Section 207 casts the obligation upon the Magistrate to perform the judicial function.

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 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 and while discharging the 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 time 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. therefore with respect, the High Court committed an error in holding 'that the order remanding the respondents to custody, made after cognizance of offence was taken, cannot be justified under Sections 167(2), 209 and 309 of the Code and no other provision under which the respondents can be remanded to custody at this stage, has been indicated by the learned Government Advocate, we feel that it would be proper to accede to the request made by the respondents, and to direct that they would be released on bail after furnishing adequate security to the satisfaction of the Chief Judicial Magistrate, Banda.'

14. 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 alone 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.

12. Mr Pawan Sharma also referred to the decision of the Supreme Court in the case of Dorai v. State of Karnataka IV (1994) CCR 2996. He referred to paragraph 26 thereof which reads as under:

26. 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 Gyamu 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.

13. Mr Sharma did not mention this, but, in Raj Kiishore Prasad v. State of Rajasthan : 1996 CriLJ2523 , the Supreme Court took a different view and particularly held that the proceedings under Section 207/209 of the Code did not fall within the ambit of 'inquiry' as defined in Section 2(g) of the Code. The Supreme Court in Raj Kishore Prasad (supra) observed that the proceedings before a Magistrate at the stage of Section 209 of the Code is only to see that the package being sent to the Court of Session is in order so that it can proceed straightway with the trial and that nothing is lacking in content as per requirement of Section 207 and 208 of the Code and that at the stage of Section 209 of the Code, the Magistrate is forbidden to apply his mind to the merits of the matter. The Supreme Court in this context observed as under:

11. The present Section 209 is thus the product of the aforesaid expert deliberation followed by legislative exercise. It is thus to be seen prominently that preliminary inquiries then known as 'committal proceedings' have been abolished in cases triable to a Court of Session. The functions left to be performed by the Magistrate, such as granting copies, preparing the records, notifying the public

prosecutor etc. are thus preliminary or ministerial in nature. It is of course true that the Magistrate at that juncture takes cognizance of a sort, but that is solely to perform those preliminary functions as a facilitator, towards placement of the case before the Court of Session, rather than being an adjudicator. It is thus manifest that in the sphere of the limited functioning of the Magistrate, no application of mind is required in order to determine any issue raised, or to adjudge anyone guilty or not, or otherwise to pronounce upon the truthfulness of any version. The role of the Magistrate thus is only to see that the package sent to the Court of Session is in order, so that it can proceed straightaway with the trial and that nothing is lacking in content, as per requirements of Sections 207 and 208 of the Code of Criminal Procedure. Such proceedings thus, in our opinion do not fall squarely within the ambit of 'inquiry' as defines that 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court', because of the prelude of its being 'subject to the context otherwise requiring'. As said before, the context requires the proceedings before a Magistrate to be formal, barely committal in that sense, and that any notion based upon the old state of law of its being an inquiry to which Section 319 could get attracted, has been done away with. thereforee, it would be legitimate for us to conclude that the Magistrate at the stage of Section 209 Cr PC is forbidden to apply his mind to the merit of the matter and determine as to whether any accused need be added or subtracted to face trial before the Court of Session.

12. This Court in *State of U.P. v. Lakshmi Brahman*¹ took a view which prima facie does not seem to be in accord with our views afore-expressed. It was held as follows: (SCC pp. 382-83, para 13):

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 under 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 and while discharging the function the Magistrate is not holding an inquiry as contemplated by the Code. From the text of the judgment it is clear that the Statement of 'Objects and Reasons' reflecting legislative policy as to the quality of 'inquiry' was not laid before this Court as well as the report of the 41st Law Commission recommending abolishing of 'inquiry' before the Magistrate, which was responsible for the change. Had the Bench been apprised of the historical perspective, we have no doubt in our mind that the comprehension of the word 'inquiry' as meant for Section 209 Cr PC would have been the same as gathered by us on becoming cognizant of the legislative scheme for early disposal of cases triable by a Court of Session.

14. In rejoinder, Mr Andley submitted that the facts of the present case were entirely distinguishable from the case of Sunil Sharma (supra) inasmuch as when the bail application was moved on 4.10.2005, the investigation had not been completed. He further submitted that in the present case on 20.9.2005 when the purported challan had been filed, the Court did not take cognizance nor was any remand order passed and, therefore, the question of applicability of Section 309 would not arise at all. These features distinguish the present case from that of Sunil Sharma (supra).

15. I had occasion to examine the provisions of Section 167(2) of the Code in the case of Om Prakash v. State : 121(2005)DLT686 . In Om Prakash (supra) it was held that it is well settled that non-completion of investigation within the period prescribed under Section 167 of the Code gives an accused an 'indefeasible right to be released on bail. After referring to the Supreme Court decisions in the cases of Sanjay Dutt v. State through CBI, Bombay : 1995 CriLJ477 ; Bipin Shantilal Panchal v. State of Gujarat : 1996 CriLJ1652 , Mohd. Iqbal Madar Sheikh v. State of Maharashtra : [1996]1SCR183 and Uday Mohanlal Acharya v. State of Maharashtra : 2001 CriLJ1832 , I had concluded that where such an indefeasible right accrues to an accused on the non-filing of the charge-sheet during the maximum period allowable under law and the accused had promptly applied for bail on such default and the said application was pending disposal by the Court, the mere filing of the charge-sheet subsequently would not extinguish or defeat such a right. It was also observed that once an accused files an application for

being released on bail and offers to furnish the bail in question, he is said to have 'availed his indefeasible right' to release on default on account of non-filing of the charge-sheet within the prescribed time limit. Moreover, the mere filing of the charge-sheet during the pendency of such an application for bail would not extinguish or defeat his right. In Sunil Kumar Sharma (supra) after referring to the Supreme Court decisions in (1) UOI v. Thamisharasi : 1996(54)ECC7 and (2) Matabar Parida (supra), this Court had concluded that it is well settled that no court has any inherent power of remand of an accused to any custody. Such power has to be conferred by law and must be traced to some provision of the statute. The relevant provisions considered in Sunil Kumar Sharma (supra) were Sections 167 and 309 of the Code. The only other provision under which an accused may be remanded to custody is Section 209 of the Code at the stage of committal of a case by the Magistrate to the Court of Session. It is clear that remand during investigation is permissible only under Section 167(2) of the Code up to a prescribed maximum period. After the filing of the challan which signals the completion of investigation and after cognizance is taken, remand of an accused to custody can generally be only under Section 309(2) of the Code and particularly, in cases of committal, under Section 209 of the Code. In Sunil Kumar Sharma (supra) it was observed that a plain reading of Section 309(2) of the Code would disclose that before an order of remand in respect of an accused can be passed thereon, the Magistrate, in the least, must have taken cognizance of the alleged offence and secondly, when the order of remand is passed the accused must already be 'in custody'. This Court also observed that the challan or charge-sheet can be filed at two stages:- (1) during the period prescribed under Section 167(2) of the Code or (2) after such period is over. In the latter case, an indefeasible right accrues to the accused of being released on bail immediately upon the expiry of the prescribed period, which right, if availed of, does not get extinguished on the filing of the challan/charge-sheet. However, this Court further observed that such a right would be extinguished on the filing of the challan if the accused had not availed of the same till then. The Court also observed that:

once the charge-sheet is filed and cognizance is taken, it is true, the investigation having come to an end, recourse to the power under Section 167(2) cannot be taken. But that does not mean that an order validly made under Section 167(2)

terminates the instant the charge-sheet is filed and cognizance is taken. Such an order would be valid till the duration for which it is made does not expire or till it is replaced by a remand order under Section 309(2) Cr PC, whichever is earlier in point of time.

16. With regard to the expression 'in custody' used in Section 309(2) of the Code, this Court, after referring to various decisions of High Courts and the Supreme Court indicated in paragraph 12 therein, concluded as under:

Clearly, on the day when a remand order is made under Section 309(2) Cr PC it is not necessary that the petitioner/accused must have been in 'lawful' custody. It is sufficient if he was in custody. In the context of the facts of the present case, even if we assume that the remand order was made on 26.4.2005 and not on 25.4.2005 and that the petitioner's custody between 25.4.2005 and 26.4.2005 was unlawful, it would not militate against the Magistrate's power to pass a valid order of remand under Section 309(2) Cr PC on 26.4.2005 when the accused was produced before him. It is also not necessary to go into the second ground urged by the learned Counsel for the petitioner with regard to the remand order of 26.4.2005 being ex facie illegal on account of it being allegedly for a period of 16 days (ie., 'exceeding fifteen days'). This is so because subsequent remand orders passed under Section 309(2) Cr PC have legitimized the custody of the petitioner as of today.

17. Keeping in mind the provisions of law as well as the decisions of the Courts referred to above, let me now examine the facts of the present case in the light of the above discussions. The first question that emerges is whether the challan filed on 20.9.2005 was incomplete. As noted above, the first point taken by Mr Andley was that the CFSL report had not been obtained and, therefore, investigation had not been completed. There is no doubt that some of the decisions referred to by him and particularly that of the Bombay High Court in the case of Sunil Vasantrao Phulbande (supra) seem to be in line with his submissions. In the latter case, the Bombay High Court observed that the Chemical Analyser's report not having been filed, the charge-sheet was incomplete. However, if one were to examine that decision, it would be apparent that the Chemical Analyser's Report in that case was crucial to the foundation of

the case itself and in the absence of such a report the Magistrate could not have taken cognizance of the offence. The question there was whether the substance recovered was Ganja or not. If it was Ganja then the provisions of the NDPS Act would apply and if it was not a Narcotic Drugs or a Psychotropic Substance then the provisions of the NDPS Act would not apply. thereforee, the result of the Chemical Analysis was crucial to the very foundation of the case for the prosecution. Without such a report it could not be ascertained whether an offence had been committed at all and, thereforee, the Magistrate was hindered in taking cognizance of such an offence under the NDPS Act. It is also material to note that in that case the Court observed that there may be situations where documents of a formal nature which did not come in the way of the Magistrate taking cognizance are not filed along with the charge-sheet yet the charge-sheet would not be construed as being incomplete. In any event, no further debate is necessary on this aspect of the matter insofar as this Court is concerned inasmuch as the issue stands settled by the Division Bench decision in the case of Taj Singh (supra) wherein the Division Bench concluded that a police report which did not include the CFSL report would still be a complete report report as envisaged in Section 173(2) of the Code. The case before the Division Bench was also one under Sections 307/302/34 IPC and Section 25 of the [Arms Act, 1959](#). Distinct from the case before the Bombay High Court, the case before the Division Bench in Taj Singh as well as the present case is not one under the NDPS Act wherein the CFSL Report would be of vital importance for the purposes of the Magistrate taking cognizance. thereforee, the absence of the CFSL report in the facts of the present case would not mean that the challan filed on 20.9.2005 was incomplete.

18. The true test is that the report filed by the police must be such that the Magistrate can straightaway proceed to take cognizance under Section 190(1)(b) of the Code and, thereafter, take steps as contemplated under Chapter XVI of the Code which includes Sections 204 (issue of process), Section 207 (supply to the accused a copy of the police report and other documents) and 209 (Commitment of the case to the Court of Session when the offence is triable exclusively by it). In the present case, the challan is said to have been filed on 20.9.2005 i.e., on 89th day after arrest. Cognizance, admittedly, was not taken by the Magistrate on that date. In fact, cognizance was taken on 18.10.2005 as indicated in the order sheet

of learned Metropolitan Magistrate. In view of the discussions above, the petitioner could be remanded to judicial custody only under three provisions. They being, Section 167(2), Section 309(2) and Section 209 of the Code. As noticed above, the period of remand under Section 167(2) comes to an end at any event on the expiry of the stipulated period of 90 days (as applicable in the present case). This means that on 21.9.2005 the period of remand under Section 167(2) came to an end. Cognizance had not been taken by the Metropolitan Magistrate by that date, i.e., 21.9.2005. Section 309(2), which is the the general provision for remand, is applicable only after cognizance has been taken. Section 209 can be invoked only at a stage after or simultaneous to issuance of process under Section 204. Section 204 of the Code clearly stipulates the issuance of process on or after taking cognizance of an offence and not to a stage prior to taking cognizance. thereforee, the period after 21.9.2005 and up to 18.10.2005 was a period during which remand under Sections 167(2), 209 and 309(2) of the Code was not permissible. Section 167(2) would not apply because the maximum period of 90 days had expired. Section 209 and 309(2) of the Code would not apply during this period because cognizance had not been taken. thereforee, the detention of the petitioner in custody during this period was clearly illegal. The petitioner's bail application dated 4.10.2005 ought to have been allowed straightway. As noted above, in Sunil Kumr Sharma (supra), it was categorically observed that no court has any inherent power of remand of an accused to any custody. Such power has to be conferred by law and must be traced to some provision of the statute. I am afraid that the order of Metropolitan Magistrate passed on 4.10.2005 sending the accused to judicial custody till 18.10.2005 cannot be traced to any statutory provision. It is also to be noted that cognizance was admittedly taken only on 18.10.2005. thereforee, Section 309(2) of the Code could only be pressed into service on and after 18.10.2005. As regards Section 209 the same position would apply. It is unfortunate that the petitioner was kept in custody illegally during this period and the Metropolitan Magistrate did not dispose of the application for bail filed on 4.10.2005 straightaway and kept it pending till 16.12.2005 by which time cognizance had been taken on 18.10.2005 and copies of the challan had been handed over to the accused on the same day. It is also to be noted that the application for bail was rejected on the ground of gravity of the offence and not on

the consideration of bail on default which was the limited scope of the bail application. Such a tendency has to be deprecated.

19. But, does this mean that the petitioner is now entitled to bail? The position as it stands today is that cognizance has been taken on 18.10.2005. The sanction under Section 39 of the Arms Act, has been obtained and copies of the relevant challan have been supplied on 30.1.2006. A copy of the CFSL report was supplied to the petitioner on 27.3.2006 and on this very day the learned Metropolitan Magistrate committed the case for trial by the Court of Session under Section 209 of the Code. The case is now pending trial before the Sessions Court. The petitioner is now in custody under a valid remand order. The question is whether the presently valid remand of the petitioner can be washed away because of the previously illegal custody of the petitioner. In the context of Section 309(2) of the Code this question has been decided in Sunil Kumar Sharma (supra) as indicated above. This Court came to the conclusion that on the day when a remand order is made under Section 309(2) Cr.P.C., it is not necessary that the petitioner/accused must have been in 'lawful' custody. It is sufficient that he was in custody. What has been stated in relation to Section 309(2) would also apply to Section 209 of the Code. therefore, the unfortunate fact that the petitioner was under unlawful custody at a prior point of time would not be to the benefit of the petitioner because at present the petitioner is in lawful custody in terms of a valid remand order. As observed in Sunil Kumar Sharma (supra), the position taken in habeas corpus cases would also be applicable in the present case. It was indicated in the said decision that in habeas corpus petitions it is normally the rule that if on the date of hearing of the writ petition it is shown that the detention of a particular person is valid then the very fact that his detention had been invalid earlier would not entitle the petitioner to any redress in the said habeas corpus petition. This was based on the clear statement of the Supreme Court in Sanjay Datt (supra) (at page 442) to the following effect:

It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order (See Naranjan Singh Nathawan v.

State of Punjab : 1952 CriLJ656 ; Ram Narayan Singh v. State of Delhi : 1953 CriLJ113 and A.K. Gopalan v. Government of India : 1966 CriLJ602)

20. Under these circumstances, although I am in agreement with the learned Counsel for the petitioner that as on the date of the application for bail made on 4.10.2005 the petitioner's custody was illegal and he was liable to be released, I am unable to allow the present application for bail under Section 167(2) of the Code for the reason that cognizance has since been taken and presently the petitioner is in judicial custody under a valid order or remand. This application is, accordingly, dismissed.

21. However, for the sake of clarity, I record that no arguments were advanced on the 'merits' and this application was not treated as a regular bail application under Section 439 of the Code. The present application has been dealt with as one under Section 167(2) and arguments were advanced only in this context although at the head of the application Section 439 is also mentioned. thereforee, it is made clear that the dismissal of this application does not prevent the petitioner from moving an application for regular bail under Section 439 for disposal on merits.

With these observations this application stands dismissed.

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