

**HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT
JABALPUR**

M.Cr.C. No.16197 of 2020

Manoj Yadav

Versus

The State of M.P.

Date of Order	15.07.2020
Bench Constituted	Single Bench
Order delivered by	Hon'ble Shri Justice Sanjay Dwivedi
Whether approved for reporting	Yes
Name of counsel for parties	For Applicant : Shri Vishal Daniel, Advocate. For Respondent/State: Shri A. Rajeshwar Rao, Government Advocate. For Objector : Shri S.K. Mishra, Advocate.
Law Laid Down	Whether the Magistrate can exercise the power to grant bail under Section 167(1) of Cr.P.C. in case it is alleged that the accused is in illegal detention.
Relevant paragraphs	7 to 21

**(O R D E R)
(15.07.2020)**

On the penultimate date of hearing i.e. 29.06.2020, the Deputy Advocate General Shri Vivek Sharma appeared for the State and sought time to file response as also to argue the matter finally. Thereafter, on the last date of hearing i.e. 08.07.2020 again time was sought by the Counsel for the State for complying with the earlier order. Today Shri Rao, Government Advocate appearing for the State submits that instead of filing reply he is ready to argue the matter finally by making oral submissions.

In the above circumstance, with the consent of the learned counsel for the parties, the matter is heard finally through oral submissions.

2. This petition under Section 482 of the Code of Criminal Procedure, 1973 (for brevity "Code") has been filed by the applicant seeking quashment of the order dated 27.05.2020 passed by the Special Judge (POCSO Act, 2012) Tikamgarh. By the impugned order, the Court below has rejected the application filed under Section 167 of the Code for grant of bail to the applicant which was filed on the ground that he is in illegal detention of the police as there is no order of remand extended and therefore in absence of any order of remand, he cannot be detained in custody and thus the order be passed to release the applicant on bail.

3. To reach the inevitable conclusion, certain relevant facts are required to be mentioned, which are:-

The applicant was arrested by the police on 01.03.2020 in connection with Crime No.79/2020 registered at Police Station Niwadi, District Tikamgarh for the offence punishable under Sections 305 and 376 of IPC and Section 5/6 of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act, 2012"). The applicant was produced before the Magistrate on 02.03.2020 and the police sought remand of judicial nature

which was granted by the Court by order dated 02.03.2020 till 14.03.2020. Again on 14.03.2020 the police sought extension of the order of remand on the basis that the investigation could not be completed and it would take more time. Therefore, the judicial remand was further extended till 30.03.2020. On 04.04.2020, the remand was further extended till 17.04.2020. On 17.04.2020 nobody appeared on behalf of the police and neither the accused was produced nor any application for extending the remand of the accused was presented before the Court. The Court while fixing the case for 30.04.2020 directed the Station House Officer Niwadi that in the respective crime either challan should be filed or by moving an application for remand time be sought. On 30.04.2020 again nobody appeared on behalf of the police and even accused was also not produced before the Court. Thereafter, the Court directed that since the accused is in jail since 02.03.2020, the SHO Niwadi be intimated that challan be filed within the prescribed limit or application for remand be filed for filing the charge-sheet. The matter was fixed on 13.05.2020. On 13.05.2020, the Public Prosecutor appeared on behalf of the State but neither the accused was produced nor any application for extending the remand was presented. Despite no intimation was given to the Court as to why even on earlier occasions nobody appeared

and the application for further remand was not moved. Thus, the Court, therefore, issued memo to the concerning SHO seeking his explanation as to why neither the challan has been filed nor any application for extension of remand was moved. The case was directed to be listed for submitting explanation on 27.05.2020.

On 26.05.2020, the counsel for the applicant moved an application under Section 167 of the Code requesting the Court that the accused is in judicial custody since 02.03.2020 but that remand was not extended for last 3-4 dates and as such the applicant's custody is illegal and due to his illegal detention and also considering the fact that there is no order of remand in force, his application may be considered and he be released on bail. The copy of application was forwarded to the Police Station Niwadi and the matter was directed to be listed on 27.05.2020. On 27.05.2020, the hearing was conducted through video-conferencing. The application was opposed by submitting objection memo mentioning therein that on 27.02.2020, the prosecutrix committed suicide by hanging and the brother of the prosecutrix informed that suicide was committed by the prosecutrix under the fear and shame as she was raped by the present applicant and therefore the applicant was arrested and was sent under judicial custody. The other

accused were also being tracked down and due to outbreak of pandemic and lock-down being imposed, the investigation could not be completed. Thus, the application for grant of bail was sought to be rejected.

After hearing the arguments, the Court below has opined that the applicant is in judicial custody since 02.03.2020 and considering the nature of offence registered against him, the Court can grant judicial remand maximum for a period of 90 days and since that 90 days period is not expired and the whole country is facing outbreak of pandemic and lock-down is imposed, in such a condition, if remand was not sought to be extended and even though that has not been extended, the applicant is not entitled to be released on bail under Section 167 of the Code and as such his application was rejected. However, on 27.05.2020, the remand was extended by the Court till 30.05.2020 considering the fact that the investigation was still not complete.

4. The learned counsel for the applicant contends that admittedly the judicial remand was in force till 17.04.2020 but thereafter neither it was requested to be extended nor it was extended by the Court and therefore the custody of the present applicant after 17.04.2020 was illegal and hence the application moved on 26.05.2020 under Section 167 of the Code ought to

have been allowed by the Court. To reinforce his contention, the learned counsel for the applicant relies upon two decisions in the case of **Ram Narayan Singh v. State of Delhi and others (AIR 1953 SC 277)** and **Raj Narain v. Superintendent, Central Jail, New Delhi and another (AIR 1971 SC 178)** and submits that the Supreme Court in these cases has clearly laid down that in absence of order of judicial remand by the Magistrate, custody of the accused even for a single minute is considered to be illegal and therefore on the date of filing the application under Section 167 of the Code in absence of any valid order of the Magistrate for judicial remand, the applicant could not be detained in custody and as such his application ought to have been allowed directing release of the applicant granting him bail as requested before the Court below.

5. Shri A. Rajeshwar Rao, learned Government Advocate appearing for the State submits that though the written reply has not been filed but from the provisions of Section 167 of the Code, it is clear that it is the discretion of the Magistrate to extend the remand for a maximum period of 90 days in the respective crime and the Court below has rightly observed that since 90 days period was not expired on the date of filing the application, the right of the applicant to be released on bail does not accrue and as such the application has rightly

been rejected. Thus, he submits that this petition is misconceived and deserves to be dismissed.

6. After hearing the rival contentions of the learned counsel for the parties, the core question emerges to be adjudicated by this Court is **“whether the Magistrate granting judicial remand can direct release of the accused exercising power provided under Section 167 of the Code and grant him bail merely because on the date of moving an application there was no valid order of remand in force”**.

7. Before dwelling upon the issue, it is worthwhile to go-through the provisions of Section 167 of the Code, which read as under,-

“167. Procedure when investigation cannot be completed in twenty-four hours.– (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that,-

[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that

adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,—

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;]

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

[Explanation I.— For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.]

[Explanation II.—If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.]

[Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution.]

[(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such

further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.]

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.”

8. On perusal of the aforesaid provisions, the basic object thereof is to be seen that “the act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of

remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.”.

9. It is clear from the above provisions and various pronouncements of the Supreme Court and the High Court, the object has been interpreted that remand may be granted to accused only after the Magistrates satisfy themselves that the application for remand by the police officer has been made in a *bona fide* manner and the reasons for seeking the remand mentioned in the case diary are in accordance with the requirements of Sections 41(1)(b) and 41 A of the Code and there is concrete material in existence to substantiate the ground mentioned for seeking remand.

10. There is no hesitation in saying that even in the absence of an application or request by the Investigating officer seeking further remand, the Magistrate can grant further

remand of the accused under section 167 of the Code. As per the learned counsel for the State in the present case it was a discretion of the Magistrate to extend the remand for a maximum period of 90 days considering the respective crime in which remand was sought but here in this case said discretion has not been exercised by the Court after 17.04.2020. Since there was no order after 17.04.2020 by the Magistrate for extending the judicial remand till 27.05.2020 the intervening period of custody of the applicant alleged to be illegal and unauthorised detention.

11. Here in this case, undoubtedly on 26.05.2020 when application under Section 167 of the Code was moved, there was no order of remand in force but a question arose whether concerning Magistrate is empowered to grant bail under the respective provision under which application for grant of bail had been moved.

12. The Supreme Court in the judgment relied upon by the learned counsel for the applicant in the case of **Ram Narayan Singh** (supra) has observed in paragraphs 3 and 4 as under:-

“3. Various questions of law and fact have been argued before us by Mr. Sethi on behalf of the petitioner, but we consider it unnecessary to enter upon a discussion of those questions, as it is now conceded that the first order of remand dated 6th March even assuming it was a valid one expired on 9th March and is no longer in force. As regards the order of remand alleged to have been made by the trying Magistrate on 9th March, the position is as follows:-The trying Magistrate was

obviously proceeding at that stage under section 344, Criminal P.C., which requires him, if he chooses to adjourn the case pending before him, " to remand by warrant the accused, if in custody," and it goes on to provide: Every order made under this section by a court other than a High Court shall be in writing signed by the presiding Judge or Magistrate. The order of the Magistrate under this section was produced before us in compliance with an order of this Court made on 10th March, which directed the production in this Court as early as possible of the records before the Additional District Magistrate and the trying Magistrate together with the remand papers for inspection by counsel for the petitioner. The order produced merely directs the adjournment of the case till 11th March and contains no direction for remanding the accused to custody till that date. Last evening, four slips of paper were handed to the Registrar of this Court at 5-20 p. m. On one side they purport to be warrants of detention dated 6th March addressed to the Superintendent of Jail, Delhi, directing the accused to be kept in judicial lock-up and to be produced in court on 9-3-1953. These warrants contain on their back the following endorsements: "Remanded to judicial till 11-3-53".

4. In a question of *habeas corpus*, when the lawfulness or otherwise of the custody of the persons concerned is in question, it is obvious that these documents, if genuine would be of vital importance, but they were not produced, notwithstanding the clear direction contained in our order of 10th March. The court records produced before us do not contain any order of remand made on 9th March. As we have already observed, we have the order of the trying Magistrate merely adjourning the case to 11th. The Solicitor-General appearing on behalf of the Government explains that these slips of paper, which would be of crucial importance to the case, were with a police officer who was present in court yesterday, but after the Court rose in the evening the latter thought that their production might be of some importance and therefore they were filed before the Registrar at 5-20 p. m. We cannot take notice of documents produced in such circumstances, and we are not satisfied that there was any order of remand committing the accused to further custody till 11th March. It has been held by this Court that in *habeas corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings. The material date on the facts of this case is 10th March, when the affidavit on behalf of the Government was filed justifying the detention as a lawful one. But the position, as we have stated, is that on that date there was no order remanding the four persons to custody. This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. The petitioners now before us are therefore entitled to be released, and they are set at liberty forthwith."

13. Likewise, in the case of **Raj Narain** (supra), the Supreme Court again in paragraph 16 onward has observed as under:-

“16. When a person under detention has come with a grievance that his detention is illegal and invalid and seeks a writ of Habeas Corpus and is produced before this Court, the prisoner comes directly under the custody of this Court. But no orders would be passed by this Court which would have the effect of detaining a prisoner beyond the period of detention already ordered and which order is complained of. In an appropriate case, during the operation of the detention order under challenge, this Court may release the prisoner on bail or otherwise either with or without conditions pending adjudication of his grievance by this Court.

17. On the letter of August 28, 1970, of the Superintendent, Central Jail, New Delhi, this Court made an order on the same day which has been set out in full in the order of the learned Chief Justice. From that order the following points emerge:

(i) Mr. Raj Narain was remanded to the custody to which he belongs namely, the U.P. authorities;

(ii) The U.P. authorities were at liberty to take the petitioner to Lucknow pending fixation of the further date for the hearing of his writ petition.

(iii) If the Superintendent of the Central Jail, New Delhi, does not receive the fresh order of remand by midnight of August 28, 1970, the petitioner should not be detained as directed by this Court and that he should be set at liberty at midnight.

18. At this stage it may be stated that if the respondents in Writ Petition No. 315 of 1970, who were represented by counsel, had brought to our notice on August 27, 1970 (when this Writ Petition was adjourned to a later date) that the remand order of the City Magistrate was expiring on August 28, 1970 and had sought directions, this Court would have, on that date itself, passed an order similar to the one which was actually passed in the evening of August 28, 1970. In that case the respondents would have had ample opportunity to take the petitioner to Lucknow, for producing him before the City Magistrate for a further order of remand, if he considered it necessary.

19. However, the position is that the petitioner was not taken to Lucknow nor produced before the City Magistrate. Instead, he was kept in the Central Jail, New Delhi. The City Magistrate, Lucknow, passed two orders, viz., one on August 28, 1970 and another on August 29, 1970, Both the orders have been quoted in the order of the learned Chief Justice. By the first order, which is stated to have been communicated by wireless message, the petitioner was remanded to further jail custody upto September 1, 1970. By the second order which

was communicated by telegram, he was remanded to further jail custody upto September 10, 1970.

20. The petitioner has in the present writ petition prayed for the issue of a writ of Habeas Corpus directing his release on the ground that his further detention is illegal. He has attacked his detention after midnight of August 28, 1970 as illegal and contrary to the directions given by this Court. He has stated that no orders of remand were communicated to him before midnight of August 28, 1970 and that the two remand orders are quite inconsistent with each other. The more serious ground of challenge in respect of the remand orders is that they are illegal as they have been passed by the City Magistrate, without his being produced before the City Magistrate and behind his back.

21. On August 31, 1970, this Court issued a notice to the Superintendent, Central Jail, New Delhi, to produce before the Court on September 1, 1970, the warrants under which "Mr. Raj Narain is presently detained" On September 1, 1970, on behalf of the jail authorities, the wireless message received on August 28, 1970 and the telegram of August 29, 1970 were brought to our notice.

22. As we were inclined to hold that the remand orders had not been passed according to law and in consequence the further detention of the petitioner was illegal, this Court passed on the same day the following order:

"By majority, we hold that the custody of Mr. Raj Narain is valid and that he is not entitled to release on his fresh petition. We shall give our reasons later."

X X X

39. It stands to reason that an order of remand will have to be passed in the presence of the accused. Otherwise the position will be that a magistrate of court will be passing orders of remand mechanically without having heard the accused for a considerably long time. If the accused is before the magistrate when a remand order is being passed, he can make representations that no remand order should be passed and also oppose any move for a further remand. For instance, he may rely upon the inordinate delay that is being caused by the prosecution in the matter and he can attempt to satisfy the court that no further remand should be allowed. Again it may be that an accused. on a former occasion may have declined to execute bond for getting himself released but on a later occasion when a further remand is being considered, the accused may have reconsidered the position and may be willing to execute bond in which case a remand order will be totally unnecessary. The fact that the person concerned does not desire to be released on bail or that he can make written representations to the magistrate are, in our opinion, beside the point. For instance, in cases where a person is sought to be proceeded against under Chapter VIII of the Criminal Procedure Code, it would 'be open to him to represent that circumstances have materially changed and a further remand has become unnecessary. Such an opportunity to make a representation is denied to a person concerned by his not

being produced before the Magistrate. As the Magistrate has to apply his judicial mind, he himself can take note of all relevant circumstances when the person detained is produced before him and decide whether a further remand is necessary. All these opportunities will be denied to an accused person if he is not produced before the Magistrate or the court when orders of remand are being passed.

40. It is no answer that the petitioner was brought to New Delhi under the orders of this Court and hence the City Magistrate had to pass the remand order at Lucknow. We have already mentioned that no representation was made nor any directions asked on August 27, 1970, on behalf of the respondents when Writ Petition No. 315 of 1970 was adjourned. Under orders of August 28, 1970, this Court released the petitioner from its custody and restored him to the original custody and even permitted him to be taken to Lucknow, pending fixation of a fresh date of hearing of his case. The Uttar Pradesh authorities concerned did not avail themselves of the opportunity to take him back to Lucknow for being produced before the Magistrate concerned. On the other hand, they were content to have an order of remand of the prisoner in New Delhi passed by the Magistrate sitting in Lucknow. Such an order, as we have held, is illegal and hence the detention of the petitioner on the authority of such an illegal order of remand is also illegal. Such a situation has been brought about by the Uttar Pradesh authorities for which they have to thank themselves.

41. In the result we hold that the orders of remand dated 28th and 29th August, 1970 passed by the City Magistrate, Lucknow, are illegal. We further hold that the detention of the petitioner in the Central Jail, New Delhi, after the midnight of August 28, 1970 on the authority of the illegal orders of remand is also illegal. In consequence the petitioner should be set at liberty forthwith. The writ petition is allowed.”

14. From the aforesaid deliberations, it is clear that in both the cases, the Supreme Court was dealing with the writ of the habeas corpus filed by the accused asking his release as he was under illegal custody. The Supreme Court also dealing with the provision of Article 21 of the Constitution granting personal liberty to the citizen of India has held that detaining a person without there being any valid order of detention is nothing but a violation of right guaranteed to a person by the

Constitution under Article 21 and, therefore, the order of release can be made.

15. Furthermore, the Supreme Court in the case of **Manubhai Ratilal Patel Tr. Ushaben v. State of Gujarat and others** reported in **(2013) 1 SCC 314** dealing with the provisions of Section 167 of the Code has held as under:-

“The writ of the habeas corpus was devised for protection of an individual in case of illegal restraint or confinement. It is of the highest constitutional importance to provide a swift and expedient remedy by determining petitioner’s right to freedom and to protect the individual’s liberty against arbitrary action of the executive or by private persons. Its main objective is to release persons illegally detained or confined.”

16. Likewise, the Supreme Court in the case of **Achpal alias Ramswaroop and another v. State of Rajasthan** reported in **(2019) 14 SCC 599** from paragraph 16 onward has observed as under:-

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

17. The letter of and spirit behind enactment of Section 167 of the Code as it stands thus mandates that the investigation ought to be completed within the period prescribed. Ideally, the investigation, going by the provisions of the Code, ought to be completed within first 24 hours itself. Further in terms of sub-section (1) of Section 167, if “it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57” the officer concerned ought to transmit the entries in the diary relating to the case and at the same time forward the accused to such

Magistrate. Thereafter, it is for the Magistrate to consider whether the accused be remanded to custody or not. Sub-Section (2) then prescribes certain limitations on the exercise of the power of the Magistrate and the proviso stipulates that the Magistrate cannot authorize detention of the accused in custody for total period exceeding 90 or 60 days, as the case may be. It is further stipulated that on the expiry of such period of 90 and 60 days, as the case may be, the accused person shall be released on bail, if he is prepared to and does furnish bail.

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

19. In the present case as on the 90th day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the Magistrate concerned to assess the situation whether on merits the accused was required to be remanded to further custody. Though the charge-sheet in terms of Section 173 came to be filed on 05-07-2018, such filing not being in terms of the order passed by the High Court on 03-07-2018, the papers were returned to the Investigating Officer. Perhaps it would have been better if the Public Prosecutor had informed the High Court on 03-07-2018 itself that the period for completing the investigation was coming to a close. He could also have submitted that the papers relating to investigation be filed within the time prescribed and a call could thereafter be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of Section 173(8) of the Code or not. That would have been an ideal situation. But we have to consider the actual effect of the circumstances that got unfolded. The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of investigation before the Magistrate concerned. The accused were thus denied of protection established by law. The issue of their custody had to be considered on merits by the Magistrate concerned and they could not be simply remanded to custody de hors such consideration. In our considered view the submission advanced by Mr. Dave, learned Advocate therefore has to be accepted.

20. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor

does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act, 1985 and Maharashtra Control of Organised Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no Court could either directly or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated 03-07-2018 was the submission that the investigation would be completed within two months by a gazetted police officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the learned Counsel for the State and the complainant.

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

22. We must at this stage note an important feature. In *Rakesh Kumar Paul (supra)* {*Rakesh Kumar Paul v. State of Assam*, (2017) 15 SCC 67}, in his conclusions, Madan B. Lokur, J. observed in para 49 as under:

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

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

24. We, therefore, allow this appeal and direct that the appellants are entitled to be admitted to bail in terms of Section 167(2) of the Code on such conditions as the trial Court may deem appropriate. The matter shall be immediately placed before the trial court upon receipt of copy of this judgment. We also add that in terms of conclusions arrived at in the majority judgment of this Court in *Rakesh*

Kumar Paul (supra), there would be no prohibition for arrest or re-arrest of the appellants on cogent grounds and in such eventuality, the appellants would be entitled to petition for grant of regular bail.

25. The appeal thus stands allowed. ”

17. Although the Supreme Court has dealt with the spirit behind the enactment of Section 167 of the Code and finally observed that if there is default in filing the charge-sheet within the prescribed limit, then in any case remand cannot be extended beyond 90 days and if that is done, the right to release the accused on bail can be exercised by the Court. However, here in this case, the applicant is not praying the Court to exercise the powers for grant of bail as given under sub-section (2) of Section 167 of the Code but, the applicant is asking the Court to exercise the power of grant of bail under Section 167(1) of the Code as his custody is allegedly illegal as there was no order of remand in force at the time of submitting the application.

18. In my opinion, the question would arise as to whether the Magistrate is empowered to exercise the discretion for granting the bail to the accused under Section 167(1) of the Code. Reading the respective provisions, I do not find any such power vested with the Magistrate for granting bail. However, that provision deals in the manner in which judicial remand can be granted by the Magistrate and the requirement under which

remand can be granted. It clearly indicates that in Section 167 if ultimately the Court comes to the conclusion that the custody is illegal and there is no order of remand in force or the order of remand is not valid, the Magistrate cannot exercise the power of releasing the accused and to grant him bail. But, power for granting bail is provided under Section 167(2) of the Code.

19. In the cases discussed hereinabove and relied upon by the counsel for the applicant, the Supreme Court has categorically observed that detaining a person without there being a valid order of remand is considered to be illegal detention and it is contrary to the personal liberty guaranteed by the Constitution under Article 21 and as such, direction for release can be granted and especially in the case of **Manubhai Ratilal Patel** (supra) it is categorically observed by the Supreme Court that writ of habeas corpus is the only remedy for production of an individual in case of illegal restraint or confinement. The Delhi High Court in the case of **Nand Ram** (supra), relying upon a full bench decision of Rajasthan High Court in case of **Taju Khan** (supra), has also observed as under:-

“6..... In **Taju Khan v. State of Rajasthan 1983 Cri. LJ 518**, the accused sought his release on bail on the ground of his illegal detention inasmuch as the order of remand before the expiry of the period for filing charge-sheet under provisos to sub-section (2) of section 167 of the Code was passed by the Reader of the court and not by the Magistrate. The court held that the accused was not entitled to be released on bail even though at some anterior period

his detention was illegal. It was held that in such a case if there was a last valid order of remand, the application for grant of bail was to be considered in the light of the provisions contained in section 437 of the Code. This judgment was sought to be distinguished on the ground that subsequently before hearing on bail application, the detention was authorised by the Magistrate by further order of remand. In a later full bench decision of the Rajasthan High Court in **Mahesh Chand etc. v. State of Rajasthan 1986(1) Crimes 63-64 (Raj.**, the view taken in *Taju Khan's* case (supra) was approved and **the court further held that the Code did not contain any provision entitling an accused to be released on bail merely on the ground, and without more, that his detention in prison was illegal.** It was held that in order to obtain his release on bail, the accused must show that his case was either covered by provisos to sub-section (2) of the Code or that he was entitled to be released on bail under the provisions of Chapter XXXIII of the Code. **It was further held that bail was no remedy and had never been conceived or intended in law to be a remedy for illegal detention.** I am in respectful agreement with the views expressed therein. Same was the view expressed by a division bench of the Orissa High court in *Durei Behera and etc. v. Suratha Behera and another 1987 CrLJ 1462*. In this it was also held that an earlier illegal detention was no ground for bail.”

(emphasis supplied)

20. In view of the aforesaid discussion and considering the enunciation of law, I am of the considered opinion that though the right to be released accrues in favour of the applicant if he is found to be in illegal detention but the application under Section 167 of the Code is not the proper remedy for claiming the relief for grant of bail from the Magistrate. That power can be exercised by the Magistrate only under sub-section (2) of Section 167 of the Code in case of default of not filing the charge-sheet within the prescribed period of 90 days. If the applicant was so advised that he was illegally detained then proper remedy had to be availed for his release. The writ of habeas corpus could be filed not before the

Magistrate but before the High Court or the Supreme Court. Accordingly, without making any observation as to whether the Court below has considered this aspect or not; whether in the order passed by the Court below it has rightly dealt with the situation or not, present petition deserves to be dismissed on the ground that granting bail under Section 167 of the code is not the power of the Magistrate and the applicant has availed improper remedy by moving such application instead of availing appropriate remedy as discussed hereinabove.

21. It is apt to note that on the date of moving the application whether there was any valid order of remand or not and the custody was valid or illegal can be examined by the competent court when proper remedy is availed by the applicant.

22. Accordingly, the present petition is **dismissed** mainly on the count that the Court below has not committed any illegality by rejecting the request for grant of bail under Section 167 of the Code because the Court below had no power to grant bail to the applicant under the prevailing circumstances.

(Sanjay Dwivedi)
Judge