REMAND

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PREFACE

A Magistrate, in his job of dealing with criminal matters, has the responsibility to protect the liberty of a citizen as guaranteed by the Constitution and concurrently to safeguard the social interest and the interest of the State in managing its security and order. And yet, he cannot be oblivious to the interest and the problems of the victim, and their social impact.

For this, his tools consist of a clear perception of the provisions of the Constitution and a thorough knowledge of the principles of law. He also has to have the skill to apply them so as to optimise the personal liberty and the interest of the society simultaneously.

He cannot justify his ignorance of law merely because in the adversary system of justice parties and their lawyers have the duty to inform him.

When the parties are unrepresented by lawyers, even this mechanism of communicating legal information fails and the equipment of the Magistrate alone can guide him.

When a man is arrested and produced before a Magistrate, usually the parties are unrepresented and no collateral channel of information may also be available as it is not infrequently that these proceedings are conducted in the verandah of the Magistrate's residence. To deal with these situations effectively, he has necessarily to be well-informed about the provisions of law and other relevant factors, to determine the judicial response.

The Institute has been trying to reinforce the equipment of the judicial officers in various fields. Sri V.K. Singh, the Deputy Director was entrusted with the task of preparing uptodate material about the law relating to remands. His effort in collecting all the latest cases and to arrange the entire subject in a logical form has been commendable.

I hope this book on remand will be of use to the Magistrates.

Institute of Judicial Training and Research, U.P., Lucknow.

J. K. MATHUR
DIRECTOR

6 February 1990.

THE AUTHOR

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REMAND is a part of Institute's Research and Publication activities and it is Sri V.K. Singh's maiden venture.

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Introductory

CHAPTER ONE

CONCEPT OF REMAND

A criminal court has to pass certain orders about the custody of the accused at various stages of investiation, inquiry and trial, known as order of remand.

The word *remand* has not been defined in the Criminal Procedure Code. To understand this concept, its meanings will have first to be seen.

The Black's Law Dictionary gives it to mean, 'to send back. When a prisoner is brought before a judge on habeas corpus, for the purpose of obtaining liberty, the judge hears the case, and either discharges him or remands him'.

According to the Oxford's Concise Dictionary of Law *remand* means, 'to commit an accused person to custody or release him on bail during an adjournment.'

The Halsbury's Law of England gives the meaning of *'remand in custody'* as follows:-

> "A person remanded in custody is committed to custody to be brought before the magistrate's court at the end of the period of remand or at such earlier time as the court may require."

The Corpus Juris Secundum defines it as follows:-

> "After a preliminary or a partial hearing before a court or Magistrate to send a prisoner back to the custody, to be kept until the hearing is resumed or trial comes on."

Legal Glossary (published by Ministry of Law & Justice of Government of India in 1988) gives it to

mean, 'the act of sending back a prisoner into custody specially in order that further evidence on the charge may be obtained'.

Thus the simple meaning of word *remand* is 'to send back'. Generally this word is used in criminal proceedings to denote the act of sending back an accused to custody, to be brought before the court on a date fixed.

This word has the same connotation in the Criminal Procedure Code as has been held in the case of *Urooj Abbas* v. *State of U.P.*[1],

> "The word 'remand' means sending back prisoner into custody to allow further enquiry: that is to say recommitting the prisoner to custody."

Prior custody essential

A study of all these meanings makes it clear that the custody of accused is *sine qua non* for remand. The word *custody* is of elastic semantics but its core meaning is that the law has taken control of the person. A person is in custody when he is in duress either because he is held by the investigating agency or other police or allied authority or is under control of the court having offered himself to the court's jurisdiction and submitted to its order by physical presence.[2]

Thus, an accused can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody, he can be stated to be in judicial custody even when he surrenders before the court and submits to its directions.[2]

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1. 1973 Cr.L.J. 1458 Allahabad High Court.
2. Niranjan Singh v. Prabhakar, 1980 Cr.L.J. 426 Supreme Court.

Under the scheme of the Code of Criminal Procedure 1973, the necessity of remand arises when the police officer arrests an accused, and produces him before a Magistrate or when an accused surrenders himself before the court and submits to its directions.

Through the power of remand the progress of investigation, inquiry or trial is watched and any tendency to laxity is curbed. The purpose of remand is,

(i) to obtain further evidence,
(ii) to ensure presence of accused at the trial,
(iii) to ensure fair investigation or trial, and
(iv) to prevent recurrence of crime.

Thus, remand is a judicial process of sending back an accused to custody to be brought before the court on date fixed. It is always for a definite period. The prisoner is to be brought before the court at the end of the period of remand. However, the court may require his earlier production.

CHAPTER TWO

RIGHT TO LIBERTY AND REMAND

Article 21 of the Constitution guarantees fundamental right to life and personal liberty in following words:-

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

It means that the personal liberty of a person can be taken away only by the 'procedure established by law'. The irresistible query arises as to what is the meaning of expression 'procedure established by law'.

This query was initially answered by the Supreme Court in the case of *A.K. Gopalan* v. *State of Madras*[1] wherein it was said that the expression 'procedure established by law' must mean procedure prescribed by the law of the State, i.e., the enacted law.

But, in *Smt. Maneka Gandhi's* case[2] the Supreme Court has enlarged the scope of this expression and said, "The procedure must be 'right', 'just' and 'fair', and not arbitrary, fanciful or oppressive, otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied".

Again in *Bachan Singh's* case[3], Supreme Court has said, "No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law".

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1. AIR 1950 S.C. 27.
2. AIR 1978 S.C. 597.
3. AIR 1980 S.C. 898.

Recently, in *Triveni Ben's* case[1] the Supreme Court has further stressed that any procedure which takes away the life and liberty of persons must be reasonable, just and fair. This procedural fairness is required to be observed at every stage and till the last breath of the life.

Verily, remand deprives a person of his personal liberty. Before a person is deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from, to the disadvantage of the person affected[2]. Therefore, a remand can only be granted if there is a statutory provision permitting it. The law is well settled that the court will have no inherent power of remand of an accused to any custody unless the power is conferred by law.[3] For those who deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, the Supreme Court has said that such authorities seeking to curtail the liberty of a subject must strictly and scrupulously observe the forms and rules of the law.[4]

A catena of these decisions, leads to the irresistible conclusion that the 'remand' must be granted under a specific provision of law, in a just, reasonable and fair manner.

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1. AIR 1989 Supreme Court 1335 at page 1355
2. Makhan Singh v. State of Punjab AIR 1952 S.C. 27.
3. Natabar Parida v. State of Orissa, AIR 1975 S.C. 1465.
4. Ram Narayan Singh v. State of Delhi, AIR 1953 S.C. 277.

CHAPTER THREE

STATUTORY PROVISIONS

The Criminal Procedure Code 1973 is the repository of powers of remand and only three sections of it, namely Sections 167, 209 and 309, confer this power. These sections are reproduced below:-

Section 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 -

[1](a) the Magistrate may authorise the detention

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1. Substituted by the Cr.P.C. (Amendment) Act, 1978.

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 in any custody under this section unless the accused is produced before him;

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

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 paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

(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.

Section 209 - **Commitment of case to Court of Session when offence is triable exclusively by it.-** When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that

the offence is triable exclusively by the court of session, he shall -

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) .....

(d) .....

Section 309 - **Power to postpone or adjourn proceedings.-**

(1) .....

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing;

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

Section 167 operates during the course of investigation, while Sections 209 and 309 come into play only when the cognizance of offence has been taken and the inquiry or trial has commenced. Sections 167 and 209 confer powers on Magistrates. A Sessions Judge as such is not empowered to remand any accused under these two provisions, unless such a power is conferred on him by some special law. Section 309 confers power of remand on all Criminal Courts. Thus a Sessions Judge can remand an accused to custody only if he has taken cognizance of the offence or if the trial has commenced.[1]

The powers of remand may be categorised as,

(i) pre-cognizance remand which means remand during investigation, and

(ii) post-cognizance remand which means remand during inquiry or trial.

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1. Kedar v. State, 1977 Cr.L.J. 1230, Allahabad High Court.

PART - B

PRE-COGNIZANCE REMAND

CHAPTER FOUR

REMAND DURING INVESTIGATION

Section 167 is the sole repository of the power of remand during investigation.[1] It is divided into six sub-sections. On a reading of the sub-sections (1) and (2) it may be seen that sub-section (1) is a mandatory provision governing what a police officer should do when a person is arrested and detained in custody and the investigation cannot be completed within the period of 24 hours fixed by Section 57. Sub-section (2) on the other hand pertains to the powers of remand available to a Magistrate and the manner in which such powers should be exercised.[2] These two sub-sections of section 167, Cr.P.C. require that when investigation cannot be completed within twenty-four hours of arrest of accused and there are grounds for believing that the accusation or information is well-founded, the Officer Incharge of the Police Station or Investigating Officer shall transmit, to the nearest Magistrate, a copy of the case-diary and forward the accused to such Magistrate, who may authorise detention of the accused in such custody as he thinks fit for a term not exceeding 15 days, whether he has or has not jurisdiction to try the case.

This 15 day's remand may either be piecemeal or even be for full 15 days at one time. Both are valid.[3] The custody during this 15 day's period may be either police custody or judicial custody. The Magistrate can remand the accused to police custody during this period of 15 days only. Even if the accused has been initially remanded to judicial custody, he may be

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1. C.M. Nandan v. State of Kerala, 1980 Cr.L.J. 1195 (Kerala High Court).
2. C. Satyanarayana v. State of A.P., AIR 1986 S.C. 2130.
3. Babu Ali v. State, 1981 A.L.J. 103 Allahabad High Court.

remanded to police custody and vice-versa, during this period of 15 days. Thereafter, the accused cannot be remanded to police custody but can be remanded only to judicial custody.[1]

If the period of remand is to exceed 15 days, the Magistrate, if he does not have jurisdiction, is required to forward the accused to a Magistrate having jurisdiction to try the case or to commit it for trial. He may then remand the accused to judicial custody only. The total period of remand during investigation, may extend to -

(i) *90 days;* if the alleged offence is punishable with death or imprisonment for life or imprisonment for a term of not less than 10 years, or

(ii) *60 days;* where the investigation relates to any other offence.

The remand for remaining 45 or 75 days may be, piecemeal or even for full 45 or 75 days at a time.[2]

On expiry of total period of 90 days or 60 days, as the case may be, the accused is entitled to bail and he must be released if he is prepared to and does furnish bail. So long as he does not furnish bail he shall be detained in judicial custody.

A new sub-section 2-A has been inserted after sub-section (2) to section 167 by the Cr.P.C. (Amendment) Act 1978. It confers power of remand on Executive Magistrates also. They are, now empowered to grant first remand for a maximum period of seven days in aggregate.

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1. C. Satya Narayana's case (supra) and Delhi Administration v. Dharam Pal, 1982, Cr.L.J. 1103 Delhi High Court (D.B.).
2. Babu Ali's case (supra).

Sub-sections (3) & (4) come into play when police remand is granted. Sub-sections (5) & (6) provide a check on investigations in summons cases.

Remand on surrender of accused

A Magistrate could remand to custody, only such accused who had been arrested by the police and forwarded to him for authorising detention. He could not remand to custody an accused who had surrendered before him, because there was no such provision in the Code, as was pointed out by the Allahabad High Court in *Kedar* v. *State*.[1] To obviate, a new Section 167-A was inserted by U.P. Act No. 18 of 1977, with effect from 5.11.77, declaring that the provisions of Section 167 shall apply also in relation to any person arrested by or under any order or direction of a Magistrate whether executive or judicial.

Section 44(2) of Criminal Procedure Code empowers any Magistrate, whether executive or judicial to arrest or direct arrest of any person, for whose arrest he is competent at the time and in the circumstances to issue a warrant, within his local jurisdiction.

The cumulative effect of Sections 44(2), 167-A and 167 is that when an accused surrenders before a Magistrate, he may arrest or direct arrest of that accused, and remand him to custody.

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1. 1977 Cr.L.J. 1230.

CHAPTER FIVE

DUTIES OF POLICE OFFICERS

Chapter V of the Code gives power to arrest an accused even without warrant and imposes mandatory duties on police officers to be performed in cases of such arrests.

Sections 41 to 43, 55 and 151 of the Code provide for making arrest without warrant. A perusal of all these sections will make it plain that the reason in each case of arrest without a warrant is that the person arrested is accused of having committed or reasonably suspected to have committed or of being about to commit or of being likely to commit some offence or misconduct.

Method of arrest

Section 46 of the Code lays down procedure of arrest. While making an arrest the police officer shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. If such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, the police officer may use all means necessary to effect the arrest, but he has no right to cause the death of such person unless he is accused of an offence punishable with death or with imprisonment for life.

Para 155 of Police Regulations says:-

"A person arrested should not be subjected to any unnecessary hardship or indignity. The instructions regarding handcuffing and fettering of convicted and undertrial prisoners, contained in Rules for Guards and Escorts will apply, as far as possible, to all arrested persons on their way to police

"stations and from outlying police stations to headquarters.

Visits of friends and legal advisers should be permitted subject to any precautions which may be necessary to prevent the prisoner from escaping or otherwise defeating the ends of justice.

When handcuffs are used a pair should be selected which will fit the prisoner's wrists; the key should be carried in the breast pocket of the police officer-in-charge of the prisoner.

For journeys by road prisoner or arrested person who wishes to travel in a hired conveyance should be allowed to do so, provided he is willing to pay both for himself and his escort.

When travelling by rail, arrested persons or prisoners will ordinarily travel in a third class (now second class) compartment. But if a prisoner or arrested person is willing to pay for a higher class fare, including the fare of the police escort, he should be allowed to travel by a class of his choice."

Communication of grounds of arrest

As soon as arrest is made, the police officer must communicate to accused, full particulars of the offence for which he is arrested or other grounds for such arrest, as provided in Section 50(1) of Cr.P.C. and Article 22(1) of the Constitution.

Article 22(1) says that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Section 50(1) says that every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

Thus every arrested person has a fundamental right to know the grounds of his arrest. A breach of Section 50(1) by police officer is an infringement of fundamental right also which renders the detention illegal. In re *Madhu Limaye's* case[1] the detention was held illegal due to non-compliance of Article 22(1). The Supreme Court has observed that the orders of remand are patently routine and appear to have been made mechanically, and thus could not cure the constitutional infirmities, i.e., non-compliance of Article 22(1).[1]

The Allahabad High Court has consistently taken the view that the provisions of Section 50(1) and Article 22(1) are mandatory, and declared the detentions illegal due to non-compliance of these provisions.[2] The Madhya Pradesh High Court has also taken the same view.[3]

In *Ramakant's* case[4] the Allahabad High Court has added that to prove the compliance of these provisions, a written record is the determining factor. Referring to Para 295(5) of the Police Regulations, the High

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1. A.I.R. 1969 Supreme Court 1014.
2. Ram Chandra alias Munai v. Superintendent Central Jail, Naini, 1982 L.L.J. 160, Subash Bhandari v. State of U.P., 1986 A.C.C. 520 and Ramakant v. State, 1988 Selected Criminal Reports 172.
3. Ashok v. State, 1987 Cr.L.J. 1750.
4. 1988 Selected Criminal Reports 172.

Court has observed that the fact of informing the accused of grounds of arrest and particulars of charges, should be entered in the General Diary.

After compliance of above mentioned duty, the police officer is required to release the arrested person on bail if he is accused of bailable offence and furnishes the security asked for;[1] otherwise he should be sent to the officer in charge of police station as provided in Section 56. He can be detained in police custody for a maximum period of 24 hours as provided in Section 57. If the investigation into the offence is completed within twenty-four hours, the accused shall be forwarded, alongwith chargesheet to the Magistrate empowered to take congnizance of the offence; and Section 167 will have no application at all.

The necessity of remand under Section 167 arises when the investigation cannot be completed within twenty-four hours. In that event the S.H.O. or I.O., is required -

(i) to produce the accused before the nearest Magistrate within twenty-four hours, and

(ii) to send a copy of case diary alongwith him.

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1. Section 50(2) of the Code.

CHAPTER SIX

PRODUCTION OF ACCUSED WITHIN TWENTY-FOUR HOURS

A combinded reading of Sections 56 and 57 of the Code will show that a Police Officer making an arrest without warrant is required to produce the "person-arrested" before a Magistrate having jurisdiction in the case, without unnecessary delay. The maximum time limit is specifically fixed by Section 57, being twenty-four hours, excluding the time necessary for the journey.

Therefore a police officer can detain an accused for a maximum period of twenty-four hours from the time of arrest. He must produce the accused before a Magistrate before the expiry of twenty-four hours. The time necessary for the journey from the place of arrest to the Magistrate's court shall not be counted in that period of twenty-four hours.

Article 22(2) of the Constitution also prescribes a similar procedure as under:-

"Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."

The object of production of an accused, arrested without warrant within twenty-four hours of his arrest, is that an independent authority exercising judicial powers may without delay apply its mind to the justification for arrest.[1] Since the legislature did

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1. Madhu Limaye's case AIR 1969 Supreme Court 1014.

not rely on the judgment of police, the provisions regarding production within twenty-four hours were incorporated in the Criminal Procedure Code and also in the Constitution of India so that abuse of powers may be prevented through independent judicial scrutiny.

Broadly speaking, arrests may be classified into two categories,

(i) Arrests without warrant

(ii) Arrests under warrant

Sections 56 and 57 of the Code apply to first category of arrests, which is apparent from the opening sentences of both the Sections. But Article 22(2) does not differentiate between the above-mentioned two categories of arrests, as is evident from bare reading of the Article. Does it mean that Article 22(2) applies to arrests under warrant also? The question was considered and answered by the Supreme Court in *State of Punjab* v. *Ajaib Singh*[1] in following words:-

"There can be no manner of doubt that arrests without warrant issued by a Court call for greater protection than do arrests under such warrants. The provision that the arrested person should within twenty-four hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive

1. AIR 1953 S.C. 10.

"fundamental right. The language of Articles 22(1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by a Court, on the allegation or accusation that the arrested person has, or is suspected to have, committed, or is likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest. In other words, there is indication in the language of Articles 22(1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority."

Thus, the necessity of production of an accused before Magistrate within twenty-four hours of arrest arises particularly in cases of arrests without warrant.

However, Section 76 of the Code deals with arrests under warrant and says that the police officer or other person executing warrant of arrest shall without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person. Provided that such delay shall not in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.

Now the question arises, how to count the period of twenty-four hours?

On bare reading of aforesaid provisions, it is manifest that the period of detention commences from the moment the arrest is effected, and continues till the arrested person is brought to the Magistrate's court. In computing period of twenty-four hours, the time necessary for the journey from the place of arrest to the Magistrate's court shall be deducted from the period of detention.

Sometimes it happens that the police officer forwards the accused within twenty-four hours of his arrest to the Magistrate but he reaches the headquarter after Court's hour or even in night; and if the Magistrate is not available at his residence the escorting police party lodges accused in the local police station and produces him next morning before the Magistrate. In the meantime, the twenty-four hours period and normal journey period expire and accused takes the plea of non-compliance of Section 57.

To meet such contingencies, the view of a Division bench of Allahabad High Court in the case of *Noorul Huda v. Superintendent Central Jail, Naini*,[1] is available. In this case the accused was arrested on 20.8.83 at about 5.30 P.M. He reached the police station on 21.8.83 at 9.30 A.M. The police station was 50 K.M. away from the place of arrest. The accused was forwarded to the court of Chief Judicial Magistrate by the I.O. on 21.8.83 at 4 P.M. They reached after court hours and C.J.M. was not available therefore, they came back to police station at about 7.30 P.M. The accused was again sent to the court of C.J.M. on 22.8.83 at about 9.30 A.M. Thereafter the C.J.M. remanded the accused to judicial custody. The High Court observed that the I.O. has explained the circumstances which delayed the production of the accused. Thus the delay cannot be said to be unjustified and it would not render the detention illegal.

What is the effect of detention beyond twenty-four hours, in contravention of Section 57(1) and Article 22(2)?

The Supreme Court, speaking through Mr. Justice Subba Rao, as he then was, has categorically said: "it would be seen that under this provision [Article 22(2)] there is a constitutional injunction that a

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1. 1984 A.Cr.R. 186.

"person arrested and detained in custody shall be produced before a Magistrate within the prescribed time. It cannot be gain-said that arrest and detention in custody in contravention of this provision is illegal".[1]

The consistent view of the Allahabad High Court is that if accused is not produced before the Magistrate within twenty-four hours, his detention is illegal.[2]

The law is thus settled that when an accused person is arrested without warrant by a police officer and is detained in police custody without any order of a Magistrate beyond twenty-four hours of arrest in contravention of provisions of Section 57 and Article 22(2), his detention shall be illegal and unconstitutional.

Now the question arises as to whether such accused person should be set at liberty forthwith or he should be released only after taking bail?

In *G.K. Reddy's* case,[3] one Mr. H.D. Mistry was arrested in Bombay on 11.3.1952 and he was taken into custody to Lucknow to be produced before the Speaker of the U.P. Legislative Assembly to answer a charge of breach of privilege. He was not produced before the Magistrate within twenty-four hours of his arrest, but still was kept in detention in the Speaker's custody at Lucknow. On 18.3.1952, the matter came up before the Supreme Court and it was held that this is a clear breach of Article 22(2) which is quite peremptory in its terms. Since this provision of the Constitution has been contravened, the said Mr. Mistry is entitled to his release.

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1. State of U.P. v. Abdul Samad AIR 1962 S.C. 1506.
2. Hariharanand v. Jailor, Varanasi AIR 1954 Allahabad 601 and Bir Bhadra Pratap Singh v. D.M. Azamgarh AIR 1959 Allahabad 384.
3. AIR 1954 S.C. 636.

In *Devendra Pandey's* case[1] the Allahabad High Court has observed;

"Furthermore, the effect of illegal detention was that the prisoners be discharged forthwith from the custody, they had then the moment of freedom which was their right guaranteed by Article 21 of the Constitution".

The Orissa High Court[2] has said that if the petitioner had come before the court challenging his detention without compliance of Section 57 of the Code, he should have certainly been set at liberty.

The Andhra Pradesh High Court,[3] relying on *Hariharanand's* case (supra), has ruled that if the accused is not produced within twenty-four hours of arrest, he is entitled to be released forthwith.

A study of above-mentioned cases, makes it clear that when the detention is illegal, the arrested person should be set at liberty forthwith. This view is fortified with following reasons:-

(i) Article 21 says that no person shall be deprived of his personal liberty except according to procedure established by law. Article 22(2) and Section 57 lay down a procedure which is mandatory and has to be followed by the police. A contravention of this procedure renders the detention illegal. The role of Magistrate is to check the abuse of powers and not to legalise the illegal acts of police. The only legal consequence in such a case would be to set at liberty from the illegal

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1. 1979 LLJ 310 (Lucknow Law Journal).
2. Rajnikant v. State of Orissa 1975 Cr.L.J. 83.
3. P.C. Kakar v. D.G. Police, 1986 (1) Crimes 620.

detention. If that is not done, the personal liberty of that person shall be curtailed unjustly and unfairly and thereby Article 21 will stand infringed which is not permissible. Here the case of *Bhim Singh* v. *State of J & K*[1] is illustrative. In this case the Supreme Court found that though Bhim Singh was arrested by the police without warrant, he was not produced before Magistrate but the Executive Magistrate remanded him to custody. The Supreme Court held that there was gross violation of Aritcles 21 and 22(2). Since the accused has already been released no further order of release is necessary; but a compensation of Rs. 50,000/- is awarded to Bhim Singh for his illegal detention.

(ii) The protection granted by Article 22(2) and Section 57, would become meaningless if one, who was supposed to be the protector of the subject, was merely to act mechanically without applying a judicial mind to see whether the arrest of the person produced before him was legal and further regular and in accordance with law.[2]

However, in the case of *Markandey* v. *State of* U.P.[3] a Division Bench of Allahabad High Court has observed that "Once a person has been validly arrested in connection with an offence, he has either to remain

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1. 1985 (4) S.C.C. 677.
2. Bir Bhadra Pratap Singh's case AIR 1959 Allahabad 384.
3. 1976 A.L.J. 88.

"in physical custody and if that physical custody comes to an end, he will have to remain in notional custody so long as the proceedings are pending". It was also observed that the Court cannot order release of the person from physical custody unconditionally, and it can only direct that the person be placed in notional custody of the Court by admitting him to bail.

But, these observations are clearly distinguishable on a perusal of facts and circumstances of the case. The students of Allahabad University were agitating for fulfilment of certain demands. On 17.1.1975 a big procession of students started in the university and as soon as it came out from the gate, the police posted there at once swooped upon the students and arrested six petitioners for an offence under Section 188 I.P.C. They were sent to jail and proceedings under Sections 107 and 117 of Cr.P.C. were also initiated. The petitioners challenged their detention on the following four grounds:-

(i) The arrest and detention of the petitioners is malafide,

(ii) The petitioners were not informed about the reasons of their arrest at the time of arrest or immediately thereafter,

(iii) The petitioners were not produced before any Magistrate within twenty-four hours of their arrest,

(iv) There is no proper order of remand authorising their detention inside the jail.

For present discussion, third ground is relevant. The finding of High Court is contained in para 7 as follows:

"The third ground taken up by the petitioners is not at all correct. We have looked into the judicial record of Crime No. 63 and it appears to us that on 17.1.1975 a remand was granted by Sri B.B. Mathur. This obviously means that the petitioners were produced before the magistrate on that very date."

Dealing with fourth ground the High Court has said, "Coming now to the last ground, it seems to us that the legality of the remand orders is now out of question, simply because at present the petitioners are in the custody of the Magistrate having been granted bail in Crime No. 63. Even if the detention of the petitioners was illegal on account of any defect in the remand orders, the present position is that the illegality, if any, has ceased to exist. Even if the original detention was illegal, the court cannot pass any order if the detention has now become legal by means of subsequent order. If a person who is alleged to have committed a bailable offence is produced before a Magistrate, as provided by Section 436(1) of the Code of Criminal Procedure, the person so arrested shall be released on bail, if at any stage of the proceedings before the court he is prepared to give bail. This provision of law also empowers the court to release the person on executing a bond, even without sureties. Similarly, Section 437 of the Code makes a provision for persons who have been arrested in a nonbailable offence and have been produced before a Magistrate. Thus the policy of the law is that wherever a person is arrested either for a bailable offence or for a nonbailable offence, he shall remain either in actual physical custody to which he may be remanded under the various relevant provisions of the Code, namely, Sections 167, 209 or 309 of the Code of Criminal Procedure, or he may be released on bail on personal bond with or without sureties, which would mean that the person shall remain in the notional custody of the court. No third course is open to the Magistrate. Thus the position is that, once a person has been validly arrested in

"connection with an offence, he has either to remain in physical custody, and if that physical custody comes to an end, he will have to remain in notional custody so long as the proceedings are pending. Accordingly if at any stage it is found that there was some defect in the order or orders remanding the arrested person to physical custody, the order placing him in the notional custody of the court will not be necessarily vitiated. The physical restraint, which once originated validly, can come to an end only by placing him under the notional custody of the court. If the physical custody becomes vitiated for some reason or the other, the court can order release of the arrested person while issuing a writ of habeas corpus. But the court cannot order the release of the person from physical custody unconditionally, and it can only direct that the person be placed in notional custody of the court by admitting him to bail. In the instant case, the petitioners are in notional custody, and unless they could succeed in showing that this notional custody is illegal for some reason or the other, no order in their favour can be passed in these proceedings, even though there might be some defects in the order or orders remanding the petitioners to physical custody prior to the granting of bail to them".

Thus it is plainly clear that the above-mentioned observations had not been made for detention rendered illegal due to non-production of accused within twenty-four hours of arrest. Instead they have been made for cases where accused had been validly arrested and remanded to custody by the Magistrate. The difference is apparent. Therefore, the above-mentioned observations do not apply to a case where an accused has been arrested without warrant by the police and the detention has become illegal due to non-compliance of Section 57 and Article 22(2).

Moreover, it is not feasible to ask for bail from an accused while holding his detention illegal

due to non-compliance of Section 57 and Article 22(2) because;

(i) If the accused fails to furnish bail bonds; he will have to be remanded to custody and that means legalisation of illegal detention which is never permissible in law.

(ii) Section 437(1)(i) says that the accused of an offence punishable with death or imprisonment for life, shall not be released on bail by a court of Magistrate. Apart from proviso, there is only one exception contained in proviso (a) to Section 167(2). The grant of bail due to contravention of Section 57 and Article 22(2) will negate the mandate of Section 437(1)(i), which is not permissible in law as there is no such provision in the Code to grant bail due to contravention of Section 57 and Article 22(2).

(iii) When the accused is set at liberty due to illegal detention, he may again be arrested after obtaining warrant from a Magistrate if sufficient evidence has been collected by the I.O. Furthemore Section 170(1) and Section 173(2) provide that the accused may be forwarded under custody to a Magistrate empowered to take cognizance of the offence, alongwith the chargesheet. But it cannot be done so if accused has been released on bail due to illegal detention.

To conclude, if the detention of an accused has become illegal due to contravention of Section 57 and Article 22(2), he should be set at liberty forthwith by the Magistrate before whom the accused is produced.

CHAPTER SEVEN

TRANSMITTING COPY OF CASE DIARY

Section 167(1) says that 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.

What is the meaning of word "Diary" used in Section 167(1)?

A Division Bench of the Allahabad High Court considered this question, and answered that the "diary" contemplated by Section 167 is the diary which is commonly known as the "case diary", and is to be maintained in accordance with Section 172 of the Code[1]. Section 172(1) says that, Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

To seek remand, the S.H.O. or I.O. is required under Section 167(1) to transmit a copy of case diary

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1. Sri Krishna v. State of U.P. 1979 Lucknow Law Journal 123.

alongwith accused, to the Magistrate. The case diary affords to the Magistrate information upon which he can decide whether or not the detention should be authorised and also enables him to form an opinion as to whether any further detention is necessary. This provision is mandatory.[1]

If the case diary is not transmitted under Section 167(1), the Magistrate has no option but to release the accused, even without taking bail.[2]

The object of transmitting copy of case diary and effect of its non-production, have been considered by the Allahabad High Court in *Sitkrishna's* case (supra) in following words:-

"When sub-section (1) and sub-section (2) are read together it appears that the Magistrate has got to see *prima facie*, that the satisfaction of the investigating police officer about the need of further time and the accusation being well-founded, is not without any basis. The Magistrate has been given the power to grant the remand from time to time for a period of fifteen days which means that he can grant a series of remands for shorter periods. At the first instance he has also to see if there was any basis for the police officers believing that the accusation was well-founded. At each time he grants the remand he has to apply his mind in regard to the length of time necessary for completing the investigation. He has, therefore, to know as to how the investigation is proceeding. He has also to apply his mind regarding the custody in which the accused be kept. He has to determine the place of custody as well as the duration of custody and this he cannot do without application of mind. He can perform this duty only on getting the necessary material. That material can be available

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1. In re B.J. Reddi's case AIR 1957 A.P. 561 (D.B.).
2. Nabachandra v. Manipur Administration AIR 1964 Manipur 39.

"to him only when the entries in the case diary are placed before him. It is for this reason that sub-section (1) of Section 167 makes it incumbent on the investigating officer, who wants to get the arrested persons kept in judicial custody, to produce before that Magistrate copy of the entries in the 'case diary' relating to the case. Law does not require or permit the Magistrate to act mechanically.

The whole matter has to be considered in the light of the Constitutional guarantees given to the individual regarding his liberty. Under Articles 21 and 22 of the Constitution he enjoys the fundamental right to remain free and not be kept in custody except in accordance with law. Article 21 protects the personal liberty of a citizen by providing, no person shall be deprived of his life or personal liberty except according to procedure established by law. Section 167 of the Code is the procedure established by law. No person can accordingly be kept in custody or deprived of his liberty except after strict compliance of the provisions of Section 167. To invoke jurisdiction of the Magistrate under sub-section (2) of Section 167 it is incumbent on the police authorities to transmit to the nearest Judicial Magistrate copy of the entries in the diary maintained under Section 172 of the Code relating to the case.

It was emphasised by the Supreme Court in *Smt. Maneka Gandhi* v. *Union of India*,[1] that the words 'procedure established by law' in Article 21 are of great significance in the lives of the people and crucial for protecting their liberty. 'Procedural safeguard' said Hon'ble Iyer, J: 'are the indispensable essence of liberty'. 'Procedure' in Article 21 does not mean a mere ritual, it contemplates a judicial act. The 'procedure established by law' for getting a remand, send a man to judicial custody consists in

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1. AIR 1978 S.C. 597.

"the transmission to the Magistrate of the entries in the diary relating to the case alongwith the accused. The non-compliance of this mandate will mean that the procedure established by law is not followed for getting the remand order for keeping the accused in custody. The Magistrate can not grant the remand and send a man to custody unless the entries are produced before him as that is a pre-condition for the exercise of his power under Section 167 of the Code. He has to see the entries to get satisfied, *prima facie*, that the Police Officer had reason to believe that the accusation was well-founded and the investigation required further time. Only thereafter can he pass the order remanding the accused to custody."

However, in the case of *Hamidullah* v. *State*[1], the Allahabad High Court has said that if the accused, when produced before the Magistrate, was said to have been arrested alongwith contraband articles and materials which is produced through an application before the Magistrate, it will be sufficient compliance of Section 167 Cr.P.C. In this case some contraband Charas was recovered from the possession of Hamidullah and two others, by an Excise Inspector. All the three were produced before the concerned Magistrate who granted remand. No case diary was produced before the Magistrate. It was observed that no case diary was prepared by the Excise Inspector at the time of arrest or seizing of contraband article, under the rules applicable to the Excise Department. A case diary is the requirement of the Cr.P.C. and not of the NDPS Act. Thus, even though no case diary was produced there was sufficient compliance of Section 167 Cr.P.C. as mentioned above.

A survey of above-mentioned cases makes it plainly clear that the provision regarding transmission of case diary by police officer is mandatory and its non-compliance may result in refusal to remand. But

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1. 1989 AWC 1.

there may be cases where sufficient materials other than the case diary are available for passing the order of remand, e.g., as in the above-mentioned case of Hamidullah. Furthermore, a reasonable distinction can be made between cases in which accused is named in the F.I.R. and those where the accused is not named in the F.I.R. Suppose an accused named in the F.I.R. is produced by the police for remand before a Magistrate alongwith the copies of F.I.R. and General Diary but no case diary is produced. In that case it would not be proper to refuse remand merely because the investigating officer did not transmit the case diary to the Magistrate. The simple reason is that sufficient material in the form of F.I.R. and General Diary entries was available for passing of the necessary remand order. It is so done in cases where accused surrenders before the court of a Magistrate. At that time only F.I.R. is available before the court and after its perusal the Magistrate remands the accused to custody. At that time no case diary is available before the Magistrate.

Therefore, it is feasible to grant remand for a short period, i.e., for a day or two when an accused is produced by the police for remand without case diary, if the accused is named in the F.I.R. The position will be quite different in cases where the accused is not named in the F.I.R. and is produced before the Magistrate without a case diary by the police. In that case only copies of F.I.R. and General Diary are not sufficient material for the purpose of granting remand. In that case the Magistrate cannot apply his judicial mind for the simple reason that no material is available against the accused produced before him. And in those cases the ratio of *Srikrishna's* case (supra) shall apply with full force.

CHAPTER EIGHT

ROLE OF MAGISTRATE

Sub-section (2) of Section 167 confers power of remand on Judicial Magistrate in following words:-

"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."

On principle, on the specific language of Section 167 of the Code, and on precedent, it is manifest that a Magistrate exercising jurisdiction under Section 167 performs essentially judicial function and not merely an executive one.[1]

The Supreme Court and the High Courts have repeatedly deprecated granting of remand in a mechanical way or in a routine manner and have emphasized acting judicially.[2] In granting remand the Magistrate has to exercise his mind - his judicial mind - and only when the Magistrate could and did

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1. Kashmir Singh v. State of Punjab 1984 Cr.L.J. 51 P & H (D.B.).
2. S.K. Dey v. Officer Incharge Sakchi AIR 1974 S.C. 871.
   In re Madhu Limaye's case AIR 1969 S.C. 1014.
   State of Bihar v. Ram Naresh AIR 1957 S.C. 389.
   Mantu Mazumdar v. State of Bihar AIR 1980 S.C. 847.
   State of U.P. v. Ram Sagar Yadav 1985(1) S.C.C. 552.
   Markandey v. State 1976 ALJ 88 Allahabad High Court (D.B.).

apply that mind then it could be said that the order made by the Magistrate for the detention in prison of a person was a valid order.[1]

The precedented proposition thus emerges that the Magistrate acting under Section 167 Cr.P.C. is to act judicially and his function is to prevent abuse of powers by the police. He should not grant remand in a mechanical way or routine manner.

Presence of accused

Presence of accused is a *sine qua non* for the exercise of powers of remand by Magistrate during investigation. Section 167(2)(b) of the Code says that "No Magistrate shall authorize detention in any custody under this Section, unless the accused is produced before him". This is a new provision in Section 167 Cr.P.C. Since there was no such provision in old Cr.P.C., the Supreme Court was of the view that non-production of accused will not vitiate a remand order.[2] In the case of *S.K. Dey v. Officer in Charge, Sakchi*,[3] accused S.K. Dey and another were remanded to jail custody on 5.6.1971, when they were produced before S.D.M. Jamshedpur, on the accusation of possession of illicit arms etc. Thereafter also they were remanded from time to time. On 5.8.1971, S.K. Dey was transferred to Gaya Jail but the remand orders continued to be passed by S.D.M. Jamshedpur without production of the accused before him. His contention was that the remand orders are illegal. Supreme Court quoted with approval the ratio, of *Raj Narain's* case[2]

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1. Bir Bhadra Pratap Singh's case, AIR 1959 Allahabad 384.
2. Raj Narain's case - AIR 1971 S.C. 178.
3. AIR 1974 S.C. 871.

which had been followed in *Gauri Shankar* v. *State of Bihar*[1] and in *M.S. Rao* v. *Union of India*[2] and ruled that:-

"Orders of remand ought not to be passed mechanically and even though this Court has ruled that the non-production of the accused will not vitiate an order of remand, Magistrate passing an order of remand ought, as far as possible, to see that the accused is produced in the Court when the order of remand is passed."

Now, the legal position has been made clear by the Legislature through aforesaid Section 167(2)(b) of Cr.P.C. 1973. In consonance with this new provision, the Supreme Court has recently said that the powers of remand given to a Magistrate become exercisable only after an accused is produced before him in terms of Sub-section (1) of Section 167 of the Code.[3] The Allahabad High Court in case of *Jagdish* v. *State of U.P.*,[4] has also ruled that Section 167 of Cr.P.C. requires that no Magistrate shall authorise detention in any custody under that Section unless the accused is produced before him.

The effect of non-production of accused at the time of remand has been discussed by the Allahabad High Court in the case of *Izhar Ahmad* v. *State*.[5] The High Court has ruled that if the accused was not produced before the Magistrate at the stage of Section 167 as well as Section 209 Cr.P.C., his detention was illegal. It was also observed that if the detention is illegal, accused can approach the Court for release under Section 439 Cr.P.C., it is not

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1. AIR 1972 S.C. 711.
2. AIR 1973 S.C. 850.
3. C. Satyanarayana v. State of A.P. AIR 1986 S.C. 2130.
4. 1978 LLJ 172 (D.B.).
5. 1978 Cr.L.J. 58.

necessary to file writ of habeas corpus.

Thus, a Magistrate, while exercising power of remand under Section 167(2), must ensure the presence of accused before him.

Injured accused

A piquant situation arises in case of arrest of an ailing or injured accused. The police officer, realising the risk of life, may lodge the accused in the hospital and transmit the case diary alongwith a request for remand to the nearest Judicial Magistrate, without physical production of accused before him. What should be done by the Magistrate in such a situation?

There is no statutory provision to deal with such contingencies.

However, para 163 of Police Regulation requires that when a person arrested has to be kept in custody but is in such a state of health as he cannot be moved without serious risk to himself or to others; the officer making the arrest must make suitable arrangements to keep him in custody where he is. Therefore, it is the statutory duty of the police officer not to move the accused from the hospital if serious risk to life of accused is involved. But the Magistrate cannot remand unless the accused is produced before him.

Latest observations of the Supreme Court made in the case of *Parmanand Katara v. Union of India*,[1] provide a guideline to reconcile the aforesaid provisions. The observations are,

"There can be no second opinion that preservation

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1. AIR 1989 S.C. 2039.

"of human life is of paramount importance. That is so on account of the fact that once life is lost, the *status quo ante* cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or be a criminal liable to punishment under the laws of the society, it is the obligation of those who are in-charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished.

It could not be forgotten that seeing an injured man in a miserable condition the human instinct of every citizen moves him to rush for help and do all that can be done to save the life.

Article 21 of the Constitution casts the obligation on the State to preserve life. A doctor at the Government hospital positioned to meet this State obligation is, therefore, duty-bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. *The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way.*

There is also no doubt that the effort to save the person should be the top priority not only of the medical professional but even of the police or any other citizen who happens to be connected with the matter or who happens to notice such an incident or a situation."

Thus the effort to save the "life" of accused is much more important than the "remand". Where the danger to the life of accused is involved, it is the

primary duty of each and every concerned authority to save the life, which could be possible if the medical aid is made available to the accused at an earliest opportunity. The necessity of remand arises only if accused is alive. Law requires that the detention of accused beyond twenty-four hours of arrest must be authorised by a Magistrate. To comply with the requirement of law the police officer is left with no option but to rush to the nearest Magistrate alongwith the Case Diary and an application narrating all the circumstances, supported with the report of the doctor, if any. In that case if the Magistrate insists on the physical production of the accused and the Police Officer complies with the direction, the accused may die on the way. A procedure, in which serious danger to the life of accused is involved cannot be said to be a 'reasonable', 'just' and 'fair' procedure.

On the other hand all the statutory provisions would be reconciled; if the Magistrate acting on the notional production by way of application of police officer visits the hospital or the place of custody, ensures physical presence of the accused and passes remand order. However, if Magistrate finds that the accused could be produced without any risk to his life he may make a suitable order and take action in accordance with law.

The Apex Court of the country has cast upon all the Magistrates dealing with remand of injured accused, a very important duty in the case of *Khatri v. State of Bihar.*[1] The Supreme Court has directed that the Magistrates should enquire from the accused how he received apparent injuries, when he is produced before them.

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1. AIR 1981 S.C. 928.

Accusation well-founded

According to sub-section (1) of Section 167, the request for remand is to be made, if there are grounds for believing that the accusation or information against arrested person is well-founded. The S.H.O. or Investigating Officer has to be satisfied about the same.

Now the question is - whether the Magistrate is bound to accept the version of the Investigating Officer that the accusation is well-founded and the investigation requires more time?

A Division Bench of Allahabad High Court had opportunity to consider this question in the case of *Sri Krishna v. State of U.P.*[1] It was contended before the High Court that a comparison of the requirements of Section 167(2) with the requirements of proviso (a) thereto, makes it evident that the Magistrate is not required to apply his mind about the necessity of granting remand when the remand is sought for a period extending upto 15 days.

The High Court had repelled this contention and said that "ofcourse after 15 days have expired the Magistrate has got to be satisfied that adequate grounds exist for keeping the accused in custody and when the remand is in the first 15 days no such satisfaction is necessary but when the sub-section (1) and sub-section (2) are read together it appears that the Magistrate has got to see, *prima facie*, that the satisfaction of the Investigating Officer about the need of further time and the accusation being well-founded, is not without any basis. The Magistrate has been given power to grant remand from time to time for a period of 15 days which means that he can grant a series of remands for shorter periods. At

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1. 1979 L.L.J. 123

"the first instance, he has also to see if there was any basis for the police officers believing that the accusation was well-founded. ----- He has also to apply his mind regarding the custody in which the accused has to be kept. He has to determine the place of custody as well as the duration of custody and this he cannot do without application of mind ---- the whole matter has to be considered in the light of the constitutional guarantee given to the individual regarding his liberty ---- the Magistrate has not to pass, in the words of Lord Goddard, 'Rubber-stamp-orders' of remand."

In *Sunder Singh* v. *Emperor*[1] it was said that in deciding the question of remand under Section 167, the Magistrate would presumably be guided by the evidence already available and the prospect of getting further relevant evidence as regards the alleged offence. The weighing of such evidence with respect to an alleged offence is essentially a judicial function and precisely for this reason the matter is left to a Magistrate and not to police officer. Relying on this ratio a Division Bench of Punjab and Haryana High Court, in *Kashmir Singh* v. *State of Punjab*[2] has said that the Magistrate is obliged to apply his mind to the materials produced before him, hear the accused either in person or through his counsel and also the prosecution and then determine the significant question whether the accused should be detained at all and if so the nature of such custody within the parameters prescribed in Section 167 of the Code. This, in essence, is a judicial function and there is no dearth of authority that in doing so the Magistrate exercises his judicial mind.

In the case of *Devi Din* v. *State of U.P.*[3] a

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1. AIR 1930 Lahore 945.
2. 1984 Cr.L.J. 51.
3. 1978 L.L.J. 94.

Division Bench of Allahabad High Court has ruled that Section 167(2) does not envisage the passing of an automatic order. It contemplates the application of mind by the Magistrate. He has to be satisfied about the advisability of taking away the liberty of the accused; even a person who is accused of an offence is entitled to liberty unless the law permits the taking away of the same. Sub-section (2) of Section 167 places duty on the Magistrate to consider the circumstances and to see that the remand is justified.

In *Bir Bhadra Pratap Singh's* case[1] the Allahabad High Court has held that the Magistrate was under an obligation to see the entries in the diaries for the purpose of seeing, if *prima facie*, the accusation made against the prisoner was sustainable.

Thus, while granting first remand the Magistrate is required to see as to whether the police officer has complied with the legal requirements laid down by Section 167(1) of Cr.P.C.

Now, two illustrative cases are worth mentioning. One is the case of *Hidayat Begum* v. *State*[2] and other is *State of U.P.* v. *Ram Sagar Yadav*.[3]

In the first case, Hidayat Begum was arrested on the basis of F.I.R. for the offence under Section 380 read with Section 109 IPC. She was produced before the Magistrate who remanded her to judicial custody. The High Court observed that the remand order was without any reason. There was no information alleged against the woman. The complainant merely suspected that she or her brother or both may have been concerned in theft because Hidayat Begum used to visit his wife. This was a remote suspicion and not a well-founded accusation. The High Court

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1. AIR 1959 All 384.
2. 52 Cr.L.J. 1951 Madhya Bharat High Court 233.
3. 1985 (1) SCC 552.

held that the Magistrate did not apply his mind to the accusation against Hidayat Begum and as to whether it can reasonably be believed that she was concerned in it. Therefore, the remand was illegal.

In the second case, one Brij Lal, who was healthy on the morning of 29.8.69, was arrested by the police and brought to police station at about 10 A.M. He was taken in a police-van to the Court of ADM for obtaining remand at about 12 noon. On being informed that Brij Lal was lying in the verandah of the court in an injured condition, the Presiding Officer left the court and came to see Brij Lal. He asked his name. Brij Lal was not able to speak. On several attempts Brij Lal could tell his name. His condition was very serious and on being questioned by the Presiding Officer as to how he came to receive the injuries, Brij Lal replied "the Daroga of Husainganj and the Constable had beaten him very badly". The learned Magistrate made a note, of the statement made by Brij Lal, on the remand application and took his thumb impresssion. Thereafter, he remanded him to judicial custody. Brij Lal reached jail at 3.40 P.M. and died at about 6 P.M. On the basis of above-mentioned statement of Brij Lal, the police officials were charged for murder of Brij Lal.

While dealing with the appeal against acquittal the Supreme Court has observed that "what is important is that Brij Lal has not committed any offence at all for which he could be remanded and, far from being an accused, he was in a position of a complainant".

The observations of Supreme Court in *Ram Sagar Yadav's* case (supra) make it clear that the Magistrate should, *prima facie*, examine as to whether the person produced before him is accused of any offence or not.

On a survey of these precedents, answer to the question posed in the beginning of the discussion may be summarized as under:-

The Magistrate is not bound to accept the version of the police officer that the accusation is well-founded. Instead he should apply his judicial mind to the materials placed before him and decide, of course, *prima facie*, whether the accusation is well-founded or not. In other words the Magistrate, while granting first remand, must see as to whether the arrested person produced before him is accused of any offence or not?

Express Power

In *Natabar Parida's* case[1] the Supreme Court has said that a court will have no inherent power of remand of any accused to any custody unless the power is conferred by law.

In *Ram Chandra* v. *State of U.P.*[2] the Allahabad High Court has held that there can be no question of a Magistrate, having power by necessary implication to remand a person to custody. The Magistrate can remand a person to custody only when he has express power to do so. No Magistrate can create jurisdiction in himself to do a thing which the law does not permit him to do.

An interesting question may sometimes arise as to whether the Magistrate has power to commit a person to custody in the event of his refusing to execute a bond as contemplated by Section 88 Cr.P.C. The answer is in negative.[3]

Thus, to remand any person to custody there must be express power conferred by law and the Magistrates are required to act according to those powers. If

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1. AIR 1975 S.C. 1465.
2. 1977 Cr.L.J. 1783.
3. Ramchandra's case 1977 Cr.L.J. 1783.

there is no express power, he cannot remand any person to custody.

Bias

Whether a Magistrate who could be competent witness in a case, could justifiably and legally make an order of remand of the accused in that very case?

The Division Bench of Allahabad High Court had opined that he could not. Since the Magistrate was himself a witness of the incident, he could not bring to bear an impartial and judicial mind to decide whether or not the accused was to be remanded to custody.[1]

In *Hariharanand's* case[2] the Allahabad High Court has said that the Magistrate before whom the accused is produced, has to scrutinize the act of others and proceed to decide whether the act was legal and proper and further whether formalities required by the law had been complied with. A Magistrate who directed arrest under Section 64 Cr.P.C. (old), of a person is not competent to act under Section 167 Cr.P.C. for granting remand because a person can never be deemed to be a competent judge of his own case.

Remand at Residence

It is not expected of a Magistrate to decline to dispose of the matters of remand when the accused is produced at his residence. In *P.C. Kakkar* v. *D.G. Police*[3] the Andhra Pradesh High Court has said that it is not permissible for a Magistrate to refuse to entertain an application for bail on the ground that necessary facilities for granting bail or for remanding the accused to judicial custody are not available at residence.

Rule 186 of General Rules (Criminal) says, "On a holiday a criminal court may dispose of such work of urgent nature, like granting of bail or remand

1. Bir Bhadra Pratap Singh's case (supra).
2. AIR 1954 All 601.
3. 1986 (1) Crimes 620.

"or to do such other work that may with propriety be done out of court and it will not be proper to refuse to do any any act or make any order urgently required merely on the ground of the day being a gazetted holiday".

Accused of other District

Often, the accused wanted in a case registered in another district or State is produced before a Magistrate for remand under Section 167. The general impression is that only CJM is authorised to grant remand in such cases, but the law is not so. In the case of *Kali Charan* v. *State*[1] it has been observed that when an accused of another district or State is produced before the Magistrate, his remand under Section 167 can be authorised by such Magistrate upto a maximum period of fifteen days and not beyond that.

Remand by Executive Magistrate

Where a judicial Magistrate is not available, the Police Officer or Investigating Officer may transmit the accused to the nearest Executive Magistrate for first remand. Such Executive Magistrate may authorise detention of the accused person in such custody as he thinks fit for a term not exceeding seven days in the aggregate. He must record reasons in writing. Before the expiry of the aforementioned period of detention the Executive Magistrate is required to transmit the records of the case together with a copy of case diary which was transmitted to him by the Investigating Officer, to the nearest Judicial Magistrate.

On the expiry of the period of detention so authorised by the Executive Magistrate, the accused person shall be released on bail except where an order

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1. AIR 1955 All.462.

for further detention of the accused person has been made by a Magistrate competent to make such order.

The period during which the accused person was detained in custody under the orders made by an Executive Magistrate, shall be taken into account in computing the period of 90 days or 60 days as the case may be.

The aforementioned powers and duties have been prescribed by Section 167(2A) of Cr.P.C. This provision was inserted by the Cr.P.C. (Amendment) Act 1978.

However, only such Executive Magistrates are empowered to grant remand, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred by the High Court.

Remand application

Whether a remand application is necessary for granting remand?

A full bench of Patna High Court[1] has ruled that a Magistrate has jurisdiction to pass an order of remand inspite of the absence of any formal written application or a request for such remand being made by the police or the prosecution.

Warrant

The remand shall always be through a warrant. The format of warrant is prescribed[2] in General Rules (Criminal). But there is no column for mentioning

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1. Ramesh Kumar Ravi v. State of Bihar 1987 Cr.L.J. 1489.
2. Vide Allahabad High Court Notification No.17/Eight-A-63 dated 8.3.89, Correction Slip No.64.

the age of the accused in it, while in *Sanjay Suri's* case[1] the Supreme Court has ruled, "We call upon every Magistrate or trial judge authorised to issue warrants for detention of prisoners, to ensure that every warrant authorising detention specifies the age of the person to be detained. Judicial mind must be applied in cases where there is doubt about the age ----- not necessarily by a trial ----- and every warrant must specify the age of the person to be detained".

Thus to ensure compliance of law laid-down by the Supreme Court, the Magistrate is duty-bound to mention the age of the accused in the warrant.

SUMMARY

The role of Magistrate acting under Section 167(2) of Cr.P.C. may, thus be summed up as follows:-

(i) The Magistrate must ensure the presence of arrested person before him.

(ii) The Magistrate must ascertain about compliance of Section 57 Cr.P.C. and Article 22(2) of the Constitution, i.e. production within 24 hours of arrest.

(iii) The Magistrate must ascertain about compliance of Section 51(1) of Cr.P.C. and Article 22(1) of the Constitution i.e. communication of ground of arrest to accused.

(iv) The Magistrate must ensure that the case diary has been transmitted to him.

(v) The Magistrate must hear the accused as well as the prosecution before passing any order.

(vi) The Magistrate should decide, *prima facie*,

1. AIR 1988 S.C. 414.

whether the accusation or the information against the arrested person, is well-founded. In other words, whether the arrested person is accused of any offence or not.

(vii) The Magistrate should enquire from the accused, how he received apparent injuries, if any.

(viii) If Magistrate is satisfied about the necessity of detention, he should decide about the nature of custody and period of detention. Thereupon he should pass remand order.

(ix) The Magistrate should remand the accused through a warrant in prescribed form, in which age of accused should also be mentioned.

CHAPTER NINE

POLICE-CUSTODY

Section 167(2) does not prescribe any specific custody but it leaves the matter to the discretion of the Magistrate. However, it does not mean that the accused can be given into custody of any one. Read as a whole, Section 167 leads to the conclusion that only two types of custody - viz - Police & Judicial, is envisaged during the course of investigation. This view is fortified by the decision of Kerala High Court in *State of Kerala* v. *K.V. Sadanandan*[1]. The High Court has categorically said, "the Legislature has recognised only two types of custody - viz. (i) Police custody and (ii) judicial custody, under Section 167 Cr.P.C. Though Section 167(2)(a) categorically forbids remand of accused persons in police custody, Section 167(2) does not say so".

A bare reading of Section 167, makes it abundantly clear that - the initial detention of the accused by Magistrate can be - (i) only for 15 days in the whole and (ii) it may be either police custody or judicial custody.

A Magistrate is empowered to authorise detention of an accused produced before him for a full period of fifteen days from the date of production of accused. Where an accused is placed in Police Custody for the maximum period of fifteen days, allowed under law either persuant to a single order of remand or to more than one order, when the remand is restricted on each occasion to a lesser number of days, further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. The Magistrate can, therefore, auuthorise detention of the accused for a maximum period of fifteen days

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1. 1984 Cr.L.J. 1823.

from the date of remand and place the accused either in police custody or in judicial custody during the period of fifteen day's remand. It has, however, to be borne in mind that if any accused is remanded to police custody the maximum period during which he can be placed in police custody is only fifteen days. No Magistrate can authorise the detention of the accused in police custody beyond that period. Further remands, to facilitate the investigation, can only be for the detention of the accused in judicial custody.[1]

The period during which the accused was in the custody of police officer under Section 57 of Cr.P.C. before the order of remand, shall not be included in computing this period of fifteen days. This period of fifteen days is exclusive of the period during which the police officer had detained the accused after arrest, by virtue of Section 57 of Cr.P.C.[2] During this fifteen day's period the Magistrate has jurisdiction to convert judicial custody to police custody or vice versa.[3] If accused has surrendered and remanded to judicial custody under Section 167, Cr.P.C. he can be given into police custody.[4] It is also settled that an accused detained in judicial custody can be given in police custody and vice versa.[5] If the accused had been remanded to judicial custody he can be given in police custody for investigation of any other case.[6]

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1. C. Satyanarayan v. State of A.P. AIR 1986 S.C. 2130.
2. Batna Ram v. State of H.P. 1980 Cr.L.J. 748 Himachal Pradesh High Court (D.B.).
3. K.V. Sadanandan's case, 1984 Cr.L.J. 1823.
4. Velu Vishwanathan v. State 1971 Cr.L.J. 725 Kerala High Court (D.B.).
5. Bhole v. State of U.P. 1983 All. Cr.R. 17 Allahabad High Court.
6. State v. Sukh Singh, AIR 1954 Rajasthan 290.

Thus the settled position is that when an accused is produced before the Magistrate under Section 167(2) for first remand, he can be remanded to police custody or judicial custody. If accused has been remanded to judicial custody, he can be given in police custody and vice versa. This can be done during the period of first fifteen day's of remand, and not thereafter.

But it does not mean that whenever request for police remand is made, it is to be granted. A police custody cannot be claimed as of right.[1] The police has to make out a case that the custody of accused with the police is necessary for further investigation. It was so held by Gujarat High Court, in the case of *State of Gujarat* v. *Swami Amar Jyoti Shyam.*[2] This was a case of abduction. The I.O. did not record the statement of abducted girl, but he made a request for police remand of accused. It was held that the request was not bonafide and hence it was rightly refused.

Para 121 of Police Regulations says, 'A remand to police custody should not be applied for or given unless the officer making application is able to show definite and satisfactory grounds. A general statement that the accused may be able to give further information should not be accepted. Applications for remand to police custody must be made through the Superintendent of Police or gazetted police officer in charge of a sub-division, and may be addressed only to Magistrates of the status required by Section 167 of the Code of Criminal Procedure'.

Verily, six decades old case - law still holds the field in cases of police remand. In *Jai Singh* v. *Emperor*,[3] the Division Bench had ruled, "The detention in the police custody should be allowed in the special

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1. State of U.P. v. Sheo Raj Singh 1984 A.Cr.R. 39 Allahabad High Court.
2. 1989 Cr.L.J. 501.
3. AIR 1932 Oudh 11.

cases and for such limited period as the necessities of the case might require. Such remands are not to be granted without sufficient cause being shown for it". The Allahabad High Court has endorsed this view in case of *T.B. Singh* v. *State of U.P.*[1]

In the case of *Bhole* v. *State of U.P.*[2], the Allahabad High Court has said that what would constitute sufficient cause will depend upon the facts and circumstances of each case and for that the Magistrate would be the best judge. It has also been observed that the interest of accused is fully safeguarded if he is medically examined before being handed in police custody and after remand. This was a case of murder and 20 accused persons had surrendered before the Magistrate and remanded to judicial custody. The police remand for two accused persons was sought for recovery of gun, cartridges etc. used in the commission of crime. The Magistrate granted police remand which was upheld by the Allahabad High Court.

In the case of *Suresh and others* v. *State*,[3] a division bench of Allahabad High Court has laid down certain safeguards for police remand in following words:

"We direct that while giving the applicants (accused) into police custody for two days as ordered by the learned Magistrate the safeguards mentioned therein, namely, the medical examination before and after the transference of the custody as ordered by the Magistrate shall be carried out and in addition an advocate shall be appointed by the Magistrate in whose presence the Investigating Officer shall interrogate the applicants if they are to make any disclosure leading to the recovery of incriminating

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1. 1981 Lucknow Law Journal 111.
2. 1983 A.Cr.R. 17.
3. 1984 Lucknow Law Journal 105.

"articles. The said advocate will remain present and interrogation will be done within sight of the advocate who shall, however, remain tied lipped. While appointing the advocate for the purpose the learned Magistrate shall exercise his discretion to safeguard the interest of the applicants as well as the State. ----- If the applicants made a statement that they are not going to make any disclosure leading to recovery the matter shall end but in case they are prepared to show something the advocate shall remain present during the course of investigation and recovery."

While remanding the accused under Section 167 the Magistrate is required to determine the nature and place of custody in which the accused is to be kept. In case he decides to remand the accused in police custody, he must give reasons for it in writing; because Section 167(3) says - "A Magistrate authorising under this Section detention in the custody of the police shall record his reasons for so doing".

A Magistrate, who grants police remand, is also required to forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate. If the order is made by C.J.M. himself he is not required to forward copy of order to anyone [vide Section 167(4)].

Only First Class Magistrates are authorised to grant police remand. A Magistrate of Second Class is not empowered to authorize detention in the custody of police. However if the High Court has specially empowered any Magistrate of second class in this behalf, he can certainly authorise detention in the custody of the police [vide - Section 167(2)(c)].

Regarding Approver

If the accused has become approver, he cannot be remanded to police custody. It has been held by

Lahore High Court that "An Approver cannot be detained in the custody of police. He should be transferred to Judicial Custody".[1]

Bail application

What will happen to bail application, if accused has been remanded to police custody? Can a Magistrate refuse to hear and dispose it of merely on the ground that the accused is in police custody?

These technical questions may sometimes arise. The law, as laid down by Allahabad High Court, is that the Magistrate cannot refuse to hear and dispose it of merely on the ground that the accused is in police custody. The disposal of bail application should not be postponed till the accused is next brought after the expiry of the remand period, but it should be disposed of forthwith.[2]

To sum up, no straight-jacket formula can be laid down for deciding the request for police remand. Each case will have to be judged on its own facts and circumstances. The incriminating information supplied by the accused in the course of investigation cannot be totally ignored merely because the accused retracts before the Magistrate and takes up the stand that he does not desire to point out any incriminating articels.[3]

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1. Experor v. Ranbir Singh AIR 1931 Lahore 480 (D.B.) and Re Khairathi Ram AIR 1931 Lahore 476.
2. Gopi v. State 1984 Lucknow Law Journal 221.
3. Narain Pasi v. State of U.P. 1989 Cr.L.J. 2552 Allahabad (D.B.).

CHAPTER TEN

JUDICIAL CUSTODY; EXTENT & COMPUTATION

During investigation first 15 day's remand can be granted by any Magistrate having jurisdiction or not. The custody may be either judicial or police. On expiry of 15 day's remand, the accused shall be remanded to judicial custody only and that too by a Magistrate having jurisdiction to try the case or commit it for trial. The maximum period of remand may be 90 or 60 days depending on sentence prescribed for the offence. Where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, the total period of remand shall not exceed 90 days, but if the investigation relates to any other offence, i.e., an offence punishable with imprisonment for less than ten years, the total period shall not exceed 60 days.

Now the question arises how to calculate the period of 90 or 60 days?

Recently, the Supreme Court has categorically said "It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run only from the date of order of remand ----------"! We find that the total period of 90 days under clause (i) and the total period of 60 days under clause (ii) has to be calculated only from the date of remand and not from the date of arrest".[1] According to Allahabad High Court the period of detention starts from the date of order of Magistrate.[2] The J. & K. High Court is also of the same view.[3]

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1. C. Satya Narain v. State of A.P. AIR 1986 S.C. 2130.
2. Subhash Bhandari's case 1986 A.C.C. 520.
3. State of J & K v. Abdul Rashid 1988 Cr.L.J. 384.

If the Magistrate authorises detention on the very date of arrest of an accused person, then the period of detention of 90 or 60 days is to be computed from the date of his arrest.[1] This is so, because the date of arrest and the order of remand happens to be the same day or date.

While calculating the period of 90 or 60 days under Clauses (i) and (ii) of paragraph (a) of Section 167 of Cr.P.C., the period of detention authorised by the Magistrate under sub-section (2) of Section 167 must be included.[2]

In cases where production warrant is issued under Section 267 Cr.P.C., the period of 90 days cannot be computed from the date of issuance of production warrant. Merely because the production warrant has been issued for accused detained in jail of another district, he cannot be said to be in custody. The period of 90 days in such cases will start from the date of order of remand passed by the Magistrate when the accused is produced before him in pursuance of production warrant.[3]

The period of detention by police under Section 57 Cr.P.C. is excluded from 90 or 60 days.[1] The period of journey under Section 57 Cr.P.C. will also be excluded in counting 90 or 60 days. In computation of period of 90 or 60 days the fraction of a day shall be counted as a day.[4] A calendar day as a unit of time

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1. Jai Singh v. State of Haryana 1980 Cr.L.J. 1229 (DB) P & H High Court.
2. Batana Ram v. State of H.P. 1980 Cr.L.J. 748 Himachal Pradesh, High Court (DB).
3. Lakhan Singh v. State of Rajasthan 1988 Cr.L.J. (NOC) 64 Rajasthan High Court.
4. Arjun Singh v. State of Rajasthan 1987 Cr.L.J. 1236 (DB) Rajasthan High Court.

is the interval between one mid-night and another. The day on which the custody is granted, cannot be excluded. It is not correct to take into consideration "fractions of two days" to make up "one day"[1].

Thus, in computing 90 or 60 day's period of detention the date of first remand order shall be included and last date of detention of accused shall also be included. The period of detention before the first remand order shall be excluded.

Sometimes, difficulty arises when the 90th day happens to be Sunday or a holiday and the Investigating Officer submits charge-sheet on the next working day. *Whether in such a situation the accused will be entitled to bail by virtue of Proviso (a) to Section 167(2)?*

Contrary views have been expressed by Orissa and Allahabad High Courts and Delhi High Court. The Orissa High Court is of the view that Section 10 of General Clauses Act 1897 applies to such a situation.[2]

Section 10 says, "Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this Section shall apply

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1. L.R. Chawla v. Murari 1976 Cr.L.J. 212 Delhi High Court.
2. N. Sureya Reddy v. State of Orissa, 1985 Cr.L.J. 939 Orissa High Court (DB).

"to any act or proceeding to which the Indian Limitation Act, 1887[1] (XV of 1887) applies."

The ratio of *N. S. Reddy's* case[2] is that if the authority had right to submit charge-sheet on the 90th day, which happened to fall on a holiday then by all standards of justice and fairness, he should be held to have complied with the mandate of law, if he has taken action at the earliest opportunity which could be only on the working day following the holiday.

In the case of *Nirapat* v. *State of U.P.*[3] the Allahabad High Court has followed the above quoted decision of Orissa High Court. In Nirapat's case, first remand was granted on 16.6.87 and charge-sheet was submitted on 14.9.87 which happened to be 91st day. The 12.9.87 was second Saturday being a holiday and 13.9.87 was Sunday. Therefore, the charge-sheet was submitted on Monday (14.9.87) when the court opened after holidays. Allahabad High Court held that the charge-sheet shall be deemed to have been filed on 90th day i.e. within time. Therefore, the accused was not entitled to bail on this account.

In the case of *Powell Nwawa Ogechi* v. *Delhi Administration*[4] a division bench of Delhi High Court has taken a contrary view and said that Section 10 of the General Clauses Act is not applicable in such a situation and it cannot be invoked to defeat the accrued right of an accused person to be freed. The Magistrates should monitor the remand proceedings during investigation in such a manner so that a full account of the remand is handy and bail is offered to such accused person at the end of 90 or 60 days, as the case may be.

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1. Now the Limitation Act, 1963 (36 of 1963).
2. 1985 Cr.L.J. 939 Orissa High Court.
3. 1988 A.C.C. 434.
4. 1986 (3) Crimes 577.

In *Powell's* case the accused was arrested on 3.2.86 and remanded to judicial custody on 4.2.86. The 90th day ended on 4.5.86 which happened to be Sunday. The charge-sheet was filed on 91st day. Even then accused was held entitled to be released on bail under Section 167 Cr.P.C.

Thus, the Orissa and Allahabad High Courts are of the view that if 90th day happens to be Sunday or a holiday and charge-sheet is filed on the next working day, it will be deemed to have been filed on the 90th day and the accused in custody will not be entitled to be released on bail, on the ground of nonsubmission of charge-sheet within the statutory period of 90 or 60 days, as the case may be. But the Delhi High Court holds a contrary view.

The view taken by the Orissa High Court is based on the applicability of Section 10 of the General Clauses Act, 1897. The Supreme Court has interpreted this Section in the case of *Harinder Singh* v. *S. Karnail Singh*,[1] in following words:

> "Broady stated, the object of the Section is to enable a person to do, what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a Court or office, and that period expires on a holiday, then according to the Section the act should be considered to have been done within that period, if it is done on the next day on which the Court or office is open. For that Section to apply, therefore, all that is requisite is that there should be a period prescribed, and that period should expire on a holiday."

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1. AIR 1957 S.C. 271.

A plain reading of Section 10 of General Clauses Act would, therefore, go to show that there should be a period prescribed for the performance of an act in a Court or office. It is only in such cases that if the last date of limitation prescribed expires on a holiday then Section 10 comes into play and makes it permissible to do that act on the next day when the Court or office opens. Section 10 of the General Clauses Act, therefore, clearly pre-supposes that there must be in existence a positive act to be performed by person and for the performance of which there is in existence a period prescribed by law. It will have no application in any other situation.[1]

Section 167 of Cr.P.C. nowhere prescribes any period for submission of charge-sheet before the court. It bars remand beyond 90 or 60 days during investigation and entitles the accused for bail.

A bare reading of proviso (a) to Section 167(2) makes it clear that during investigation, the Judicial Magistrate can remand an accused upto a maximum period of 90 or 60 days; and on the expiry of this period the accused shall be released on bail. The Supreme Court has also said that the effect of the new proviso is to entitle an accused person to be released on bail if the investigating agency fails to complete the investigation within 60 days.[2] These provisions have created a substantive right for the accused person to be released on bail and there is no discretion left with the Magistrate except to release the accused on bail.[3] In *Hussainara Khatoon's* case,[4] the Supreme Court has categorically said, "when an undertrial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may be, the Magistrate must, before making an order for further remand to judicial custody, point

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1. Powell Nwawa Ogechi v. Delhi Administration 1986 (3) Crimes 577.
2. Raghubi Singh's case AIR 1987 S.C. 149.
3. Sudhakar's case 1984 A.Cr.R. 558 Allahabad High Court.
4. AIR 1979 S.C. 1377.

"out to the undertrial prisoner that he is entitled to be released on bail".

In a latest decision the Supreme Court has said, "In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds".[1] The proviso (a) to Section 167(2) is mandatory and detention beyond 60 days is illegal if the accused is ready to furnish bail.[2]

A survey of above-mentioned precedents makes it abundantly clear that the proviso (a) to Section 167(2) gives an absolute right of bail to the accused on expiry of 90 or 60 days period of detention during investigation. The Magistrate has no power to remand an accused beyond the stipulated period of 90 or 60 days. He is left with no option but to make an order for bail. If accused fails to furnish bail bonds, he can be detained in custody so long as he does not furnish the same by virtue of Explanation-I to Section 167(2). Thus the total effect of all these provisions of Section 167(2) is that the Magistrate has to make an order for release of accused on bail, on the expiry of 90 or 60 days as the case may be, with a direction to detain the accused in custody so long as he does not furnish bail bonds.

To prevent accrual of right to bail the Investigating Officer should complete investigation and submit charge-sheet to the Magistrate, before the expiry of 90 or 60 days. On submission of charge-sheet, the Magistrate is required to take cognizance under Section 190, and thereupon remand will be governed by Section 209 or Section 309 of the Code.

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1. Rajnikant Jivanlal Patel's case 1989 (3) S.C.C. 532.
2. State of Rajasthan v. Bhanwaru Khan 1975 Cr.L.J. 1981 (Rajasthan High Court).

A catena of above-mentioned decisions fortifies the Delhi High Court's[1] view expressed in following terms:-

"Sub-section (2) of Section 167 of the Code nowhere prescribes a period within which the police is required to present charge-sheet before the court nor does it envisage the performance of an act by an accused person within a particular period before a court or office. In fact, nowhere in the Code a period is prescribed for investigation to produce the charge-sheet before a court of law. Since the Legislature in its wisdom has not prescribed a period within which the investigation has to present charge-sheet against an accused person before a court, it would be wrong to say that the provision of Section 167(2) of the Code had prescribed the limit by implication. If the Legislature had aimed it to be so, there was nothing to prevent it from saying so explicity. By invoking the doctrine of implication we will be importing something in the provision which the Legislature has deliberately refrained to do. It will not only have the effect of distorting the provision but will also defeat the legislative intent."

The Bombay High Court is also of the view that Section 10 has no application as the Code does not prescribe any time limit for presentation of charge-sheet by the Investigation.[2]

However, the period for submission of charge-sheet is prescribed in Para 122(1) of Police Regulations. It says, "The charge-sheet with the final diary in the cases shall be submitted to the court through the circle officer and the public prosecutor and should reach the Court within four weeks of the

1. Powell Nwawa Ogechi v. Delhi Administration 1986 (3) Crimes 577.
2. State of Maharashtra v. Sharad B. Sarda. 1983 (2) Cr. Law Cases 18.

"date of lodging of the first information report in summons and warrants cases and eight weeks in Sessions Cases. None of the circle officer and the public prosecutor should normally retain the charge-sheet for more than a week and the latter should submit it to the court concerned within the time-limit prescribed. Time-limit should not be allowed to exceed except for very special reasons".

This provision makes it absolutely clear that the period for submission of charge-sheet, is not prescribed in Cr.P.C., but elsewhere viz. Police Regulations. Thus Section 10 of General Clauses Act will not apply to the period prescribed by proviso (a) to Section 167(2) in so far as the submission of charge-sheet before the court is concerned for the simple reason that it is not a period prescribed for submission of charge-sheet. Verily, Proviso (a) to Section 167(2) prescribes maximum period of remand during investigation.

Moreover, the Supreme Court has ruled that an order for release on bail made under the proviso to Section 167(2) is not defeated by the lapse of time, the filing of charge-sheet or remand to custody under Section 309(2).[1]

It thus follows that if right to bail under Section 167(2)(a) has accrued to accused on Sunday it will not be defeated on Monday or next working day on filing of charge-sheet and accused will still be entitled to bail by virtue of proviso (a) to Section 167(2).

Considering all these aspects of matter, the view expressed by the Delhi High Court seems to lay the correct law.

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1. Raghubir Singh's case AIR 1987 S.C. 149.

Moreover, to avoid this legal quibbling the Magistrates may grant remand in such a way that the detention period does not exceed 90 or 60 days and as soon as this statutory period expires the accused should be produced before him so that he may be informed of the right to bail. In case the 90th day happens to be Sunday, the last remand may be granted upto the working day preceding holiday or Sunday. It would make Investigating Officer expedite and complete the investigation and if possible he may submit charge-sheet on the same day or he may seek remand for remaining one day for filing charge-sheet. In such a case submission of charge-sheet or making order for release of an accused would be an urgent matter and it can be done even on a holiday as provided by Rule 186 of General Rules (Criminal) - of the Allahabad High Court. If the 90th day happens to be Sunday, the Magistrate may order production of the accused on that day at his residence at a fixed time and the Investigating Officer may be informed of the same so that he may submit charge-sheet if any on Sunday at the residence of Magistrate, who may pass necessary orders regarding bail or cognizance and remand, as he deems fit.

CHAPTER ELEVEN

RIGHT TO BAIL

Proviso (a) to Section 167(2) gives a right to bail to the accused on expiry of 90 or 60 day's period of remand, as the case may be, in following words:-

"Provided that-

[1](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, when 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:

Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry

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1. As amended by the Cr.P.C. (Amendment) Act, 1978.

"of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail."

Nature of right

The command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy, murders, dacoities, robberies by inter-State gangs or the like, it may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. 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.[1]

Thus if it is not possible to complete the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail.[2]

The effect of this new proviso is to entitle an accused person to be released on bail if the investigating agency fails to complete the investigation within 60 days.[2]

It is now, a settled view that the provisions of section 167(2) are mandatory.[3] The entitlement

1. Natabar Parida v. State of Orissa AIR 1975 SC 1465.
2. Raghubir Singh's case - AIR 1987 SC 149.
3. State of Rajasthan v. Bhanwaru Khan 1975 Cr.L.J. 1981 (Rajasthan High Court), Khinvdan v. State of Rajasthan 1975 Cr.L.J. 1984 (Rajasthan High Court), and Sudhakar v. State 1984 A.Cr.R. 558 (Allahabad High Court), Noor Mohammed v. State I.L.R. 1978 (II) Delhi High Court (D.B.) Page 442.

to be released on bail accrues to an accused by operation of statute at the end of 90 or 60 days as the case may be. He is entitled to be offered bail as a matter of right. This right of the accused person, under Section 167(2) of the code, is absolute and indefeasible unless he fails to furnish the bail.[1] The proviso creates a substantive right in the accused person to be released on bail and there is no discretion left with the Magistrate except to release the accused on bail.[2]

The Supreme Court, in *Hussainara Khatoon's* case,[3] has categorically stated that "when an undertrial prisoner is produced before the Magistrate and he has been in detention for 90 or 60 days, as the case may be, the Magistrate must, before making an order for further remand to Judicial custody, point out to the under-trial prisoner that he is entitled to be released on bail."

Since the proviso (a) is mandatory, detention of accused beyond 60 days is illegal and unlawful.[4]

The nature of right to bail may, thus be summed up, in the words of the Supreme Court[5] expressed in a recent decision, as under:-

"An order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail

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1. Powell's case 1986 (3) Crimes 577 (D.B.) Delhi High Court., B.P. Patel v. State of Gujarat 1982 Cr.L.J. 284(F.B.) Gujarat High Court.
2. Sudhakar's case (supra).
3. A.I.R. 1979 S.C. 1377.
4. Bhanwaru Khan's case (Supra), Nethala Vinod Prabhu v. State of A.P. 1979 Cr.L.J. (NOC)90 Andhra Pradesh High Court., and Suresh Singh v. State 1978 Cr.L.J. (NOC) 58 Patna High Court.
5. Rajnikant Jivanlal Patel's case 1989 (3) S.C.C. 532.

"on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds."

Application if necessary

Conflicting views have been expressed by various High Courts on the question - whether the accused should apply for bail on expiry of 90/60 days or the court should suo motu pass the bail order?

In 1975, the single Judge Bench of Allahabad High Court had said that the detention of accused will continue to be legal till he actually applies for bail. In otherwords, to get bail, the accused must move an application.[1] Relying on this ratio, the Karnataka High Court has held that the Accused has to exercise that right by expressing to the Magistrate that he is prepared to be enlarged on bail and to furnish bail and then only the Magistrate has to enlarge him on bail.[2]

But the Division benches of Allahabad High Court[3] have repeatedly held that it is not necessary for the accused to apply for bail and it is the duty of

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1. Heeraman v. State of U.P. - 1975 Cr.L.J. 1508.
2. Gyanu v. State of Karnataka 1977 Cr.L.J. 632.
3. Maharaj Narain Singh v. State of U.P. 1975 L.L.J. 203, Vijay Bahadur Singh v. State of U.P. 1981 A.L.J. 198, Sudhakar v. State 1984 A.Cr.R. 558.

the Magistrate to extend the benefit of the proviso to sub-section (2) of Section 167 Cr.P.C. to him.

A full bench of Punjab & Haryana High Court[1] and division benches of, Madhya Pradesh High Court[2], Delhi High Court,[3] and single Judge benches of Orissa High Court[4] as well as J & K High Court[5] have also taken the same view; which is fortified by the two recent decisions of the Supreme Court in the cases of *Raghubir Singh*[6] and *Rajni Kant Jivanlal Patel*[7]

On a survey of all these precedents the latest legal position may thus be summarized as under:-

"To get bail under proviso (a) to Section 167 (2) it is not necessary for accused to move bail application. The Magistrate should suo motu pass the bail-order without waiting for bail application. It is a statutory duty of the Magistrate. However, he should also pass order simultaneously in accordance with the Explanation-I to Section 167(2)."

Effect of filing charge-sheet

The law is now settled that "an order for release on bail made under the proviso to Section 167(2) is not defeated by the lapse of time, the filing of the charge-sheet or remand to custody under Section 309(2)[8]. But what will happen where, even after expiry of 90/60 days the bail order could not be passed either suo motu or on bail application moved

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1. Baldev Singh v. State of Punjab - 1975 Cr.L.J. 1662.
2. Umashanker v. State of M.P. 1982 Cr.L.J. 1186.
3. Noor Mohd. v. State - ILR 1978(II) Delhi 442 and Powell's case 1986(3) Crimes 577.
4. Mangal Heerum v. State of Orissa 1982 Cr.L.J. 687.
5. Vijay Kumar v. State 1983 Cr.L.J. (NOC) 11.
6. A.I.R. 1987 S.C. 149.
7. 1989 (3) S.C.C. 532.
8. Raghubir Singh's case AIR 1987 S.C. 149.

by accused if any, and meanwhile the charge-sheet is submitted in the Court?

In *Heeraman's* case,[1] the Allahabad High Court took the view that it would not be open to the accused to claim that he is entitled to bail as of right by invoking section 167(2) (a) of the code because as soon as the charge-sheet was submitted, the period of remand pending investigation came to an end and provisions of section 167(2)(a) would cease to apply to such a case and in such case bail can be granted only on merits under the provisions of chapter XXXIII of the code. But relying on a decision of the Supreme Court,[2] the Rajasthan High Court[3] has disagreed with the *Heeraman's* Case (supra).

Furthermore, a Division Bench of Delhi High Court[4] has said that the Allahabad decision in *Heeraman* v. *State of U.P.* (supra) is wrong. After 60 days an order for release must be passed. Neither under Section 209 nor under Section 309(2), the Court can refuse bail once it is shown that 60 days have expired and the challan has not been filed. Section 309(2) is subservient to the overriding provisions of Section 167(2) of the Code. Section 309(2) cannot be used as an additional safety net. If the challan is filed on 61st day the Court cannot refuse to admit the accused on bail. Suppose on the 61st day the accused makes the prayer to be released on bail, and on the other hand the prosecution brings the challan and submits it. Can the Court refuse bail on the ground that challan has after all come? The answer is "not."

However, in *Umed Sinh's* Case,[5] a Division Bench of Gujarat High Court has held that if pending bail application a charge-sheet is filed in the court,

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1. 1975 Cr.L.J. 1508.
2. Natabar Parida's case AIR 1975 S.C. 1465.
3. Prem Raj singh v. State of Rajasthan 1976 Cr.L.J. 455.
4. Noor Mohd. v. State, I.L.R. 1978(II) Delhi (D.B.) 442.
5. A.I.R. 1977 Gujarat 11.

the investigation comes to an end so also the power of the Magistrate of granting bail to the accused under the provisions of Section 167(2). The Magistrate can then exercise power of granting bail only under Section 437. The same view has been expressed by Madras High Court,[1] Andhra Pradesh High Court[2], and Rajasthan High Court[3]. In *Vijay Bahadur Singh's* Case,[4] the Allahabad High Court agreed with these decisions and further stated that 'After the submission of charge-sheet the power of the Magistrate, Court of Session and the High Court for enlarging the accused on bail can be exercised only under Section 437 Cr.P.C., and not under the proviso of Section 167(2), Cr.P.C. Prior to the submission of charge-sheet, however, it is open to the Session Judge or High Court to take into consideration the circumstances of non-submission of charge-sheet within the prescribed period while considering the accused's prayer for bail.

But the decision given in *Umed Sinh's* Case (supra) has since been over-ruled by a Full Bench of Gujarat High Court.[5] Relying on two decisions of the Supreme Court,[6] it has been held that the right of accused to be released on bail after 90 days, must be considered to be an absolute right, subject to cancellation of bail under Chapter XXXIII of the Code. The High Court has further observed that the power of the Magistrate to remand the accused to jail custody comes to an end with the expiry of 90 or 60 days. That basic restriction on the power of the Magistrate to authorise detention of the accused concerned in jail custody must operate once the period

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1. Pandi v. State 1979 Cr.L.J. 1503.
2. Nethala Vinod Prabhu v. State 1979 Cr.L.J. (NOC) 90.
3. Kana v. State 1980 Cr.L.J. 344.
4. 1981 A.L.J. 198.
5. B.P. Patel v. State of Gujarat 1982 Cr.L.J. 284.
6. Natabar Parida's case - AIR 1975 S.C. 1465 and Bashir's case AIR 1978 S.C. 55.

of 90 or 60 days expires. Under Section 309(2), after first taking cognizance of the offence, the Court may by a warrant remand the accused if in custody, but that power of remand has to be read in the light of the right or entitlement of the accused to be released on bail once the period of 90/60 days mentioned in Section 167(2)(a) comes to an end. This is the only way in which the provisions of Ss. 167, 209 and 309 can be reconciled.

In the aforesaid case, accused was first remanded on 22.10.80. On 20.1.81, the period of 90 days expired and bail application was moved before the Magistrate who instead of releasing accused on bail, adjourned the hearing to 23.1.81. In the meantime the Investigating authorities filed charge-sheet on 21.1.81. Considering right of accused, to be released on bail after 90 days, an absolute right, the bail plea was allowed by the High Court.

Again, in the case of *Sairabhai* v. *State of Gujarat*,[1] a Division Bench of Gujarat High Court has said that if accused makes an application for bail on expiry of 90/60 days and no charge-sheet is filed till then, it would be highly improper to keep his application pending so as to enable the police to file the charge-sheet and thus defeat the right of accused to be released on bail. The same view has been taken by the Madhya Pradesh High Court in the case of *Umashankar* v. *State of M.P.*[2] In this case, accused was detained in jail for the offence of murder and ninety day's period expired but no charge-sheet was filed. He moved bail application but the Magistrate did not dispose it immediately. However, on the same day, charge-sheet was filed in the Court in afternoon and the Magistrate took cognizance and remanded the accused to jail custody under Section 309, Cr.P.C. and thereafter rejected the bail application.

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1. 1987(1) Crimes 719.
2. 1982 Cr.L.J. 1186 (DB).

Relying on the decision of Supreme Court,[1] the Madhya Pradesh High Court has held that it was illegal and further said that the Accused cannot be deprived of their right to be released on bail under proviso (a) to Section 167(2), by the Magistrate's inaction which enabled filing of challan before disposal of bail application and the Magistrate ought to allow such an application irrespective of the challan being filed during its pendency.

The Jammu & Kashmir High Court[2] is also of the view that if no charge-sheet is filed within 90/60 days, the right accrues to accused continue till the conclusion of trial. This right cannot be defeated on filing of charge-sheet.

The Allahabad High Court has also taken the same view in *Sudhakar's* Case[3] and said that the Magistrate, however, cannot postpone the release of an accused under proviso (a) to Section 167(2) Cr.P.C. after the expiry of 90/60 days, just to enable the police to file a charge-sheet and to alter the detention to one under Section 309 Cr.P.C.

In the Case of *Ghurey Singh* v. *State of U.P.*[4] the Allahabad High Court has said that if accused had moved bail application under Section 439 Cr.P.C. in the Court of Session or High Court before expiry of 90 days, but this application comes up for hearing after expiry of 90 days, and before filing of charge-sheet, then the Court of Session or High Court may take provisions of Section 167(2)(a) into consideration and admit the accused to bail without looking into any other aspect of the case. But where the accused

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1. Hussainara Khatoon's Case AIR 1979 SC 1377.
2. Vijay Kumar v. State 1983 Cr.L.J. (NOC) 11.
3. 1984 A.Cr.R. 558.
4. 1985 A.C.C. 102.

did not avail the benefit of proviso to Section 167(2) at the relevant stage, his bail application under Section 439 Cr.P.C. when it comes up for hearing after such stage has ceased to exist, has to be dealt with in accordance with the normal principle governing consideration of such application.

In the case of *Lakhey* v. *State*,[1] the Allahabad High Court has reiterated the same view. In this case the accused was taken into custody on 20.5.87 and detained in jail custody since then. Ninetieth day expired on 17.8.87. Accused moved bail application on 18.8.87 at about 12 noon, but the Magistrate did not pass any order on it. It was taken up again at about 4 p.m. but mean-while charge-sheet was filed in the Court. The Magistrate rejected the bail application. But the Allahabad High Court has held that the charge-sheet was filed after the expiry of 90 day's period. Since the accused wanted to be released on bail, the rejection of bail application was not proper. The accused was entitled to bail.

In a recent decision the Supreme Court has also ruled that the right to bail under Section 167(2), proviso (a), is absolute.[2] The facts of this case will help in appreciating the correct legal position.

The accused-persons were arrested on 23.3.83 and were remanded to custody by the Magistrate. The remand order was subsequently renewed from time to time. On 10.5.88 they moved application for bail. While the petition was still pending for consideration, the prosecution submitted charge-sheet on 23.6.88. The accused filed an application for bail under Section 167(2) Cr.P.C. on the ground that the charge-sheet was filed after the expiry of 90 days of their

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1. 1987 S.Cr.R. 304.
2. Rajnikant Jivanlal Patel's case 1989(3) S.C.C. 532.

arrest. This was allowed and on 29.7.88 the Magistrate enlarged them on bail. Later on the prosecution, applied for cancellation of bail, but the Magistrate refused to cancel the bail. Then the prosecution moved Delhi High Court, which cancelled the bail on a consideration of materials on record and seriousness of crime etc. Then matter came up before the Supreme Court. Though the cancellation of bail was upheld, the following observations of the Supreme Court regarding right to bail, are very relevant for the present discussion. "The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. In fact the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds".

On a survey of all the available precedents mentioned-above, the latest legal position may thus be summed up as below:-

The right to bail accrued under proviso (a) to Section 167(2), is a substantive and absolute right and the Magistrate must pass bail order on expiry of 90/60 day's period of remand. The subsequent filing of charge-sheet will have no adverse effect on the bail order. Even, if bail order could not be passed for some reason or the other and meanwhile charge-sheet is filed, still the accrued right subsists and accused should be granted bail.

Cancellation of Bail

A person released on bail under the proviso to Section 167(2) for 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. That is provided by the proviso to Section 167(2) itself.[1]

Orders for release on bail are effective until an order is made under Section 437(5) or Section 439(2). The two provisions deal with what is known in ordinary parlance as cancellation of bail. These two provisions enable the Magistrate who has released an accused on bail or the court of session or the High Court to direct the arrest of the person released on bail and to commit him to custody.[1] Thus the bail granted under Section 167(2)(a) is also subject to the provisions of Ss. 437(5) and 439(2) and may be cancelled like any other bail on relevant grounds. But, can it be cancelled merely on filing of charge-sheet in Court?

The Allahabad High Court has said that the proviso (a) to sub-section (2) of Section 167, Cr.P.C. does not contemplate cancellation of bail on the furnishing of charge-sheet. The receipt of charge-sheet in Court can by itself be no ground for cancellation of bail. A conditional bail order, that it shall be deemed to be vacated and cancelled as soon as charge-sheet is received in the Court, is bad in law.[2]

The Madhya Pradesh High Court is also of the same view, and has added that if accused has been bailed out under Section 167, the cancellation of bail on filing of charge-sheet is illegal.[3]

The Supreme Court[4] has ruled that when the accused has been granted bail under Section 167 Cr.P.C., the subsequent filing of charge-sheet will not be the valid ground for cancellation of bail

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1. Raghubir Singh v. State of Bihar AIR 1987 SC 149.
2. Ram Pal Singh v. State of U.P. 1976 Cr.L.J. 288.
3. Sri Jagdish v. State of M.P. 1989 CrLJ 531 (M.P. High Court).
4. Bashir v. State of Haryana AIR 1978 SC 55.

under Section 437(5) of Cr.P.C. In *Raghubir Singh's* Case[1] the Supreme Court has settled the law in following words:-

"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)".

To sum up the settled law, the Bail granted under the proviso to Section 167(2) cannot be cancelled merely on filing of charge-sheet in the Court.

Then what would be the valid grounds for cancellation of Bail?

The Supreme Court[2] has answered in following words:-

'Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. The course of justice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may abuse the liberty granted to him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in sixty days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have

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1. AIR 1987 SC 149 = 1987 Cr.L.J. 157.
2. Raghubir Singh's Case (Ibid).

'the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed.'

Thus, the bail could be cancelled under Section 437(5) if the Court came to the conclusion that there were sufficient grounds, after the filing of the challan, to believe that the accused had committed a non-bailable offence and that it was necessary to arrest him and commit him to custody.[1] The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled.[2]

Incomplete charge-sheet

Often, the reports of Chemical Examiner and Ballistic Expert are not received within stipulated time and the Investigating Officer submits 'Incomplete charge-sheet, in order to prevent release of accused persons under proviso (a) to Section 167(2). The question arises whether filing of such incomplete Charge-sheet-within 90/60 days will prevent the accrual of right of bail to accused under Section 167?

The High Courts of Andhra Pradesh,[3] Assam,[4] Delhi[5] and Patna[6] were of the view that it would not prevent the accrual of right to bail. There is no provision

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1. Bashir's Case (Ibid).
2. Rajnikant Jivanlal Patel and another v. Intelligence Officer Narcotics Control Bureau, New Delhi. 1989 (3) S.C.C. 532.
3. T.V. Sarma v. Smt. Turga Kamala Devi, 1976 Cr.L.J. 1247.
4. Ved Prakash Seth v. State of Assam 1975 Cr.L.J. 646.
5. Harichand v. State 1977 Cr.L.J. (NOC) 262.
6. Suresh Singh v. State of Bihar 1978 Cr.L.J. (NOC) 58.

for interim charge-sheet in Cr.P.C. when incomplete challan is filed it means the investigation is not complete and thus the accused is entitled to bail. These views were expressed between the years 1975 to 1978.

But the Full Bench of Punjab & Haryana High Court[1] have expressed the view that even if an incomplete police report i.e. without Expert reports etc., is submitted within 90 days, the accused cannot claim benefit of proviso (a) to Section 167(2). The Police reports should contain such facts and evidence as may enable the Magistrate to take cognizance of the offence.

The same view has been taken by the High Courts of Bombay,[2] Himachal Pradesh[3] and Delhi,[4] during the years 1977 to 1988.

A plain reading of Section 173 Cr.P.C. shows that every investigation must be completed without unnecessary delay and as soon as it is completed the officer incharge of the police station shall forward a report to the Magistrate in the form prescribed. Therefore, there is no question of sending up of a police report within the meaning of Section 173(2) Cr.P.C. until the investigation is completed. Any report sent before the investigation is completed will not be a police report within the meaning of Section 173(2) and there is no question of the Magistrate taking cognizance of the offence and consequently the provision of Section 309 Cr.P.C. cannot be invoked.[5]

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1. State of Haryana v. Mehal Singh, AIR 1978 P & H 341.
2. State of Maharashtra v. Tukaram Shiva Patil, 1977 Cr.L.J. 394 (D.B.).
3. State of H.P. v. Guddu 1983 Cr.L.J. 402.
4. Taj Singh v. Delhi Administration 1988 Cr.L.J. 1634 (D.B.) and Umashanker v. State 1989 Cr.L.J. (NOC) 192.
5. T.V. Sarma v. Smt. Turga Kamala Devi 1976 Cr.L.J. 1247 A.P. High Court.

Section 2 clause (r) of Cr.P.C. says that a police report means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 Cr.P.C.

Section 173(2) says that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating -

(a) the names of the parties;
(b) the nature of the information;
(c) the names of the persons who appear to be acquainted with the circumstances of the case;
(d) whether any offence appears to have been committed and, if so, by whom;
(e) whether the accused has been arrested;
(f) whether he has been released on his bond and, if so, whether with or without sureties;
(g) whether he has been forwarded in custody under Section 170.

The moment the police report as defined in the code and as contemplated under Section 173(2) has been filed, it is for the Magistrate to apply his mind judiciously. If the Magistrate takes cognizance of the offence, the power of remand will be governed by Section 309(2) and Section 167 will have no application.

On a study of aforesaid provisions of the code, the aforesaid view expressed by the Full Bench of Punjab & Haryana High Court[1] seems to lay the correct law on the point.

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1. AIR 1978 Punjab & Haryana 341.

The illustrative case of *C. Varlakrishna* v. *State of A.P.*,[1] also supports this conclusion. In this case the accused persons were detained in the custody during investigation. The police report was filed on 18.7.1988, but it did not contain the original statements of the witnesses under Section 161 Cr.P.C. and the original documents relied on by the prosecution. The Magistrate had returned the police report for the purpose of complying with the omissions that have been required under Section 173(5). The charge-sheet was again filed on 1.8.1988, but again returned for compliance of omissions and the same was filed on 17.8.88 and the court took cognizance of the same. Meanwhile 90 days period expired and accused claimed bail under Section 167(2)(a). The Magistrate held that cognizance of the offence set-out in the charge-sheet has already been taken on 18.7.1988 and it was returned to comply with some omissions found by the court by applying its judicial mind and thus the bail petition is not maintainable. The matter came up before the High Court, which said that mere return of the report on the ground of complying with certain omissions as contemplated under Section 173(5) did not mean that the police report as filed, detailing all the particulars as prescribed in the form under Section 173(2) was not a proper police report. There is a clear distinction in the words used in Sections 173(2) and 173(5) of the Code. It is for the Magistrate to apply his mind judiciously. The fact that the Magistrate has taken cognizance does not necessarily mean that there will be proceedings against any one. If police report is filed and the same is returned for complying with certain omissions under Sections 173(5), it shall be deemed that the Magistrate has applied his mind judiciously. If an accused wants to claim benefit on the ground that the 90 day's period has expired during remand, he has to establish that the 'report' as defined in the code and as contemplated under Section 173(2) of

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1. 1989 (1) Crimes 548 A.P. High Court.

the Code has not been filed within time.

Thus, the filing of incomplete charge-sheet within 90/60 days will prevent accrual of right to bail provided that it contains such facts and evidence as may enable the Magistrate to take cognizance of the offence under Section 190 Cr.P.C.

Formal order of cognizance

Whether an accused will be entitled to bail, if police report has been submitted before the court within 90/60 days but the formal order of taking cognizance is not passed within 90/60 days by the court?

The authoritative answer lies in the case of *Sri Sambhu Nath Singh* v. *State of Bihar*,[1] wherein a Division Bench of Patna High Court has held that the accused will not be entitled to be released on bail under Section 167 of Cr.P.C., in such a case.

In the instant case, the Police report was submitted on 29.11.1985 i.e. well within 90 days period and the Chief Judicial Magistrate had signed it the same day. After the submission of charge-sheet the case was taken over by the Central Bureau of Investigation and further investigation was proceeding. However, the formal order saying that cognizance of offence was being taken, was passed on 19.2.1986. The accused submitted that as the order taking cognizance of the offences was not passed within 90 days, the Magistrate had no power to remand him and he should be released on bail. But the High Court took the view that the expression taking cognizance means only application of judicial mind to the offence alleged. As such once the Magistrate takes note of the Police report submitted against the accused concerned it shall be deemed that cognizance

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1. 1987 Cr.L.J. 510.

has been taken and an enquiry commenced within the meaning of Section 2(g) of the Code. In this background it is difficult to hold that an enquiry within the meaning of Section 2(g) did not commence with effect from 29.11.1985 itself. Once it is held that an enquiry had commenced from 29.11.1985 itself then it cannot be disputed that the Magistrate had power to remand the accused in accordance with Section 309(2); and the accused cannot claim to be released under Section 167(2) of the Code.

[1]SUMMARY

The aforesaid propositions may be summarized as under:-

(1) Detention beyond 60/90 days is unauthorised and unlawful under Section 167(2).

(2) On the expiry of 60/90 days the accused is entitled to bail as of right.

(3) No application for bail is necessary.

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

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

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

(7) There is no distinction between the bail under Section 167(2) and a bail on merits under chapter XXXIII.

(8) Section 209 and 309(2) do not override the mandatory provisions of Section 167(2).

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1. Noor Mohd. v. State I.L.R. 1978 (II) Delhi 442.

Section 209(b) is expressly subject to the provisions of bail. Similarly Section 309(2) is subservient to Section 167(2).

(9) Bail granted under Section 167(2) is subject to cancellation under Section 437(5): and

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

CHAPTER TWELVE

REMAND OF JUVENILES

Juvenile means a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years. This meaning has been given by Section 2(h) of the Juvenile Justice Act 1986. Where a juvenile court has been constituted for any area, it will have exclusive jurisdiction regarding all the proceedings relating to delinquent juveniles or neglected juveniles. Where no juvenile court has been constituted for any area, the powers conferred on the juvenile court can be exercised by the followings, namely:-

(i) the district magistrate, or

(ii) the sub-divisional magistrate, or

(iii) judicial magistrate first class or metropolitan magistrates (vide Section 7).

Section 8 provides that when any magistrate is not empowered to exercise the powers of a board or a juvenile court under this Act is of the opinion that a person brought before him under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile, he shall record such opinion and forward the juvenile and the record of the proceedings to the competent authority having jurisdiction over the proceedings who shall hold the inquiry as if the juvenile had originally been brought before it.

Therefore the power of remand of a delinquent juvenile lies with the juvenile court or board. Where no juvenile court or board has been constituted, then any judicial magistrate of first class can exercise powers of remand and the juvenile delinquent may be remanded either to special homes or to observation

homes. They can not be remanded to police custody or jail custody.

Section 18 provides for bail and custody of juvenile. It says that when any person accused of a bailable or non-bailable offence and apparently a juvenile is arrested or detained or appears or is brought before a juvenile court, such person shall be released on bail with or without surety. But he shall not be so released if there appears reasonable ground for believing that the release is likely to bring him into association with any known criminal or expose him to moral danger or that his release could defeat the ends of justice. When such person is not released on bail he shall be detained in an observation home or a place of safety, but he shall not be committed to prison.

When a police officer arrests a juvenile and does not release him on bail then the officer incharge of the police station or such police officer shall cause him to be kept in an observation home or a place of safety in the prescribed manner until he can be brought before a juvenile court. But the juvenile shall not be kept in a police station or jail [Section 18(2)].

Thus, where an accused is produced for remand before a judicial magistrate and it appears to him that he is a boy of less than 16 years of age or a girl of less than 18 years of age, then such magistrate shall forward the accused and all the papers of the case to the juvenile court. However, if no juvenile court has been constituted, such magistrate shall have power to remand the accused to special homes or observation homes. But he can not remand him to police custody or jail custody in any case.

CHAPTER THIRTEEN

REMAND BY SPECIAL JUDGES

In recent past, several courts of special Judges have been constituted to try the cases of White Collar Criminals, terrorists, gangestors and dacoits. The question arises who will grant remand of such accused persons arrested during the course of investigation? Whether a Magistrate can grant remand in such cases or only Special Judges are authorised to grant remand. It would be convenient to discuss the situation regarding each of the Acts separately.

Prevention of Corruption Act 1988

This Act bars trial of cases by any other Court except the special Courts established under the Act. Under the provisions of the Act, a speciial Judge is authorised to take cognizance without the accused being committed to him for trial. Thus the charge-sheets are filed in the Court of special judge.

This Act does not have any provision for production and remand of accused arrested during the course of investigation. Section 5 of the Act says that the provisions of Cr.P.C. 1973 shall, so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a special Judge. Since the Act does not contain any provision regarding remand of accused persons, the provisions of Code contained in Sections 167 and 309 shall apply. Section 167 applies to pre-cognizance stage i.e. during investigations, but it gives power of remand to Magistrates only.

Can a special Judge exercise the powers, of remand conferred on a Magistrate under Section 167, to authorise detention of accused in custody during investigation?

This question has been answered by the Supreme Court in the case of *State of Tamilnadu* v. *Krishna Swami Naidu*.[1] The Supreme Court has said, "If a Special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail, it will lead to an anomalous situation. A Magistrate other than a Magistrate having jurisdiction cannot keep him in custody for more than 15 days and after the expiring of the period if the Magistrate having jurisdiction to try the case does not include special judge it would mean that he would have no authority to extend the period of remand or to release him on bail. So also if the Special Judge is not held to be "a Magistrate having jurisdiction", a charge-sheet under Section 173 cannot be submitted to him. It is relevant to note that in the General Clauses Act, Section 32 defines a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. Section 3 of the Criminal Procedure Code provides that any reference without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires, in the manner stated in the sub-sections. If the context otherwise requires the word "Magistrate" may include Magistrates who are not specified in the Section. Read alongwith the definition of the Magistrate in the General Clauses Act there can be no difficulty in construing the Special Judge as a Magistrate for the purposes of Section 167".

The Supreme Court concluded the answer in following words:-

"We have no hesitation in coming to a conclusion that a special Judge would be a Magistrate empowered to try a case under Section 167 of Cr.P.C. The Special Judge will proceed to exercise the powers that are

1. AIR 1979 SC 1255.

"conferred upon a Magistrate having jurisdiction to try the case."

Thus, a special Judge can exercise the powers of remand conferred on a Magistrate under Section 167, to authorise detention of accused in custody during investigation. But does it excludes the powers of a Magistrate to grant remand during first fifteen days, given in the opening paragraph of sub-section (2) to Section 167.

True, the Magistrate has no jurisdiction to try a case of corruption, only special Judge has the jurisdiction. But so far as power of remand is concerned Section 167(2) says that the Magistrate to whom an accused person is forwarded under this Section may, whether he has or has not jurisdiction to try the case, authorise the detention of accused in such custody as he thinks fit, for a term not exceeding 15 days in the whole. There is no provision in the Prevention of Corruption Act to take away this power of remand. This Act nowhere says that the Magistrate will have no power to remand an accused of corruption case.

Thus, the power of remand conferred on Magistrates by first paragraph of sub-section (2) of Section 167, remain intact for the corruption cases also. The aforesaid observations of the Supreme Court also lend support to this conclusion.

To sum up, when an accused is produced before a Special Judge, he can grant first remand as well as further remands, upto a maximum period of 90 days or 60 days depending on the quantum of sentence prescribed for the offence. However a Judicial Magistrate of I class can grant initial remand upto a maximum period of 15 days.

The Essential Commodities Act,[1] 1955 and The Narcotic Drugs & Psychotropic Substances Act[2], 1984

Both these Acts provide that the offences under these Acts shall be triable only by the Special Courts constituted for the area in which offence has been committed. The power of Judicial Magistrate to grant first remand upto a maximum period of "15 days" in the whole, has been retained. If the Magistrate before whom any accused is forwarded, considers that the detention of accused is unnecessary, he shall order such accused to be forwarded to the Special Court having jurisdiction. In case the Magistrate had granted first remand for 15 days, and upon or at any time before the expiry of period of detention authorised by him, he considers the detention unnecessary, then also he shall order such accused to be forwarded to the Special Court having jurisdiction.

The Special Court, to whom the accused has been forwarded, shall have the same powers, which a Magistrate having jurisdiction to try the case may exercise under Section 167 of Cr.P.C.

Thus, a Judicial Magistrate of first class and Special Judge have concurrent power to grant initial remand for fifteen days. However, after first fifteen day's period the accused can be remanded by the Special Judge alone and Magistrate will have no power to grant remand, not being the court of competent jurisdiction.

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1. As amended by the Essential Commodities (special provisions) Act, 1981.
2. As amended by the N.D.P.S. (Amendment) Act, 1988.

Terrorists Affected Areas (Special Courts) Act, 1984, The Terrorists and Disruptive Activities (Prevention) Act, 1987, and The U.P. Gangestors and Anti-Social Activities (Prevention) Act, 1986.

The Terrorists and Disruptive Activities (Prevention) Act, 1987 creates "Designated courts" while other two Acts create "Special Courts" for trial of offences mentioned therein. All the three "Acts" contain similar provisions regarding taking of cognizance of offences. The Special Courts as well as Designated Courts are empowered to take cognizance of any offence without the accused being committed to them for trial. Therefore the ratio of *Krishna Swami Naidu's* case (supra) shall apply with full force to the Courts of Special Judges constituted under these three Acts. All these three Acts bar trial of cases by any other court except the Special Courts but do not bar grant of first remand by the Magistrates.

However, the maximum period of remand prescribed by Section 167(2), has been modified by all these three Acts. The Terrorists and Disruptive Activities (Prevention) Act, 1987 as well as the U.P. Gangestors and Anti-Social Activities (Prevention) Act, 1987 have modified Section 167(2) to the effect that wherever words "15 days", "90 days", "60 days", occur, shall be construed as references of "60 days" "one year" and "one year" respectively. Therefore a Judicial Magistrate of first Class can remand, any accused of an offence mentioned in these Acts, upto a maximum period of "60 days" instead of "15 days". And the Special Court is empowered to grant remand upto a maximum period of "one year" in the whole.

The Terrorists Affected Areas (Special Courts) Act, 1984 modifies Section 167(2) of Cr.P.C. to the effect that wherever the words "15 days", "90 days" and "60 days" occur, shall be construed as references

to "30 days", "one year" and "one year" respectively. Thus, when an accused of offence under this Act is produced before the Judicial Magistrate of first Class he can grant remand upto a maximum period of "30 days". While the Special Court created under this Act is empowered to grant remand upto a maximum period of "one year" in the whole.

However, in the case of *Gursewak Singh* v. *State of Punjab*,[1] the Punjab & Haryana H.C. has held that though during investigation, detention can be authorised upto a maximum period of one year under Section 20 of Terrorists & Disruptive Activities (Prevention) Act, 1987, but that does not mean to keep the undertrial in detention without further ado or Investigation. In such a case court must release the accused on bail. It is open to court, while considering bail application to see how investigation is proceeding.

THE U.P. DACOITY AFFECTED AREA ACT, 1987

In the Schedule appended to the Act, several sections and offences of the Indian Penal Code, which can be tried by the Special Courts only, have been enumerated. These Special Courts have been constituted under this Act.

This Act modifies Section 167(2)(a) so that the accused may be remanded to custody upto a maximum period of 180 days in the whole. It also modifies Section 167(2)(b), so that the production of accused for remand before Magistrate, after the initial order of remand, may be waived in the interest of public order.

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1. 1988 Cr.L.J. 1605.

Section 7 empowers a Special Court to take cognizance of any scheduled-offence. Therefore, the ratio of *Krishna Swami Naidu's* case (supra) shall apply to special Judges appointed under Section 5 of this Act. This Act bars trial of cases by any other court except the Special Courts but does not bar grant of first remand by the Magistrate.

Thus if an accused is produced before a Special Judge he can grant first remand as well as further remands upto a maximum period of 180 days. However, a Judicial Magistrate of First Class can grant initial remand upto a period of 15 days.

CHAPTER FOURTEEN

REMAND IN CUSTOMS CASES

Section 104 of the Customs Act, 1962 gives power of arrest in following words:-

1. If an officer of customs empowered in this behalf by general or special order of the Collector of Customs has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under Section 135, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

2. Every person arrested under sub-section (I) shall without unnecessary delay, be taken to a Magistrate.

3. Where an officer of customs has arrested any person under sub-section (I), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898.

4. Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this Act shall not be cognizable.

The Act does not say as to what the Magistrate has to do after the arrested person has been produced before him. In other words the Act does not give power of remand. The question is whether any provision of Code of Criminal Procedure or the Customs Act has the effect of rendering the provisions of Section 167 of the Code applicable to the case of person arrested under the Customs Act by Customs Officer?

The conflicting views have been expressed by the Delhi High Court and Kerala High Court while answering this question.

In the case of *Dalam Chand Baid v. Union of India*,[1] a person accused of an offence punishable under the Foreign Exchange Regulation Act 1973 was arrested by the Enforcement Officer and was produced before the Magistrate who remanded accused to Judicial Custody. It was challanged and the question arose as to whether the arrested person could be remanded to Judicial Custody?

The High Court gave answer in negative; and held that the remand to judicial custody was not valid and the accused was being detained without the authority of Law. Followings are the relevant observations of the High Court:-

"The provisions of Section 104 of the Customs Act, 1962 and of Section 35 of the Foreign Exchange Regulation Act, 1973, are practically the same. In one case the power to arrest is exercisable by a specially authorised Officer of Customs and in the other by a specially authorised officer of Enforcement. In each case the officer-concerned may arrest the person believed to be guilty of an offence punishable as prescribed by the Act and inform him of the grounds for such arrest. Under sub-section (2) such an arrested peron has to be taken to a Magistrate without unnecessary delay. Sub-section (3) gives to the officer of Enforcement or officer of Customs, as the case may be, the same power for releasing the arrested person on bail or otherwise, and subject to the same provisions as are available to an Officer-incharge of a police station. However, neither Act indicates what the Magistrate has to do after the arrested person has been produced before him."

High Court has pointed out that there is no provision in these Acts for allowing the remand; and a serious lacuna now exists in cases arising under the Customs Act or the Foreign Exchange Regulation Act.

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1. 1982 Cr.L.J. 747 Delhi High Court (D.B.).

Relying on the decision of Supreme Court in the case of *Illias* v. *Collector of Customs Madras*[1] the Delhi High Court has said that the statutory power which automatically transforms the Enforcement Officer into an incharge of a police station is of restricted application and the transformation is only transitory and only for the purpose of grant of bail or refusal of the same. This being so the provisions of Section 167(2) of the Code of Criminal Procedure do not apply to an arrest of this type.

Ultimately, the Delhi High Court has held that the Magistrate cannot rely on Section 167 of Cr.P.C. to remand the accused to judicial custody or other custody.

But the Kerla High Court has expressed contrary view in the case of *M.K. Ayoob* v. *Superintendent, Customs Intelligence Unit Cochin*[2] The High Court has observed, "A customs Officer derives power to arrest a person suspected of having committed an offence under the Customs Act, by virtue of sub-section (1) of Section 104 of the Act. Besides the Constitutional provision, there is also sub-section (2) of Section 104 which requires the person arrested to be taken to a Magistrate without unnecessary delay, sub-section (3) lays down that the Customs Officer has power to grant bail or refuse bail in the same manner and subject to the same provisions of the Code as an officer in charge of a police station has, and is subject to, under the Code. There is no provision in the Act which lays down in what manner a Magistrate has to deal with a person produced before him under Section 104 (2). The Act also does not lay down in what manner an arrested person has to be dealt with, if he is not to be granted bail. In other words, the law and procedure dealing with order of detention

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1. 1970 Cr.L.J. 998.
2. 1984 Cr.L.J. 949.

in such custody as thought fit of a person arrested by a Customs Officer and produced before a Magistrate are not laid down by the Act. That is a field left untouched by the Act."

The High Court took the aid of Section 4 of Cr.P.C. and further observed, "Sub-section (2) of Section 4 of the Code states that all offences under any other law (i.e. law other than the Penal Code) shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions (i.e. the provisions of the Code), but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Section 4(2) renders the provisions of the Code applicable in areas not covered by the provisions of the Act. The Code mainly purports to deal with offences under the Indian Penal Code and investigation by police officers or officers in charge of police station. That is why Section 167(1) refers to Section 57 of the Code and officer in charge of police station. This cannot lead to the conclusion that provision of Section 167 of the Code cannot be applied to cases under the Customs Act. In relation to matters of investigation, inquiry, trial or other matters not covered by the provisions of the Act, the parallel provisions of the Code must necessarily be applied. That is the clear effect of the operation of Section 4(2) of the Code. This would mean that in the absence of any provision in the Act, touching any such matter as mentioned in Section 4(2) of the Code, the provisions of the Code would apply. Remand or detention of an arrested person, not being provided by the provisions of the Act, the provisions of the Code must govern the matter. It would follow that the provisions of sub-sections (2) and (3) of Section 167 of the Code must apply in the case of a person arrested under the Customs Act and produced before a Magistrate."

Finally, the High Court ruled, "In relation to a person arrested under the Act, the provisions of Section 167 of the Code must be read suitably, that is, reference to 'officer in charge of a Police Station' must be read as 'Customs Officer'. This view is strengthened by the provision in sub-section (3) of Section 104 of the Act also. The provisions in sub-sections (2) and (3) of Section 167 of the Code apply to persons arrested under Section 104(1) of the Act and produced before a Magistrate under Section 104 (2) of the Act. The benefit of the proviso to Section 167(2) of the Code is available to them."

A comparative perusal of above-mentioned decisions reveals that the provision contained in Section 4(2) of Cr.P.C. was not brought to the notice of Delhi High Court in the case of *Dalam Chand Vaid* v. *Union of India* (supra). There is no mention of Section 4(2) of Cr.P.C. in the judgement of Delhi High Court. While the decision of Kerala High Court is based on the provision of Section 4(2) of Cr.P.C. Sub-section (1) of Section 4 provides that cases under Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to foregoing provisions of the Code. Sub-section (2) provides that cases under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions of the Code subject to any special provision contained in that law. Since Customs Act, 1962 does not contain any special provision regarding remand of persons arrested by the Customs Officer, the relevant provisions contained in Cr.P.C. will apply by virtue of Section 4(2) of the Code.

Furthermore, Section 104(2) of Customs Act requires production of arrested person before the Magistrate but what will happen thereafter is not provided anywhere in the Customs Act. The purpose of producing an accused before a Magistrate is to ensure that the arrest and detention of the accused

person is prima facie justified. The law apparently did not rely on the judgment of the police for the purpose of accepting that the charge that was being levelled against a person was, even prima facie, sustainable. It is for the Magistrate to decide though prima facie on certain materials placed before him, whether or not the detention in prison of an accused was necessary. In coming to his conclusion the Magistrate has to exercise his mind - his judicial mind.[1] The production of accused before a Magistrate ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him.[2] The Magistrate is neither bound to make an order of remand nor is it bound to release the accused person. The discretion to make a suitable order is to be exercised judicially keeping in view all the facts and circumstances of the case including the nature of the charge, the gravity of the alleged offence, the area of investigation, the antecedents of the accused and all other relevant factors which may appropriately help the court in determining whether to keep the accused in custody or to release him on bail.[3]

If the Delhi High Court's view is taken to be correct law, the very purpose of the provision of Section 104(2) of Customs Act, 1962 will be frustrated and production of arrested person before the Magistrate will become nugatory. On the other hand the view taken by the Kerala High Court is consonant with purpose of production and spirit and object of Section 4 of the Code.

Thus, the view expressed by the Kerala High Court, seems to lay down the correct law.

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1. Bir Bhadra Pratap Singh v. D.M. Azamgarh A.I.R. 1959 Allahabad 384.
2. State of Punjab v. Ajaib Singh A.I.R. 1953 S.C. 10.
3. Lakshamanrao v. J.M., Parvatipuram A.I.R. 1971 S.C. 186.

PART - C

POST-COGNIZANCE REMAND

CHAPTER FIFTEEN

REMAND UNDER SECTION 209, CRIMINAL PROCEDURE CODE

The investigation would come to an end the moment police report viz. charge-sheet or final report is submitted as required under Section 170, Cr.P.C., unless the Magistrate directs further investigation. Thereupon, the Magistrate is required to apply his judicial mind to contents of the police report. This process is known as 'taking cognizance'. Generally, the cognizance of offence is taken either upon a complaint or police report. When the cognizance of offence has been taken, 'remand' will be governed either by Section 209 or Section 309 of the Code of Criminal Procedure. If the offence, of which cogziance has been taken, is exclusively triable by the court of session, the accused in custody will be remanded to custody under Section 209 of the Code. In all other cases, remand is to be granted under sub-section (2) of Section 309 of the Code.

Section 209 confers power of remand on the Magistrate only, while Section 309 confers power of remand on all the criminal Courts.

A bare reading of Section 209 makes it clear that where accused has been in custody during investigation and police report, disclosing an offence exclusively triable by the Court of Session, has been submitted the accused will be remanded in accordance with the provision of Section 209, Cr.P.C.

Section 209 says, 'When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall -

[1](a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

'(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) .....

(d) .....

In the case of *Laxmi Brahman* v. *State of U.P.*[2] a Division Bench of Allahabad High Court had held that the Magistrate had no power to remand accused during committal proceedings, as it is neither inquiry nor trial, and thus Section 309 did not apply. But this decision has been reversed by the Supreme Court[3] in appeal. The Supreme Court has held that the committal proceedings are 'inquiry' and accused could have been remanded under Section 309, Cr.P.C.

However, Section 209(a) was amended in 1978 and Magistrates have been authorised to remand the accused to custody during committal proceeding. The position, now is that when a Magistrate takes cognizance of an offence exclusively triable by Court of Session, and the accused is in custody, he shall remand the accused to custody until commitment of the case, and as soon as the case is committed, the accused shall be remanded to custody during, and until conclusion of, the trial.

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1. As amended by Cr.P.C. (Amendment) Act, 1978.
2. 1976 Cr.L.J. 118.
3. State of U.P. v. Lakshmi Brahman AIR 1983 SC 439.

A Division Bench of Allahabad High Court[1] has held that Section 209 provides that where an accused appears or is brought before a Magistrate and the Magistrate feels that the offence is exclusively triable by the Court of Session he has to, unless the accused has been directed to be released on bail, remand him to custody during and until conclusion of the trial. He has no option in the matter.

This Section vests the Magistrate with a power to authorise the detention of an accused in jail custody during and until the conclusion of the trial while committing him to stand his trial before the Session Court. In such a case even though further proceedings are to take place before the Court of Session and no proceedings are to take place before the Magistrate, the detention of the accused in jail custody can be authorised by the Magistrate who commits the accused to Court of Session. The Magistrate, however, should exercise his discretion in taking the accused into custody at the time of committing the case on sound judicial principle and should not act arbitrarily. The power of remand is subject to the provisions relating to bail.[2] If the accused is already on bail, his bail should not be arbitrarily cancelled. If the committing court thinks that it is not necessary to commit the accused who may be on bail, to custody, he may not cancel the bail.[3] There is a provision in Section 441(3) of Cr.P.C. under which bail can be granted to an accused so as to bind him to appear before the Court of Sessions, in which event, on committal, he would not be rearrested and brought before the Court of Session . ..... It would avoid hardship to an accused if the Magistrate while releasing the accused on bail,

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1. Raghvendra Singh v. State 1983 Lucknow Law Journal 209.
2. Sunder Lal v. State 1983 A.Cr.R. 102 (F.B.) Allahabad High Court.
3. Kewal Krishn v. Suraj Bhan AIR 1980 SC 1780.

requires execution of a bond with or without sureties as the case may be, binding the accused not only to appear as and when required before him but also to appear when called upon in the Court of Session.[1]

Presence of accused

A plain reading of Section 209 Cr.P.C. shows that an order for remanding an accused to jail custody during and until the conclusion of the trial, can be made only when the accused appears or is brought before the Magistrate. No order for remanding an accused to jail custody under Clause (b) of Section 209 Cr.P.C. can be made in his absence or behind his back.[2] Even at the stage of Section 209 no order of remand can be passed in the absence of accused[3].

Therefore, presence of accused is a condition precedent for exercising powers of remand under Section 209, Cr.P.C.

Custody-legal or illegal

The statute does not make it obligatory that the accused be brought before the Magistrate from lawful custody. When a criminal is brought or is infact within the jurisdiction of the Court, the Magistrate may, so far as the law is concerned, proceed against him, and need not enquire as to the particular methods employed to bring him..... The effect of illegal detention is that, the prisoner should be discharged forthwith from custody. They have then the moment of freedom which was their right,

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1. Free Legal Aid Committee Jamshedpur v. State of Bihar AIR 1982 SC 1463.
2. Kamlesh Kumar Dixit v. State 1982 LLJ 4 Allahabad High Court(DB).
3. Izhar Ahmed v. State 1978 Cr.L.J. 58 Allahabad High Court.

guaranteed by Article 21 of the Constitution.[1] However, if detention of accused under Section 167 was illegal, that will stand cured after proper orders for remand were passed under Section 209 Cr.P.C.[2].

Sessions Judges not empowered

Section 209 Cr.P.C. is a special provision which enables a Magistrate, while committing the accused to Court of Session, to authorise his detention during and until the conclusion of trial. A Sessions Judge is not at all competent to issue an order of remand under Section 209 Cr.P.C. for keeping the accused in custody during and until the conclusion of trial, and under Section 309 the Sessions Judge cannot remand the accused to jail custody during and until the conclusion of trial before him. Section 309 is a general provision contained in the Code enabling all courts taking cognizance of an offence or commencing the trial that if they find it necessary or advisable to postpone the commencement or adjourn any inquiry or trial, remand an accused who is already in custody. Therefore the Sessions Judge cannot exercise the power of a Magistrate under Section 209 Cr.P.C.[3]

Section 309 not to apply

It is well settled that the speecial provisions in a statute governing a specific situation excludes the applicability of any general provision contained therein, to that situation. Accordingly, nothing contained in Section 309 of Cr.P.C. which limits the jurisdiction of a Magistrate to remand an accused to custody for a period of 15 days only, will apply to a case where a Magistrate makes an order remanding

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1. Devendra Pandey v. State of U.P. 1979 LLJ 310 Allahabad High Court.
2. Izhar Ahmad's case (supra).
3. Raghvendra Singh's case (supra).

the accused to custody while committing his case to Court of Session. Section 209, Cr.P.C. in very clear words authorises the Magistrate to pass an order directing the jail authorities to keep an accused in custody during and until the conclusion of the Sessions trial ..... Merely because the Sessions Judge fixes various dates for production of the accused before him and thereafter sends back the accused to jail custody, it does not mean that the authorisation made by the committing Magistrate for keeping the accused in custody during and until the conclusion of Sessions trial has come to an end.[1]

Remand not illegal due to Omissions or weakness of Language

In the case of *Iqbal* v. *State of U.P.*,[2] it was found that though the Magistrate passed an order to keep the accused in jail custody the words "during and until conclusion of trial" were not mentioned. In warrant also it was not mentioned but the jailor was authorised on warrant to keep accused in custody and produce him before the Court of Session on the date mentioned on the warrant. The High Court held that such omission will not vitiate the order of remand, and the custody cannot be said to be illegal.

The defect or weakness of language does not render an order illegal provided the substance fulfils the requirements of law and is not open to more than one interpretation. The provisions contained in Section 209(b) are mandatory and shall be followed by a Magistrate while committing the case to the Court of Session. However, the trial Court (Court of Session) has not been precluded from exercising its powers under Section 309(2). So, an order remanding

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1. A. Jabbar v. Superintendent of District Jail 1984 A.Cr.R. 141 Allahabad High Court (D.B.).
2. 1987 ACC 356. (Allahabad High Court).

the accused to custody by means of a warrant under Section 309(2) would not render the previous order under Section 209(b) of the Code, illegal. Similarly, the order passed under Section 309(2) would not be rendered illegal simply because of a previous order under Section 209(b) of the Code. Therefore the Courts of Sessions are competent to pass an order of remand under Section 309, though it was not necessary if there was already an order of detention under Section 209(b) of the Code.[1]

In the case of *Ashok* v. *Superintendent of Jail, Hardoi*,[2] it was found that the case was committed to the Court of Session but no remand order was passed by the Magistrate and the accused was kept in jail without any remand order. However, on a subsequent date the concerned Court of Session passed remand order to the effect that the accused shall stay in jail. The Division Bench of Allahabad High Court held that the detention of the accused at the moment was legal, and could not be said to be illegal.

In the case of *Sheo Baran Singh* v. *State of U.P.*,[3] the Allahabad High Court has advised the Sessions Judges to examine the custody-warrant and see whether there is a proper order for keeping in jail during and until the conclusion of the trial by the committing Court and if it is not they should themselves pass speaking order in terms of Section 309, Cr.P.C. so that jailor may have an authority to keep such person in jail.

A survey of aforesaid cases makes it clear that a Magistrate is expected to act carefully. He should be vigilant enough while passing remand orders and preparing warrants. Exact and relevant expressions of Section 209(a) or Section 209(b) as the case may

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1. Pushpendra Singh v. Superintendent District Jail 1984 A.Cr.R. 446 Allahabad High Court.
2. 1982. Cr.L.J. 2182.
3. 1982 Lucknow Law Journal 128.

be, should be reproduced in remand order as well as in warrant.

To sum up, when a Magistrate takes cognizance of offence exclusively triable by Court of Session, he should do following things:-

(1) Ensure presence of accused before him.

(2) If the accused is already on bail, he should be allowed to appear on the same. His bail should not be cancelled arbitrarily.

(3) If the accused is in custody, he shall be remanded to custody during and until commitment of the case, through a warrant, properly worded.

(4) As soon as, the case is committed to Court of Session, the accused shall be remanded to custody during and until conclusion of trial, through a warrant.

CHAPTER SIXTEEN

REMAND UNDER SECTION 309, CRIMINAL PROCEDURE CODE

Sub-section (2) of Section 309 gives powers of remand to all Criminal Courts. The relevant provisions are as follows:-

"If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

(Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him).

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or

the accused.

Old provision

Section 344 of the old Cr.P.C. corresponds to Section 309 of new Cr.P.C. However under the old provision, i.e. Section 344, the Magistrate could remand an accused to custody during investigation also. But now the position is quite different under the new Code. A Magistrate can now remand an accused to custody under Section 309 Cr.P.C. only after he has taken cognizance of the offence.[1] Section 309 empowers the trial court to remand the accused who is already in custody only till the date on which the case is to be taken up next and the detention of the accused beyond the period mentioned in the custody warrant has to be reauthorised after the expiry of that period.[2]

Presence of accused

In the case of *Raj Narain* v. *Superintendent Central Jail, New Delhi*,[3] the Supreme Court observed that there is nothing in the law which required accused's personal presence before the Magistrate because that is a rule of caution for Magistrate before granting remands at the instance of the police. However even if it be desirable for the Magistrates to have the prisoner produced before them, when they recommit him to further custody, a Magistrate can act only as the circumstances permit. This ratio has been followed by the Supreme Court in the cases of *Laxman Rao* v. *Judicial Magistrate, Parvatipuram*;[4] *Gauri Shankar Jha* v. *State of Bihar*[5] and *M.S. Rao* v. *Union of India*.[6]

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1. Ram Chandra v. State of U.P. 1977 Cr.L.J. 1783 Allahabad High Court.
2. Raghvendra's case 1983 LLJ 209 (D.B.) Allahabad High Court.
3. AIR 1971 SC 178
4. AIR 1971 SC 186
5. AIR 1972 SC 711.
6. AIR 1973 SC 850.

A Full Bench of Allahabad High Court[1] has also held that the remand order passed under Section 344 Cr.P.C. shall not be rendered illegal merely because the accused was not produced in the Court when remand order was passed.

Therefore, the orders of remand under Section 344 Cr.P.C., could be passed validly in the absence of accused, if his presence at the time could not be secured.

Section 309, also nowhere requires presence of accused at the time of passing of remand order. The legal position, thus, remains the same as was held in above-mentioned cases.

It is now well-settled that remand order can be passed without the physical production of the accused before the Court. Even if it be desirable for the Magistrate to have the personal production before him when the prisoners are remanded to further custody, an order of remand without producing the accused in court is not invalid, as it may on occasions be necessary to order for remand in the absence of the accused.[2]

Remand beyond 15 days

A Full Bench of Patna High Court[3] had held that a Magistrate cannot remand an accused for a period extending 15 days under Section 344 Cr.P.C. If it exceeds 15 days it becomes illegal on the expiry of 15 days.

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1. Urooj Abbas v. State of U.P. 1973 Cr.L.J. 1458.
2. Muneshwar's case 1984 A.Cr.R. 464.
3. Babu Nandan v. State of Bihar 1972 Cr.L.J. 423.

But, in the case of *Janki* v. *State of U.P.*[1], it was held by the Allahabad High Court that a remand for more than 15 days can be granted by the Magistrate under Section 309(2).

"The period of 15 days was prescribed with a view to expedite the hearing and with the object of giving effect to the words 'Couched in the Language' which though appears to be imperative, is in our opinion no more than mere instructive to those entrusted with the task of discharging statutory duties for public benefit. Where no prejudice is caused by giving remand beyond 15 days then in our opinion there should be no cause for complaint. The word 'shall', therefore, in our opinion is only instructive and its noncompliance would not render the act of the Magistrate illegal in granting remand beyond 15 days. If the remand is for a longer period than 15 days, it would be irregular and remand granted by the Magistrate beyond 15 days would not be rendered illegal."[2]

Reasons for adjournment

Section 309 deals with the postponement of the commencement, or adjournment, of any inquiry or trial and also for remand of the accused where such postponement or adjournment is made. The powers of the Magistrate are thus regulated for postponement and adjournment by this Section.[3]

In the case of *Urooj Abbas* v. *State of U.P.*,[4] the Full Bench of Allahabad High Court held that a separate order of remand is not required under Section 344, Cr.P.C. Only issue of warrant of remand is sufficient. However, a separate and reasoned order

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1. 1982 Lucknow Law Journal 262.
2. Muneshwar v. State 1984, A.Cr.R. 464 Allahabad High Court.
3. Sunder Lal v. State 1983 A.Cr.R. 102 (FB) Allahabad High Court.
4. 1973 Cr.L.J. 1458.

for adjournment or postponement is required under Section 344,Cr.P.C.

Where no order of remand was passed on the order-sheet, the remand was authorised on the basis of a valid warrant and endorsement on it, it was held that the requirement of Section 309(2) was fulfilled and therefore bail could not be granted for noncompliance of Section 309(2). It was also observed that there is no need to pass a written order of remand on order-sheet, while remanding accused under Section 309(2).[1]

Custody-Legal or Illegal

Often the question arises as to whether the word "custody" used in Section 309(2) means both legal and illegal custody?

The Allahabad and Rajasthan High Courts had held that the word "custody" in Section 309(2) means legal or lawful custody.[2]

But, a Full Bench of Allahabad High Court, in the case of *Surjit Singh* v. *State of U.P.*[3], has overruled the decisions of above-mentioned cases and held that "the word'custody' in Section 309(2), Cr.P.C. means imprisonment both legal and illegal..... The Court is, therefore, competent to remand the accused to custody under this Section even if he is in illegal imprisonment. It can, thus, rectify its mistake and transform his illegal imprisonment into legal imprisonment."

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1. Mashooq Ahmad v. State of U.P. 1987 ALJ 329 Allahabad High Court.
2. H.P.D. Tyagi v. D.M. Farrukhabad 1976 ALJ 62,
   Mahesh Chandra's case 1983 LLJ 141,
   Raghvendra's case 1983 ALJ 611,
   Kamlesh Kumar Dixit v. State 1982 LLJ 4, and
   Khinvdan v. State of Rajasthan 1975 Cr.L.J. 1984
3. 1984 A.Cr.R. 55

Another Full Bench of Allahabad High Court[1] has endorsed the ratio of *Surjit Singh's* case (supra).

Illegality curable

When a valid order of remand is passed after submission of the charge-sheet all the previous irregularities or illegalities which occured in connection with the orders of remand passed under Section 167, Cr.P.C. stand cured as orders of remand then would be governed by the provisions of Section 209 or Section 309(2), Cr.P.C.[2]

If subsequent orders of remands are valid, then any irregularity or illegality in the previous order of remand is of no consequence. The previous illegal order for remanding accused to custody stands cured by subsequent valid remand order authorising the custody of accused.[2]

The true test for the illegality or otherwise of the detention is, on the date of the hearing itself. A defect in an earlier order of remand of an accused person is not incurable and he cannot claim a writ of habeas corpus on that score alone, if on the date of hearing he is in custody under a valid order of remand.[3]

An earlier unauthorised or illegal detention of an accused does not invalidate his subsequent valid detention. If the detention of accused is legal when the application for bail is preferred, his previous illegal detention should not be considered.[4]

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1. Muneshwar's case 1984 A.Cr.R. 464.
2. Noorul Huda v. Superintendent Central Jail Naini 1984 A.Cr.R. 186 (DB) Allahabad High Court.
3. R.K. Ravi v. State Bihar 1987 Cr.L.J. 1489, Patna High Court (FB).
4. Durei Behera v. Suratha Behera 1987 Cr.L.J. 1462 (D.B.) Orissa High Court.

Remand of accused only

A person against whom proceedings under Section 110 Cr.P.C. are pending, cannot be remanded to custody under Section 309, Cr.P.C. because he is not an accused.[1]

The legal position may be summarized as follows:-

(1) The power of remand can be exercised only after taking cognizance of the offence.

(2) Any criminal Court can exercise this power.

(3) Only an accused person, in custody - legal or illegal, can be remanded.

(4) Illegality in previous remand is curable.

(5) Though the presence of accused before the Court is not necessary, it is desirable.

(6) The Magistrate can remand an accused upto a maximum period of 15 days at a time. But it will not be illegal if the period exceeds 15 days.

(7) There is no such limit for the Court of Sessions.

(8) The Court is not required to record reasons for remand.

(9) Though remand can be authorised by endorsement on a valid warrant only, it is desirable to pass order of remand on the order-sheet also.

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1. Damodar v. State 1981 Cr.L.J. 1450, Orissa High Court.

PART - D

FORMS

APPENDIX-I

WARRANT OF CUSTODY
[Section 167, Cr.P.C. 1973]

IN THE COURT OF ----------.

DISTRICT ----------.

SUPERINTENDENT
DISTRICT JAIL

or

OFFICER INCHARGE OF
POLICE STATION

Whereas accused ---------- aged --
S/o ---------- R/o ---- ----------
P.S. ---------- District ----------
Crime No. ---------- P.S.----- ----------

has been produced before me and on a perusal of related documents and due consideration of facts, I consider it necessary to detain above named accused into Police custody/Judicial custody.

This is to authorise and require you to receive and safely keep the said accused ---------- into your custody till ---------- and to produce before me on ----------.

Seal of
Court

Full Signature
of Magistrate

Date ----------

The reverse contains five columns (see overleaf).

No. of Remand	Date of order	Date fixed for production of accused	Signature	Magistrate

APPENDIX-II

WARRANT OF CUSTODY
[Section 209, Cr.P.C. 1973]

IN THE COURT OF ----------

DISTRICT ----------

SUPERINTENDENT
DISTRICT JAIL

Case No. -------- Year -----

Whereas against accused ----------
aged -------- Son of ----------R/o
---------- P.S. ----------
District ----------, the Police
Station ---------- has submitted
charge-sheet -------- for offence u/s ----------.

The charges levelled against him, appears to be exclusively triable by the Court of Session.

This is to authorise and require you to safely keep the said accused ---------- during inquiry and until commitment of case/during and until conclusion of trial before the Court of Session.

Seal of
Court

Full Signature of
Magistrate

Date .....

Note: 1. Score out "during and until conclusion of trial before the Court of Session", if remand granted u/s. 209(a).
2. Score out "during inquiry and until commitment of case", if remand granted u/s. 209(b).

APPENDIX-III

WARRANT OF CUSTODY
[Section 309, Cr.P.C. 1973]

IN THE COURT OF ----------

DISTRICT ----------

THE SUPERINTENDENT
DISTRICT JAIL Case No. _____ Year _____

Whereas accused ---------- aged --
S/o ----------R/o
---------- P.S. ----------
District ----------, has been charged with ---------- and remanded to take his trial before the Court of ----------.

You are hereby required to receive the said ---------- into your custody and produce him before the said Court as required on the reverse.

Date ..... MAGISTRATE

Seal

The reverse contains four columns:-

Number of remand	Date of order	Date on which accused is to be produced	Magistrate's Signature

SUBJECT INDEX

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