IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF OCTOBER, 2022

BEFORE

THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ

WRIT PETITION NO. 2997 OF 2021 (GM-RES)

BETWEEN:

SHRI. HRISHIKESH DEVDIKAR
S/O BHASKAR
AGE- 41 YEARS
OCC - BUSINESS,
R/O FLAT NO.12, MAHARANA PRATHAP
HOUSING SOCIETY, N-7, CIDCO
AURANGABAD-431003
MAHARASHTRA

...PETITIONER

(BY SRI. KIRAN.B.S, ADVOCATE)

AND:

STATE OF KARNATAKA
SIT, CID OFFICE, CARLTON HOUSE
BANGALORE
REP. BY SPECIAL PUBLIC PROSECUTOR
HIGH COURT COMPLEX, BANGALORE

... RESPONDENT

(BY SRI. ASHOK N.NAIK, SPL. PP)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482OF CR.P.C, PRAYING TO (A) ISSUE NOTICE TO THE RESPONDENT; (B) CALL FOR ALL RECORDS AND PROCEEDINGS OF THE SPECIAL COURT WITH REFERENCE TO THE ANNEXURES, AS ALSO THE RECORDS OF EMAILS RECEIVED, PRINTED AND PROCESSED AND SUCH NECESSARY DOCUMENTS, INCLUDING BUT NOT LIMITED TO INTERNAL MECHANISM GUIDELINES/ORDERS/SOP'S. AND RECORDS ON GUIDELINES/ORDERS/SOP'S AND ETC.

THIS WRIT PETITION COMING ON FOR PRELIMINARY HEARING IN 'B' GROUP AND HAVING BEEN RESERVED FOR ORDERS ON 19.09.2022, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

1. The petitioner is before this Court seeking for the following reliefs:

i. This Hon'ble High Court be pleased to: (a) issue notice to the Respondent, (b) call for all records and proceedings of the Special Court with reference to the Annexures, as also the records of emails received, printed and processed and such necessary documents, including but not limited to internal mechanism guidelines/orders/SOP's. and records on guidelines/orders/SOP's.

*ii. This Hon'ble High Court be pleased to quash and set aside the order by the Special Court in Spl C.C No. 872 of 2018 dated 12-05-2020 at **Annexure-A.***

iii. This Hon'ble Court be pleased to grant bail to the Petitioner on such conditions as deemed fit.

iv. This Hon'ble Court be further pleased to examine the records and pass necessary orders for departmental proceedings against the concerned judicial staff/registry officers/clerks etc. found responsible for: (a) negligence and dereliction of duty; and, (b) frustrating the fundamental rights of the Petitioner.

v. This Hon'ble Court be further pleased to pass orders and grant other reliefs as it may deem fit under the facts and circumstances of the case herein and in the interest of justice.

2. The petitioner is accused No.18 in CC 872/2018 pending on the file of the Prl. City Civil and Sessions Judge and Special Judge for Karnataka Control and Organised Crime Act at Bengaluru.

3. FIR in Crime No.221/2017 was registered with the Rajarajeshwari Nagar Police station, Bengaluru as regards the murder of one Gowri Lankesh. He was arrested on 9.01.2020 and remanded to judicial custody on 27.01.2020. The petitioner on 4.05.2020 filed an application under subsection (2) of Section 167 of Cr.P.C. seeking for statutory/default bail. Without passing any orders on the said application, the Special Court remanded the petitioner to judicial custody on 12.05.2020. It is challenging the said order, the petitioner is before this Court.

4. Sri.Kiran.B.S, learned counsel for the petitioner would submit that:

4.1. Being the case of murder, a supplementary charge sheet was required to be filed on or before 9.04.2020 i.e. 90th date from the date on which the petitioner was arrested i.e., 9.01.2020. No charge sheet having been laid within that period of time, the application which had been filed by the petitioner by following the Standard Operating Procedure issued by this court vide notification dated 16.04.2020, the petitioner's counsel having forwarded an application under Subsection (2) of Section 167 of Cr.P.C., vide email dated 4.5.2019 post the expiry of period of 90 days from the date of arrest, the Special Court ought to have enlarged the petitioner on default bail.

4.2. Instead of doing so without orders being passed on the application under subsection (2) of Section 167 of Cr.P.C, the requisition for extension of period for filing charge sheet on

12.05.2020 was considered and allowed which was contrary to Subsection (2) of Section 167 of Cr.P.C. The extension of time by exercising powers under clause (b) Subsection 2 of Section 22 of Karnataka Control of Organized Crimes Act, 2000 [hereinafter referred to as 'KCOCA'] without passing orders on the application filed under subsection (2) of Section 167 of Cr.P.C, is nonest.

4.3. No opportunity has been provided to the petitioner to cause reply to the request made for extension of time by the respondent-State and as such, the rights of the petitioner have been violated.

4.4. The petitioner has been following up on the matter in the Special Court, however, due to the COVID pandemic and SOP in force, only 20 matters were taken per day resulting in the

petitioner continuing to be in custody thereby impinging upon his life and liberty. Therefore, he submits that the application filed by the petitioner on 4.05.2020 by email sent to the email address provided under the SOP is in due compliance with the SOP and it was for the Court to pass necessary orders on the same. It was also the duty of the concerned court clerk to put up the said application before the concerned Judge. He relies upon the decision in ***Madhu Limaye, In re*[1]*,*** more particularly para 10 and 12 thereof which are reproduced hereunder for easy reference:

> ***10.*** *Article 22(1) embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the rule of law prevails. For example, the 6th amendment to the Constitution of the United States of America contains similar provisions and so does article 34 of the Japanese Constitution of 1946. In England whenever an arrest is made without a warrant, the arrested person has a right to be informed not only that he is being arrested but also of*

[1]AIR 1969 SC 1014

the reasons or grounds for the arrest. The House of Lords in Christie v. Leachinsky [(1947) 1 All ELR 567] went into the origin and development of this rule. In the words of Viscount Simon if a policeman who entertained a reasonable suspicion that X had committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of why he was doing this, the prima facie right of personal liberty would be gravely infringed. Viscount Simon laid down several propositions which were not meant to be exhaustive. For our purposes we may refer to the first and the third:

"1. If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.

*2. * * **

3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained."

Lord Simonds gave an illustration of the circumstances where the accused must know why he is being arrested.

There is no need to explain the reasons of arrest if the arrested man is caught red-handed and the crime is patent to high Heaven."

The two requirements of clause (1) of Article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and, also, to know exactly what the accusation against him is so that he can exercise the second right, namely, of consulting a legal practitioner of his choice and to be defended by him. Clause (2) of Article 22 provides the next and most material safeguard that the arrested person must be produced before a Magistrate within 24 hours of such arrest so that an independent authority exercising judicial powers may without delay apply its mind to his case. The Criminal Procedure Code contains analogous provisions in Sections 60 and 340 but our Constitution makers were anxious to make these safeguards an integral part of fundamental rights. This is what Dr B.R. Ambedkar said while moving for insertion of Article 15-A (as numbered in the Draft Bill of the Constitution) which corresponded to present Article 22:

"Article 15-A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilised country follows as principles of international justice. It is quite true that these two provisions contained in clause (1) and clause (2) are already to be found in the Criminal Procedure Code and thereby probably it might be said that we are really not making any very fundamental change. But we are, as I contend, making a fundamental change because what we are doing by the introduction of Article 15-A is to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these two provisions, because they are now introduced in our Constitution itself."

> *As stated in Ram Narayan Singh v. State of Delhi [AIR (1953) SC 277] this Court has often reiterated that those who feel called upon to deprive other persons of liberty in the discharge of what they conceive to be their duty must, strictly and scrupulously, observe the forms and rules of law. Whenever that is not done the petitioner would be entitled to a writ of habeas corpus directing his release.*
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> ***12.*** *Once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters. This the State has failed to do. The remand orders are patently routine and appear to have been made mechanically. All that Mr Chagla has said is that if the arrested persons wanted to challenge their legality the High Court should have been moved under appropriate provisions of the Criminal Procedure Code. But it must be remembered that Madhu Limaye and others have, by moving this Court under Article 32 of the Constitution, complained of detention or confinement in jail without compliance with the constitutional and legal provisions. If their detention in custody could not continue after their arrest because of the violation of Article 22(1) of the Constitution they were entitled to be released forthwith. The orders of remand are not such as would cure the constitutional infirmities. This disposes of the third contention of Madhu Limaye.*

4.5. Detention in custody violates the constitutional guarantees and the detention ought not to have continued beyond a period of 90 days from the

date of arrest of the petitioner. In this regard, he relies upon the decision of the Hon'ble Apex Court in ***Jaya Sing -v- State of Jammu and Kashmir***[2]. Even if at all there was a right to seek for extension of time to file a charge sheet, the said application ought to have been filed prior to the expiry of 90 days from the date of arrest. In the present case, 90 days having been expired on 4.04.2020, the application having filed on 12.05.2020 was not within the said timeframe and as such, that application could not have been considered.

4.6. While hearing the application under Section 22 of the KCOCA which is in parametria to Section 43 of the Unlawful Activities Prevention Act, Maharashtra Organized Control of Crime Act, Narcotic Drugs and Psychotropic Substances Act, 1985, notice ought to have been issued to

[2] (1985)1 SCC 561

the petitioner and an opportunity to be provided to the petitioner-accused to have been heard in the matter.

4.7. The application filed under Section 22 of KCOCA is a mechanical application without application of mind inasmuch as the said application does not indicate the progress of the investigation and specific reasons as to why the detention of the petitioner is required to be extended beyond a period of 90 days. The application filed as also the order passed ought to take note of reasonable grounds, if available. If no reasonable grounds were available, custody could not have been extended. In this regard relies upon the decision in ***Chenna Boyanna Krishna Yadav v. State of Maharashtra***[3]**,** more particularly para 13 and 14 thereof, which are reproduced hereunder for easy reference:

[3](2007) 1 SCC 242

13. *It is plain from a bare reading of the non obstante clause in the sub-section that the power to grant bail by the High Court or the Court of Session is not only subject to the limitations imposed by Section 439 of the Code but is also subject to the limitations placed by Section 21(4) of MCOCA. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provisions requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of findings under the said provision is a sine qua non for granting bail under MCOCA.*

14. *In R.B. Sharma case [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057] construing the said provision somewhat liberally, S.B. Sinha, J. speaking for a three-Judge Bench observed thus: (SCC pp. 318-19, paras 43-44 & 46)*

"43. Section 21(4) of MCOCA does not make any distinction between an offence which entails punishment of life imprisonment and an imprisonment for a year or two. It does not provide that even in case a person remains behind the bars for a period exceeding three years, although his involvement may be in terms of Section 24 of

the Act, the court is prohibited to enlarge him on bail. Each case, therefore, must be considered on its own facts. The question as to whether he is involved in the commission of organised crime or abetment thereof must be judged objectively. …

44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in future must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

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46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of

> *Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby."*

4.8. The right to default bail/statutory bail could not be denied on the ground that a subsequent application by extension of time was issued. In this regard he relies upon the decision in ***Sayed Mohd. Ahmad Kazmi v. State (Govt. of NCT of Delhi)***[4]**,** more particularly para 25, 26 and 27 thereof, which are reproduced hereunder for easy reference:

> ***25.*** *Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General Mr Raval. There is no denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the Additional Sessions Judge and the custody of the appellant*

[4](2012) 12 SCC 1

was held to be illegal and an application under Section 167(2) CrPC was made on behalf of the appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the appellant on the expiry of 90 days from the date when the appellant was taken into custody. Such right, as has been commented upon by this Court in Sanjay Dutt [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and the other cases cited by the learned Additional Solicitor General, could only be distinguished (sic extinguished) once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before the charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.

26. *The circumstances in this case, however, are different in that the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.*

27. *We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and*

> *we are of the view that the appellant acquired the right for grant of statutory bail on 17-7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.*

4.9. The right of default/statutory bail cannot be extinguished and ought to be granted if exercised in a proper manner. In this regard, he relies upon a decision in ***Union of India v. Nirala Yadav***[5]***,*** more particularly para 47 which is reproduced hereunder for easy reference:

> ***47.*** *Coming to the facts of the instant case, we find that prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. Had an application for extension been filed, then the matter would have been totally different. After the respondent-accused filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. Mr P.K. Dey, learned counsel for the appellant would submit that the*

[5](2014)9 SCC 457

same is permissible in view of the decision in Bipin Shantilal Panchal [(1996) 1 SCC 718 : 1996 SCC (Cri) 200] but on a studied scrutiny of the same we find that the said decision only dealt with whether extension could be sought from time to time till the completion of period as provided in the statute i.e. 180 days. It did not address the issue what could be the effect of not filing an application for extension prior to expiry of the period because in the factual matrix it was not necessary to do so. In the instant case, the day the accused filed the application for benefit of the default provision as engrafted under proviso to sub-section (2) of Section 167 CrPC the Court required the accused to file a rejoinder-affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the learned Magistrate was misconceived. He was obliged on that day to deal with the application filed by the accused as required under Section 167(2) CrPC. We have no hesitation in saying that such procrastination frustrates the legislative mandate. A court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. If we permit ourselves to say so, the prosecution exhibited sheer negligence in not filing the application within the time which it was entitled to do so in law but made all adroit attempts to redeem the cause by its conduct.

4.10. By not granting default bail, the fundamental right of the petitioner guaranteed by Article 21

of the Constitution of India has been violated by relying upon the decision in ***M. Ravindran v. Directorate of Revenue Intelligence***[6], more particularly para 17 which is reproduced hereunder for easy reference:

> ***II. Section 167(2) and the Fundamental Right to Life and Personal Liberty***
>
> ***17.*** *Before we proceed to expand upon the parameters of the right to default bail under Section 167(2) as interpreted by various decisions of this Court, we find it pertinent to note the observations made by this Court in Uday Mohanlal Acharya [Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453 : 2001 SCC (Cri) 760] on the fundamental right to personal liberty of the person and the effect of deprivation of the same as follows: (SCC p. 472, para 13)*
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> *"13. … Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such,*

[6](2021) 2 SCC 485

could be violative of Article 21 of the Constitution."

17.1. *Article 21 of the Constitution of India provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law". It has been settled by a Constitution Bench of this Court in Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] , that such a procedure cannot be arbitrary, unfair or unreasonable. The history of the enactment of Section 167(2) CrPC and the safeguard of "default bail" contained in the proviso thereto is intrinsically linked to Article 21 and is nothing but a legislative exposition of the constitutional safeguard that no person shall be detained except in accordance with rule of law.*

17.2. *Under Section 167 of the Code of Criminal Procedure, 1898 ("the 1898 Code") which was in force prior to the enactment of the CrPC, the maximum period for which an accused could be remanded to custody, either police or judicial, was 15 days. However, since it was often unworkable to conclude complicated investigations within 15 days, a practice arose wherein investigating officers would file "preliminary charge-sheets" after the expiry of the remand period. The State would then request the Magistrate to postpone commencement of the trial and authorise further remand of the accused under Section 344 of the 1898 Code till the time the investigation was completed and the final charge-sheet was filed. The Law Commission of India in Report No. 14 on Reforms of the Judicial Administration (Vol. II, 1948, pp. 758-760) pointed out that in many cases the accused were languishing for several months in custody without any final report being filed before the courts. It was also pointed out that there was conflict in judicial opinion as to whether the Magistrate*

was bound to release the accused if the police report was not filed within 15 days.

17.3. *Hence the Law Commission in Report No. 14 recommended the need for an appropriate provision specifically providing for continued remand after the expiry of 15 days, in a manner that "while meeting the needs of a full and proper investigation in cases of serious crime, will still safeguard the liberty of the person of the individual". Further, that the legislature should prescribe a maximum time period beyond which no accused could be detained without filing of the police report before the Magistrate. It was pointed out that in England, even a person accused of grave offences such as treason could not be indefinitely detained in prison till commencement of the trial.*

17.4. *The suggestion made in Report No. 14 was reiterated by the Law Commission in Report No. 41 on The Code of Criminal Procedure, 1898 (Vol. I, 1969, pp. 76-77). The Law Commission re-emphasised the need to guard against the misuse of Section 344 of the 1898 Code by filing "preliminary reports" for remanding the accused beyond the statutory period prescribed under Section 167. It was pointed out that this could lead to serious abuse wherein "the arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner". Hence the Commission recommended fixing of a maximum time-limit of 60 days for remand. The Commission considered the reservation expressed earlier in Report No. 37 that such an extension may result in the 60-day period becoming a matter of routine. However, faith was expressed that proper supervision by the superior courts would help circumvent the same.*

17.5. *The suggestions made in Report No. 41 were taken note of and incorporated by the*

Central Government while drafting the Code of Criminal Procedure Bill in 1970. Ultimately, the 1898 Code was replaced by the present CrPC. The Statement of Objects and Reasons of the CrPC provides that the Government took the following important considerations into account while evaluating the recommendations of the Law Commission:

*"**3.** The recommendations of the Commission were examined carefully by the Government, keeping in view, among others, the following basic considerations:*

(i) an accused person should get a fair trial in accordance with the accepted principles of natural justice;

(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and

(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community."

***17.6.** It was in this backdrop that Section 167(2) was enacted within the present day CrPC, providing for time-limits on the period of remand of the accused, proportionate to the seriousness of the offence committed, failing which the accused acquires the indefeasible right to bail. As is evident from the recommendations of the Law Commission mentioned supra, the intent of the legislature was to balance the need for sufficient time-limits to complete the investigation with the need to protect the civil liberties of the accused. Section 167(2) provides for a clear mandate that the investigative agency must collect the required evidence within the prescribed time period, failing which the*

accused can no longer be detained. This ensures that the investigating officers are compelled to act swiftly and efficiently without misusing the prospect of further remand. This also ensures that the court takes cognizance of the case without any undue delay from the date of giving information of the offence, so that society at large does not lose faith and develop cynicism towards the criminal justice system.

17.7. *Therefore, as mentioned supra, Section 167(2) is integrally linked to the constitutional commitment under Article 21 promising protection of life and personal liberty against unlawful and arbitrary detention, and must be interpreted in a manner which serves this purpose. In this regard we find it useful to refer to the decision of the three-Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam [Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67 : (2018) 1 SCC (Cri) 401] , which laid down certain seminal principles as to the interpretation of Section 167(2) CrPC though the questions of law involved were somewhat different from the present case. The questions before the three-Judge Bench in Rakesh Kumar Paul [Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67 : (2018) 1 SCC (Cri) 401] were whether, firstly, the 90-day remand extension under Section 167(2)(a)(i) would be applicable in respect of offences where the maximum period of imprisonment was 10 years, though the minimum period was less than 10 years. Secondly, whether the application for bail filed by the accused could be construed as an application for default bail, even though the expiry of the statutory period under Section 167(2) had not been specifically pleaded as a ground for bail. The majority opinion held that the 90-day limit is only available in respect of offences where a minimum ten year' imprisonment period is stipulated, and that the oral arguments for default bail made by*

the counsel for the accused before the High Court would suffice in lieu of a written application. This was based on the reasoning that the court should not be too technical in matters of personal liberty. Madan B. Lokur, J. in his majority opinion, pertinently observed as follows: (SCC pp. 95-96 & 99, paras 29, 32 & 41)

"29. Notwithstanding this, the basic legislative intent of completing investigations within twenty-four hours and also within an otherwise time-bound period remains unchanged, even though that period has been extended over the years. This is an indication that in addition to giving adequate time to complete investigations, the legislature has also and always put a premium on personal liberty and has always felt that it would be unfair to an accused to remain in custody for a prolonged or indefinite period. It is for this reason and also to hold the investigating agency accountable that time-limits have been laid down by the legislature. …

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32. … Such views and opinions over a prolonged period have prompted the legislature for more than a century to ensure expeditious conclusion of investigations so that an accused person is not unnecessarily deprived of his or her personal liberty by remaining in prolonged custody for an offence that he or she might not even have committed. In our opinion, the entire debate before us must also be looked at from the point of view of expeditious conclusion of investigations and from the angle of personal liberty and not from a purely dictionary or textual perspective as canvassed by the learned counsel for the State.

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41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court."

(emphasis supplied)

Therefore, the courts cannot adopt a rigid or formalistic approach whilst considering any issue that touches upon the rights contained in Article 21.

17.8. *We may also refer with benefit to the recent judgment of this Court in S. Kasi v. State [S. Kasi v. State, (2021) 12 SCC 1 : 2020 SCC OnLine SC 529] , wherein it was observed that the indefeasible right to default bail under Section 167(2) is an integral part of the right to personal liberty under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasised that the right of the accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a charge-sheet.*

17.9. *Additionally, it is well-settled that in case of any ambiguity in the construction of a penal statute, the courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedures providing for the curtailment of the liberty of the accused.*

> ***17.10.*** *With respect to the CrPC particularly, the Statement of Objects and Reasons (supra) is an important aid of construction. Section 167(2) has to be interpreted keeping in mind the threefold objectives expressed by the legislature, namely, ensuring a fair trial, expeditious investigation and trial, and setting down a rationalised procedure that protects the interests of indigent sections of society. These objects are nothing but subsets of the overarching fundamental right guaranteed under Article 21.*
>
> ***17.11.*** *Hence, it is from the perspective of upholding the fundamental right to life and personal liberty under Article 21 that we shall clarify and reconcile the various judicial interpretations of Section 167(2) for the purpose of resolving the dilemma that has arisen in the present case.*

4.11. The application filed for extension of time is bereft of merits and mechanical and the Public Prosecutor ought to have applied his mind and made out clear and categorical reasons for extension of time for investigation, that not having been made out, even the orders passed by the Special Court extending time is bad in law. In this regard reliance is placed on the decision in ***Manubhai Ratilal Patel v. State***

of Gujarat[7], more particularly para 24 which is reproduced hereunder for easy reference:

> ***24.*** *The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.*

4.12. He also relies on the decision in ***Hitendra Vishnu Thakur v. State of Maharashtra***[8]***,*** more particularly para 23 thereof, which is reproduced hereunder for easy reference:

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[7]AIR 2013 SC 313
[8](1994) 4 SCC 602

23. *We may at this stage, also on a plain reading of clause (bb) of sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that*

there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where

either no report as is envisaged by clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court 'shall' release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the 'default' of the prosecution becomes indefeasible and cannot be defeated by reasons other than those contemplated by sub-section (4) of Section 20 as discussed in the earlier part of this judgment. We are unable to agree with Mr Madhava Reddy or the Additional Solicitor General Mr Tulsi that even if the public prosecutor 'presents' the request of the investigating officer to the court or 'forwards' the request of the investigating officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause

(bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a 'post office' of the investigating agency nor its 'forwarding agency' but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in clause (bb) of sub-section (4) of Section 20. Since the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report fails in the performance of one of its essential duties and renders its order under clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in further custody as envisaged by clause (bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the

> *prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension.*

4.13. Investigation would be complete only if sufficient material is collected by the Investigating officer, based on which cognizance can be taken. In the present case, the investigation is yet to be completed and a supplementary charge sheet is yet to be laid insofar as petitioner/accused No.18 is concerned and as such, 90 days period has expired from the date of arrest of the petitioner, the petitioner is entitled for default/statutory bail. In this regard, he relies upon the decision of the Hon'ble Telangana High Court in ***Parthasarathy vs. Director of***

Enforcement[9], more particularly para 22 thereof, which is reproduced hereunder for easy reference:

> ***22.*** *From the above decisions, it is clear that a charge sheet can be filed only after the completion of investigation. Investigation is said to be completed if sufficient material is collected by the Investigating Officer based on which cognizance can be taken under Section 167 of the Cr.P.C. It was contended by the Respondent that the complaint dated 19.03.2022 is a charge sheet and only further investigation is being carried out which is permissible under Section 44(1) (d) (ii). The said contention cannot be accepted.*

4.14. The test to be applied is not as regard whether a charge sheet is filed but the investigation is completed or not. In the present case, neither is the investigation complete nor a charge sheet is laid, as such the application for statutory/default bail ought to have been considered. In this Court, he relies upon the decision of Hon'ble Andhra Pradesh High Court in ***Akul Ravi Teja v. State of Andhra***

[9]Crl. P. Nos. 3386, 4217, 4137 of 2022

Pradesh*[10]*, more particularly para 17 which is reproduced hereunder for easy reference:

> ***17.*** *However, as regards the second ground on which the said petition was dismissed by the learned Magistrate is concerned, this Court is of the view that the said finding is legally unsustainable. Admittedly, the charge-sheet that was filed in the present crime is not a final charge-sheet. It is undoubtedly a preliminary charge-sheet. The investigation officer, himself has clearly stated in unequivocal terms in the charge-sheet that was filed by him that it is a preliminary charge-sheet. It is stated by him in the charge-sheet that it is not possible for him to specify the overt acts of each and every accused till the statements of 22 crucial witnesses, who are in Central Prison, Rajahmundry, as remand prisoners in other Crime No. 452 of 2020, under Section 161 Cr.P.C. are recorded, and also till the statements of 8 more crucial witnesses who are also the accused in other Crime No. 452 of 2020, who are absconding, are recorded under Section 161 Cr.P.C. It is further stated by him in the charge-sheet that the unknown person, who recorded the rioting in his video and flashed it to media, has to be traced and his video instrument has to be collected and as such, he has filed the preliminary charge-sheet. The aforesaid relevant portion in the charge-sheet is extracted hereunder for better appreciation and reads thus:*
>
> *"It cannot be possible to specify the overt-acts of each and every accused, till the recording of 161 Cr.P.C. statements of 22 crucial witnesses, who are in Central Prison, Rajahmundry as remand prisoners in Cr. No. 452/2020; and also recording of 161 Cr.P.C. statements of 8*

[10]2020 SCC Online AP 1464

more crucial witnesses who are absconding for their involvement in Cr. No. 452/2020.

The unknown person who video graphed the Rioting (Gang War) and flashed it to media, has to be traced and his video instrument has to collected.

A-20, A-23, A-24 and A-27 are still absconding from date of commission o;f offence. They are to be apprehended.

Hence Preliminary Charge Sheet."

4.15. Further investigation contemplated under subsection (8) of Section 173 of Cr.P.C., is a stage after submission of a charge sheet under Subsection (2) of Section 173. If the initial charge sheet has not been submitted, the question of further investigation would not arise. In this regard he relies upon the decision in ***Sharadchandra Vinayak Dongre v. State of Maharashtra***[11], more particularly paras 22 to 27 which is reproduced hereunder for easy reference:

[11](1991) Maharashtra L.J. 656

22. *Shri Gangakhedkar, learned A.P.P. on behalf of the State, except for contending that the cognizance was properly taken, was not able to reply to the aforesaid contentions. On the contrary, on a query made by me as to whether the investigation was at least now complete, the answer was in the negative.*

23. *Reference here may usefully be made to a decision of the Supreme Court in Abhinandan Jha v. Dinesh Mitra, AIR 1968 SC 117, which points out that the investigation under the Code takes in several aspects and stages ending ultimately with the formation of an opinion by the police as to whether, as from the material covered and collected, a case is made out to place the accused before the Magistrate for trial and the submission of either a charge-sheet or a final report is dependent on the nature of the opinion so formed. The formation of the said opinion by the police is the final step in the investigation evidenced by the "police report" contemplated under section 173(2) of the Code.*

24. *In my view, a plain reading of section 173 of the Code shows that every investigation must be completed without unnecessary delay and as soon as it is completed, the Officer-in-charge 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, sub-section (2) of Criminal Procedure Code until the investigation is completed. Any report sent before the investigation is completed will not be a police report within the meaning of sub-section (2) of section 173 of the Criminal Procedure Code read with section 2(r) of the Code and there is no question of the*

Magistrate taking cognizance of the offence within the meaning of section 190(1)(b) of the Code on the basis of an incomplete charge-sheet. In the present case, admittedly an incomplete charge-sheet has been filed and it is specifically stated therein that the investigation is not yet completed. The application, Exhibit 2, clearly further recites that the investigation is not completed and this fact is even admitted before me as stated in the reply affidavit filed by the Investigating Officer opposing the present Application. Consequently, the incomplete charge-sheets cannot be treated as a "police report" at all as contemplated under section 173(2) of the Code to entitle the Magistrate to take cognizance of the offences. The learned Counsel for the applicants is right in contending that the definition of "police report" as given in the Code cannot be enlarged under the guise of interpretation and it is contended that when the meaning of a statutory provision is plain and clear, the Court should not be impelled by factors like practical difficulties and inconvenience. The learned Counsel appears to be further right when he canvassed that the expression "incomplete charge-sheet" does not occur anywhere in the Code and that forwarding of a "police report" after the completion of the investigation is the requirement of sub-section (2) of section 173 of the Code. Any report or statement of facts in the form of an "incomplete charge-sheet" does not become "police report" by merely giving a particular nomenclature.

25. *The learned Counsel for the State contended that the new provision added in sub-section (8) of section 173 of the Code can be resorted to by the Investigating Officer for collecting further evidence. According to him, it tends to indicate that*

the investigation is not shut but remains in suspended animation till the police report is sent to the Magistrate. As has already been pointed out, a police report as defined in section 2(r) of the Code can only be filed "as soon as the investigation is completed". If it is not complete; no such report can be filed. When no report is forwarded as required by the Code, the Magistrate cannot take cognizance. Thus, unless all these steps are crossed, sub-section (8) cannot be pressed in aid for collecting further evidence which really can be called in aid if further evidence is discovered after the filing of the charge-sheet or the police report on the completion of the investigation.

26. *As stated earlier, sub-section (2) of section 173 of the Code also speaks of taking cognizance of the offence by a Magistrate on a police report. Thus, without the police report as defined in section 2(r) of the Code, the Magistrate is not empowered and is incapacitated to take cognizance and unless cognizance has been taken, sub-section (8) cannot be set in motion.*

27. *The question thus emerges naturally is, whether the Magistrate can take cognizance on the admittedly "incomplete charge-sheet" forwarded by the police. The answer stubbornly and admittedly must be in the negative, because the investigation is yet incomplete and the "police report" yet remains to be filed. Thus, the filing of the incomplete charge-sheet cannot circumvent the provisions of sub-section (2) of section 173 of the Code and incomplete report or an incomplete charge-sheet with whatsoever expression it may be called does not meet the obligatory requirements of law. If the view as contended by the State is accepted, the*

> *provisions of section 167(2) or to say section 468 of the Criminal Procedure Code can always be circumvented by the prosecution and the apparent legislative intents under those provisions would not only be not effectuated but undoubtedly stultified.*

4.16. The power of remand under Subsection (2) of 309 of Cr.P.C, could only be exercised after the investigation is completed. In this case, the investigation not being completed, there is no possibility of exercising powers under subsection (2) of Section 302 and 309. In this regard he relies upon the decision in ***Mithabhai Pashabhai Patel v. State of Gujarat***[12], more particularly paras 15, 16 and 17 which are reproduced hereunder for easy reference:

> ***15.*** *The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The pre-cognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four corners of the Code.*

12

16. *The power to remand, indisputably, is vested in a Magistrate in terms of sub-section (2) of Section 167 of the Code which reads as under:*

"167. Procedure when investigation cannot be completed in twenty-four hours.—

*(1)****

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

Provided that—

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,—

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

(ii) sixty days, where the investigation relates to any other offence,

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

(b) no Magistrate shall authorise detention 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."

17. *The power of remand in terms of the aforementioned provision is to be exercised when investigation is not complete. Once the charge-sheet is filed and cognizance of the offence is taken, the court cannot exercise its power under sub-section (2) of Section 167 of the Code. Its*

power of remand can then be exercised in terms of sub-section (2) of Section 309 which reads as under:

"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."

4.17. The right under subsection (2) of Section 167 having arisen prior to the application filed for an extension of time, the provisions of subsection (8) of Section 173 and subsection (2) of Section 309 of Cr.P.C. would not come in the way of grant of default/statutory bail. The petitioner also not having been produced before the Special Court on the day of alleged remand viz., 12.05.2020, there is a violation of provision (b) to Subsection (2) of Section 167 of Cr.P.C. rendering the remand order bad in law. The Magistrate should not have taken cognizance of a preliminary charge sheet is his submission by relying upon the decision in ***Tula Ram v. Kishore Singh***[13], more particularly para

[13](1977)4 SCC 459

15 which is reproduced hereunder for easy reference:

> ***15.*** *In these circumstances we are satisfied that the action taken by the Magistrate was fully supportable in law and he did not commit any error in recording the statement of the complainant and the witnesses and thereafter issuing process against the appellants. The High Court has discussed the points involved thread-bare and has also cited a number of decisions and we entirely agree with the view taken by the High Court. Thus on a careful consideration of the facts and circumstances of the case the following legal propositions emerge:*
>
> *"1. That a Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code.*
>
> *2. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:*
>
> *(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.*

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

4. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above."

4.18. The cognizance which has been taken and the order of committal which has been passed by the Magistrate is without due application of mind since the same has been done on the incomplete police report which establishes the mechanical application of mind without any basis. In this regard he relies upon the decision in ***Dilawar Singh v. State of Delhi***[14]***,*** more

[14](2007)12 SCC 641

particularly para 18 which is reproduced hereunder for easy reference:

> ***18.*** *"6. Section 156 falling within Chapter XII, deals with powers of police officers to investigate cognizable offences. Investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated under Section 156 of the Code.*
>
> *7. Chapter XII of the Code contains provisions relating to 'information to the police and their powers to investigate', whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to 'direct an investigation by a police officer'. But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code.*
>
> *8. The various steps to be adopted for investigation under Section 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end*

up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e.

'or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding'.

10. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

12. The above position was highlighted in Suresh Chand Jain v. State of M.P. [(2001) 2 SCC 628 : 2001 SCC (Cri) 377]

13. In Gopal Das Sindhi v. State of Assam [AIR 1961 SC 986 : (1961) 2 Cri LJ 39] it was observed as follows : (AIR pp. 988-89, para 7)

'7. When the complaint was received by Mr Thomas on 3-8-1957, his order, which we have already quoted, clearly indicates that he did not take cognizance of the offences mentioned in the complaint but had sent the complaint under Section 156(3) of the Code to the officer in charge of Police Station Gauhati for investigation. Section

156(3) states "any Magistrate empowered under Section 190 may order such investigation as abovementioned". Mr Thomas was certainly a Magistrate empowered to take cognizance under Section 190 and he was empowered to take cognizance of an offence upon receiving a complaint. He, however, decided not to take cognizance but to send the complaint to the police for investigation as Sections 147, 342 and 448 were cognizable offences. It was, however, urged that once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of the Code. It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because Section 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word "may" in Section 190 to mean "must". The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable

offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code. Numerous cases were cited before us in support of the submissions made on behalf of the appellants. Certain submissions were also made as to what is meant by "taking cognizance". It is unnecessary to refer to the cases cited. The following observations of Mr Justice Das Gupta in Supdt. and Remembrancer of Legal Affairs v. Abani Kumar Banerjee [AIR 1950 Cal 437] (AIR p. 438, para 7)

"[w]hat is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, — proceeding under Section 200, and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence"

were approved by this Court in R.R. Chari v. State of U.P. [AIR 1951 SC 207 : 1951 SCR 312 : (1951) 52 Cri LJ 775] It would be clear from the observations of Mr Justice

Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence. The observations of Mr Justice Das Gupta above referred to were also approved by this Court in Narayandas Bhagwandas Madhavdas v. State of W.B. [AIR 1959 SC 1118 : 1959 Cri LJ 1368] It will be clear, therefore, that in the present case neither the Additional District Magistrate nor Mr Thomas applied his mind to the complaint filed on 3-8-1957, with a view to taking cognizance of an offence. The Additional District Magistrate passed on the complaint to Mr Thomas to deal with it. Mr Thomas seeing that cognizable offences were mentioned in the complaint did not apply his mind to it with a view to taking cognizance of any offence; on the contrary in his opinion it was a matter to be investigated by the police under Section 156(3) of the Code. The action of Mr Thomas comes within the observations of Mr Justice Das Gupta. In these circumstances, we do not think that the first contention on behalf of the appellants has any substance.'

14. In Narayandas Bhagwandas Madhavdas v. State of W.B. [AIR 1959 SC 1118 : 1959 Cri LJ 1368] it was observed as under : (SCR pp. 102-06)

'On 19-9-1952, the appellant appeared before the Additional District Magistrate who recorded the following order:

"He is to give bail of Rs 50,000 with ten sureties of Rs 5000 each. Seen police

report. Time allowed till 19-11-1952, for completing investigation."

On 19-11-1952, on perusal of the police report the Magistrate allowed further time for investigation until 2-1-1953, and on that date time was further extended to 2-2-1953. In the meantime, on 27-1-1953, Inspector Mitra had been authorised under Section 23(3)(b) of the Foreign Exchange Regulation Act to file a complaint. Accordingly, a complaint was filed on 2-2-1953. The Additional District Magistrate thereon recorded the following order:

"Seen the complaint filed today against the accused Narayandas Bhagwandas Madhavdas under Section 8(2) of the Foreign Exchange Regulation Act read with Section 23-B thereof read with Section 19 of the Sea Customs Act and Notification No. FERA 105/51 dated 27-2-1951, as amended, issued by Reserve Bank of India under Section 8(2) of the Foreign Exchange Regulation Act. Seen the letter of authority. To Shri M.N. Sinha, SDM (Sadar), Magistrate, First Class (spl. empowered) for favour of disposal according to law. Accused to appear before him."

Accordingly, on the same date Mr Sinha then recorded the following order:

"Accused present. Petition filed for reduction of bail. Considering all facts, bail granted for Rs 25,000 with 5 sureties.

To 26-3-1952 and 27-3-1952 for evidence."

It is clear from these orders that on 19-9-1952, the Additional District Magistrate had not taken cognizance of the offence because he had allowed the police time till 19-11-1952, for completing the

investigation. By his subsequent orders time for investigation was further extended until 2-2-1953. On that date the complaint was filed and the order of the Additional District Magistrate clearly indicated that he took cognizance of the offence and sent the case for trial to Mr Sinha. It would also appear from the order of Mr Sinha that if the Additional District Magistrate did not take cognizance, he certainly did because he considered whether the bail should be reduced and fixed the 26th and 27th of March, for evidence. It was, however, argued that when Mitra applied for a search warrant on 16-9-1952, the Additional District Magistrate had recorded an order thereon, "Permitted. Issue search warrant." It was on this date that the Additional District Magistrate took cognizance of the offence. We cannot agree with this submission because the petition of Inspector Mitra clearly states that "as this is non-cognizable offence, I pray that you will kindly permit me to investigate the case under Section 155 CrPC". That is to say, that tne Additional District Magistrate was not being asked to take cognizance of the offence. He was merely requested to grant permission to the police officer to investigate a non-cognizable offence. The petition requesting the Additional District Magistrate to issue a warrant of arrest and his order directing the issue of such a warrant cannot also be regarded as orders which indicate that the Additional District Magistrate thereby took cognizance of the offence. It was clearly stated in the petition that for the purposes of investigation his presence was necessary. The step taken by Inspector Mitra was merely a step in the investigation of the case. He had not himself the power to make an arrest having regard to the provisions of Section 155(3) of the Code of Criminal Procedure. In order to facilitate his investigation it was necessary for him to arrest the appellant

and that he could not do without a warrant of arrest from the Additional District Magistrate. As already stated, the order of the Additional District Magistrate of 19-9-1952, makes it quite clear that he was still regarding the matter as one under investigation. It could not be said with any good reason that the Additional District Magistrate had either on September 16, or at any subsequent date up to 2-2-1953, applied his mind to the case with a view to issuing a process against the appellant. The appellant had appeared before the Magistrate on 2-2-1953, and the question of issuing summons to him did not arise. The Additional District Magistrate, however, must be regarded as having taken cognizance on this date because he sent the case to Mr Sinha for trial. There was no legal bar to the Additional District Magistrate taking cognizance of the offence on 2-2-1953, as on that date Inspector Mitra's complaint was one which he was authorised to make by Reserve Bank under Section 23(3)(b) of the Foreign Exchange Regulation Act. It is thus clear to us that on a proper reading of the various orders made by the Additional District Magistrate no cognizance of the offence was taken until 2-2-1953. The argument that he took cognizance of the offence on 16-9-1952, is without foundation. The orders passed by the Additional District Magistrate on 16-9-1952, 19-9-1952, 19-11-1952, and 2-1-1953, were orders passed while the investigation by the police into a non-cognizable offence was in progress. If at the end of the investigation no complaint had been filed against the appellant the police could have under the provisions of Section 169 of the Code released him on his executing a bond with or without sureties to appear if and when so required before the Additional District Magistrate empowered to take cognizance of the offence on a police report and to try the

accused or commit him for trial. The Magistrate would not be required to pass any further orders in the matter. If, on the other hand, after completing the investigation a complaint was filed, as in this case, it would be the duty of the Additional District Magistrate then to enquire whether the complaint had been filed with the requisite authority of Reserve Bank as required by Section 23(3)(b) of the Foreign Exchange Regulation Act. It is only at this stage that the Additional District Magistrate would be called upon to make up his mind whether he would take cognizance of the offence. If the complaint was filed with the authority of Reserve Bank, as aforesaid, there would be no legal bar to the Magistrate taking cognizance. On the other hand, if there was no proper authorisation to file the complaint as required by Section 23 the Magistrate concerned would be prohibited from taking cognizance. In the present case, as the requisite authority had been granted by Reserve Bank on 27-1-1953, to file a complaint, the complaint filed on February 2, was one which complied with the provisions of Section 23 of the Foreign Exchange Regulation Act and the Additional District Magistrate could take cognizance of the offence which, indeed, he did on that date. The following observation (at AIR p. 438, para 7) by Das Gupta, J., in Supdt. and Remembrancer of Legal Affairs v. Abani Kumar Banerjee [AIR 1950 Cal 437] was approved by this Court in R.R. Chari v. State of U.P. [AIR 1951 SC 207 : 1951 SCR 312 : (1951) 52 Cri LJ 775] :

"7. … What is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any

offence under Section 190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, — proceeding under Section 200, and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

It is, however, argued that in Chari case [AIR 1951 SC 207 : 1951 SCR 312 : (1951) 52 Cri LJ 775] this Court was dealing with a matter which came under the Prevention of Corruption Act. It seems to us, however, that that makes no difference. It is the principle which was enunciated by Das Gupta, J., which was approved. As to when cognizance is taken of an offence will depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or of a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance was taken of an offence. Obviously, it is only when a Magistrate applies his mind for the purpose of proceeding under Section 200 and subsequent sections of Chapter XVI of the Code of Criminal Procedure or under Section 204 of Chapter XVII of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance.' "

These aspects were highlighted in Mohd. Yousuf v. Afaq Jahan [(2006) 1 SCC 627 : (2006) 1 SCC (Cri) 460] , SCC pp. 630-36, paras 6-14.

4.19. He also relies on the decision in ***Rattiram v. State of M.P.,***[15] more particularly para 2 and 8 which is reproduced hereunder for easy reference:

> ***2.*** *At this juncture, it is requisite to clarify that the real conflict or discord is manifest in Moly v. State of Kerala [(2004) 4 SCC 584 : 2004 SCC (Cri) 1348 : AIR 2004 SC 1890] and Vidyadharan v. State of Kerala [(2004) 1 SCC 215 : 2004 SCC (Cri) 260] on one hand wherein it has been held that the conviction by the Special Court is not sustainable if it has suo motu entertained and taken cognizance of the complaint directly without the case being committed to it and, therefore, there should be retrial or total setting aside of the conviction, as the case may be, and the other in State of M.P. v. Bhooraji [(2001) 7 SCC 679 : 2001 SCC (Cri) 1373 : AIR 2001 SC 3372] wherein, taking aid of Section 465(1) of the Code, it has been opined that when a trial has been conducted by the court of competent jurisdiction and a conviction has been recorded on proper appreciation of evidence, the same cannot be erased or effaced merely on the ground that there had been no committal proceeding and cognizance was taken by the Special Court inasmuch as the same does not give rise to failure of justice.*

[15](2012) 4 SCC 516

> ***8.*** *Section 193 of the Code reads as follows:*
>
> *"**193.Cognizance of offences by Courts of Session**.—Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."*
>
> *On a plain reading of the aforesaid provision, it is clear as noonday that no Court of Session can take cognizance of any offence as a court of original jurisdiction except as otherwise expressly provided by the Code or any other law for the time being in force.*

4.20. He submits that there is nothing to show the guilt of the accused No.18 in the present case and as such, the order of remand ought not to have been passed.

5. Per contra, Sri. Ashok N.Naik, learned Special Public Prosecutor submits that:

5.1. The FIR in Crime No.221/2017 had been registered by the Rajarajeshwari Nagar Police station on 5.09.2017 for offences under Section

302 of IPC and Section 25 of the Arms Act against unknown persons.

5.2. Upon investigation a charge sheet had been laid on 29.05.2018 implicating two accused. Thereafter, a further charge sheet was laid on 23.11.2018 implicating certain others including the petitioner, who was arraigned as accused No.18. However, accused No.18 was absconding and not traceable. There have been several additional charge sheets which have been laid from time to time. In the charge sheet which had been laid on 23.11.2018, offences under Section 302, 120B, 114, 118, 109, 201, 203, 204 and 35 of IPC have been invoked along with Section 25(1), 25(1)(b) and 27(1) of the Indian Arms Act, 1959, as also Section 3(1)(1), 3(2), 3(3) and 3(4) of the KCOCA.

5.3. Permission had been sought for to submit the charge sheet insofar as accused No.18 after he was traced. A further charge sheet was submitted on 25.06.2020 against accused No.18. Once in the charge sheet the provisions of KCOCA were invoked, the period for the investigation came to be extended to a period of 180 days by referring to Section 22 (2) (a) and proviso thereof since charge sheet has been laid insofar as accused No.18 on 25.06.2020, the arrest having been made on 9.01.2020, a charge sheet having been laid within the said extended period, there is no question of statutory/default bail.

5.4. Be that as it may, he submits that the first charge sheet against the petitioner/accused No.18 was submitted on 23.11.2018 itself, even prior to the arrest of the petitioner, the charge sheet which has been submitted subsequently

was upon further investigation being a additional charge sheet or supplementary charge sheet. Therefore, the question of invoking either subsection (2) of Section 167 as regards the default bail does not arise at all.

5.5. It is only when there is no charge sheet submitted at the time of arrest of the accused, that the provision under subsection (2) of Section 167 of Cr.P.C. would be applicable. The petitioner absconding from the year 2018, when the charge sheet was laid on 23.11.2018 and having not cooperated with the investigation, the petitioner is not entitled for any relief under subsection (2) of Section 167 of Cr.P.C.

5.6. He relies on the decision passed in ***Amol Kale and others vs. State of Karnataka***[16], more

[16]Criminal Appeal No.573/2019 DD 7.09.2022

particularly para 14, 15 and 16 thereof, which are reproduced hereunder for easy reference:

> ***14.*** *The reading of the above provisions show that the Special Court has the power to extend the period of90 days upto 180 days on the request of the Public Prosecutor. Therefore, the only question in the case was, whether the chargesheet in the case on hand was filed within those 180 days.*
>
> ***15.*** *Though several judgments are relied on by both side relating to Section 167(2) Cr.P.C., the ratio in the said judgments is that, if the chargesheet is not filed within 90 days as contemplated under Section 167(2) of Cr.P.C., the accused is entitled to statutory bail. By virtue of operation of Section 22 of KCOCA, the said time gets extended upto 180 days.*
>
> ***16.*** *As rightly pointed out by learned Special Public Prosecutor, the other contentions that the accused were not heard on the application under Section 22 for extension, the chargesheet copies were not furnished to them, etc., were the interlocutory orders. They were not appealable under Section 12 of the Act. Moreover, the appellants did not challenge those orders, therefore, they attained finality. Therefore, now it is not open to the appellants to question them in this proceeding.*

5.7. On the above grounds, he submits that the above petition is required to be rejected.

6. Heard Sri. KrianB.S, learned counsel for the petitioner and Sri.Ashok N.Naik, Special Public Prosecutor for the respondent. Perused papers.

7. The points that would arise for determination are:

1. **Whether an accused would be entitled to the benefit under Subsection (2) of Section 167 of Cr.P.C, in the event of charge sheet having already been filed before his arrest?**

2. **Whether the filing of an additional/supplementary charge sheet would give rise to a right for default/statutory bail under Subsection (2) of Section 167 of Cr.P.C?**

3. **Whether the second remand could be made during COVID period without physical production of an accused?**

4. **Whether the order of remand passed without passing order on application under Subsection (2) of Section 167 of Cr.P.C. is bad in law?**

5. **Could a absconder claim benefit of Subsection(2) of Section 167 of Cr.P.C?**

6. **What order?**

8. I answer the above points as under:

9. **<u>ANSWER TO POINT NO.1:</u> Whether an accused would be entitled to the benefit under Subsection (2) of Section 167 of Cr.P.C, in the event of charge sheet having already been filed before his arrest?**

9.1. Subsection (1) and (2) of Section 167 of Cr P.C. reads thus:

> *167.* ***Procedure when investigation cannot be completed in twenty four hours.***
>
> *(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty- four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.*
>
> *(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-*
>
> *(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so,*

but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

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

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

(b) no Magistrate shall authorise detention 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.[1]

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.*

9.2. In terms of proviso (a) to Subsection (2) of Section 167 of Cr.P.C, no Magistrate can authorise the detention of the accused person who is in custody beyond a period of 90 days where the investigation relates to offence punishable with death, imprisonment for life not less than 10 years in other cases 60 days.

9.3. The above provision is normally referred to as statutory bail or default bail i.e. to say in the event of the investigation not being complete

within a period of 90 days or 60 days as referred to above, there is a right which accrues to the accused to seek for bail which cannot be refused by the court. Of course if such a right is not exercised and application not filed, there is no obligation on part of the court to enlarge such person on bail.

9.4. This is an aspect of much debate inasmuch as it could be contended that whether an application is filed or not, the accused ought to be enlarged on bail and the duty cast on the court to direct such enlargement on bail if investigation is not completed within time period stipulated.

9.5. In the present case, we are dealing with proceedings initiated under KCOCA. In terms of proviso to Subsection (2) of Section 22, the said period of 90 days can be extended up to 180 days by the said court on a report of the

Public Prosecutor indicating the progress of the investigation and specific reasons for detention of the accused beyond a period of 90 days. Subsection (1) and (2) of Section 22 of KCOCA is reproduced hereunder for easy reference:

> *22.* ***Modified application of certain provisions of the Code.*** *-*
>
> *(1) Notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act, shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code and "Cognizable case" as defined in that clause shall be constructed accordingly.*
>
> *(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in sub-section (2), -*
>
> *(a) The references to "fifteen days" and "Sixty days" wherever they occur, shall be constructed as references to "Thirty days" and "ninety days" respectively;*
>
> *(b) After the proviso, the following proviso shall be inserted namely:-*
>
> *"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period up to one hundred and eighty days on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days."*

9.6. Thus, an accused in crimes other than under KCOCA could seek for statutory/default bail in terms of proviso (2) to Subsection (2) of Section 167 of Cr.P.C, if investigation is not completed within the prescribed period of 60 or 90 days as contained therein.

9.7. Insofar as offences under KCOCA are concerned, even in such circumstances the accused could seek for statutory/default bail if the investigation is not completed within the prescribed period under Subsection (2) of Section 167 of Cr.P.C., but however, the Public Prosecutor could make an application seeking for extension of time to complete the investigation and give the reasons for requirement of the accused to be in custody. If the same is accepted and the court were to extend the period of investigation subject to a maximum of 180 days, then the benefit under

Subsection (2) of Section 167 of Cr.P.C. can only be claimed subject to time period fixed by the Special Court in orders passed on such application.

9.8. ***Madhu Limaye***[1] case dealing with protection of personal liberty would not be attracted in the present case since the investigation has been completed insofar as the petitioner is concerned.

9.9. The decision in ***Chenna Boyanna Krishna Yadav's***[3] case relating to the matters to be considered while granting or refusing bail would not be applicable in view of my finding above that the investigation has been completed and charge sheet has been laid. In the event of separate application for regular bail is filed, the same would be considered by the Special Court in accordance with law.

9.10. In the decision in **Sayed Mohd. Ahmed Kazmi's[4] case** relating to the time period whether the application for statutory/default bail was filed would not apply to the present case since investigation has been completed and charge sheet has been laid.

9.11. The decision in **Nirala Yadav's[5] case,** being to a similar effect, the same would not apply to the present fact situation.

9.12. The decision in **M.Ravindran's[6] case,** dealing with the applicability and consideration of Subsection (2) of Section 167 were all in relation to a situation where charge sheet has not been laid and investigation was not completed and the Hon'ble Apex Court had categorically held that Article 21 would be violated if investigation is not completed in a timebound manner with the accused continuing

to be in custody. For the very same reason as stated above, this decision has no application to the present facts.

9.13. The decision in ***Manubhai Ratilal Patel's[7] case*** relating to remand, the decision in **Hitendra Vishnu Takur's[8] case** relating to extension of time for completion of investigation would also not be applicable since the investigation has already completed. For the very same reasons the decision in **Akul Ravi Teja's[10]** case and ***Sharadchandra Vinayak Dongre's[11]*** case would not be applicable since the charge sheet insofar as the petitioner was already laid and further investigation would be carried out once the remaining absconding accused are traced.

9.14. The decision in ***Mithabhai Pashabhai Patel's[12]*** **case** relating to applicability of

Subsection (2) of Section 167 and the consideration thereof is a matter of law. The decision in **Tula Ram's[13] case** is relating to postponement of issuance of summons and the enquiry to be held under Section 202 which is not applicable to the present case. The decision in **Gulavar Singh's case** relatable to the aspect of taking cognizance is again not applicable for the reasons that investigation has been completed.

9.15. **In view of the above I answer point No.1 by holding that an accused would not be entitled to the benefit under Subsection (2) of Section 167 of Cr.P.C, in the event of charge sheet having already been filed before his arrest.**

10. **<u>ANSWER TO POINT NO.2:</u> Whether the filing of an additional/supplementary charge sheet would give rise to a right for default/statutory**

bail under Subsection (2) of Section 167 of Cr.P.C?

10.1. In the event of a person to be detained in custody and investigation not being capable of completing within 24 hours as fixed under section 57 of Cr.P.C, the Officer in-charge of the police station shall produce the accused before the nearest Judicial Magistrate. The Judicial Magistrate could authorise the detention of the accused in such custody for a term not exceeding 15 days in a whole. The above detention is required beyond period of 15 days, the Magistrate is to be satisfied that adequate grounds exist for extending the time which can be extended to a total period of 90 days for offences punishable with death, imprisonment for life or imprisonment of a term not less than 10 years or 60 days where investigation relates to any other offence with lesser punishment.

10.2. The filing of a charge sheet denotes the completion of the investigation and whether that particular accused is charged with having committed any offence or not. There are other situations where investigation being ongoing as regards certain other accused on account of their non availability, a charge sheet is filed as regards the available accused and permission is sought to carry out further investigation and file additional charge sheet in the event of the said absconding accused being found. In such a situation, an additional or supplementary charge sheet would be filed.

10.3. The above facts give rise to two distinct situations. Firstly, where when a charge sheet has been laid, the concerned accused is implicated in the said charge sheet, secondly, where the concerned accused is not implicated

in the charge sheet and further investigation is ongoing.

10.4. In the first situation when the concerned accused is implicated in the charge sheet, the investigation has come to an end on the existing material and the concerned accused has been charged of the offences contained in the charge sheet, though in the event of further investigation being carried on as regards other accused, as regards the accused against whom a charge sheet has already been laid, supplementary charge sheet/s could be laid. Thus, once a charge sheet is filed within the time period prescribed under Subsection (2) of Section 167 of Cr.P.C, or as may be extended in terms of proviso to Subsection (2) of Section 22 of KCOCA, the concerned accused would not be entitled to default/statutory bail.

10.5. In the second case, where a charge sheet has not been laid against the concerned accused, but investigation is going on, in such event the rigour of Subsection (2) of Section 167 of Cr.P.C, would apply, insofar as offences other than that covered under KCOCA, as regards offences under KCOCA it would be governed by any order passed under the proviso to Subsection (2) of Section 22 of KCOCA. The investigation not being completed within the period mentioned under Subsection (2) of Section 167 of Cr.P.C., then concerned accused could seek for default/statutory bail. If the accused has been tried for offences under KCOCA, it is only after the expiry of the period, if any extended by the Special Court under proviso of Subsection (2) of Section 22 of KCOCA that the right to seek for statutory/default bail would arise.

11. **<u>ANSWER TO POINT NO.3:</u> Whether the second remand could be made during COVID period without physical production of an accused?**

11.1. The COVID period or the SOP applicable during that period is not relevant in the present case for the reason that the petitioner in this case was not remanded for the second time but was in judicial custody subsequent to the filing of the charge sheet. In such a situation, the accused only had an option to seek for and obtain regular bail. Once a charge sheet has been filed, there is no question of remand as envisaged under Subsection (2) of Section 167 of Cr.P.C. or proviso to subsection (2) of Section 167 of Cr.P.C. or the proviso to subsection (2) of Section 22 of KCOCA.

11.2. It is only in the event of the investigation not being completed, the question of second remand or third remand, etc, would arise where the aforesaid provisions would apply.

12. **ANSWER TO POINT NO.4: Whether the order of remand passed without passing order on application under Subsection (2) of Section 167 of Cr.P.C. is bad in law?**

12.1. Learned counsel for the petitioner contended that an order of remand has been passed insofar as the petitioner is concerned without considering the application under Subsection (2) of Section 167 of Cr.P.C.

12.2. In the present case, a charge sheet having already been laid and the petitioner being implicated in the offence, the question of statutory/default bail not being applicable is considered and answered hereinabove. Hence, the question of the application for default/statutory bail considered prior to remand would also not arise the investigation having been completed.

12.3. This point raised by the learned counsel for the petitioner would only arise in the event of

investigation not being completed and the period expiring which is not so in the present case.

13. **<u>ANSWER TO POINT NO.5:</u> Could a absconder claim benefit of Sub section(2) of Section 167 of Cr.P.C?**

13.1. The contention of Sri.Ashok N. Naik, the Special Public Prosecutor that the petitioner in this case having absconded and thereafter being arrested on a non bailable warrant cannot claim the benefit of Subsection (2) of Section 167 of Cr.P.C.

13.2. A reading of Subsection (2) of Section 167 of Cr.P.C does not make any distinction between an absconder or a person arrested at initial stage itself. Section 167 of Cr.P.C. deals with a situation where a person has been arrested, investigation not being completed within 24

hours, accused is required to be remanded to custody.

13.3. Section 167 of Cr.P.C, would come into play only upon arrest and not at a time when person is absconding i.e. to say it is only when the petitioner was arrested that the benefit and/or entitlement under Section 167 accrued to the accused and as per the time period fixed therein at least 24 hours, 15 days, 60 days or 90 days as the case may be, certain rights would accrue to the accused to seek for statutory/default bail.

13.4. In my considered opinion as dealt with hereinabove, the fact of the accused absconding or delaying the investigation during the period of he being absconding would not be relevant for consideration of application Subsection (2) of Section 167 of Cr.P.C.

13.5. It is after the accused is arrested and available in custody, the investigation is required to be completed in a time bound manner as contained in Subsection (2) of Section 167 of Cr.P.C.

14. **ANSWER TO POINT NO.6: What order?**

14.1. In view of the answer to various points which have been raised for consideration, I am of the considered opinion that in the present case, charge sheet having been laid against the petitioner even prior to the arrest of the petitioner, the petitioner having been arraigned as an accused and charged with certain offences punishable under 302, 120(B), 114, 118, 109, 201, 203, 204, 35 IPC & 25 (1), 25(1B), 27(1) of Indian Arms Act and Section 3(1)(i), 3(2), 3(3), 3(4) of KCOCA, I am of the considered opinion that the benefit under

Subsection (2) of Section 167 of Cr.P.C. would not arise.

14.2. Hence, I pass the following:

ORDER

The petition stands dismissed.

Sd/-
JUDGE

In