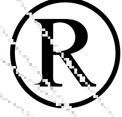

IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 26TH DAY OF JULY 2019

BEFORE

THE HON'BLE MR.JUSTICE B.A.PATIL

CRIMINAL PETITION NO.100871 OF 2019

BETWEEN

1. GANESH MISKIN @ GANESH @
   GANU BIN DASHARATH,
   AGE: 27 YEARS, OCC: BUSINESS,
   R/AT: GANESH COLONY,
   GOKUL ROAD, HUBBALLI.

2. AMEET BADDI @ BADDI @ AMEET BIN
   LATE RAMACHANDRA,
   AGE: 27 YEARS, OCC: BUSINESS,
   R/AT: TADPATRI GALLI,
   JANTHA BAZAAR, HUBBALLI. ...PETITIONERS

(BY SRI. GOURISHANKAR H MOT, ADVOCATE)

AND

THE STATE OF KARNATAKA
BY VIDYAGIRI POLICE STATION,
BY DEPUTY SUPERINTENDENT OF POLICE CCD,
CID BENGALURU,
REP. BY ITS
STATE PUBLIC PROSECUTOR,
DHARWAD BENCH, DHARWAD. ...RESPONDENT

(BY SRI. H.S.CHANDRAMOULI, STATE PUBLIC PROSECUTOR)

THIS CRIMINAL PETITION IS FILED U/SEC.439 OF CR.P.C., PRAYING TO ENLARGE ON BAIL, THE PETITIONERS HERE ACCUSED NO.1 AND 2 IN CRIME NO.0142/2015 REGISTERED BY VIDYAGIRI POLICE STATION FOR THE OFFENCE PUNISHABLE U/SEC.302, 34 OF IPC & 25 OF ARMS ACT PENDING BEFORE THE 3RD ADDL. SENIOR CIVIL JUDGE & CJM, AT: DHARWAD.

THIS CRIMINAL PETITION COMING ON FOR ORDERS ON 04.07.2019, HAVING BEEN HEARD AND RESERVED FOR ORDERS, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This petition has been filed by the petitioner/accused Nos. 1 and 2 under Section 439 of the Code of Criminal Procedure to enlarge them on bail in Crime No.142/2015 of Vidyagiri Police Station for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and also under Section 25 of the Arms Act.

2. I have heard Sri. Gourishankar Mot, learned counsel for the petitioners and Sri. H.S.Chandramouli, learned State Public Prosecutor appearing for the respondent-State.

3. Accused Nos.1 and 2 were apprehended in Crime No.221/2017 of Rajarajeshwarinagar Police Station, Bangalore and were in judicial custody at Parappana Agrahara, Bengaluru. The Deputy Superintendent of Police, CCD, CID, Bengaluru, filed a requisition seeking body warrant as against accused Nos.1 and 2, who were in custody in crime No.221/2017, filed an application contending that during the investigation in the present crime, cartridges used for the commission of the offence that were recovered on the spot in Gauri Lankesh case and cartridges recovered in Dr. Kalburagi murder's case were sent to Forensic Science Laboratory. Subsequently, FSL Report was received. As in the present crime number, the case was registered against unknown accused persons for the purpose of investigation and progress, the body warrant was sought. The Court below, by order dated 6.9.2018, issued the body warrant. On 15.09.2018, accused Nos.1 and 2 were produced before the Court under the body warrant and they were given to the custody of DSP, CID, Bengaluru, for a period 14 days for

the purpose of investigation. Thereafter, on 28.09.2018, accused Nos.1 and 2 were produced before the Court and the Court directed that accused Nos.1 and 2 are to be sent back to judicial custody in original case. On 17.12.2018, an application was filed under Section 167(2) of Cr.P.C. to release them on statutory bail. To the said application, objections were filed by the prosecution. After hearing the applicant as well as the learned Assistant Public Prosecutor, the bail application filed under section 167(2) CR.P.C. was dismissed by order dated 08.01.2019. Challenging the same, accused Nos.1 and 2 are before this Court.

4. It is the submission of the learned counsel for the petitioners/accused Nos.1 and 2 that the petitioners were arrested on 15.09.2018 and within 90 days, the charge-sheet was required to be filed, but in the instant case no charge sheet has been filed and as such, accused persons are entitled to be released on statutory bail. The learned Magistrate erred in holding that custody was transferred

to original case and there was no question of custody in this case and as such, there is a wrong interpretation. He further submits that the records clearly goes to show that the accused persons were in custody of the Court and if the charge sheet is not filed on completion of investigation, either within 60/90 days, the accused gets an indefeasible right of bail; this is a right which accrues to the accused even if no application is there and the accused is entitled to bail. It is his further contention that when once an application is filed, under Section 167(2) of Cr.P.C., the merits of the case cannot be looked into and technicalities cannot be a ground for rejection of the bail. In order to substantiate his contention, he relied upon the decision in the case of **Rakesh Kumar Paul Vs. State of Assam** reported in **2018 Cri.L.J.155 (SC)**. It is his further contention that a man can be in custody without he being formally arrested when restriction is imposed on his movements, either by police surveillance or some other restrictions by the police. Non-filing of the challan entitles the accused bail under Section 167(2) of Cr.P.C. In order to substantiate the said

argument, he relied upon the decision in the case of **Ramu vs. State of Karnataka** reported in **ILR 1991 KAR 1861**. He further submitted that when once the accused continues to be in detention in pursuance of his arrest and remains in jail, under such circumstances also he is entitled to be released on bail. On these grounds, he prayed to allow the petition and to release the accused on bail.

5. *Per contra,* the learned State Public Prosecutor for the respondent-State vehemently argued and submitted that the present case is entrusted to SIT and monitored by the Special Court. Accused was brought on body warrant and they were not arrested in the present case on hand. Under section 167(2), the main consideration is that the accused must be in custody of police or the Court, then under such circumstances, the provisions can be made applicable and from the date of custody, if within 90 days or 60 days if the charge sheet is not filed then the accused is entitled to be released on bail under the said provision. In order to substantiate his said

contention, he relied upon the decision in the case of **State of West Bengal vs. Dinesh Dalmia** reported in **AIR 2007 SC 1801**. It is his further contention, that there must be arrest of the accused and the custody of the accused must be there with the Court. Section 167 proviso comes into operation where the Magistrate thinks that the detention beyond period of 15 days is necessary, then the said provisions lays down an authority to the Magistrate for detention of the accused other than in the custody of the police. It is his further contention that the accused who is in judicial custody in one case can be allowed to be remanded to police custody in another case at a subsequent stage of investigation, then under such circumstances, it is not considered to be a custody. It is his further submission that Section 309 comes into operation after taking cognizance and during the period of investigation and the remand under this provision can only be to judicial custody and there cannot be any controversy about the said facts. In order to substantiate his contention, he relied upon the decision of the Hon'ble

Apex Court in the case of **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni** reported in **(1992)3 SCR 158**. It is his further submission that the body warrant which has been issued by the learned Magistrate is only a transit order. The Court is not having any control over the accused and immediately thereafter the accused has been remanded to the custody in the original case. Already in the said case, the charge sheet has been filed and even the bail application filed in that case also came to be dismissed. Under such circumstances, that the provisions of Section 167 of Cr.P.C. does not attract so as to release the accused on bail. It is his further submission that the body warrant issued against the accused cannot be equated to the warrant of arrest; the order issued in the body warrant cannot be construed to be an authorization for detaining the person. Body warrant is issued only for the purpose of securing the presence of an accused person, who is already detained in custody in another case and thereby the right of the accused are not curtailed. Police custody

has been given only for the purpose of investigation and the same cannot be considered to be police custody in that particular case or a judicial custody in the case where a body warrant has been issued. In order to substantiate his contention, he relied upon the decision of a Division Bench of this Court in the case of **Central Bureau of Investigation vs. Kenche Mahesh Kumar,** in Crl.P.No.1697/2014 disposed off on 21.07.2015. Section 167(2) is a default bail; it has to be exercised by the Court only when the charge sheet has not yet been filed within the stipulated period as contemplated under the law. On these grounds he prays to dismiss the petition.

6. I have carefully and cautiously considered the submissions made by the learned counsel for the parties and perused the records.

7. I have given my thoughtful consideration to the decisions quoted by the learned counsel for the petitioner and the learned SPP for the respondent-State.

8. In the present case on hand, it is an admitted fact that petitioner/accused Nos.1 and 2 were apprehended in Crime No.221/2017 of Rajarajeshwarinagara Police Station, Bengaluru. Subsequently, on 6.9.2018, an application was filed seeking body warrant against accused Nos.1 and 2 and Court accepted the same and accordingly, accused Nos.1 and 2 were produced before the Court and thereafter they have been handed over to the police and thereafter, on 28.09.2018, police produced the accused persons before the Court, and the Court passed an order to send accused Nos.1 and 2 to judicial custody in original case. The point to be considered in this case is,

> *Whether a person brought under the body warrant is said to be in custody as contemplated under the law and whether he is entitled to take the benefit under section 167(2) of Cr.P.C.?*

9. As could be seen from Cr.P.C., unfortunately, the terms 'custody', 'detention' or 'arrest' have not been defined. Under such circumstances, the Court is not having

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any option, but to refer to the dictionary meaning. As per Oxford Dictionary, 'custody' is imprisonment, detention, confinement, incarceration, internment, captivity, remand duress and durance. As per Cambridge Dictionary, it is state of being kept in prison especially while waiting to go to court for trial. As per Chambers Dictionary, the condition of being a held by the police, arrest or imprisonment, to take someone into custody to arrest them. Similar issue came up before the Hon'ble Apex Court in the case of **Sundeep Kumar Bafna Vs. State of Maharashtra and Another** reported in **(2014) 16 SCC 623**, wherein, at para nos.9.9 and 10, it has been observed as under:

> "**9.9.** This is how "custody" is dealt with in Black's Law Dictionary, (5th Edn. 2009):-
>
> "***Custody***- The care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. Also the

> detainer of a man's person by virtue of lawful process or authority.
>
> The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. Term "custody" within statute requiring that petitioner be "in custody" to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty. U. S. ex rel. Wirtz v. Sheehan, D.C.Wis, 319 F.Supp. 146, 147. Accordingly, persons on probation or released on own recognizance have been held to be "in custody" for purposes of habeas corpus proceedings."

10. A perusal of the dictionaries thus discloses that the concept that is created is the controlling of a person's liberty in the course of a criminal investigation, or curtailing in a substantial or significant manner a person's freedom of action. Our attention has been drawn, in the course of Rejoinder arguments to the judgment of the Full Bench of the High Court of Madras in Roshan Beevi vs State of T.N. 1984(15) ELT 289 (Mad), as also to the decision of the Court in Directorate of Enforcement vs Deepak Mahajan (1994) 3 SCC 440; in view of the composition of both the Benches, reference to the former is otiose. Had we been called upon to peruse Deepak Mahajan earlier, we may not have considered it necessary to undertake a study of several

Dictionaries, since it is a convenient and comprehensive compendium on the meaning of arrest, detention and custody."

Therein, after analysing the material placed on record, the Hon'ble Apex Court observed, at para no.16 as under:

"16. It appears to us from the above analysis that custody, detention and arrest are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. In Roshan Beevi, the Full Bench of the High Court of Madras, speaking through S. Ratnavel Pandian J, held that the terms 'custody' and 'arrest' are not synonymous even though in every arrest there is a deprivation of liberty is custody but not vice versa. This thesis is reiterated by Pandian J in Deepak Mahajan by

deriving support from Niranjan Singh vs Prabhakar Rajaram Kharote (1980) 2 SCC 559. The following passages from Deepak Mahajan are worthy of extraction:-

> "48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi.
>
> 49. While interpreting the expression 'in custody' within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in Niranjan Singh v. Prabhakar

> Rajaram Kharote observed that: (SCC p.563, para 9)
>
> "9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions."
>
> (emphasis supplied)

If the third sentence of para 48 is discordant to Niranjan Singh, the view of the coordinate Bench of earlier vintage must prevail, and this discipline demands and constrains us also to adhere to Niranjan Singh; ergo, we reiterate that a person is in custody no sooner he surrenders before the police or before the appropriate Court. This enunciation of the law is also available in three decisions in which Arijit Pasayat J spoke for the 2-Judge Benches, namely (a) Nirmal Jeet Kaur vs State of M.P. (2004) 7 SCC 558 (b) Sunita Devi vs State of Bihar (2005) 1 SCC 608, and (c) Adri Dharan Das vs State of West Bengal, (2005) 4 SCC 303, where the Co-equal Bench has opined that since an accused has to be present in Court on the moving of a bail petition under Section 437, his physical appearance before the Magistrate tantamounts to surrender. The view of Niranjan Singh (see extracted para 49 supra) has been followed in State of Haryana vs Dinesh Kumar

> (2008) 3 SCC 222. We can only fervently hope that member of Bar will desist from citing several cases when all that is required for their purposes is to draw attention to the precedent that holds the field, which in the case in hand, we reiterate is Niranjan Singh."

On close reading of the said paragraph, on occurrence of the crime the police is likely to carry out the investigative interrogation of the person in the course of which the liberty of that individual is not impaired and if accused appears before the Court or surrenders then under such circumstances that his liberty is curtailed then under such circumstances, it can be held that he is in custody. Though the petitioners were accused of an offence, but were not in custody and that they were in custody in the original case. Similar issue also came up before the Division Bench of this Court in the case of **Gaurav Goel Vs. State of Karnataka & Others** reported in **2016 Crl.L.J. 381,** at para no.4, 5, 6, 7 and 8, it has been observed as under:

> "4. Chapter XXII of the Code of Criminal Procedure (Cr.PC for short) deals with the

attendance of persons confined or detained in Prisons. Section 267 of Cr.PC empowers the Court to make an order requiring the Officer in-charge of the Prison to produce the person confined or detained in Prison, before the Court for answering the charge or for the purpose of such proceeding or, as the case may be, for giving evidence. The provisions of Section 267 of Cr.PC are employed by the Court to secure the presence of a prisoner who is already facing the criminal proceedings including investigation, trial etc., in one criminal case, for the purpose of answering the charge of an offence, or for the purpose of any proceedings against him in another criminal case. The warrant issued pursuant to the order passed by the Court under Section 267 of Cr.PC is generally called body warrant or Production Warrant or P.T. Warrant. On receiving the body warrant so issued by the Court, the officer in-charge of the Prison is required to produce the said prisoner before the Court which has issued the body warrant. However Section 269 of Cr.PC provides for certain contingencies where the officer in-charge of the Prison may abstain from carrying out the Court's order passed under Section 267 of Cr.PC and send to the said Court a statement of reasons for so abstaining.

5. At this stage, it is beneficial to note the relevant portion of Section 269 of Cr.PC for the purpose of decision in this matter:

> S.269. Officer in charge of prison to abstain from carrying out order in certain contingencies.-Where the person in respect of whom an order is made under Sections 267-
>
> (a) xxx xxx
>
> (b) xxx xxx
>
> (c) is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained; or
>
> (d) xxxx;
>
> the Officer in-charge of the prison shall abstain from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining:
>
> Provided that where the attendance of such person is required for giving evidence at a place not more than twenty-five kilometers distant from the prison, the Officer in-charge of the prison shall not so abstain for the reason mentioned in clause (b).

So also it is beneficial to note the Provisions of Sections 3 and 6 of the Prisoners (Attendance in Courts) Act, 1955 ('Prisoners Act' for short), which reads thus:

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3. Power of Courts, to require appearance of prisoners to give evidence or answer a charge.-

(1) Any civil or criminal court may, if it thinks that the evidence of any person confined in any prison is material in any matter pending before it make an order in the form set forth in the First Schedule, directed to the officer-in-charge of the prison:

Provided that no civil court shall make an order under this sub-section, in respect of a person confined in a prison situated outside the State in which the court is held.

(2) Any criminal court may, if a charge of an offence against a person confined in any prison is made or pending before it, make an order in the form set forth in the Second Schedule, directed to the officer-in-charge of the prison.

(3) No order made under this section by a civil court which is subordinate to a District Judge shall have effect unless it is countersigned by the District Judge; and no order made under this section by a Criminal Court which is inferior to the Court of a Magistrate of the first class shall have effect unless it is countersigned by the District Magistrate to whom that court is subordinate or within the local limits of whose jurisdiction such Court is situate.

(4) For the purposes of sub-section (3), a Court of Small Causes outside a Presidency-town or city of Hyderabad shall be deemed to be subordinate to the District

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Judge within the local limits of whose jurisdiction such Court is situate.

6. Officer in-charge of prison when to abstain from carrying out order.- Where the person in respect of whom an order is made under Section 3 -

(a) xxxx

(b) xxxx

(c) xxxx

(d) is in custody for a period, which would expire before the expiration of the time required for removing him under this Act and for taking him back to the prison in which he is confined, the officer-in-charge of the prison shall abstain from carrying out the order and shall send to the Court from which the order had been issued a statement of reasons for so abstaining:

Provided that such officer as aforesaid shall not so abstain where-

(i) the order has been made by a Criminal Court; and

(ii) the person named in the order is confined under committal for trial or under remand pending trial or pending a preliminary investigation and is not declared in accordance with the rules made in this behalf to be unfit to be removed from the prison where he is confined by reason of sickness or other infirmity; and

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(iii) the place, where the evidence of the person named in the order is required, is not more than five miles distant from the prison in which he is confined.

From the above, it is clear that Section 3 of the Prisoners Act empowers the Court to make an order requiring the person who is confined in any Prison to be produced to answer the charge in another case. Section 6 of the Prisoners Act provides the circumstances under which the officer in-charge of Prison shall abstain from carrying out the order and shall send to the Court the statement of reasons for so abstaining.

6. If a person is detained legally in connection with any crime by the order passed by A Court, such person if required in another crime in B Court, the provisions of Section 267 of Cr.PC shall be employed. Section 269 of Cr.PC is an adjunct to Section 267 of Cr.PC and the two provisions have to be read harmoniously. The main purpose of Section 267 of Cr.PC is to check delays when criminal proceedings are pending in different Courts.

7. It is clear from the provisions of Sections 267 and 269 of Cr.PC that they are akin to Sections 3 and 6 of the Prisoners Act. Section 6 of the Prisoners Act and Section 269 of Cr.PC authorizes the officer in-charge of the Prison to abstain from complying with the order issued under Section 3 of the Prisoners Act or under

Section 267 of Cr.PC as the case may be, requiring the officer in-charge of the Prison to produce the person detained in prison, before the Court.

8. Admittedly, in the matter on hand, the JMFC Court, Tiptur has given the date as 17.7.2015 for production of the petitioner's father (detenue) before the said Court and for the said purpose the body warrant is issued by the JMFC Court, Tiptur and the same is communicated to the Prison authorities, Bangalore wherein the detenue is imprisoned. It is not in dispute that the detenue was imprisoned and sent to Central Prison, Bangalore in connection with Crime No.10/2015 registered by the Special Investigation Team, Karnataka Lokayukta, Bengaluru. Admittedly, the Special Court has granted an order of bail in favour of the detenue on 19.6.2015 in the said matter. The release order is also issued by the Special Court after complying with the conditions imposed by the said Court in the order of bail. Despite the same, the prison authorities have not released the detenue on the ground that the body warrant is issued against the detenue by the JMFC Court, Tiptur in CC Nos.309/2009 and 63/2009. In our considered opinion, mere pendency of body warrant/production warrant will not be enough to keep a prisoner in prison beyond the date of expiry of the sentence or beyond the date of release order,

in case if he is granted an order of bail and the release order is made. The pendency of Production Warrant cannot be equated with the pendency of remand order or the warrant of arrest The Production warrant/body warrant cannot be construed to be an authorization for detaining a person illegally. As aforementioned, the date fixed by the JMFC Court, Tiptur for production of detenue in CC Nos.309/09 and 63/09 is 17.7.2015. The body warrant is issued on the ground that the detenue was detained in Central Prison, Bangalore in connection with Crime No.10/15 of Special Investigation Team, Karnataka Lokayukta, Bengaluru. Undisputedly, the detenue is granted an order of bail by the Special Court in Crime No.10/2015 on 19.6.2015 and release order was also issued immediately after complying with the conditions of bail. If it is so, the detention of the detenue subsequent to service of the release order issued by the Special Court in Crime No.10/2015, on the Prison Authorities, would be illegal. The Prison Authorities could not have detained the prisoner in Crime No.10/2015 subsequent to passing of the release order dated 19.6.2015. On that day itself, the detenue should have been released by the Prison Authorities. Citing the reason of issuance of body warrant by the JMFC Court, Tiptur in CC

> Nos.309/2009 and 63/2009, the Prison Authorities have wrongly detained the detenue till this date. As aforementioned, the pendency of the body warrant/Production Warrant cannot be equated to the order of remand and the same cannot be construed to be an authorization for detaining a person beyond the period. Body Warrant is issued only for the purpose of securing the appearance of a person who is already detained in custody. Admittedly, there is no order or authorization for detaining the detenue after 19.6.2015 by any Court including the JMFC Court, Tiptur. So also the arrest warrant is not issued by any Court after 19.6.2015. It is not disputed by the Government Advocate that the offences alleged against the detenue before the JMFC Court, Tiptur are bailable in nature. Hence in our considered opinion, the detention of the detenue subsequent to service of release order on the Prison Authorities, Bengaluru is illegal and unauthorized."

Therein, it has been observed that the pendency of a body warrant/production warrant cannot be equated to the order of remand and the same cannot be construed to be an authorization for detaining a person beyond the period. Body warrant is issued only for the purpose of securing

the appearance of the person who is already detained in custody. Keeping in view the ratio and the order passed by the Trial Court when accused Nos.1 and 2 were produced on 28.09.2018, Court passed an order to send back the petitioner/accused Nos.1 and 2 to judicial custody in original case and directed to send to judicial custody in original case. Under such circumstances, that the accused Nos.1 and 2 were not held to be in custody in Crime No.142/2015 of Vidyagiri Police Station. Section 167 clearly mentions that any person is arrested and detained in custody and the Magistrate to whom an accused person is forwarded under the said section. He is having an authority to remand as contemplated under the said section. But, in the case on hand, no such situation exists and admittedly, accused Nos.1 and 2 have been brought under body warrant and thereafter, they have been sent back to the custody in original case. In that light, the contention of the learned counsel for the petitioner that within 90 days the chargesheet has not been filed and

accused Nos.1 and 2 are entitled to be released on statutory bail is not accepted.

10. Even in the decision of the Hon'ble Apex Court in the case of **State of West Bengal** quoted *supra*, it is observed that in order to attract the provisions of section 167(2) the accused must be in the custody of the police and so-called deemed surrender in another case cannot be taken as starting point for counting the days for 15 days or 90 or 60 days as the case may be. At para Nos.13 to 15 of the said judgment, it is observed as under:

> "13. Sub-section (1) says that when a person is arrested and detained in custody and it appears that investigation cannot be completed within 24 hours fixed under Section 57 and there are grounds of believing that accusation or information is well-founded, the officer in charge of the Police Station or the Police Officer making the investigation not below the rank of sub-inspector shall produce the accused before the nearest judicial magistrate. The mandate of sub-section (1) of Section 167, Cr.P.C. is that when it is not possible to complete investigation within 24 hours then it is the duty of the Police to produce the

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accused before the Magistrate. Police cannot detain any person in their custody beyond that period. Therefore, Sub-Section (1) pre-supposes that the police should have custody of an accused in relation to certain accusation for which the cognizance has been taken and the matter is under investigation. This check is on police for detention of any citizen . Sub-Section (2) says that if the accused is produced before the Magistrate and if the Magistrate is satisfied looking to accusation then he can give a remand to the police for investigation not exceeding 15 days in the whole. But the proviso further gives a discretion to the Magistrate that he can authorize detention of the accused otherwise then the police custody beyond the period of 15 days but no Magistrate shall authorize detention of the accused in police custody for a total period of 90 days for the offences punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and no magistrate shall authorize the detention of the accused person in custody for a total period of 60 days when the investigation relates to any other offence and on expiry of the period of 90 days or 60 days as the case may be. He shall be released if he is willing to furnish bail. Therefore, the reading of sub-Sections (1) & (2) with proviso clearly transpires that the incumbent

should be in fact under the detention of police for investigation. In the present case, the accused was not arrested by the police nor was he in the police custody before 13.3.2006. He voluntarily surrendered before a Magistrate and no physical custody of the accused was given to the police for investigation. The whole purpose is that the accused should not be detained more than 24 hours and subject to 15 days police remand and it can further be extended up to 90/60 as the case may be. But the custody of police for investigation purpose cannot be treated judicial custody/ detention in another case. The police custody here means the Police custody in a particular case for investigation and not judicial custody in another case. This notional surrender cannot be treated as Police custody so as to count 90 days from that notional surrender. A notorious criminal may have number of cases pending in various police station in city or outside city, a notional surrender in pending case for another FIR outside city or of another police-station in same city, if the notional surrender is counted then the police will not get the opportunity to get custodial investigation. The period of detention before a Magistrate can be treated as device to avoid physical custody of the police and claim the benefit of proviso to Sub-Section 1 and can be released on bail. This kind of

device cannot be permitted under Section 167 of the Cr.P.C. The condition is that the accused must be in the custody of the police and so called deemed surrender in another criminal case cannot be taken as starting point for counting 15 days police remand or 90 days or 60 days as the case may be. Therefore, this kind of surrender by the accused cannot be deemed to be in the Police custody in the case of 476/02 in Calcutta. The Magistrate at Egmore, Chennai could not have released the accused on bail as there was already cases pending against him in Calcutta for which a production warrant had already been issued by the Calcutta Court. In this connection in the case of State of Maharashtra Vs. Bharati Chandmal Varma (Mrs.) reported in MANU/SC/0770/2001 : 2002 CriL.J 575 their Lordships has very clearly mentioned that:

> "For the application of the proviso to Section 167(2) of the Code, there is no necessity to consider when the investigation could legally have commenced. That proviso is intended only for keeping an arrested person under detention for the purpose of investigation and the legislature has provided a maximum period for such detention.. On the expiry of the said period the further custody becomes unauthorized and hence it is mandated that the arrested person shall be released on bail if he is prepared to and does furnish bail. It may be a different position if the same accused was found to have been involved in

> some other offence disconnected from the offence for which he is arrested. In such an eventuality the officer investigating such second offence can exercise the power of arresting him in connection with the second case. But if the investigation into the offence for which he was arrested initially had revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable."

Therefore, it is very clearly mentioned that the accused must be in custody of the police for the investigation. But if the investigation into the offence for which he is arrested initially revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable. Meaning thereby that during the course of the investigation any further ramification comes to the notice of the Police then the period will not be extendable. But it clearly lays down that the accused must be in custody of police. In the case of Directorate of Enforcement v. Deepak Mahajan and Another reported in MANU/SC/0422/1994 : 1994 CriLJ 2269 their Lordships observed that Section 167 is one of the provisions falling under Chapter XII of the Code commencing from Section 154 and ending with Section 176 under the caption "Information to the

police and other powers to investigate". Their Lordships also observed that main object of Section 167 is the production of an arrestee before a Magistrate within twenty four hours as fixed by Section 57 when investigation cannot be completed within that period so that the Magistrate can take further course of action as contemplated under sub-Section (2) of section 167. In para 54 their Lordships have also observed with regard to the pre-requisite condition which reads as under:

> "54. The above deliberation leads to a derivation that to invoke Section 167(1), it is not an indispensable pre-requisite condition that in all circumstances, the arrest should have been effected only by a police officer and none else and that there must necessarily be records of entries of a case diary. Therefore, it necessarily follows that a mere production of an arrestee before a competent Magistrate by an authorized officer or an officer empowered to arrest (notwithstanding the fact that he is not a police officer in its stricto sensu)on a reasonable belief that the arrestee " has been guilty of an offence punishable" under the provisions of the Special Act is sufficient for the Magistrate to take that person into his custody on his being satisfied of the three preliminary conditions, namely (1) the arresting officer is legally competent to make the arrest; (2) that the particulars of the offence or the accusation for which the person is arrested or other grounds for such arrest do exist and are well-founded; and (3) that the provisions of the special Act in

> regard to the arrest of the persons and the productions of the arrestee serve the purpose of Section 167(1) of the Code."

As against this learned counsel for the accused respondent has invited our attention to the case of Niranjan Singh & Anr. v. Prabhakar Rajaram Kharote & Ors. MANU/SC/0182/1980. This case only relates to 'custody' under section 439 Cr.P.C. Therefore, this case does not provide us any assistance whatsoever. In another case, Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni MANU/SC/0335/1992 : 1992 CriLJ 2768 their Lordships observed in paragraph 11 as follows :

> "In one occurrence it might so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorize the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. But their Lordships put an occasion and added that limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an

> accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation in other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody."

Their Lordships have clarified that if one case is registered against the accused in which during the course of investigation it is found that he has committed more than one offence then it will be treated to be one investigation and for each offence a separate police remand cannot be sought. But in case it is a different offence which has been committed by him then it will be a separate case registered and separate investigation will be taken up and for that the detention by the accused in the previous case cannot be counted towards a new case or different case registered against the accused. In fact, the observation in this case answers the question raised in this petition. Therefore, their Lordships observed;

> "the occurrence constituting to different transactions give rise to two different cases and the exercise of power under Sections 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two difference cases….. Arrest and detention in custody in the context of

> Section 167(1) & (2) of the Code has to be truly viewed with regard to the investigation of that specific case in which the accused person has been taken into custody.
>
> 14. Therefore, for the separate offence the accused has to be tried separately and for that the proceedings will be initiated separately and independent remand can be sought by the accused.
>
> 15. In view of the above discussion, we are of the opinion that the view taken by the learned Single Judge of the Calcutta High Court is not correct and we accordingly set side the order of the Calcutta High Court dated 27.9.2006 and allow the appeal filed by the State of West Bengal and direct the Metropolitan Magistrate to proceed in the matter in accordance with law."

On close reading of the above said paragraphs, it clarifies the fact that the arrest and detention must be in that case in which the accused has been taken into custody. In the instant case on hand the accused is in the custody in another crime number and as such, he is not said to be in custody in the present case, so as to attract the provisions of Section 167 of Cr.P.C. so as to grant default bail.

11. On close reading of Section 167, proviso the said proviso comes into operation where the magistrate thinks fit where the detention beyond the period of 15 days is necessary, the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police beyond the period of 15 days. Otherwise than in the custody of the police beyond the period of 15 days in the said proviso is significant. Even in the said section, the nature of the custody can be altered from judicial custody to police custody vice-a-versa during the period of 15 days. After 15 days accused could only be kept in judicial custody or any other custody as ordered by the Magistrate. In the case on hand, on a close reading of the material that the accused were not taken to judicial custody however they were brought on body warrant and immediately they were remanded to the Court of original jurisdiction. In that light, the provisions of Section 167(2) will not made applicable to the facts of the case on hand. Though the learned counsel for the petitioner/accused has urged many more grounds by relying upon the various

decisions of the Hon'ble Apex Court and other High Courts, with all due respects, the facts in the said case are not similar to facts of the case on hand and as such, that the contentions taken are not acceptable.

In view of the above, the petition is dismissed as devoid of merits.

Sd/-
JUDGE

Kms

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