

ILR 2008 KAR 495

S.R. BANNURMATH AND A.C. KABBIN, JJ

**Yashodamma vs The State of Karnataka by Station
House Officer***

- (A) CODE OF CRIMINAL PROCEDURE, 1973 –
SECTIONS 167 AND 309(2) – Scope of – Power of the
Magistrate to remand the accused – HELD, As per the
wordings of Section 309(2) of the Code of Criminal
Procedure, that the power of a Magistrate to remand the
accused during enquiry is only after cognizance is taken
and not before that and Section 309 of the Code of Criminal
Procedure does not come into picture until cognizance is
taken - FURTHER HELD, The remand so granted will be
operative until the period specified in the remand order or
until the expiry of the maximum period stipulated in
Sub-Section (2) of Section 167 Cr.P.C whichever is earlier
– The detention of the accused by a Court subsequent to
the time, the chargesheet is filed until cognizance is taken
falls under the said power of detaining the accused till he
furnishes bail and it is not illegal – In that event, the right
of the accused to be released on bail will have to be under
relevant provisions for bail i.e., Sections 436, 437, 439 of**

***Criminal Petition No. 27/2005 C/w 4033/04, 3728/04 and 1035/05,
Dated: 19th day of December 2007**

the Code of Criminal Procedure and not under the proviso to Section 167 of the Code of Criminal Procedure.

- (B) **CODE OF CRIMINAL PROCEDURE, 1973 – SECTION 167 – EXPLANATION TO SECTION 167(2) – Detention of the accused – Filing of chargesheet – Accused, entitlement of bail – HELD, The detention of an accused subsequent to the date of filing the chargesheet until cognizance is taken will be detention under the 1st Explanation to the proviso to Section 167(2) of the Code of Criminal Procedure. When the chargesheet is filed within the period specified in Section 167(2) of the Code of Criminal Procedure, the accused is not entitled to be released on bail under the proviso to Section 167(2) of the Code of Criminal Procedure, even if the Magistrate fails to take cognizance of the offence within the time stipulated in Section 167(2) – FURTHER HELD, When an accused is in custody and the chargesheet is filed within the time stipulated, a duty is cast upon the Magistrate, to consider the chargesheet without undue delay and pass orders on the question of taking cognizance of the offences. However, the delay in taking cognizance of the offence does not render the detention illegal, though it is irregular. Such detention from the time the chargesheet is filed within time until cognizance is taken falls under Explanation-I to the proviso to Section 167(2) of the Code of Criminal Procedure. Indefeasible right of the accused under the proviso to Section 167(2) of the Code of Criminal Procedure**

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to claim compulsory bail will not be available in such an event.

CASES REFERRED:

AT PARAS

1. 2004 Cr.L.J. 1506
Devindrappa and another vs State of Karnataka (Ref) 2
2. ILR 1985 Kar. 3098
Balappa Karnal vs State of Karnataka (Ref) 2
3. 1994(3) Crimes 697
Dorai and Another vs State of Karnataka (Ref) 2
4. 1977 Criminal Law Journal 632
Gyanu Madhu Jamkhandi vs The State of Karnataka (Ref) 7
5. AIR 1953 S.C. 277
Ram Narayan Singh vs The State of Delhi and Others (Ref) 10
6. AIR 1992 S.C. 1768
Special Investigation Cell-I New Delhi vs Anupam J. Kulkarni (Ref) 10
7. AIR 1983 S.C. 439
State of U.P. vs Lakshmi Brahman and Another (Ref) 12
8. AIR 1996 S.C. 1931
Raj Kishore Prasad vs State of Bihar and Another (Ref) 13
9. 1985 Cr.L.J. 301
Mahesh Chand and etc., vs State of Rajasthan and etc., (Ref) 16

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10. *AIR 2001 Supreme Court 1910*
Uday Mohanlal Acharya vs State
of Maharashtra (Ref) 17
11. (1994) 5 *Supreme Court Cases* 410
Sanjay Dutt vs State Through C.B.I.
Bombay (II) (Ref) 17

Sri Mohan Bhat, Basavaraj Kareddy, Hashmath Pasha, K. Apparao
and Sri Dhiraj Kumar, Advocates for Petitioner.

Sri H.S. Chandramouli, SPP, P.N. Prakash, Spl. Public Prosecutor,
Advocate for Respondent.

ORDER

Kabbin, J

The question of law that is required to be considered in these petitions is as to whether the remand of an accused under Section 167 of the Code of Criminal Procedure comes to an end as soon as a charge sheet is filed and if there is delay in the Magistrate taking cognizance of the offence, whether the intervening period from the time the charge sheet is placed until the cognizance is taken amounts to illegal detention.

2. These four petitions have been filed under Section 439 of the Code of Criminal Procedure, for grant of bail. During arguments in Criminal Petition No. 27/2005 one of the contentions raised was that as held by the learned Single Judge of this Court (Justice Smt.

Manjula Chellur) in *DEVINDRAPPA AND ANOTHER vs STATE OF KARNATAKA*¹, once the charge sheet is filed, period of remand under section 167 of the Code of Criminal Procedure comes to an end in the absence of specific order of remand under Section 309 of the Code of Criminal Procedure, the detention of the accused in custody from the date of charge sheet till date was illegal. Relying on an earlier decision of this Court in *BALAPPA KARNAL vs STATE OF KARNATAKA*² it was urged that in view of intervening period of detention being illegal, the accused was entitled to be released on bail as of right. The learned Single Judge. (Justice Shri Huluvadi G. Ramesh) before whom Criminal Petition No. 27/2005 was argued, was of the opinion that in view of different view taken by another Single Judge of this Court in *DORAI AND ANOTHER vs STATE OF KARNATAKA*³, the issues involved are required consideration by a Division Bench and accordingly he proposed that the following points of law be referred for consideration and decision:

"1. Whether the accused is entitled for compulsory bail as per Sec. 167(2) of the Cr.P.C. even if the charge sheet is filed within 90 days from the date the Magistrate has first authorised detention of the accused and, cognizance is taken subsequent to the period of 90 days and whether such detention

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1. 2004 CrI.L.J. 1506
 2. ILR 1985 Kar. 3098
 3. 1994(3) Crimes 697

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beyond 90 days till cognizance is taken becomes illegal and thereby accused is entitled to be released on bail:

or

2. Whether on the filing of the charge sheet within 90 days from the date of the Magistrate first authorising detention of the accused if cognizance is not taken within 90 days and is taken beyond the said period of 90 days, the accused cannot be considered for compulsory bail u/s 167(2) of the Cr.P.C.

3. Is taking cognizance before expiry of 90 days compulsory to disentitle the accused to seek compulsory bail under sec. 167(2), Cr.P.C? If not, under which provision the detention and custody of the accused to be extended beyond 90 days till cognizance is taken and till order of committal is passed under Sec. 209 Cr.P.C.?

3. Hon'ble the Chief Justice has therefore assigned Criminal Petition No. 27/2005 and also three other petitions involving similar questions, i.e. Criminal Petition Nos. 4033/2004, 3728/2004 and 1035/2005 for consideration of the points.

4. The petitioners are represented by the Learned Counsel, Sri Hasmath pasha, Sri Ravi B. Naik, Sri Appa Rao, Sri Dhiraj Kumar, Sri Basavaraj Kareddy, Sri Mohan Bhat and the respondent - State is represented by Sri N. Rudramuni, learned Addl. Govt. Advocate. Narcotic Control Bureau has been represented by Sri P.N. Prakash and Sri Urval Ramanand, learned standing counsel for South Zone. Since the points of law are of general matters, we have also heard the learned Amicus Curiae.

5. Before Considering the questions of law referred, it is necessary to refer to the relevant factual aspects involved in these petitions. The petitioners are the accused in different cases before different Courts. In all the cases, charge sheets were filed before the expiry of the period of remand provided in sub-Section (2) of section 167 of the Code of criminal Procedure. However, some time was taken by the Presiding Officers of the respective Courts in taking cognizance of the offences. The dates relevant for the decision on points involved may be mentioned as follows:

Criminal Petition	Date on which maximum period of detention allowed in Section 167 expired	Date on which charge sheet was filed	Date on which cognizance was taken
27/2005	6-8-2004	2-8-2004	28-8-2004
4033/04	28-7-2004	27-7-2004	31-7-2004
3728/04	28-6-2004	24-6-2004	29-6-2004
1035/05	9-3-2005	8-2-2005	14-2-2005

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6. Relying on the principle in Devindrappa's case referred to above and many other decisions of the Supreme Court, the learned Counsel for the petitioners urged the following prepositions:

1. *That once the charge sheet is filed, the remand granted u/s 167 of the Code of Criminal Procedure comes to an end and further remand is only under section 309 of the Code of Criminal Procedure.*
2. *Remand under Section 309 of the Code of Criminal Procedure cannot be prior to the stage, the Magistrate or the Special Judge takes cognizance of the offence.*
3. *If there is no valid remand from time to time, the period of detention under section 167 of the Code of Criminal Procedure comes to an end from the time, charge sheet is filed and the detention thereafter becomes illegal; and therefore the accused, as of right, is entitled to be released on bail.*

7. In this regard, the learned Counsel for the petitioners have placed reliance on the observations in *GYANU MADHU JAMKHANDI vs THE STATE OF KARNATAKA*⁴. In that case for

4. 1977 Criminal Law Journal 632

the last time, the accused had been remanded on 3-9-1976 to judicial custody till 10-9-1976. On 6-9-1976 charge sheet was filed which itself was after the expiry of the period provided in the proviso (a) to section 167(2) of the Code of Criminal Procedure. The learned Magistrate took cognizance of the offences on the same day, but instead of passing any order under Section 309(2) of the Code of Criminal Procedure, he adjourned the matter to 10-9-1976 until which date, the detention under Section 167 of the Code of Criminal Procedure had been authorised earlier. Under the circumstances, it was observed by a learned Single Judge of this Court as follows:

"If, on the filing of the charge sheet, a Magistrate does not, for a number of days proceed to apply his mind and take cognizance of the offence made out, he cannot for those number of days exercise powers of remand to judicial custody either under Section 167 or under Section 309(2). The situation can be solved by a Magistrate applying his mind to the facts and material available in the final report and the documents produced along with, it in no time after the filing of the final report and deciding whether cognizance of the offence made out should be taken or not; if he decides to take cognizance of the offence. Then he can, under Section 309(2), proceed to exercise his power of remand.

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The period of remand fixed by the order dated 3-9-1976 having come to an end on 6-9-1976 when the charge sheet was filed and the Magistrate having not passed any order of remand on 6-9-1976 in exercise of his powers under Section 309(2), the period of detention from 6-9-1976 till 10-9-1976, cannot be considered as the period of remand fixed by the Magistrate in exercise of his powers either under Section 167 or under Section 309(2). Thus the accused were detained in custody between 6-9-1976 and 10-9-1976 without any valid and legal orders of detention in custody passed by a Magistrate. In view of this, the accused were entitled to be enlarged on bail."

8. In the latest decision of this Court given in *DEVINDRAPPA AND ANOTHER vs STATE OF KARNATAKA (SUPRA)* the following observations have been made.

"The power of Magistrate to remand the accused to custody could be exercised either under Section 167 or under Section 309, Cr.P.C. Once charge sheet is filed, period of remand under Section 167, Cr.P.C. comes to

an end. If further custody is necessary, it can be done only under Section 309, Cr.P.C. To remand the accused to custody under Section 309, Cr.P.C. Magistrate has to apply his mind to the facts and material available in the final report i.e., charge sheet and decide whether cognizance of the offence could be taken or not. If he takes cognizance of the offence, then he can exercise his power under Section 309(2), Cr.P.C. to remand the accused. Accused were arrested on 6-2-2003 and the 90 days period would come to an end, at any cost by 6-5-2003 or 7-5-2003. The period of investigation allowed under the Act would come to an end at any cost before 7-5-2003. After 7-5-2003, no application under Section 167, Cr.P.C. came to be filed though such right was available to the accused. The charge sheet was filed on 10-6-2003. The detention from 7-5-2003 till 10-6-2003, did not become unauthorised. But after filing of the charge sheet on 10-6-2003; he could not have been detained in custody under Section 167, Cr.P.C. The Magistrate ought to have exercised his mind to the material available on record to the cognizance. Unfortunately, he took cognizance on 27-6-2003. Subsequent to

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taking cognizance, the custody is under Section 309(2), Cr.P.C. and the same would be authorised. Therefore, the detention in between 10-6-2003 to 27-6-2003 becomes illegal and they are entitled to be released on bail under Section 439, Cr.P.C. as the custody was neither under section 167, Cr.P.C. nor under Section 309, Cr.P.C."

9. In *BALAPPA KARNAL vs STATE OF KARNATAKA (SUPRA)* a learned Single Judge of this Court observed that the order of remand under Section 309 of the Code of Criminal Procedure can be only if the accused are in custody authorised by law, but that where detention is beyond the period of 90 days stipulated under Section 167 of the Code of Criminal Procedure, detention being unauthorised remand order under Section 309 of the Code of Criminal Procedure cannot be made. In that view of the matter, in that case it was directed that the accused be released on bail.

10. Sri Hasmath Pasha, learned Counsel for one of the petitioners refers to the observation of the Supreme Court in *RAM NARAYAN SINGH vs THE STATE OF DELHI AND OTHERS*⁵ that detention of a person in custody after the expiry of the remand order, without any fresh order of remand committing him to further custody while adjourning the case under Section 344 of the Code of Criminal Procedure is illegal. He also placed reliance on the observation of the

5. AIR 1953 S.C. 277

Supreme Court in Central Bureau of Investigation, Special Investigation Cell-1, *NEW DELHI vs ANUPAM J. KULKARNI*⁶ regarding the limitation under Section 167(2) of the Code of Criminal Procedure.

11. We have very carefully considered these submissions urged on both sides regarding scope of sections 167 and 309 of the Cr.P.C. in remanding the accused. Criminal Jurisprudence provides for arrest of an accused involved in a crime, and if sufficient grounds exist to presume his complicity in the crime for his detention on the order of the nearest Magistrate, before whom the investigating officer is required to produce such accused. If sufficient grounds do not exist for further detention, the arrested persons cannot be detained. Where there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary and shall also forward the accused to such Magistrate. Such Magistrate may authorize the detention of the accused as provided in sub-Section (2) which in the event of offences punishable with death or imprisonment for life and imprisonment for life shall not exceed fifteen days at a time. On consideration of the prayer of the investigating officer further detention beyond the period of fifteen days can be authorised, if the Magistrate is satisfied that there exist adequate grounds for doing so. But no Magistrate shall authorise the detention of the accused in custody for a total period exceeding.

6. AIR 1992 S.C. 1768

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- (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.*

After completion of investigation, charge sheet/ final report will be filed by the I.O. Thereafter the remand can be only u/S. 309 of the Cr.P.C.

12. There is another provision dealing with the detention of the accused in custody i.e., Section 209(b) of the Cr.P.C. It provides that the Magistrate at the time of committing a case to the Court of Sessions shall remand the accused to custody during, and until the conclusion of the trial. On a reading of these three provisions, it is clear that the legislature has taken care of each situation and has provided for detention of the accused in custody once he is arrested until his release on bail. There is nothing in any of these provisions to show that the remand once granted comes to an end on filing the charge sheet. Sections 167 and 309 of the Cr.P.C. being mutually exclusive, the intention of legislature is that the former should be exercised during investigation and that the latter should be exercised after the cognizance of the offence is taken. The learned standing counsel for the Narcotic Control Bureau argues that from the time the chargesheet is filed until the case is committed or trial is taken, it would

be within the meaning of enquiry defined in Section 2(g) of the Code and therefore the detention of the accused from the time, charge sheet is placed has to be presumed as remand under Section 309 of the Code of Criminal Procedure. In this regard he places reliance on the following observations of the Supreme Court in *STATE OF U.P. vs LAKSHMI BRAHMAN AND ANOTHER*⁷.

"From the time the accused appears or is produced before the magistrate with the police report under Section 170 and the Magistrate proceeds to enquire whether Section 207 has been complied with and then proceeds to commit the accused to the Court of Sessions, the proceeding before the Magistrate would be an inquiry as contemplated by Section 2(g) of the code. Obviously Section 309 would enable the Magistrate to remand the accused to the custody till the inquiry to be made is complete".

13. The learned Counsel for the petitioners submit that this view of the Supreme Court in Lakshmi Brahman's case has been held per incurium in *RAJ KISHORE PRASAD vs STATE OF BIHAR AND ANOTHER*⁸. We have gone through the said case in Raj Kishore

7. AIR 1983 S.C. 439

8. AIR 1996 S.C. 1931

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Prasad. That observation is in the context as to whether the Magistrate considering the prayer for committing an accused under Section 209 of the Code of Criminal Procedure, was conducting an enquiry before committal. There is no scope to interpret that decision as nullifying the observation of the Supreme Court in Lakshmi Brahman's case. However, if one looks to the wordings of Section 309(2) of the Code of Criminal Procedure, one will find that the power of a Magistrate to remand the accused during enquiry is only after cognizance is taken and not before that. We therefore accept the submission of the learned Counsel for the petitioners that Section 309 of the Code of Criminal Procedure does not come into picture until cognizance is taken.

14. The next question that arises is as to whether the detention of the accused comes to an end as soon as the charge sheet is filed and before an order under Section 309(2) of the Code of Criminal Procedure is passed.

15. As observed above, we do not find any provision in the Code of Criminal Procedure to substantiate the view taken in Gyanu Madhu Jamkhandi's case and Devindrappa's case referred to above to hold that the remand validly made under Section 167 of the Code of Criminal Procedure comes to an end as soon as the charge sheet is filed. The remand so granted will be operative until the period specified in the remand order or until the expiry of the maximum period stipulated in sub-Section (2) of section 167 of the Code of Criminal Procedure whichever is earlier.

16. A Full Bench of Rajasthan High Court had an occasion to consider similar point in *MAHESH CHAND AND ETC., vs STATE OF RAJASTHAN AND ETC.,*⁹ and it was observed as follows:

"The new code does not contain any provision entitling an accused to be released on bail merely on the ground, and without more that his detention in prison is illegal. In order to obtain his release on bail, the accused must show that his case is either covered by para (a) of Section 167 (2), or that he is entitled to it under the provisions of chapter 33 of the new Code. It is not legally permissible to introduce "a stage of compulsory bail not envisaged by the code".

Bail is no remedy, and has never been conceived or intended in law to be a remedy, for illegal detention. An accused person shall be admitted on bail in accordance with the enacted provisions of law, as interpreted by superior Court from time to time, and not otherwise, not even if the Court discovers some illegality vitiating his detention in prison. In the latter situation, the bail Court should leave the matter to be dealt with by

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the Court which may be competent to set the accused at liberty without any restraint on such liberty.

If the Magistrate is guilty of any act of omission or commission in the exercise of his powers of remanding an accused to custody under Section 167, 209 or 309 of the new Code, the accused may be justified in complaining that his detention was illegal during the relevant period and he may have his legal remedies including the remedy of habeas corpus, against such illegal detention, but illegal detention, by itself and taken alone is no ground for bail and has not been recognised as such by the new Code.

Provisions of bail, as contained in proviso of sub section (2) of Section 167 has been made to discourage slackness in investigation and to forewarn the investigating agency that any delay in that behalf would entitle the accused to be released on bail. If eventually the accused is released on bail under Section 167 (2) (a) it is not because his detention was illegal, but because he become entitled to bail by reason of the failure of the investigation agency to

complete the investigation within the period specified in para (a).

If an accused person is illegally detained in prison, the least that a Court of law is expected to do for him is to quash the illegal detention and set him at liberty forthwith. Bail is no remedy for illegal detention."

17. As regards the right of the accused to be released on compulsory bail on the failure of the investigating officer to place the charge sheet within the period of stipulated period, the Supreme Court in *UDAY MOHANLAL ACHARYA vs STATE OF MAHARASHTRA*¹⁰ relying on the decision of the Constitution Bench in the case of *SANJAY DUTT vs STATE THROUGH C.B.I. BOMBAY (II)*¹¹ has laid down the following six conditions:

"1. Under sub-Section (2) of Section 167 a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

10. AIR 2001 Supreme Court 1910

11. (1994) 5 Supreme Court Cases 410

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2. *Under the proviso to the aforesaid sub-Section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.*
3. *On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.*
4. *When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have accrued in his favour on account of default on the part of the investigating agency in*

completion of the investigation within the specified period, the Magistrate/ Court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigating within the period stipulated.

5. *If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-Section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during the period investigation is complete and the charge sheet is filed then the so-called indefeasible right of the accused would stand extinguished.*

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6. *The expression "if not already availed of" used by this Court in Sanjay Dutt case must be understood to mean when the accused filed an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-Section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."*

18. Except the situation mentioned in condition No.3 above, the indefeasible right to be released on compulsory bail will not be available. If the charge sheet is filed within the time stipulated, as stated by the Supreme Court in condition No.5 above, the so- called indefeasible right of the accused would stand extinguished. To avoid doubts of such kind, Explanation 1 was added to the proviso to sub-Section (2) of Section 167. It reads as follows:

"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 he does not furnish bail".

Therefore, the detention of the accused by a Court subsequent to the time, the charge sheet is filed until cognizance is taken falls under the said power of detaining the accused till he furnishes bail and it is not illegal. In that event the right of the accused to be released on bail will have to be under relevant provisions for bail i.e., 436, 437, 439 of the Code of Criminal Procedure and not under the proviso to Section 167 of the Code of Criminal Procedure.

19. For the abovesaid reasons we answer the reference as follows:

1. *Negative. The detention of an accused subsequent to the date of filing the charge sheet until cognizance is taken will be detention under the 1st Explanation to the proviso to Section 167(2) of the Code of Criminal Procedure.*
2. *When the charge Sheet is filed within the period specified in Section 167 (2) of the Code of Criminal Procedure, the accused is not entitled to be released on bail under the proviso to Section 167(2) of the Code of Criminal Procedure, even if the*

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Magistrate fails to take cognizance of the offence within the time stipulated in Section 167(2).

3. *When an accused is in custody and charge sheet is filed within the time stipulated, a duty is cast upon the Magistrate, to consider the charge sheet without undue delay and pass order on the question of taking cognizance of the offences. However, the delay in taking cognizance of the offence does not render the detention illegal, though it is irregular. Such detention from the time the charge sheet is filed within time until cognizance is taken falls under Explanation-I to the proviso to Section 167 (2) of the Code of Criminal Procedure. Indefeasible right of the accused under the proviso Section 167 (2) of the Code of Criminal Procedure to claim compulsory bail will not be available in such an event.*

With these findings, we direct respective petitions to be placed before the respective benches. An honorarium of Rs. 3000/- be paid to the learned Amicus Curie.
