(2019) 02 J&K CK 0111

Jammu & Kashmir High Court

Case No: Bail Application (B.A) No. 129 Of 2018

Mohd Rafiq		APPELLANT
	Vs	
State Of Jammu & Kashmir And Anr		RESPONDENT

Date of Decision: Feb. 22, 2019

Acts Referred:

- Narcotic Drugs And Psychotropic Substances Act, 1985 - Section 8, 21, 22, 29, 36, 36A(4), 37
- Code Of Criminal Procedure, 1973 - Section 19, 24, 27A, 57, 167, 167(1), 167(2), 167(2A), 173, 173(8), 439
- Code Of Criminal Procedure, 1898 - Section 344
- Constitution Of India, 1950 - Article 21, 22(1)

Hon'ble Judges: Sanjay Kumar Gupta, J

Bench: Single Bench

Advocate: Zainab Shamas Watali, Suneel Malhotra

Final Decision: Allowed

Judgement

1. Through the medium of instant application, the petitioner/applicant inter alia seeks indulgence of this Court for grant of bail on the grounds that after

the arrest of the petitioner/applicant on 04.01.2018, he was produced along with other accused before the Executive Magistrate, Jammu on 05.01.2018

for getting their first remand and the petitioner/applicant was on remand of the police till 03.07.2018; that the petitioner/applicant in this case was

arrested on 04.01.2018 and from the period of his first remand i.e. 05.01.2018 till 03.07.2018, the period of 180 days as prescribed in Section 36-A (4)

of the NDPS Act for producing the charge sheet had expired and the investigating agency failed to file the charge sheet before the competent court of

law. It is further stated that as per the settled law, the period of detention which is required to be taken into consideration by the court for grant of bail

under Section 167(2) CrPC is the period of the first remand of the petitioner/applicant and in the instant case the first remand was taken on

05.01.2018 and till 03.07.2018 the period of 180 days had expired; that the petitioner/applicant had moved an application before learned 2nd Additional

Sessions Judge, Jammu for admitting him on bail, which was dismissed on 24.07.2018 on the ground of premature and that the charge sheet came to

be filed on 04.07.2018 i.e., immediately after the expiry of the statutory period. It is further submitted that the learned trial court on the one hand has

accepted the fact that the challan has been presented after the expiry of the statutory period but on the other hand has opined that even if the right

accrued to the petitioner/applicant for consideration of compulsive bail, it stood lost because of filing of the charge sheet after the statutory period had

expired before the prayer could be considered by the trial court; that the impugned order is self contradictory and the trial court has not at all

appreciated the essence of Section 36-A (4) of the NDPS Act. The proviso to the said section clearly emphasizes that if it is not possible to complete

the investigation within the said period of 180 days, the Special Court may extend the said period upto one year on the report of the Public Prosecutor

indicating the progress of the investigation and specific reason for the detention of the accused beyond the said period of 180 days. While passing the

impugned order, the learned trial court has placed heavy reliance on the case titled Sanjay Dutt vs State, reported in (1994) 5 SCC 410 and has not at

all appreciated the latest judgment of the Supreme Court.

2. The State has filed the objections wherein it has been stated that the accused was caught with Afghan mark heroin; that from the accused persons

as named in the Challan, which stands produced before the Court of learned 2nd Additional Sessions Judge, Jammu a commercial quantity of heroin

was recovered; the accused along with other as named in the Challan arising out of FIR No.05/2018 Police Station Akhnoor, under Section 8/21/22/29

are facing trial before the learned 2nd Additional Sessions Judge, Jammu. The trial is at its initial stage. Hence, the rigorous of Section 37 of NDPS

Act is applicable; that as per the NDPS Act, if there is a recovery of drug of commercial quantity, the bail under these offences involving a recovery

of commercial quantity of Narcotic substance is as a rule denied and ground of bail is an exception. The accused was caught with the conscious

possession of Narcotic drug along with other co-accused, hence stands challaned under offence 8/21/22/29 of NDPS Act, therefore, it is denied that

the accused is a innocent person and has not committed any offence. It is further stated that the charge is pending before the learned 2nd Additional

Sessions, Judge, Jammu. It is further stated that the concession of bail cannot be extended to the accused who is belonging to an organized group

dealing with Narcotics and operating in a manner, which is destructive of special fiber spoiling the society particularly the young generation. There is

no change of circumstances on the basis of which the present application has been filed. That the perusal of the charge sheet/challan, it is manifest

that huge quantity of heroin Afghan made commercial quantity was recovered from the applicant/accused herein along with other co-accused person.

It is, therefore, prayed that the bail application of the applicant/accused may kindly be dismissed.

3. I have heard learned counsel for the parties and have perused the case file.

4. Brief facts of the case are that on 04.01.2018, petitioner-Mohd. Rafiq along with co accused namely Som Nath were intercepted at routine naka

laid by Police Station Akhnoor at Old Bridge, when they were travelling in a Maruti Car and on search heroin weighing 1 Kg 03 grams was recovered

from the possession of each of these accused and from their interrogation the complicity of other applicants/accused came to light and they were

arrested on 05.01.2017 and on their disclosure statements and at their instance two packets of heroin weighing 1 Kg 042 grams and 1.046 Kg were

recovered on the Nishandahi of applicant/accused Raju, whereas, 2 packets containing heroin weighing 1.044 each at the instance of Jabbar applicant

and 1 packet weighing 1.042 grams from applicant/accused Jankar Singh. It is also alleged in the chargesheet that the other accused persons

Gurvinder Singh and Amarpreet Singh being members of the same party had travelled all the way from Punjab to Akhnoor to receive consignment and

were apprehended, whereas the other accused Vishal Singh had helped the applicants in transportation of the smuggled contraband.

5. Section 167 of Cr.P.C. reads as under:-

167. Procedure when investigation cannot be completed in twenty-four hours. - (1) Whenever any person is arrested and detained in custody and it

appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, 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, Executive or 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. If he

has not 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 detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is

satisfied that adequate grounds exit for doing so, but no Magistrate shall authorise that detention of the accused person in custody under this section

for a total period exceeding sixty days and on the expiry of the said period of sixty days 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 section shall be deemed to be so released under tile provisions of Chapter

XXXIX for the purpose of that Chapter ;

(b) no Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before him in

person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further

detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class not specially empowered in this behalf by the Government or the High Court, as the case may be, shall authorise

detention in the custody of the police.]

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

[(4) If such order is given by an Executive Magistrate other than the District Magistrate or Sub-Divisional Magistrate, he shall forward a copy of his

order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate; and if such order is given by a Judicial Magistrate, he

shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate].

[(5) If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which

the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation

satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is

necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on

an application made to him or otherwise, that further investigation into the offence ought to be made vacate the order made under sub-section (5) and

direct further investigation to be made into the offence subject such direction with regard to bail and other matter as he may specify].

Explanation:- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of

accused person may be proved by his signatures on the order authorized detention or by the order certified by the Magistrate as to production of the

accused person through the medium of electronic video linkage, as the case may be.â€

6. Section 36-A of NDPS Act reads as under:-.

â€œOffences triable by Special Courts.â€"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),â€" (a) all

offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court

constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them

as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or

sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in

such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the

whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considersâ€" (i) when such person is forwarded to him as

aforesaid; or (ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary,

he shall order such person to be forwarded to the Special Court having jurisdiction; (c) the Special Court may exercise, in relation to the person

forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of

Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section; (d) a Special

Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central

Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may,

under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of

Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that

section as if the reference to â€œMagistrateâ€ in that section included also a reference to a â€œSpecial Courtâ€ constituted under section 36.

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial

quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to â€œninety daysâ€, where they

occur, shall be construed as reference to â€œone hundred and eighty daysâ€: Provided that, if it is not possible to complete the investigation within the

said period of one hundred and eighty days, the Special Court may extend the said period up to one year 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 one hundred and eighty

days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with

imprisonment for a term of not more than three years may be tried summarily.â€

7. From bare perusal of these relevant sections, it is evident that there is exception to general rules of completing the investigation by police and

presenting the report in terms of section 173 Cr.P.C, when the person/accused is under arrest, within stipulated time with regard to offences

punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity. In terms of section 167(2) Cr.P.C.

investigation in all the cases under RPC where an accused is in custody, has to be completed within 60 days from the date of arrest; but in terms of

this section 36-A of NDPS Act, it has to be completed within 180 days from the date of arrest. In case investigation is not completed within such

period, then accused gets indefeasible right to be enlarged on bail. The first day of arrest under this section starts from the date of first remand

granted by Magistrate as per law settled by judicial precedent.

8. Now coming to present case, the petitioner was arrested on 04.01.2018 and first remand has been obtained on 05.01.2018; so 180 days would have

expired on 03.07.2018. It means 180 days would have ended at 12 oâ€™clock at night on 03.07.2018. So default period would have started on

4th/7/2018 after 12 oâ€™clock at night. The finding of the trial Court that the bail application was premature, is not tenable because the Court is

required to consider right of accused for compulsive bail not on the date of application but on the date of consideration as is held by the Apex Court in

case titled State of M.P. Vs. Rustam and others reported in 1995 Supp (3) SCC 221, the relevant extract of the said judgment reads as under:-

â€œ4. We may also observe that the High Courtâ€˜s view in entertaining the bail petition after the challan was filed was erroneous. The matter now

stands settled in Sanjay Dutt v. State (1994) 5 SCC 410 in which case Hitendra Vishnu Thakur Vs. State of Maharashtra (1994) 4 SCC 60 2has aptly

been explained away. The court is required to examine the availability of the right of compulsive bail on the date it is considering the question of bail

and not barely on the date of the presentation of the petition for bail. This well-settled principle has been noticed in Sanjay Dutt case on the strength of

three Constitution Bench cases- Naranjan Singh Nathawan Vs. State of Punjab, 1952 SCR 39,5 Ram Narayan Singh V. State of Delhi, 1953 SCR

652, and A. K. Gopalan V. Govt of India, (1996) 2 SCR 427. On the dates when the High Court entertained the petition for bail and granted it to the

accused-respondents, undeniably the challn stood filed in Court, and then the right as such was not available.

So this finding of the trial Court is not correct as per above law.

9. Now coming to second finding of court below that after the challan is produced on 04.07.2018, the right of petitioner to be enlarged on compulsive

bail gets forfeited, is concerned, that finding is not as per law.

10. In case titled Rakesh Kumar Paul v. State of Assam reported in 2017 (9) SCALE 24, a three judges bench of apex court has held as under:-

â€œ40. In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for ‗default bailâ€˜ on or after 4th

January, 2017 till 24th January, 2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is

correct since the petitioner applied for regular bail on 11th January, 2017 in the Gauhati High Court â€" he made no specific application for grant of

_default bailâ€˜. However, the application for regular bail filed by the accused on 11th January, 2017 did advert to the statutory period for filing a

charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the

petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of

maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail â€" such an application was definitely

made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too

technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for _default bailâ€˜ or an oral

application for _default bailâ€˜ is of no consequence. The concerned court must deal with such an application by considering the statutory

requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed

and whether the accused is prepared to and does furnish bail.

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.

42. In Sunil Batra II v. Home Secretary, Delhi Administration (1980) 3 SCC 488 this Court accepted a letter, which was treated as petition, written by

a prisoner in Tihar Jail, Delhi complaining of inhuman torture inflicted on another prisoner by the Jail Warder. In Hussainara Khatoon v. State of Bihar

(1980) 1 SCC 98 a number of writ petitions, some by way of a letter, were grouped together and treated as habeas corpus petitions. In Rubabbuddin

Sheikh v. State of Gujarat (2007) 4 SCC 318 the brother of the deceased wrote a letter to the Chief Justice of India complaining of a fake encounter

and subsequent disappearance of his sister-in-law. This was treated as a habeas corpus petition. In Kishore Singh Ravinder Dev v. State of Rajasthan

(1981) 1 SCC 503 the petitioners sent a telegram to a learned judge of this Court complaining of solitary confinement of prisoners. The telegram was

treated as a habeas corpus petition and the concerned persons were directed to be released from solitary confinement. In Paramjit Kaur (Mrs.) v.

State of Punjab (1996) 7 SCC 20 a telegram received at the residential office of a learned judge of this Court alleging an incident of kidnapping by the

police was treated as a habeas corpus petition. In Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161 a petition addressed to a learned judge

of this Court relating to the inhumane and intolerable conditions of stone quarry workers in many States and how many of them were bonded labour

was treated as a writ petition on the view that the â€œConstitution-makers deliberately did not lay down any particular form of proceeding for

enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or straight-jacket formulaǁ. In

Peopleâ€˜s Union for Democratic Rights v. Union of India AIR 1982 SC 147 3a letter addressed to a learned Judge of this Court concerning violation

of various labour laws in the construction projects connected to the Asian Games was treated as a writ petition. In Dr. Upendra Baxi (I) v. State of

Uttar Pradesh (1983) 2 SCC 308 a letter relating to inhuman conditions in the Agra Protective Home for Women was treated as a writ petition and in

Sheela Barse v. State of Maharashtra (1983) 2 SCC 96 a letter addressed by a journalist complaining of custodial violence against woman prisoners in

Bombay was treated as a writ petition. These cases are merely illustrative of the personal liberty jurisprudence of this Court and in matters pertaining

to Article 21 of the Constitution of India this Court has consistently taken the view that it is not advisable to be ritualistic and formal. However, we

must make it clear that we should not be understood to suggest that procedures must always be given a go-by â€" that is certainly not our intention.

Duty of the Courts

43. This Court and other constitutional courts have also taken the view that in the matters concerning personal liberty and penal statutes, it is the

obligation of the court to inform the accused that he or she is entitled to free legal assistance as a matter of right. In Khatri v. State of Bihar (1981) 1

SCC 627 the Judicial Magistrate did not provide legal representation to the accused since they did not ask for it. It was held by this Court that this was

unacceptable and that the Magistrate or the Sessions Judge before whom an accused appears must be held under an obligation to inform the accused

of his or her entitlement to obtain free legal assistance at the cost of the State. In Suk Das v. Union Territory of Arunachal Pradesh (1986) 2 SCC 401

the accused was tried and convicted without legal representation, due to his poverty. He had not applied for legal representation but notwithstanding

this, this Court held that the trial was vitiated and the sentence awarded was set aside, particularly since the accused was not informed of his

entitlement to free legal assistance, nor was an inquiry made from him whether he wanted a lawyer to be provided at State expense. In Rajoo @

Ramakant v. State of Madhya Pradesh (2012) 8 SCC 553 the High Court dismissed the appeal of the accused without enquiring whether he required

legal assistance at the expense of the State even though he was unrepresented. Relying on Khatri and Suk Das this Court remanded his appeal to the

High Court for re-hearing after giving an opportunity to the accused to take legal assistance. Finally, in Mohammed Ajmal Mohammad Amir Kasab v.

State of Maharashtra (2012) 9 SCC 1 this Court relied on Khatri and held that in paragraph 474 of the Report as follows:

â€œâ€¦ it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him

fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one

would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be

strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it

clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental

proceedings.â€

44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court

on coming to know that the accused person before it is entitled to ₋default bailâ€˜, to at least apprise him or her of the indefeasible right. A contrary

view would diminish the respect for personal liberty, on which so much emphasis has been laid by this Court as is evidenced by the decisions

mentioned above, and also adverted to in Nirala Yadav.

Application of the law to the petitioner

45. On 11th January, 2017 when the High Court dismissed the application for bail filed by the petitioner, he had an indefeasible right to the grant of

₋default bailâ€˜ since the statutory period of 60 days for filing a charge sheet had expired, no charge sheet or challan had been filed against him (it

was filed only on 24 th January, 2017) and the petitioner had orally applied for ₋default bailâ€˜. Under (2012) 9 SCC 1 these circumstances, the only

course open to the High Court on 11 th January, 2017 was to enquire from the petitioner whether he was prepared to furnish bail and if so then to

grant him ₋default bailâ€˜ on reasonable conditions. Unfortunately, this was completely overlooked by the High Court.

46. It was submitted that as of today, a charge sheet having been filed against the petitioner, he is not entitled to ₋default bailâ€˜ but must apply for

regular bail â€" the ₋default bailâ€˜ chapter being now closed. We cannot agree for the simple reason that we are concerned with the interregnum

between 4th January, 2017 and 24th January, 2017 when no charge sheet had been filed, during which period he had availed of his indefeasible right of

₋default bailâ€˜. It would have been another matter altogether if the petitioner had not applied for ₋default bailâ€˜ for whatever reason during this

interregnum. There could be a situation (however rare) where an accused is not prepared to be bailed out perhaps for his personal security since he or

she might be facing some threat outside the correction home or for any other reason. But then in such an event, the accused voluntarily gives up the

indefeasible right for default bail and having forfeited that right the accused cannot, after the charge sheet or challan has been filed, claim a

resuscitation of the indefeasible right. But that is not the case insofar as the petitioner is concerned, since he did not give up his indefeasible right for

₋default bailâ€˜ during the interregnum between 4th January, 2017 and 24th January, 2017 as is evident from the decision of the High Court rendered

on 11th January, 2017. On the contrary, he had availed of his right to ‗default bailâ€˜ which could not have been defeated on 11th January, 2017 and

which we are today compelled to acknowledge and enforce.

47. Consequently, we are of opinion that the petitioner had satisfied all the requirements of obtaining ‗default bailâ€˜ which is that on 11 th January,

2017 he had put in more than 60 days in custody pending investigations into an alleged offence not punishable with imprisonment for a minimum period

of 10 years, no charge sheet had been filed against him and he was prepared to furnish bail for his release, as such, he ought to have been released by

the High Court on reasonable terms and conditions of bail.‖

11. Apex court in Achpal @ Ramswaroop Vs. The State of Rajasthan (CRIMINAL APPEAL NO. 1218 of 2018 @ SPECIAL LEAVE PETITION

(CRIMINAL) NO.6453 of 2018), on 24 September, 2018, has held as under:-

â€œ14. The historicasl background which led to the enactment of Section 167 of the Code, as it presently stands has been dealt with by Madan B.

Lokur, J. in paragraphs 11 to 15 of his judgment in Rakesh Kumar Paul v. State of Assam (2017) 15 SCC 67. Paragraphs 11 and 12 extract portions

from the report of Law Commission of India in its 41st report, the proposed provisions as suggested by the Law Commission and the Statement of

Objects and Reasons dated 07.11.1970 while introducing the Code. Said Paragraphs 11 and 12 are quoted here:-

â€œ11. Unfortunately, all laws tend to be misused whenever opportunity knocks, and Section 167 of the Code of Criminal Procedure, 1898 was no

exception. Since there was a practical difficulty in completing investigations within the 15-day time-limit, the prosecution often took recourse to the

provisions of Section 344 of the Code of Criminal Procedure, 1898 and filed a preliminary or incomplete report before the Magistrate to keep the

accused in custody. The Law Commission of India noted this in its 41st Report (after carefully studying several earlier Reports) and proposed to

increase the time-limit for completion of investigations to 60 days, acknowledging that:

â€œ14.19. â€¦ such an extension may result in the maximum period becoming the rule in every case as a matter of routine; but we trust that proper

supervision by the superior courts will prevent that.ll (emphasis supplied) The view expressed by the Law Commission of India and its proposal is as

follows:

â€œ14.19. Section 167.â€"Section 167 provides for remands. The total period for which an arrested person may be remanded to custodyâ€"police or

judicialâ€"is 15 days. The assumption is that the investigation must be completed within 15 days, and the final report under Section 173 sent to court by

then. In actual practice, however, this has frequently been found unworkable. Quite often, a complicated investigation cannot be completed within 15

days, and if the offence is serious, the police naturally insist that the accused be kept in custody. A practice of doubtful legal validity has therefore

grown up.

The police file before a Magistrate a preliminary or â€œincompletell report, and the Magistrate, purporting to act under Section 344, adjourns the

proceedings and remands the accused to custody. In the Fourteenth Report, the Law Commission doubted if such an order could be made under

Section 344, as that section is intended to operate only after a Magistrate has taken cognizance of an offence, which can be properly done only after a

final report under Section 173 has been received, and not while the investigation is still proceeding. We are of the same view, and to us also it appears

proper that the law should be clarified in this respect. The use of Section 344 for a remand beyond the statutory period fixed under Section 167 can

lead to serious abuse, as an arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner. It

is, therefore, desirable, as was observed in the Fourteenth Report, that some time-limit should be placed on the power of the police to obtain a remand,

while the investigation is still going on; and if the present time-limit of 15 days is too short, it would be better to fix a longer period rather than

countenance a practice which violates the spirit of the legal safeguard. Like the earlier Law Commission, we feel that 15 days is perhaps too short,

and we propose therefore to follow the recommendation in the Fourteenth Report that the maximum period under Section 167 should be fixed at 60

days. We are aware of the danger that such an extension may result in the maximum period becoming the rule in every case as a matter of routine;

but we trust that proper supervision by the superior courts will prevent that. We propose accordingly to revise sub-sections (2) and (4) of Section 167

as follows:

â€˜167. (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 at a time

and sixty days in the whole. 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 thatâ€

(a) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(b) 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.

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

to the Chief Judicial Magistrate.â€™â€™â€™

12. The recommendations of the Law Commission of India were carefully examined and then accepted. The basic considerations for acceptance, as

mentioned in the Statement of Objects and Reasons dated 7-11-1970 for introducing the (new) Code of Criminal Procedure, 1973 were:

â€œ3. The recommendations of the Commission were examined carefully by the Government, keeping in view among others, the following basic

considerationsâ€

(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.

The occasion has been availed of to consider and adopt where appropriate suggestions received from other quarters, based on practical experience of

investigation and the working of criminal courts.â€™â€™

15. As observed by the Law Commission in paragraph 14.19 of its 41 st Report, a practice of doubtful legal validity had grown up where Police used

to file before a Magistrate a preliminary or incomplete report and the Magistrate, purporting to act under Section 344 of the Code of Criminal

Procedure, 1898 used to adjourn the proceeding and remand the accused to custody. It was observed that such remand beyond the statutory period

fixed under Section 167 would lead to serious abuse and therefore some time limit was required to be placed on the power of the police to obtain

remand and as such the maximum period for completion of investigation was suggested. The objects and Reasons for introduction of new Code voiced

similar concern.

16. The letter of and spirit behind enactment of Section 167 of the Code as it stands thus mandates that the investigation ought to be completed within

the period prescribed. Ideally, the investigation, going by the provisions of the Code, ought to be completed within first 24 hours itself. Further in terms

of sub-section (1) of Section 167, if â€œit appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section

57ll the concerned officer ought to transmit the entries in the diary relating to the case and at the same time forward the accused to such Magistrate.

Thereafter, it is for the Magistrate to consider whether the accused be remanded to custody or not. Sub-Section (2) then prescribes certain limitations

on the exercise of the power of the Magistrate and the proviso stipulates that the Magistrate cannot authorize detention of the accused in custody for

total period exceeding 90 or 60 days, as the case may be. It is further stipulated that on the expiry of such period of 90 and 60 days, as the case may

be, the accused person shall be released on bail, if he is prepared to and does furnish bail.

17. The provision has a definite purpose in that; on the basis of the material relating to investigation, the Magistrate ought to be in a position to proceed

with the matter. It is thus clearly indicated that the stage of investigation ought to be confined to 90 or 60 days, as the case may be, and thereafter the

issue relating to the custody of the accused ought to be dealt with by the Magistrate on the basis of the investigation. Matters and issues relating to

liberty and whether the person accused of a charge ought to be confined or not, must be decided by the Magistrate and not by the Police. The further

custody of such person ought not to be guided by mere suspicion that he may have committed an offence or for that matter, to facilitate pending

investigation.

18. In the present case as on the 90th day, there were no papers or the charge-sheet in terms of Section 173 of the Code for the concerned

Magistrate to assess the situation whether on merits the accused was required to be remanded to further custody. Though the charge-sheet in terms

of Section 173 came to be filed on 05.07.2018, such filing not being in terms of the order passed by the High Court on 03.07.2018, the papers were

returned to the Investigating Officer. Perhaps it would have been better if the Public Prosecutor had informed the High Court on 03.07.2018 itself that

the period for completing the investigation was coming to a close. He could also have submitted that the papers relating to investigation be filed within

the time prescribed and a call could thereafter be taken by the Superior Gazetted Officer whether the matter required further investigation in terms of

Section 173(8) of the Code or not. That would have been an ideal situation. But we have to consider the actual effect of the circumstances that got

unfolded. The fact of the matter is that as on completion of 90 days of prescribed period under Section 167 of the Code there were no papers of

investigation before the concerned Magistrate. The accused were thus denied of protection established by law. The issue of their custody had to be

considered on merits by the concerned Magistrate and they could not be simply remanded to custody dehors such consideration. In our considered

view the submission advanced by Mr. Dave, learned Advocate therefore has to be accepted. We now turn to the subsidiary issue, namely, whether

the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation

must be completed nor does it admit of any such eventuality. There are enactments such as the Terrorist and Disruptive Activities (Prevention) Act,

1985 and Maharashtra Control of Organised Crime Act, 1999 which clearly contemplate extension of period and to that extent those enactments have

modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period, no

Court could either directly or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated

03.07.2018 was the submission that the investigation would be completed within two months by a Gazetted Police Officer. The order does not indicate

that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission

of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the learned

Counsel for the State and the complainant.

In our considered view the accused having shown their willingness to be admitted to the benefits of bail and having filed an appropriate application, an

indefeasible right did accrue in their favour.

19. We must at this stage note an important feature. In Rakesh Kumar Paul (supra), in his conclusions, Madan B. Lokur, J. observed in para 49 as

under:

â€œ49. The petitioner is held entitled to the grant of â€œdefault bailll on the facts and in the circumstances of this case. The trial Judge should release

the petitioner on â€œdefault bailll on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or

otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner

is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on

the arrest of the petitioner in any other case.â€™â€™

In his concurring judgment, Deepak Gupta, J. Agreed (Para 86 of the Judgment of Honâ€˜ble Deepak Gupta) with conclusions drawn and directions

given by Madan B. Lokur, J. in paragraphs 49 to 51 of his judgment. According to the aforesaid conclusions, it would not prohibit or otherwise prevent

the arrest or re-arrest of the accused on cogent grounds in respect of charge in question and upon arrest or re-arrest the accused would be entitled to

petition for grant of regular bail which application would then be considered on its own merit.

20. We, therefore, allow this appeal and direct that the appellants are entitled to be admitted to bail in terms of Section 167(2) of the Code on such

conditions as the trial Court may deem appropriate. The matter shall be immediately placed before the trial court upon receipt of copy of this

Judgment. We also add that in terms of conclusions arrived at in the majority Judgment of this Court in Rakesh Kumar Paul (supra), there would be no

prohibition for arrest or re-arrest of the appellants on cogent grounds and in such eventuality, the appellants would be entitled to petition for grant of

regular bail.

12. In present case, admittedly petitioner moved application for default bail prior to 180 days of first remand; but challan has been produced on 181st

days; prosecution has not sought any extension after competition of 180 days; even if application was not maintainable it was mandatory on part of

Judge to ask the accused /petitioner of right to be enlarged on default/compulsive bail and would have asked the accused as to whether he is ready to

furnish bail bonds, when the challan was produced before the Court after expiry of 180 days. Court below has not complied with mandatory provision

of law.

13. In view of above, this petition is allowed. Petitioner be enlarged on bail subject to his furnishing of personal bond and two surety bonds of Rs.1 lakh

each subject to satisfaction of trial Court, with further undertaking that he will attend the court proceeding regularly; he shall not come in contact with

prosecution witnesses; he will report to concerned police where FIR has been lodged, once in month. He shall further deposit his passport with court

below and shall not leave jurisdiction of trial court without prior permission of that court. It is further held that there would be no prohibition for arrest

or re-arrest of the appellants on cogent grounds and in such eventuality, the applicant would be entitled to petition for grant of regular bail.