

Golden Research Thoughts



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Abstract:-

Section 167 laid down the procedure to be adopted when the investigation against accused person can not be completed within 24 hours of his arrest and there are ground for believing that the accusation against him are well founded. Police detaining a person for more than 24 hours on pretext of interrogation without any formal arrest is reprehensible. It applies at the stage:-

(A) when the accused is arrested without warrant and is detained by a police officer in his custody.

(B) It appears that more than 24 hours will be need for accused investigation.

(C) There are grounds to believe that accusation or information against hi is well founded.

(D) The officer In – charge of the police station or his

NATURE, SCOPE & APPLICABILITY OF SECTION 167 OF THE CODE OF CRIMINAL PROCEDURE



investigation officer not below the rank of a sub-inspector forwards the accused for remand before a magistrate.

The judicial magistrate may either refuse to detain him or he may direct his detention in police custody or judicial custody. The police can interrogate the accused even after his remand to judicial custody when the police is not readily available for escort duty, it would be valid ground for extending the period of remand of an accused under section 167 (2) of the code.

The provision contained in section 167 aim at maintaining a balance between personal liberty and interest of society. The objective of this section is that an important matter like liberty of a person cannot be fully left in the discretion of magistrate acts as a rider over the apprehended arbitrariness of police so as to prevent of police torture or abuse of power (to use third degree).

Keywords:

Third Degree Method, Judicial Custody, Indefeasible Right, Substantial Grounds, Right to Compulsive Bail.

INTRODUCTION

When police officer consider that investigation is not to be completed within 24 hours he should forwarded the accused to magistrate for further order. This section applies at the stage when person is arrested and either an investigation has started or is yet to start but is such that it cannot be completed with 24 hours. Final report against same accused and investigation going on against the rest of the accused. Accused against whom final report is sent cannot take the advantage of section 167 (2). Remand order cannot be passed without producing accused in court. Further remand order also past in the causal manner at the resident of the magistrate after the office hours, without producing the accused, it its lack of sense of the responsibility or possible collusion with police, further remand for more than 15 days is illegal when no reason of the satisfaction. Accused order to be released on bail but having not furnished surety is in jail and police in the mean while submit charge sheet he is not entitled to be detained but must be released on furnishing surety. Thus accused has no absolute right to be released on bail after 60/90 days when no charge sheet is submitted, when an accused is produced in court by the police there are 3 remedies.

- (A) To detain him police custody.
- (B) To grant him bail.
- (C) To keep him in judicial custody. Magistrate must passed a speaking order

Before charge sheet is filed magistrate can remand for a maximum period of 60 days provision of section 167 (2) is mandatory. If charge sheet is not submitted within 60 days accused is entitled to bail. Duty of magistrate when an under trial prisoner is produced before remanding he must point out to accused that he is entitled to bail and right of assistance of lawyer by state to apply for bail at the cast of the state

In *Natawar Parida Vs. State of Orrissa* it was held that during the pendency of investigation which started before coming into force of new criminal procedure code the accused cannot press into service provisio (a) to section 167 (2) and claim to be released on bail as a matter of right. It was observed that this section would be attracted when the arrest is made after coming into force of the Act.

Scope & Applicability Of Section 167 Of The Code Of Criminal Procedure

A-Calculation of Period in police custody or judicial custody

Section 167 (2) speaks that the magistrate may authorize the detention of an accused in plice or judicial custody as the magistrate deems fit for a term not exceeding 15 days in the whole, the detention beyond the period of 15 days in judicial custody may be authorized up to a period for 90 days where the investigation concern to an offence punishable with death imprisonment for life or imprisonment for a term not less than 10 years and 60 days where the investigation concerned to any other offence.

The question arises whether the period of 60 or 90 days should be recorded from the date of arrest or from the date of remand of another question arises, whether the date of remand should also be included while ascertaining the total period. In the case of *Chaganti Satyanaryan and others vs State of AP2* the Supreme Court made it clear that total period of 90 days or 60 days begins to run only from the date of order of remand and not from the date of arrest of the accused. The right to bail granted to remand prisoners at the end of 90 days or 60 days, as the case may be does not have the effect of rendering the subsequent period of detention IPSO facto illegal or unlawful.

Section 167 Explanation:- to provisio obligates the accused being detained in custody in the spite of the expiry of the prescribed period of 90 days or 60 days, as the case may be so long as he does not furnish bail the SC further said that if the period of custody is to be reckoned from the date of arrest, then the magistrate will be disentitled in placing an accused in police custody judicial custody for a period of 15 days.

The question regards the inclusion or exclusion of first day of remand in the period of 60 or 90 days the Supreme Court held in state of M.P. Vs. *Rustam3* that while calculating the period of limitation the day accused was remanded to judicial custody should be excluded and the day an which the challan was filed in the court should be included. Further a question may came before the court that where the 60 or 90 days is holidays, then whether provisions of section 10 (2) of the General clauses Act, 1897 will come into play and the challan filed on next day shall be treated with the prescribed limit. In this situation the prosecution cannot claim the benefit of 90 days being a holidays because challan need not be filed in court and it could be filed before the magistrate, therefore, section 10 (2) of General clauses Act 1897 is not applicable while the computing the total period of 60/90 days under section 167 (2)

It was held in *Devendra Kumar Vs. State of MP4* that an accused released on bail for alienated period or for a few days on conditions cannot be deemed to be detained in custody of the State for the purpose of reckoning the period of 90 days under provisio (A) section 167 (2) of the code. So as to get the benefit of absolute and indefeasible right in default of the prosecution in not filing the challan within the prescribed period of 90 days to be enlarged on bail.

Another similar case in *Sri Shivanna Vs. State by Arasikere Rural Police5* the accused was remained to custody and the 90 day of remained was a public holiday. It was held that section 10 of the

general clauses Act will not apply while considering the entitlement of accused to be released on bail, as there is no legislature command that the charge sheet should be filed within 90 days. The period of 90 days begins from the date of order of remand not from the date of arrest.

B-Personal appearance of accused

The mandate of Law Provided in proviso (B) 167 (2) is very clear that detention in any custody cannot be authorized by a magistrate unless the accused is produced before him. However, there may be contingencies where it may not be possible for the police to physically produce the accused in person before the magistrate.

In this issue divisional bench of MP High Court in Raju and another vs. State of MP and others⁶ held that rule of requirement regarding physical production of the accused before the magistrate cannot be stretched to such an extent as to cover even those cases and circumstances where it is almost practically impossible to physically produce the accused before the magistrate. The court pointed that there may be situation and contingencies where in spite of all diligence, bona fide intention and precautions it may not be possible for the state to physically produce the accused before the magistrate and in such a situation due to the absence of the accused the order of remand will not stand vitiated.

C-Police custody after 15 days

The legal position that the magistrate has full fledged and unfettered discretion to authorize police custody for a term not exceeding 15 days in full. The question is whether after initial period of 15 days the magistrate has jurisdiction to authorize police custody. The supreme court examined this issue in CBI special investigation cell –I New Delhi, vs. Anupam J Kulkarni⁷ that there cannot be any detention in police custody after the expiry of first 15 days even in a case where some more offence either serious or otherwise committed by the accused in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. In a case falling in the former category any remand beyond first period of 15 days can only be in judicial custody. It was further held that the period of 90 or 60 days as the case may be for releasing the accused on bail in case of non completion of investigation has to be computed from the date of detention as per orders of the magistrate and not from the date of arrest by the police. Consequently the first period of 15 days mentioned in section 167 (2) has to be computed from the date of such detention and after the expiry 15 days it should be only judicial custody.

The object of section 167 is putting pressure on prosecution to make every effort to ensure detention and punishment of crime quickly. The idea is to prevent disappearance of material evidence, to prevent vexatious and belated prosecutions, clearly in consonance with the concept of fairness of trial enshrined in Article 21 of the constitution⁸. The language used in the section allows magistrate from time to time to pass an order placing the accused in such custody as he deems fit. Under section 167 (2) the magistrate has power to alter the nature of the custody from judicial custody to police custody and vice – versa during the first period of 15 days mentioned in section 167 (2)⁹ when the magistrate is satisfied that there are substantial grounds for ordering police custody.

D-Accused surrender before a Magistrate

Section 167 provides the production of arrest person by officer in charge of the police station or investigation officer, if he is not below the rank of sub – inspector before the magistrate. Sometimes, a question is posed as to whether the provisions section 167 shall apply when a person is arrested by an officer other than a police officer or when an accused surrenders before a magistrate.

In Bijan Holder vs. State¹⁰ it was held that this section will not apply to an enquiring or proceeding under the customs Act because there is no scope of reading “customs officer” in place of “officer in charge of Police station” or the police officer making the investigation.

Further directorate of enforcement vs. Deepak Mahajan¹¹ and another case the Supreme court laid down 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 the entries of a case diary. Therefore it follows that a mere production of an accused before a competent magistrate by an authorized officer or an officer empowered to arrest (not with standing the fact that he is not a police officer in its strict sense) on a reasonable belief that the arrestee has been quality of an offence punishable under the provisions of the special Act is sufficient for the magistrate to take the person into custody of his being satisfied of following conditions.

- I. Arresting officer is legally competent to make the arrest.
- II. That the particulars of the offence or the accusation for which the person is arrested or other grounds for such arrest exist and are well founded; and
- III. That the provisions of the special act in regard to the arrest of the persons and the production of arrestee serve the purpose of section 167 (1) of the code.

It was held that section 167 applies only when a person has been arrested by police and where the accused has surrendered before the court this section does not apply.

In State of West Bengal vs. Dinesh Dalmia¹² case, Two FIR were lodged against accused, one at Calcutta and the other at Chennai. While the accused was in CBI custody in the case pending before court at Chennai, on receiving information that he was also required in a case at Calcutta voluntarily surrendered before the magistrate at Chennai in the case relating to FIR in Calcutta. It was held that for the purposes of computation of period of police custody contemplated in section 167 (2) for entitlement of bail, such Notional surrender cannot be treated as police custody. so as to count 90 days from that notional surrender as regards case pending at Calcutta. It was observed that a notorious criminal may have number of cases pending in various police situation in city or outside city, a notional surrender in a pending case for another FIR outside city or another police station in same city, if the notional surrender is counted then the police will get the opportunity to get custodial investigation the period of detention before a magistrate can be treated as advice 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 Criminal Procedure Code. The condition is that the accused must be in the custody of the police and the so called deemed surrender in another criminal case cannot be taken as a 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 pending in Calcutta

E-Applicability of section 167 in cases of NDPS and TADA.

The issues regarding the applicability in the NDPS case full bench of MP High Court in the case of Ram Dayal vs. Central Narcotics, Gwalior¹³ took the view that section 167 (2) regarding compulsory bail on default of submission of charge sheet within stipulated period is not applicable in the case of arising under the NDPS Act 1985 But this view was overruled by the Supreme Court and it was laid down in the case Bipin Shantilal Panchal Vs. State of Gujrat¹⁴ it was held that if an accused person fails to exercise his right to be released on bail for failure of the prosecution to file the charge sheet within the maximum time limited allowed by proviso to section 167 (2) he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding. The fact that in the meantime the charge sheet is filed but on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be re-arrested on the mere filing of the charge sheet.

As regards the case arising under TADA the court held in the case of Jayanta Borbora vs State of Assam¹⁵ is a case under section 3 of the terrorists and disruptive Activities (Prevention) Act, 1987 in this case the accused / terrorist was remanded to army custody for interrogation on prayer by investigation officer. The order was held to be illegal and ultra vires the constitution because Armed Forces have no power of investigation or interrogation while coming to the aid of civil authority. This it clear that the provisions of section 167 (2) are equally applicable to cases arising under TADA Act 1987.

F- Charge sheet filing after period of 60/90 days.

There may three different fact situations respect of a person detained in custody where charge sheet have been filed after the prescribed period of 60/90 days and a relief has been made for release on bail under section 167 (2) of code of criminal procedure on the ground of default in submission of charge sheet with the prescribed time limit.

First a case where the charge sheet is filed by the prosecution after the prescribed period 60/90 days and thereafter accused files an application seeking bail under section 167 (2) for default in submission of charge sheet within the prescribed time limit. When the bail was granted on the ground that the charge sheet was not filed within the prescribed period of 90 days but was filed on the ninety first days, after the court hours, the court could not cancel the bail already granted by treating the charge sheet as having been filed during the working hours.

The Supreme Court in Sanjay Dutt vs State¹⁶ through CBI case, where the constitution bench of the Supreme Court has ordained that the indefeasible right accruing to the accused in such a situation is enforceable only prior to the challan and it does not survive enforceable on the challan being filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to the grant of bail to an accused after filing of the challan because of custody of the accused after the challan has been filed is not covered by section 167 but different provision of the code. The court held that if the right had accrued but it remained unenforced till the filing of challan, then there is no question of its enforceable thereafter since it is extinguished the moment challan is filed.

In second situation facts may be that after the period of 60/90 days the accused requests for compulsive bail and charge sheet is submitted after the accused has already availed of his right to compulsive bail. In such a case the filing of charge sheet will not alter the situation and order for release on bail of such a person made under the proviso to section 167 (2) would not be defeated however, such an order may be cancelled under section 437 (5) or 439 (2) Cr.P.C if the requisite conditions do exist.

Thirdly a situation may arise where after the completion of 60/90 days the accused submits application for release on bail under section 167 (2) and pending such application a charge sheet is filed. In

such a case the question which crops up before court is as to whether mere filing of the application by the accused amounts to availing of the indefeasible right accruing in his / her favour on default in filing of charge sheet within prescribed time limits. The Supreme Court in *Uday Mohan Lal Acharya vs. State of Maharashtra*¹⁷ after expiring of period of 60 days for filing challan. The accused filed an application for being released on bail and was prepared to after and furnish bail, however the Magistrate rejected his application on erroneous interpretation about non – application of section 167 (2) to case pertaining to Maharashtra protection of interest of depositors (MPID) Act 1999 and accused approached Higher forum. However in the mean while charge sheet was submitted it was held that the indefeasible right of accused of being released on bail does not get extinguished subsequent filing of charge sheet. The accused can be said to have availed of his right to be released on bail on date he filed application for being released on bail and after to furnish bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however have to be produced before the Magistrate on a charge sheet being filed in accordance with section 209 and the Magistrate must deal with him in the manner of remand to custody subject to the provisions of the code relating to bail and subject to the provisions of cancellation of bail.

It was held by the Supreme Court in *Singamala Sankara Nath vs. State of AP*¹⁸ that right to release on bail under proviso to section 167 (2) of the criminal procedure code is indefeasible. It is enforceable by accused only from time of default till filing of challan or charge sheet. Further in *Rakesh Swain vs State of Orissa*¹⁹ right of accused on bail accrued for not filing of charge sheet within statutory period. But this right of accused to be released on bail would get extinguished if application under section 167 (2) was filed after the charge sheet was received by the court. Thus the court is required to examine the availability of right to compulsive bail on the date it is considering the question of bail and not on date of presentation of petition for bail.

G-Application for bail – necessity

In *Uma Shankar Vs. State of MP*²⁰ case court held that proviso (a) to 167 (2) does not require any application from the accused for being released on the bail and all that he has to do intimate the court that he is prepared to furnish bail as may be ordered. This view was based on the decision of the Supreme Court in *Hussanara Khatoon vs. Home Secretary State of Bihar*²¹ where in it was ordained that on the completion of 60/90 days the magistrate has a duty to inform the under trial that he is entitled to be released on bail. *Khatoon* case it was held that if there are adequate grounds, the Magistrate may extend the period of remand not exceeding 60 days for detention of the accused otherwise than in police custody. On the expiry of that period the person should be released on bail. It must be pointed out the under trial prisoner if he is entitled to be released on bail.

Imprisonment for a term of not less than 10 years

Under section 167 (2) provides that 90 days shall be the maximum permissible period of custody where the investigation related to an offence punishable with death, imprisonment for life or imprisonment for a term not less than a period of 10 years. There may not be any difficulty where the offence is punishable either with death penalty or with imprisonment for life.

Recent case *Sayed Mohd. Ahmed Kazmi vs. State of GNCTD*²² and others court held that- it is well established that if an accused does not exercise his right to grant of statutory bail before charge sheet is filed, he loses his right to such benefits once such charge sheet is filed and can there after only apply for regular bail: in this case the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and order were passed there upon. The court allow the appeal set aside. The order dated 20 July 2012 passed by chief Metropolitan Magistrate extending time of investigation and custody of accused for 90 days and the order of High Court dated 2 July 2012, 6 July 2012 and 6th August 2012 impugned the appeal and direct that the appellant be released on bail

CONCLUSION

In the above discussion it is evident that the Magistrate ordering detention under section 167 Act in his judicial and not executive capacity. The Magistrate exercise discretionary function in respect of which the initiative is that the executive but the responsibility is his. The discretion power of magistrate in such matter has necessarily to be exercised with reference to such material as is by then available in not a Prima facie judicial determination of any specific issue under section 167 the remand orders cannot be passed mechanically and the magistrate passing an order of remand ought as far as possible, to see that the prisoner is produced before the court when the remand order is passed. Though the remand order passed in the absence of the prisoner in court is not vitiated it is highly unsatisfactory.

This section only permits a remand when investigation relating to any offence is pending. This section is not applicable where a person is arrested and detained in connection with proceeding for prevention of breach of peace under section 107 and not any allegation or suspicion of any offence.

NOTES & REFERENCES

- 1.AIR 1975 SC 1465
- 2.AIR 1986 SC 2130
- 3.1975 SC SUPP (3) 221
- 4.1992 Cr.LJ 1730 MP
- 5.1992 Cr.LJ 2287 (KARNATAKA)
- 6.1990 Cr.LJ. NOC 154
- 7.1992 Cr.L.J. 2728 SC
- 8.1993 Cr. L.J. 3646 (MADRAS)
- 9.1982 Cr.LJ 1103
- 10.1993 Cr.LJ 3082 (AL)
- 11.AIR 1994 SC 1775
- 12.(2007 Cr. L.J. 2757 SC)
- 13.1992 (II) MPJR 250 (FB)
- 14.AIR 1996 SC 2897
- 15.1992 Cr.LJ 2147 (GAUHATI)
- 16.1994 (5) SCC 410
- 17.2001 Cr.LJ 1832 (SC)
- 18.2007 Cr. LJ 884 (AP)
- 19.2005 Cr.LJ 1450 SC
- 20.1982 MPLJ 291 (MP)
- 21.AIR 1979 SC 1377
- 22.Criminal appeal Nos 1695 to 1697 of 2012 decided on 19 oct 2012 criminal cases supreme court 15 April 2013.