Aslam Babalal Desai

Vs

State of Maharashtra

(A. M. Ahmadi, M. M. Punchhi, K. Ramaswamy JJ)

Criminal Appeal No. 559 of 1992

15.09.1992

JUDGEMENT

AHMADI, J. (Majority view) (K. Ramaswamy, J. concurring)

1.Special leave granted.

2. Can bail granted under the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (hereafter called, the Code) for failure to complete the investigation within the period prescribed thereunder be cancelled on the mere presentation of the challan (charge-sheet) at any time thereafter? This is the question which we are called upon to answer in the backdrop of the following facts.

3. A complaint was lodged against the appellant and 8 others at Miraj City Police Station, District Sangli alleging commission of offences punishable under Sections 147, 148, 302 and 323 read with Section 149 IPC, in regard to an incident which took place at about 11 p.m. on 8th September, 1990. The appellant was arrested in that connection on the next day i.e. 9th September, 1990. The appellant thereafter made an application before the Sessions Judge, Sangli for being enlarged on bail. That application was rejected. The appellant approached the High Court but later withdrew the application and then once again moved the Sessions Judge, Sangli for bail under the proviso to Section 167 (2) of the Code on the ground that the investigation had not been completed within 90 days. The learned Sessions Judge by his order dated 11th March, 1991 directed the release of the. appellant on bail. After the charge-sheet was submitted and the documents were tendered subsequent thereto, the State of Maharashtra moved an application under Section 439 (2) of the Code in the High Court for cancellation of bail granted by the, Sessions Judge. The High Court by the impugned order dated 31st March, 1992 cancelled the bail. The High Court was of the view that since the learned Sessions Judge had granted bail on a technical ground, namely, failure to file the charge-sheet within the time allowed and since the investigation revealed the commission of a serious offence of murder, on the ratio of this Court's decision in Rajnikant Jeevanlal Patel v. Intelligence Officer NCB, New Delhi, (1989) 3 SCC 532 : (AIR 1990 SC 71) it was open to the High Court to direct cancellation of the bail. On this line of reasoning the High Court cancelled the bail and directed the appellant to surrender to the bail. In obedience to that order the appellant has surrendered to his bail. These, in brief, are the facts which have a bearing on the question under consideration.

4. Sub-section (1) of Section 167 insofar as it is relevant for our purpose. provides that whenever

any person is arrested and detained in custody and it appears that the investigation cannot be completed within 24 hours and there are grounds for believing that the accusation or information is well founded, the officer-in-charge of the police station or the investigating officer not below the rank of Sub-Inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary and forward the accused to such Magistrate. Sub-section (2) of Section 167 which has bearing on the question under consideration may be extracted at this stage :

> "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 in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the. accused to be forwarded to a Magistrate having such jurisdiction.

Provided that -

> (a) the Magistrate may authorise the detention of the accused persons, otherwise than in the custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-
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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;
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> > (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;"

5. At this stage we may mention that the State of Maharashtra has not made any amendment in the aforesaid provision. On a plain reading of this sub-section it becomes clear that the Magistrate to whom the accused is forwarded may authorise his detention in such custody as he may think fit for a term not exceeding 1 5 days in the whole. If the Magistrate has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he is required to order the accused to be forwarded to a Magistrate having jurisdiction. Such Magistrate may authorise his detention beyond the period of 15 days if adequate grounds exist but no Magistrate can authorise the detention of the accused persons in custody for a total period exceeding 90 days or 60 days as the case may be depending on the nature of the crime alleged to have been committed. The proviso, therefore, fixes the outer limit within which the investigation must be completed and if the same is not completed within the said prescribed period, the accused has a right to be released on bail if he is prepared to and does furnish bail. Where a person is released on bail in such circumstances under the said sub-section, such release must be deemed to be one under the provisions of Chapter XXXIII of the Code which contains provisions in regard to bail and bonds. In the present case, as stated earlier, the

appellant had applied for bail before the expiry of the period of 90 days which was refused by the learned Sessions Judge since the offence allegedly committed was of a serious nature. However, unfortunately the investigating agency did not show urgency and did not complete the investigation within the maximum period allowed by the proviso to S. 167(2) and hence on the appellant making an application for release on bail, the learned Sessions Judge had no alternative but to direct that he be released on bail on his executing a bond for Rs. 5,000/- with one surety for like amount. Undoubtedly this release was solely on account of the fact that the investigating agency had failed to complete the investigation within the maximum period allowed by the proviso to S. 167(2) i.e. 90 days. This default on the part of the investigating agency enabled the appellant seek and secure his release on bail. The investigating agency submitted the charge-sheet at a later date and appended the documents subsequent thereto. On the completion of the charge-sheet the investigating agency moved the High Court for cancellation of the bail under S. 439(2) of the Code. The High Court for reasons already stated earlier cancelled the bail and directed that the appellant be taken into custody.

6. Chapter XXXIII of the Code comprises Sections 436 to 450; of these Sections 437 and, 439 have relevance so far as the question at.issue is concerned. Sub-sections (1) & (2) of Section 437 insofar as relevant provide as under :

> "437. When bail may be taken in case of non-bailable offence.-(1) 'When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-
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> > (i) such person shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
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> > (ii) such person shall not be released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence.
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> (2) If it appears to such officer or Court at any stage of the invetigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has,committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of Sec. 446-A and pending such inquiry, be released on bail or, at the discretion of such officer or Court, on of the execution by him of a bond without sureties for his appearance as hereinafter provided."

7. Sub-section (5) of Section 437 empowers the Court which has released the person on bail under sub-section (1) or (2) to cause his arrest and commit him to custody, if it considers necessary so to do. Section 439 empowers a High Court or a Court of Session to release any person accused of an offence and in custody on bail. Sub-section (2) next,provides that a High Court or a Court of Session may direct that any person who has been released on bail under this chapter be arrested and commit him to custody. It will thus be seen from the aforesaid two Sections that while power has been conferred on courts for grant of bail, power has also been conferred for cancellation of bail in

fit cases. The language of the proviso to sub-section (2) of Section 167 specifically states that when an accused person is released on bail for failure to complete the investigation within the time prescribed, every person so released on bail 'shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of this Chapter'.

8. Now before we proceed to deal with the submissions made before us it is necessary to bear in mind the scheme of the Code insofar as it relates to investigation on the criminal law having been set in motion by the filing of a First Information Report. Section 41 empowers any police officer to arrest any person without an order from the Magistrate or without a warrant in the cases catalogued at clauses (a) to (i) of sub-section (1) thereof. Section 57 next provides that the person arrested shall not be detained in custody by the police officer for a period longer than that which is reasonable but such period shall not exceed 24 hours exclusive of the time necessary for journey from the place of arrest to the Magistrate's court in the absence of a special order under Section 167 of the Code. Article 22(2) of the Constitution also provides that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the court of Magistrate and no such person shall be detained in custody beyond the said period without the authority of the Magistrate. Sections 154 and 155 enjoin on an officer-in-charge of a police station to record every information relating to a cognizable or a non-cognizable offence. Section 156 empowers an officer-in-charge of a police station to investigate any cognizable offence without a formal order of a Magistrate. Such an investigation can also be undertaken, if empowered by a Magistrate under Section 190 of the Code. Section 157 prescribes the procedure for investigation with which we are not concerned. It is in this backdrop that we must consider the scope and ambit of Section 167 of the Code. It will be seen from the above scheme that the Code expects that once a person is arrested and detained in custody, the investigation must be completed as far as possible within 24 hours. If that is not possible, the arrested or detained person must be produced before the nearest Magistrate before the expiry of 24 hours excluding the time consumed during journey to the.Magistrate's court. If the investigation cannot be completed within the said period of 24 hours, the Magistrate before whom the accused person is produced, whether he has or has not jurisdiction to try the case, can authorise his further detention in custody from time to time for a period not exceeding 15 days in the whole. If he has no jurisdiction to try the case or commit for trial and considers his further detention unnecessary, he must forward the accused to the Magistrate having jurisdiction. Such Magistrate may authorise the further detention of the accused person otherwise than in the custody of the police, beyond the period of 15 days if he is satisfied that adequate grounds exist for so doing. But even he cannot authorise the detention of the accused person in custody for a period exceeding 90 days, if the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, or 60 days where the investigation relates to any other offence, if the accused person is prepared to furnish bail. In other words if on the expiry of the aforesaid period of 90/60 days, the accused person offers to furnish bail, the Magistrate is bound to release him on bail and such release shall be deemed to be under Chapter XXXIII of the Code. As pointed out earlier Chapter XXXIII which includes Sections 437 and 439 relevant for our purpose empowers the Court to release an accused person on bail and at the same time also provides for cancellation of bail in certain eventualities.

9.The legislative history of Section 167 shows that under the Code of 1898.the detention of an accused person in custody was not permitted for a term exceeding 15 days in the whole. This provision was breached by the convenient practice, albeit of doubtful legality, of filing a 'preliminary' charge-sheet and then seeking remand under Section 344 (Section 309 under the Code) which really did not come into play during investigation. But it was at the same time realised that in

genuine and complex cases the investigation may not be completed within the short period of 15 days even if the investigating agency proceeds with the utmost sense of urgency. The Law Commission had recommended that the period be increased to 60 days but it was apprehended that while this increase could become a rule, yet the practice of doubtful legality of filing a preliminary charge-sheet and seeking remand may not be curbed. The Joint Select Committee, therefore, felt that the maximum period within which the investigation must be completed must be provided in the statute and a right should be conferred on the accused for being released on bail if within the prescribed period the investigation is not completed. It, therefore, while retaining sub-section (2) of Seetion 167 in the same language introduced the proviso extracted earlier prescribing the outer limit within which the investigation must be completed. While conferring a right on the accused to be released on ball it stated that the release so granted shall be deemed to be one under the provisions of Chapter XXXIII of the Code. So far as Chapter XXXIII is concerned, Section 437 has since undergone an amendment w.e.f. 23rd September, 1980, vide Criminal Procedure (Amendment) Act, 1980. It is not necessary to note the background of the amendment but it is sufficient to state that once bail has been granted under that provision it can be cancelled and the accused person can be arrested and committed to custody if the court considers it necessary so to do. That is the import of sub-section (5) of Section 437 of the Code. The circumstances in which the court will exercise the power of the cancellation of bail have been set out in a number of judgments of this Court to which we will have an occasion to refer a little later. At this stage it is sufficient to state that the Legislature has conferred on the court the power to grant bail as well as to cancel the same. Similarly sub-section (1) of Section 439 empowers the High Court as well as the Court of Session to direct any accused person to be released on bail Sub-section (2) thereof provides that the High Court or the Court of Session may cancel bail and direct that the person released on bail under sub-section (1) be re-arrested and re-committed to custody. Here again the circumstances under which the court will exercise the power conferred by Section 439(2) will have to be noticed later. This in brief is the scheme of the Code. In the backdrop of this scheme we have to consider the question whether bail once granted under sub-section (2) of Section 161 of the Code for failure to complete the investigation within the prescribed time can be cancelled on the mere ground that subsequently a charge-sheet has been produced which discloses that the accused person has committed a serious crime punishable with death or imprisonment for life or imprisonment for a term exceeding 10 years.

10. We may now notice the case law on the subject. In Bashir v. State of Haryana, (1978) 1 SCR 585 : (AIR 1978 SC 55) the FIR lodged against eleven persons disclosed the commission of an offence punishable under Sections 302/149, IPC. Eight of the eleven accused persons were released on bail but the bail applications of the remaining three persons were rejected on the ground that they were the authors of the fatal injuries. The High Court too declined to grant them bail. However, as the challan was not filed within the time prescribed the remaining three accused were also released on bail under Section 167(2) of the Code. Subsequently the police filed the challan and thereupon all the eleven accused were committed to stand trial before the Sessions Court. An application for cancellation of the bail of the three accused persons whose bail was earlier rejected was moved on the ground that they were released under Section 167(2) for failure to file the challans within the prescribed time and since the, challans were filed, the Court should cancel their bail. The Sessions Judge allowed the application and ordered cancellation of the bail on the ground that on the filing of the challans the court had jurisdiction to do so. The High Court dismissed the appeal. Thereupon this Court was moved by special leave on the plea that once the bail is granted under Section 167(2) of the Code it cannot be cancelled on the mere filing of a challan but could be cancelled only under Section 437(5) of the Code. This Court after examining the relevant provisions to which we have

adverted here in above concluded as under (at p 58 of AIR) :

> "The power of the Court to cancel bail if it considers it necessary is preserved in cases where a person has been released on bail under section 437(1) or (2) and these provisions are applicable to a person who has been released under section 167(2). Under section 437(2) when a person is released pending inquiry on the ground that there are not sufficient grounds to believe that he had committed a non-bailable offence may be committed to custody by court which released him on bail if it is satisfied that there are sufficient grounds for so doing after inquiry is completed. As the provisions of section 437(1), (2) and (5) are applicable to a person who has been released under section 167(2) the mere fact that subsequent to his release a challan has been filed is not sufficient to commit him to custody. In this case the bail was cancelled and the appellants were ordered to be arrested and committed to custody on the ground that subsequently a charge-sheet had been filed and that before the appellants were directed to be released under section 167(2) their bail petitions were dismissed on merits by the Sessions Court and the High Court. The fact that before an order was passed under section 167(2) the bail petitions of the accused were dismissed on merits is not relevant for the purpose of taking action under section 437(5). Neither is it a valid ground that subsequent to release of the appellants a challan was filed by the police. The court before directing the arrest of the accused and committing them to custody should consider it necessary to do so under section 437(5). This may be done by the court coming to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody. It may also order arrest and committal to custody on other grounds such as tampering of the evidence or that his being at large is not in the interests of justice. But it is necessary that the court should Proceed on the basis that he has been deemed to have been released under section 437(1) and (2)."

(Emphasis supplied)

11. It will thus be seen that once an accused person has been released on ball by the thrust of the proviso to Section 167(2), the mere fact that subsequent to his release a challan has been filed is not sufficient to cancel his ball. In such a situation his bail can be cancelled only if considerations germane to cancellation of bail under Section 437(5) or for that matter Section 439(2) exist. That is because the release of a person under Section 167(2) is equated to his release under Chapter XXXIII of the Code.

12. In Raghubir Singh v. State of Bihar, (1986) 3 SCR 802 : (AIR 191 87 SC 149) a similar question came up for consideration. In that case on the night between 29th/30th November, 1984 the Security Police Patrol on duty near Jogbani Check Post on the Indo Nepal Border intercepted a speeding jeep with five occupants, one of them being a dismissed IPS Officer. He was wanted. A detention order under the National Security Act was passed against him but could not be executed as he had gone underground. On being questioned they initially refused to disclose their identity and the manner in which they behaved aroused suspicion. One of the security officers however identified the IPS officer and on search of their baggage a substantial cash was found with one of the occupants. A number of documents and other articles were also seized which established the identity of the fleeing IPS Officer. On the basis of the information derived from the seizure of various documents, cash, etc., an FIR was, registered for offences under Sections 121 A, 123, 124A,

153A, 165A, 505 and 120B IPC and Section 5(3) of the Prevention of Corruption Act. However, before the submission of .the charge-sheet the preventive detention order was served on the IPS officer and he was removed to Bhagalpur jail. The other four persons were also similarly detained in the same jail. These persons applied for bail under the proviso to Section 167(2) of the Code. The learned Magistrate granted bail but imposed a condition that the surety should be residents of Araria town. Ultimately these persons could secure sureties from Araria but could not be released as the preventive detention orders were in force. Subsequently the surety of all the five persons appeared in court and prayed to be discharged, whereupon the learned Magistrate passed an order discharging him and issued formal warrants of arrest under S. 444(2) of the Code. At this stage the detention order against the IPS Officer came to be quashed. Subsequently the charge-sheet was filed in the .court of the learned Magistrate by the police. The bail application of four of the accused was rejected and the High Court confirmed the same. The case was thereafter transferred to the Special Judge (Vigilance), Patna. The IPS Officer moved an application offering cash security but it was rejected on the ground that the High Court had already rejected the application of the other four accused persons. The case was later transferred to the Special Judge, Bhagalpur. When the matter came to this Court one of the grounds urged was that the High Court as well as the Special Judge were wrong in holding that the order of the Magistrate directing them to be released on bail under Section 167(2) had come to an end by the passage of time particularly after cognizance of the case was taken. Dealing with this contention this Court examined the scope of Section 167 read with Sections 437 and 439 of the Code and the ratio of the decision in Bashir's case (AIR 1978 SC 55) and proceeded to observe as under (AIR 1987 SC 149, Para 22) :

> "The order for release on bail may however be cancelled under S. 437(5) or S. 439(2). Generally the grounds for cancellation of bail, broadly, are interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him..... Where bail has been granted under the proviso to S. 167(2) for the default of the prosecution in not completing the investigation in sixty days after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed."

13. Proceeding further while dealing with the facts on hand this Court observed (AIR 1987 SC 149, Para 23) :

> "The order of release on bail was not an order on merits but was what one may call an order-on-default, an order that could be rectified for special reasons after the defect was cured. The,order was made long ago but for one reason or the other, the accused failed to take advantage of the order for several months. Probably for that reason, the prosecuting agency did not move in the matter and seems to have proceeded on.the assumption that the order had lapsed with the filing of the charge-sheet. The question is should we now send the matter down to the High Court to. give an opportunity to the prosecution to move that court for cancellation of bail? Having regard to the entirety of the circumstances, the long lapse of time since the original order for bail-was made, the consequent change in circumstances and situation, and the directions that we have now given for the expeditious disposal of the case, we do not think that we will be justified in exercising our discretion to

interfere under Article 136 of the Constitution in these matters at this stage."

14.It will thus be seen that this Court came to the conclusion that once an order for release on bail is made under the proviso to Section 167(2) it is not defeated by lapse of time and on the mere filing of the charge-sheet at a subsequent date. The order for release on bail can no doubt be cancelled for special reasons germane to cancellation of bail under section 437(5) or 439(2). This Court then set out the grounds on which generally bail once granted could be cancelled and then proceeded to state that in the peculiar facts and circumstances of the case it would not be justified in interfering with the impugned order. Therefore, the final order which the court made was in the backdrop of the special facts and circumstances of the case.

15. In Rajnikant's case (AIR 1990 SC 71) (supra), Shetty, J. sitting singly during vacation was concerned with a case in which the accused persons were arrested on 23rd March, 1988 by the officers of the Narcotic Control Bureau at Bombay. They were produced before the Additional Chief Metropolitan Magistrate, New Delhi and were remanded to judicial custody till 12th April, 1988. The remand order was subsequently renewed from time to time. On 10th May, 1988 the accused moved for bail and while the said application was pending, a charge-sheet was submitted on 23rd June, 1988 for the commission of offences under Sections 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. On 22nd July, 1988 the accused filed an application for bail under Section 167(2) of the Code on the ground that the charge-sheet had been filed after the expiry of the period of 90 days. The learned Magistrate by his order dated 29th July, 1988 enlarged them on bail. The prosecution sought cancellation of the bail but the learned Magistrate did not accede to that request whereupon the High Court of Delhi was moved under Section 439(2) read with Seetion 482 of the Code. In that application the nature of offence committed, the part played by the accused, the gravity of the offence, etc., were set out. It was also mentioned that two of the accused persons had earlier absconded and as such the investigation could not be completed within the time prescribed by the proviso to Section 167(2) of the Code. The High Court following the dicta of Raghubir Singh's case (AIR 1987 SC 149) cancelled the bail. It was against this order that the accused approached this court by special leave under Article 136 of the Constitution. Shetty, J. after considering the provisions of Section 167(2) read with Chapter XXXIII of the Code and in particular Sections 437(5) and 439(2) came to the following conclusion (AIR 1990 SC 71, Paras 12 and 13) :

> "An order for release on bail under proviso (a) to section 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/ 60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail. and communicate the same to the accused to furnish the requisite bail bonds.

16.The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed., the bail granted under proviso (a) to Section 167(2) could be cancelled."

17. On this line of reasoning the learned Judge upheld the order of the High Court and refused to

interfere. It may here be mentioned that this Court's decision in Bashir's case (AIR 1978 SC 55) was not placed before the learned Judge.

18. On a conjoint reading of Sections 57 and 167 of the Code it is clear that the legislative object was to ensure speedy investigation after a person has been taken in custody. It expects that the investigation should be completed within 24 hours an if this is not possible within 15 days and failing that within the time stipulated in clause (a) of the proviso to Section 167(2) of the Code. The law expects that the investigation must be completed with despatch and the role of the Magistrate is, to over-see the course of investigation and to prevent abuse of the law by the investigating agency. As stated earlier, the legislative history shows that before the introduction of the proviso to Section 167(2) the maximum time allowed to the investigating agency was 15 days under sub-section (2) of Section 167 failing which the accused could be enlarged on bail. From experience this was found to be insufficient particularly in complex cases and hence the proviso was added to enable the Magistrate to detain the accused in custody for a period exceeding 15 days but not exceeding the outer limit fixed under the proviso (a) to that sub-section. We may here mention that the period prescribed by the proviso has been enlarged by State amendments and wherever there is such enlargement, the proviso will have to be read accordingly. The purpose and object of providing for the release of the accused under sub-section (2) of Section 167 on the failure of the investigating agency completing the investigation within the extended time allowed by the proviso was to instil a sense of urgency in the investigating agency to complete the investigation promptly and within the statutory time-frame. The deeming fiction of correlating the release on bail under sub-section (2) of S. 167 with Chapter XXXIII, i.e. Sections 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the order of release is by fiction of law an order passed under Section 437(1) or (2) or 439(1) it follows as a natural consequence that the said order can be cancelled under subsection (5) of Section 437 or sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in Raghubir Singh's case (AIR 1987 SC 149) the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under Section 437(1) or (2) or 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.

12. In State (Delhi Admn.) v. Sanjay Gandhi, (1978) 2 SCC 411 : (AIR 1978 SC 961) this Court observed rejection of bail when bail is applied for is one thing; cancellation of a bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail once granted. That is because cancellation of bail interferes with the liberty already secured by the accused either on the exercise of discretion by the court or by the thrust of law. This Court, therefore, observed that the power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. That does not mean that the power though extraordinary in character must not be exercised even if the ends of justice so demand.

13. In Bhagirathsinh Judeja v. State of Gujarat, (1984) 1 SCC 284 : (AIR 1984 SC 372) this Court observed that very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail. Even where a prima facie case is established the approach of the Court in

the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence. It is wrong to think that bail secured by virtue of the proviso (a) to Section 167 is an undeserved one. To so think is to doubt the legislative wisdom in prescribing the outer limit for filing the charge-sheet and to ignore the legislative history. As pointed out earlier the legislative history of Section 167 shows that by proviso (a) the detention period was enhanced to a maximum of 90 days from 15 days earlier allowed. When the legislature made it obligatory that the accused shall be released on bail if the charge-sheet is not filed within the outer limit provided by proviso (a), it manifested concern for individual liberty notwithstanding the gravity of the allegation against the accused. It would not be permissible to interfere with the legislative mandate on imaginary apprehensions, e.g., an obliging investigation officer deliberately not filing the charge-sheet in time, as such misconduct can be dealt with departmentally. To permit the prosecution to have the bail cancelled on the mere filing of the charge-sheet is to permit the police to trifle with individual liberty at its sweet will and set at naught the purpose and object of the legislative mandate. The paramount consideration must be to balance the need to safeguard individual liberty and to protect the interest of administration of justice so as. to prevent its failure. In the present case the High Court cancelled the bail solely on the ground that the bail was granted on technical grounds and the investigation revealed that there was eye-witness account disclosing the commission of a serious offence if murder. In its view the ratio of Rajnikant Jeevanlal Patel's case (AIR. 1990 SC 71) applies to the case with full vigour. We find it difficult to agree.

14. We sum up as under :

The provisions of the Code, in particular Ss. 57 and 167, manifest the legislative anxiety that once a person's liberty has been interfered with by the police arresting him without a Court order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by the proviso (a) to S /167(2) of the Code. It must be realised that the said proviso was introduced in the Code by way of enlargement of time for which the arrested accused could be kept in custody. Therefore, the prosecuting agency must realise that if it fails to show a sense of urgency in the investigation of the case and omits or defaults to file a charge-sheet within the time prescribed, the accused would be entitled to be released on.bail and the order passed to that effect under S. 167(2) would be an order under S. 437(1) or (2) or 439(1) of the Code. Since S. 167 does not empower cancellation of the bail, the power to cancel the bail can only be traced to S. 437(5) or 439(2) of the Code. The bail can then be cancelled on considerations which are valid for cancellation of bail granted under S. 437(1) or (2) or 439(1) of the Code. The fact that the bail was earlier rejected or that it was secured by the thrust of proviso (a) to S. 167(2) of the Code then recedes in the background. Once the accused has been released on bail his liberty cannot be interfered with lightly i.e. on the ground that the prosecution has subsequently submitted a charge-sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Ss. 57 and 167(2) of the Code. We are, therefore, of the view that, once an accused is released on bail under S. 167(2) he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime. The ratio of Rajnikant's case (AIR 1996 SC 71) to the extent it is inconsistent herewith does not, with respect, state the law correctly.

15. Even where two views are possible, this being a matter belonging to the field of criminal justice involving the liberty of an individual, the provision must be construed strictly in favour of individual liberty since even the law expects early completion of the investigation. The delay in

completion of the investigation can be on pain of the accused being released on bail. The prosecution cannot be allowed to trifle with individual liberty if it does riot take its task seriously and does not complete it within the time allowed by law. It would also result in avoidable difficulty to the accused if the latter is asked to secure a surety and a few days later be placed behind the bars at the sweet will of the prosecution on production of a charge-sheet. We, are, therefore, of the view that unless there are strong grounds for cancellation of the bail, the bail once granted cannot be 12 S.C. Aslam Babalal Desai v. State of Mahatashtra A. I. Rcancelled on mere production of the chargesheet. The view we are taking is consistent with this Court's view in the case of Bashir and Raghubir (AIR 1978 SC 55) & (AIR 1987 SC 149) (supra) but if any ambiguity has arisen on account of certain observations in Rajnikant's case (AIR 1990 SC 71) our endeavour is to clear the same and set the controversy at rest.

16. For the above reasons this appeal is allowed and the impugned order of the High Court is set aside. The matter is remitted to the High Court for reconsideration and disposal on merits in the light of the legal position hereinabove stated.

PUNCHHI, J. (Minority view):-

17. I have read with admiration the neat analysis and exposition of law in the judgment pre- pared by my learned brother Ahmadi, J. but respectfully, though regretfully, I have opted to differ.

18. The question, as it appears to me, which requires determination in this appeal rather is (in contrast to the one posed by brother Ahmadi, J.) whether an order granting bail under the proviso to sub-section (2) of S. 167 of the Code of Criminal Procedure 1973 (hereafter called the Code) for failure to complete the investigation within the period prescribed thereunder, after the presentation of the challan (charge-sheet) can be recalled or reviewed and on what grounds?

19. The facts giving rise to the instant appeal appear in detail in the judgment prepared by my learned brother Ahmadi, J. and those need not bear repetition. The culled out provisions of the Code too, so far relevant to the facts of the instant case figuring in the said judgment would also bear no reproduction. It is to the case law developed by this Court that I venture to give an explanation which differs with the views thereon expressed by my learned brother Ahmadi, J.

20. A three-member Bench of this Court in State (Delhi-Administration) v. sanjay Gandhi (1978) 2 SCC 411 : (AIR 1978 SC 961) made the following elemental distinction in defining the nature of exercise while cancelling bail (para 13 of AIR):

> "Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail already granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial.

(Emphasis supplied)

21. The view of this Court ever since has been that when a decision of bail already made on merit, after due deliberation, is required to be reviewed on prayer for cancellation of bail, it would require the exercise to be undertaken with the necessary care and circumspection. Sanjay Gandhi's case (AIR 1978 SC 961) arose in the backdrop of S.439(2) of the Code where under the High Court or

Court of Session can direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power of the High Court or Court of Session to cancel bail is exercisable vis-a-vis an order passed by the High Court or the Court of Session under sub-section (1) of S. 439, as the case may be, as also to an order of bail passed by a Court other than the High Court or the Court of Session under sub-secs. (1) and (2) of S. 437 of the Code. Bail orders under the aforesaid provisions by the very nature are decisions on merit and if a review is attempted a strong case has to be made out so as to secure cancellation of bail. Hence the apparent distinction in the approach of the Court while granting bail and cancelling bail. This field is covered entirely by judge made law.

22. The Code designedly classifies offences bailable as well as non-bailable. Whereas bail is the rule in the case of bailable offences, in non-bailable offences it is left to the discretion of the Court. Designedly, serving a purpose is the power arrest and detention as an integral part of the investigating process and that of the trial. This is because a civilized society has to preserve on, the one hand in individual's personal dignity 1993 Aslam Babalal Desai v. State of Maharashtra S. C. 13and on the other the general interests of the society at large and the concept of bail is an inter-position between the two, seeing through both without undermining one or the other. The Constitution and our laws are so designed so as to safeguard and protect personal liberty from Governmental power and to authorise the collective use of State power permitting arrest and detention of an individual to ensure, amongst others, domestic tranquillity and security of public and State. Hence the see-saw for and against bail witnessed in Courts. The tests to be applied by Courts in granting bail is by reference to many considerations, such as the nature of the accusation the evidence in support thereof, the severiy of punishment on conviction which would entail the character, behaviour, means and standing of the accused etc. etc. But along side is the larger interest of the State to be kept in view in granting or refusing bail. By no means are the aforementioned factors exhaustive. There may be other considerations which may be determinative for taking one view or the other. The Court is obligated, all the same, to strike a balance. The decision of the Court after consideration of the aforefactors and other of the like conceivable results in a verdict judicial in character capable of being reviewed or altered again by a judicial exercise within judicially set out parameters. A bail order-on-default is, as goes the coined expression, a specie apart which involves no such deliberation and so cannot, in my understanding, be equated with bail orders passed on merit by a Court, other than a High Court or a Court of Session, under sub-secs. (1) and (2) of S. 437 or such a bail order passed by the High Court or Court of Session under sub-sec (1) of S. 439 of the Criminal Procedure Code. Such a compulsive bail by the thrust of S. 167(2) can by no event be termed as a decision on merit to which the distinctive approach as given in Sanjay Gandhi case (AIR 1978 SC 961) is to play its significant part when effort to cancel bail is attempted.

23. The mere circumstance that Section 167(2) ordains that every person released on bail under this sub-section shall be deemed. to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter does not ipso facto means that the bail order assumes the content and character of bail orders on merit, of the kind conceived of in sub-secs. (1) and (2) of S. 437 or sub-sec. (1) of S. 439 of the Code. The deeming requirement of S. 167(2) puts the release on bail of such person as if under the provisions of Chapter XXXIII but only for the purposes of that Chapter. In other words, it means that by this fiction the provision is to be read as a part of Chapter XXXIII so that it invites the purposes of that Chapter such as filling of bonds, provision of sureties etc., as also permitting cancellation of bail. It is on the thrust of such inclusion that cancellation under S. 437(5) can be attempted as if fictionally the bail order had been passed under sub-sees. (1) and (2) of S. 437 but not on considerations as if the bail order was on merit. Fiction of this kind cannot be permitted to go to the length of converting an order of bail not on merit as if passed on merit.

24. A seeming diverse.,view for what 1 have expressed above is available in a decision of a two-member Bench of this Court in Bashir v. State of Haryana (1978) 1 SCR 585 : (AIR 1978 SC 55). The bench observed at page 589 (of SCR) (at p. 58 of AIR) as follows :

> "..... As under S. 167(2) a person who has been released on the ground that he had been in custody for a period of over sixty days is deemed to be released under the provisions of Cha XXXIII, his release should be considered as one under S. 437(1) or (2). S. 437(5) empowers the Court to direct that the person so released may be arrested if it considers it necessary to do so."

Yet the bench further went on to observe at page 590 (of SCR) : (at pp. 58-59 of AIR) as follows :

> "The fact that before an order was passed under S. 167(2) the bail petitions of the accused were dismissed on merits is not relevant for the purpose of taking action under S. 437(5). Neither is it a valid ground that subsequent to release of the appellants a challan was filed by the police. The Court before directing the arrest of the accused and committing them to custody should consider it necessary to do so under S. 437(5). This may be done by the Court coming to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a non-bailable offence and that it is necessary that he should be arrested and committed to custody. It may also order arrest and commital to custody on other grounds such as tampering of evidence or that his bring at large is not in the interests of justice . But it is necessary that the Court should proceed on the basis that he has been deemed to have been released under S. 437(1) and (2).(Emphasis supplied)

25. The emphasised words are reflective of the view that the Court could at that stage after the challan is filed be of the opinion that there appear sufficient grounds for entertaining the view that the accused had committed a non-bailable offence and that it was necessary that he should be arrested and committed to custody. Besides the aforementioned ground for cancellation, a ground singularly sufficient and special to an order-in-default, the Court may also arrest and commit to custody such person or other grounds judicially noted and others relevant; such as tampering of evidence etc. The later hinted grounds are those grounds which normally weigh with a Court while cancelling a merited bail under Section 437(5) when the bail in stricto sensu has been granted on merit under sub-sees. (1) and (2) of S. 437. But a deemed bail under Chapter XXXIII, under , the thrust of S. 167(2), as is discernible, appears to me on a different footing, permitting cancellation of bail not only on the well known grounds for cancellation of bail but also on the special singular ground on the Court's entertaining the view that there are sufficient grounds that the accused had committed a non-bailable offence and that it was necessary that he should be arrested and committed to custody. The seeming diversity in Bashir's case props up only if it is understood that it takes a bail order under S. 167(2), as if an order on merit under sub-secs. (1) and (2) of S. 437. But if the fiction, as it appears to me, extends to the extent of the bail order being treated as if passed under Chapter XXXIII and that too under sub-secs. (1) and (2) of S, 437 read with the provisions of S. 167(2) as part and parcel of that chapter so that the bail order remains an order passed on default and not on merit. the tangency disappears. And even if this aspect is ignored, Bashir's case (AIR 1978 SC 55) goes on to add a singular and special ground for cancellation of ball granted under S. 167(2) over and above the other well known grounds for cancellation of bail granted under sub-sees. (1) and (2) of S. 437 of the Code. The provision employable in that event again is S. 437(5) of the Code, notwithstanding the text of the provision, for besides that there is no other provision with the Court.

26. The-existence of such special ground for cancellation of bail, over and above the well known grounds for cancellation of ball, granted under S. 167(2) of the Code was reaffirmed and repeated in a decision of this Court by a two-member Bench in Raghubir Singh v. State of Bihar (1986) 3 SCR 802 at page 826 : (AIR 1987 SC 149 at p. 161) by stating as follows :

> "Where bail has been granted under the proviso to S. 167(2) for the default of the prosecution is not completing the investigation in sixty days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest,him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed."

The strong grounds referred in the context obviously are grounds on merits of the case, which are reflective from the formal accusation put in the challan which the accused has to face at the trial.

27. Raghubir Singh's case (AIR 1987 SC 149) was followed by a decision of a Vacation Judge of this Court in Rajnikant Jivanlal v. Intelligence Officer, Narcotic Control Bureau, New Delhi (1989) 3 SCC 532 : (AIR 1990 SC 71). It was observed at page 536 (of SCC) (at p. 73 of AIR) as follows :

> "An order for release on bail under proviso (a) to S. 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under S. 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court's discretion. If the investigating agency fails to file chargesheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.
>
> The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filled, the bail granted under,provison (a) to S. 167(2) could be cancelled." (Emphasis supplied)

28. On the analysis the case law above discussed I have rather come to the conclusion that a compulsive bail order made by a Court under S. 167(2) of the Code being one not on merit, when required to be cancelled after the; filing of the challan would not involve any review of a decision made on merit. Such bail is cancellable if the Court has reason to entertain the belief that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. The occasion to grant or refuse bail on merit becomes available to the Court after the filing of the challan because earlier thereto merit of bail could not figure at .the time of the grant of compulsive bail. The goal of the Court in any event is to strike a judicial balance depending on the exigencies of the situation keeping in view amongst others the claims of personal liberty and the larger interests of the State. It cannot be overlooked that a bail order under S. 167(2) of the Code could even be managed through a convenient investigating officer, however, heinous. be the crime. The.court would have to grant bail under the mandate of law, debarred as it is to see to the merits of the case at that stage. To say that thenceforth the Court is for ever shut to see to the merits of the

case, though it otherwise has power to cancel bail is to deprive it of its elementary function to administer justice and weigh the claims on merit inter se. 1 would rather loath for such an interpretation as that would frustrate justice, and would on the other hand let the Court have the power to cancel bail, for once examining the merits of the case in such a situation.

29. The High Court in the instant case when approached for cancellation of bail applied its mind on the merits of the case and had relied on Rajnikant Jeevan Lal's case (AIR 1990 SC 71) (supra). In my view the High Court rightly relied on this decision when Raghubir Singh's case (AIR 1987 SC 149) (supra) was the basis thereof. These two cases have summed up and have drawn the demarcation between bail orders granted on merit and bail granted under the compulsion and thrust of under S. 167(2) of the Code and the parameters of cancellation. Challan for prosecution has been filed. I have seen the imputation against the appellant. He is described to be a gang leader who had arrived at the scene of the occurrence along with some others and committed the murder of a man on account of gang rivarly.. He is accused of having taken part in it by inflicting wounds on the deceased. The allegations have supportive eye-witnesses. The accusation against the appellant is pointedly there. His role in the crime, as an active participant could lead the High Court to entertain the view that the appellant has committed a non-bailable offence which may invite capital punishment or imprisonment for life and that there were sufficient grounds to arrest him and commit him into custody. And on coming to that view, the strong ground for cancellation of bail was made out. The view of the High Court thus seems to me right. For the aforesaid reasons this appeal must fail and is accordingly dismissed.

K. RAMASWAMI, J. (Concurring with Abmadi, J.) :-

30. The illuminating and weighty, but with mutual discordant opinions of my esteemed brethren Ahmadi and Punchhi, JJ., have given me an occasion to have insight into the operational zone of custodial law of the accused during investigation, his entitlement to bail and the resultant consequences. Since the facts in nutshell were narrated by my brother Ahmadi, J. in his judgment, the need to reiterate them is obviated.

31. As prefaced by my brother Ahmadi, J. the only question in this appeal is whether the liberty had by the accused by statutory operation of the proviso to S. 167(2) of the Code of Criminal Procedure, 1973, for short 'the Code' ipso facto is conterminous with the filing of the charge-sheet (challan) under S. 173 of the Code.

32. The laying of the information under S. 154 either orally or in writing of the commission of a cognizable offence sets the Criminal Law in motion and the investigating officer under S. 156 acquires power to investigate into those offences together with non-cognizable offence, if any. As a part of the process of investigation under S. 157, he shall proceed to the spot to ascertain the facts and if necessary, to take measures for the discovery and arrest of the offender. In State of M.P. v. Mubarak Ali, AIR 1959 SC 707: (1959 Cri LJ 920), this Court held that "investigation starts after the police officer receives information in regard to an offence under the Code. Investigation consists generally of the following steps (a) proceeding to the spot, (b) ascertainment. of the facts and circumstances of the case; and (c) discovery and arrest of the suspected offender. S. 41 empowers, him without an order from a Magistrate and without a warrant, to arrest any person concerning the said cognizable offence or when entertained reasonable suspicion, a reasonable complaint or on having credible information, in the circumstances enumerated thereunder. S. 57 (61 of the old Code) entitles the investigating officer to detain the arrested person in custody, but within imposed statutory limit, namely he shall not detain the arrested person in custody for more than 24 hours

excluding the requisite time necessary for the journey from the place of arrest to the Magistrate Court.

33. Section 57, is supplement to and effectuates the, constitutional mandate of Art. 22(2) that every person who is arrested and detained, in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of the arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Cl. (3)(b) lifts the rigour when the person is arrested under the provision of the Code or preventive detention law providing for preventive detention. In other words the precious personal liberty would be deprived only according to law. The intendment of S. 57 appears to be that investigation needs completion within 24 hours, but in practice and invariably it is difficult to complete the investigation within 24.hours. As its supplement S. 167(1) arms the investigating officer, when there are grounds to believe that the information is well founded shall forthwith transmit to the nearest Judicial Magistrate, a copy of the entries in the diary or the case and shall also forward the accused to such Magistrate and seek an order extending the custody. Sub-sec. (2) thereto empowers the Magistrate whether he has or has not jurisdiction to try the case, if he thinks fit to extend the detention of the accused from time to time and authorise the detention of the accused in the custody. So, however, it shall not exceed 15 days as a whole. If he has no jurisdiction to try the case or committing it for trial and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. The proviso thereto further enjoins that the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police beyond the period of 15 days only, if he is satisfied that adequate grounds exist for doing so. But, however, he is enjoined that no Magistrate shall authorise the detention of the accused person in custody for a total period exceeding (i) 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; (ii) 60 days, where the investigation relates to any other offence. On his satisfying that the period of 90 or 60 days, as the case may be, has been expired the accused shall be released on ball if he is prepared to and does furnish the bail. Every person, so released on bail, shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter of that Court. Under Cl. (b) of sub-sec. (2) of S. 167 production of the accused before the Magistrate is mandatory before authorising detention of the accused in custody under that section.

34. It is thus clear that, the detention without warrant of a Magistrate, by the police in his custody of the accused within 24 hours is permissible excluding the time necessary to produce him before the Magistrate while the investigation is on. An additional 15 days' detention in police custody is allowed by operation of sub-see. (2) of S. 167. However, the proviso enables the investigating officer to continue in an appropriate case, the investigation and also obtain detention (police custody or judicial custody) to a maximum of 90/ 60 days based on the nature of offences. On its failure to complete the investigation and filing the charge-sheet under S. 173, the law mandates the Magistrate to have the accused released, if he is prepared to and does furnish the bail. The expression "the accused person shall be released on bail" indicates the legislative mandatory duty of the Magistrate to release the accused on bail. By operation of explanation 1 to S. 167(2), notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail'. The object underlying the proviso is to prevent the police of the laxity in investigation and detention of the accused in the police or judicial custody, during the investigation. The law obviously disfavours the detention of the accused in the custody of the police and if further detention within the outer limit is necessary, the reason for such detention in writing shall be laid before the Magistrate concerned and the detention is not a matter of course. Whenever the further

detention was asked for and is necessary, the Magistrate shall be satisfied from the report of the investigation in the diary, which is the source. The power of remand during investigation was an integral part of process which is meant to be exercised to aid collection of evidence. However, the proviso puts an embargo on the power of the Magistrate to extend remand on expiry of 90/60 days.

35. Proviso to S. 167(2) was introduced for the first time under the Code. The reason appears to be, as stated by the Law Commission's report and statement of objects and reasons that S. 167(2) was honoured more in breach than in observance and that the police investigation takes a much longer time. A practice of doubtful legality had grown whereby police filed a preliminary charge-sheet and moved the Court for remand under S. 309 (344 of old Code), which he is not entitled to apply to such remand during investigation. The power for completion of the investigation with police or judicial custody of the accused after 15 days was thus extended up to 90/ 60 days, as the case may be covering under Cls. (i) and (ii) of the Cl. (a) of the provision to sub-sec. (2) of S. 167. This was meant to expedite investigation and to inculcate the sense of its urgency. The proviso enjoins the Magistrate that the accused shall be released from detention on bail. Such a release is by fiction of law as if one under Chapter XXXIII which includes Ss. 437 and 439 which empowers the Court of Session and the High Court to release the accused on bail and also power to cancel the bail so granted. Brother Ahmadi, J. extracted the relevant provisions of cancellation of bail and considered the subject with which I agree. So there is no need for my separate discussion in that behalf as well.

36. In Natabar Parida v. State of Orissa, 1975 Cri LJ 1212 : (AIR 1975 SC 1465), a two-Judge Bench, at the earliest considered, the scope of the proviso and held thus (at p. 1469, para 8 of AIR) :

> "The command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy murders, dacoities, robberies by inter-State gangs or the like, it may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the Court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under S. 167 will be deemed to be so released under the provisions of Chapter XXXIII and for the purposes of that Chapter. That may empower the Court releasing him bail bail, if it considers necessary so to do, to direct that such person be arrested and committed to custody as provided in sub-sec. (5) of S. 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance the power of remand is to be exercised under S. 309 of the new Code. But if it is not possible to complete, the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on ball. Such a law may be "paradise for the criminals." but surely it would not be so, as sometimes it is supposed to be, because of the Courts, it would be so under the command of the Legislature."

The same view was reiterated in a recent judgment of this Court by another Bench consisting of one of us (Ahmadi, J.) and K. J. Reddy, J. in Central Bureau of Investigation v. Anupam J. Kulkarni (1992) 3 JT (SC) 366: (AIR 1992 SC 1768) and it was stated in the context of construing whether the accused would be kept in the police or judicial custody after the expiry of 15 days under sub-sec. (2) of S. 167 thtis : "Now coming to the object and scope of S. 167, it is well settled that it is

supplementary to S. 57. It is clear from S. 57 that the investigation should be completed in the first instance within 24 hours, if not the arrested person should be brought by the police before a Magistrate as provided under sub-see. (1) of S. 167. The law does not authorise the police officer to detain and arrest person for more than 24 hours exclusive of time necessary for the journey from the place of arrest to the Magistrate Court.

37. In Bashir v. State of Haryana (1978) l SCR 585 : (AIR 1978 SC 55) a case directly on the point had arisen. Therein also 8 accused were prosecuted for the offence under S. 302 read with S. 149, I.P.C. for causing the death of one Sangroo. Investigation was not completed within 90 days. As a result the accused though bail was refused on merit earlier) released,on bail by operation of the proviso to S. 167(2) of the Code. On filing the chargesheet (challang), the Magistrate cancelled the bail and committed the accused to the Sessions Court. Cancellation of bail was questioned. Ultimately in the appeal . this Court held that (at p. 58 of AIR) :

> "A person accused of a non-bailable offence may be released by a Court but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. The two provisos to sub-sec. (1) are not material and need not be considered. Sub-sec. (2) to S. 437 provides that if the investigating officer or the Court at any stage of the investigation, inquiry or trial, as the case may be, is of opinion that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, pending such inquiry, the accused shall be released on bail. Sub-sec. (5) to S. 437 is important. It provides that any Court which has released person on bail under sub-see. (2). may. if it considers it' necessary so to do, direct that such person be arrested and commit him to custody.

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> The fact that before an order was passed under S. 167(2), the bail petitions of the accused were dismissed on merits is not relevant for the purpose of taking action under S. 437(5). Neither is it a valid ground that subsequent to release of the appellants a challan was filed by the police. The Court before directing the arrest of the accused and committing them to custody should consider it necessary to do so under S. 437(5)." (Emphasis supplied)

In Raghubir Singh v. State of Bihar (1986) 3 SCR 802 : (AIR 1987 SC 149) in similar circumstances, this Court held at p. 826 (of SCR) : (at p. 161 of AIR) thus :

> "The result of our discussion and the case law in this : An order for release on bail made under the proviso to S. 167(2) is not defeated by lapse of time, the filing of the charge-sheet or by remand to custody under S. 309(2). The order for release on bail may however be cancelled under S. 437(5) or S. 439(2). Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him. The due administration of justice may be interfered with by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. The course ofjustice may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the sureties. He may

abuse the liberty granted to him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to S. 167(2) for the default of the prosecution in not completing the investigation in 60 days, after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed."

38. In Rajnikant Jivanlal v. Intelligence Officer, Narcotic Control Bureau (1989) 3 SCC 532 : (AIR 1990 SC 71) the Vacation Judge, K. J. Shetty, J. upheld cancellation of the bail on filing the charge-sheet for an offence under Narcotic Drugs and Psychotropic Substances Act, 1985. Following this judgment the impugned order was passed by the High Court of Bombay cancelling the bail.

39. Undoubtedly. by operation of the proviso to S. 167(2) of the Code, the accused is entitled to bail due to default by the investigating officer to complete the investigation and laying the charge-sheet within the prescribed period of 90/60 days and not on merits. The fiction of law under the proviso applying the provisions of Chapter XXXIII is to serve the purpose of law, namely not only the release of the accused on taking the requisite bond and conditions to be incorporated therein as envisaged in the said Chapter, but also the power of the Court to cancel the bail and to take the accused into detention for the grounds mentioned under the relevant provisions in Ss.437(5) and 439(2) of the Code. The Legislature is aware of the pre-existing practice of not filing the charge-sheet within 15 days as envisaged under sub-sec. (2) of S. 167 of the old Code and the consequences as well. The doubtful procedure of seeking further detention on securing order of remand under S. 344 of the old Code and S. 309 of the present Code was to be put to an end to, while preserving the power to the Court to cancel the bail, if circumstances warrant to take the accused into custody. At the earliest this Court in Natabar Parida's case (AIR 1975 SC 1465) also took note of the fact that even under S. 167(2) proviso, it might not be possible to complete the investigation into grave crimes within the outer limit of the time set out in the proviso. In the light of the statutory animation to have the accused released from detention on expiry of 90/60 days if the accused shall be prepared to and does furnish bail, the consequences are inevitable and the release is a statutory paradise to the criminals not by judicial fiat but legislative mandate.

40. The purpose of interpretation is to sustain the law. The Court must interpret the words or the language in the statute to promote public good and misuse of power is interdicted. Criminal law primarily concerns with social protection and prescribes rules of behaviour to be observed by all. Law punishes for deviance, transgression violation or omission. Liberty of the individual and security and order in the society or public order are delicate and yet paramount considerations. Undue emphasis on either would impede harmony and hamper public good as well as disturb social weal and peace. To keep the weal balanced, must be the prime duty of the Judiciary. The purpose of the proviso to S. 167(2) read with Chapter XXXIII of the Code is to impress upon the need for expeditious completion of the investigation by the police officer within the prescribed limitation and to prevent laxity in that behalf. On its default the Magistrate shall release the accused on ball if the accused is ready and does furnish the bail. At the same time during investigation or trial the power of the Court to have the bail cancelled and have the accused taken into custody are preserved. But as interpreted by this Court on the happening of the catalyst act i.e. expiry of 90/60 days the hammer of release on default would fall. Later filing of the charge-sheet (challan) is not by itself relevant to have the bail cancelled on committing the accused for trial or taking cognizance of the offence. As emphasised by this Court in Bashir's (AIR 1978 SC 55) and Raghubir's (AIR 1987 SC 149) cases,

on curing the defect by filing the charge-sheet (challan) if the prosecution seeks to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest and commit him into the custody, prima facie at that,stage, strong grounds indeed are necessary. For cancellation of the bail after filing of the charge-sheet the factum of dismissal of the bail on the earlier occasion is not relevant. But during investigation some strong prima facie evidence and gravity and magnitude of the crime or the manner in which the crime was committed and other attending circumstances may be relevant as prima facie grounds to have a fresh look to cancel the bail. The grounds for cancellation of the bail in Chapter XXXIII are dehors the merits in the matter, namely necessity due to the conduct of the accused and abuse of liberty i.e. obstruction of the smooth investigation or suborning witnesses or attempting to tamper the evidence, threatening the witnesses with dire consequences or making or attempting to remove himself beyond the reach of the Court to hamper the smooth trial, etc. are independent of the merits in the matter. Cancellation of the bail would be necessitated by the conduct of the accused himself after the release. I agree with brother Punchhi, J. that it might be possible to abuse the proviso by deliberate delay in completing the investigation to facilitate the release of the accused on bail. I also agree that merits brought out in the charge-sheet and attending circumstances are relevant, as the bail was granted due to default of the investigating officer without Court's adverting to the merits but strong grounds are necessary to cancel the bail. To that extent brother Ahmadi, J. also laid emphasis namely, strong grounds are to be made out in the charge-sheet. With respect I agree with brother Ahmadi's emphasis that filing the charge-sheet (challan) itself is not sufficient. However, I lay emphasis that the High Court or the Court of Session should consider the merits of the case. With respect, K. J. Shetty, J., laid emphasis on the subsequent filing of the charge-sheet and the power for cancellation under Ss. 437 and 439 of the Code. Unfortunately, the ratio in Parida's (AIR 1975 SC 1465) and Bashir's (AIR 1978 SC 55) cases was not brought to the notice of the learned Judge, which was directly on the point and for the reasons stated 1 find it difficult to agree with the learned Judge in that respect. I am in full agreement with the view expressed by brother Ahmadi, J. and the order proposed by him.

Appeal allowed.

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