

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.305 of 2016

Arising Out of PS.Case No. -null Year- null Thana -null District- GAYA

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Shintu Yadav Son of Late Dhanraj Yadav, resident of Vilage- Paharpur, P.S.
Fatehpur, Dist- Gaya.

.... Petitioner

Versus

The State of Bihar through District Magistrate, Gaya.

.... Respondent

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Appearance :

For the Petitioner : Mr. Akhileshwar Prasad Singh, Senior Advocate
Mr.Gauri Shankar Prasad, Advocate

For the Respondent : Mr. Vinay Kirti Singh, G.A.-2

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 18-10-2016

The present writ petition is filed under Article 226 of the Constitution of India, seeking a writ of *habeas corpus*. It is the case of the petitioner that his detention in judicial custody is illegal for being in contravention of Section 309(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code').

2. The facts relevant to the present proceedings may be briefly summarised as follows;

BACKGROUND FACTS:

(i) An information, in writing, was given by one Mahabir Yadav to the Officer-in-Charge, Fatehpur Police



Station, that on 10.01.2014, he received a telephonic message with regard to the death of his daughter, namely, Munni Devi, and, on receiving the said information, when he reached the village of his daughter's husband, enquired about the incident from the villagers, he came to know that his daughter had been done to death and, later on, cremated. It is further alleged by the informant that the in-laws of his daughter had demanded a motorcycle and a gold chain, which he promised to fulfill by selling rice and wheat.

(ii) Based on the above information and treating the same as First Information Report (in short, 'F.I.R.') Fatehpur Police Station Case No. 16 of 2014, dated 11.01.2014, came to be registered under Sections 304-B, 201/34 of the Indian Penal Code, against the son-in-law, Shintu Yadav (i.e., the writ petitioner), and his other family members.

(iii) The writ petitioner was arrested in the aforementioned case on 24.04.2015 and has been in custody till date. A *charge-sheet/police report*, dated 28.06.2015, was submitted, under Section 173(2)(i) of the Code of Criminal Procedure, (in short, the Code) charging only the accused-petitioner under Sections 306 and 201 of the Indian Penal Code and not the remaining persons, who were named as accused in the F.I.R.

(iv) Upon submission of the *charge-sheet*, the learned



Additional Chief Judicial Magistrate, Gaya, by order, dated 12.08.2015, instead of taking *cognizance* of any offence on the basis of *police report/charge sheet*, issued notice to the informant since all the accused persons, named in the F.I.R., except the petitioner-accused, were not sent up for trial. The writ petitioner, namely, Shintu Yadav, who was *charge-sheeted*, has, however, been kept remanded to judicial custody from time to time by the learned Additional Chief Judicial Magistrate, Gaya. The petitioner is still in judicial custody by the instant writ petition, dated 17.03.2016, has challenged the judicial custody for being in contravention of section 309 of the Code.

3. We have heard and carefully considered the submissions made by Mr. Akhileshwar Prasad Singh, learned Senior counsel for the petitioner, and Mr. Vinay Kirti Singh, learned Government Advocate No.3, appearing for the State respondent.

Submissions on behalf of the petitioner:

4. Mr. Akhileshwar Prasad Singh, learned Senior counsel, has raised the issue with regard to power of the learned Additional Chief Judicial Magistrate, Gaya, to remand the accused-petitioner to custody, under Section 309(2) of the Code, without taking *cognizance* of any offence inasmuch as the *police report* charging the petitioner, under Sections 306 and 201 Indian Penal Code, was filed on 28.06.2015 and the accused-

petitioner was remanded to judicial custody even after filing of the said *charge sheet* without taking *cognizance* of the offences alleged to have been committed by the accused.

5. Mr. Akhileshwar Prasad Singh, learned Senior counsel, relying on the judgment of this Court, in ***Sanjay Bhagat vs. State of Bihar***, reported in [2009 (1) BBCJ 95], contended that in the light of the provisions of Section 309(2) of the Code, once a *police report* against the petitioner was filed, the learned trial Court could not have further remanded the petitioner to custody without taking *cognizance* of any offence.

6. It is, thus, the case of the petitioner that once a *police report*, under Section 173(2)(i) of the Code, is filed, the investigation stands completed and, thereafter, the power to remand an accused would be available only under Section 309(2) and not under Section 167(2) of the Code, and as the accused-petitioner was remanded to judicial custody even after the *charge sheet* was filed without taking *cognizance* of any offence, the order directing his remand is bad in law being violative of Section 309 as well as 167(2) of the Code.

7. The learned Senior counsel, for the petitioner, has also relied on the decision of this Court in ***S.K.Lal Vs. Lalu Prasad***, reported in 2009 (1) PLJR 782, another decision of this Court, in ***Pawan Kumar Jaiswal Vs. The State of Bihar***, reported in 1999(2) PLJR 365.

Submissions on behalf of respondent State: -

8. Mr. Vinay Kiriti Singh, learned Senior counsel, appearing for the respondents, on the other hand, submits that the issue, arising in the present case, is as to whether, upon completion of the investigation, an accused acquires indefeasible right to be released from custody if *cognizance* has not been taken by the Court on the basis of the *police report* filed under Section 173(2)(i) of the Code.

9. Mr. Vinay Kiriti Singh, learned Senior counsel, appearing for the respondents, also submits that though the power to remand an accused is vested in a Magistrate at the stage of investigation under Section 167(2) of the Code, and this power of the Magistrate to remand an accused to custody continues to remain available with the Judicial Magistrate not only till the submission of *charge sheet* but also until the time the Magistrate takes *cognizance* of any offence. He further submits that only when the *cognizance* of any offence is taken by a Magistrate that the power to remand shifts to clause (2) of Section 309 of the Code.

10. It is also submitted by Mr. Vinay Kiriti Singh, learned Senior counsel, appearing for the respondents, that it is most crucial to note that in the present case, even though the *police report* has been submitted stating that no offence is made out against seven other accused named in the First



Information Report, only the accused-petitioner has been charged with the offences under Sections 306 and 201 of Indian Penal Code, 1860, and that is why, points out the learned senior counsel for the respondents, the Additional Chief Judicial Magistrate, Gaya, has issued notice to the informant on 22.04.2016 and has invoked his power contained in the Code to verify whether investigation has been fair or not, so that necessary order, directing *further investigation*, if required, can be passed if the learned ACJM, Gaya, finds, on receiving the objection, if any, from the informant pursuant to the notice, which was issued to him, that such an investigation was needed so as to enable the learned Magistrate take *cognizance* of the offences and proceed only against the accused-petitioner, who had been sent up for trial, or to proceed against some or all the accused named in the First Information Report if sufficient materials were found or direct *further investigation*.

11. Necessarily, therefore, the next stage, in the context of the facts of the present case, was, according to the learned Counsel for the respondents, an *enquiry* to be held by the Magistrate as to what shall be done and how the case shall be proceeded with, though the *charge sheet* had been submitted inasmuch as the *charge sheet* had not sent up all the accused for trial, but only one of them, i.e., the accused-petitioner.



12. It is the submission of the learned Senior counsel for the respondents that in a criminal trial, right to fair investigation is a right, which is vested in both, an accused as well as the victim/informant, who puts criminal law into motion, and, therefore, before taking *cognizance* of the offences, the learned Additional Chief Judicial Magistrate, Gaya, rightly issued notice to the informant, because the informant had a right to protest against the fairness and veracity of the investigation carried out by the police and also correctness of the *police report*, which was tantamount to exonerating, in the light of the investigation carried out, the remaining accused named in the First Information Report.

13. The principal issues, arising out of this writ petition, may be summarized as follows;

(i) *When an informant names more than one persons, in the F.I.R., as accused and the police, upon investigation, submits its report, under Section 173 (2) (i) of the Code, to the effect that it has found materials only against one or some of the persons named as accused in the F.I.R. and not against all, who had been named as accused by the informant, whether a Magistrate is, before accepting such a report and/or before taking 'cognizance' of offence(s) on the basis of such a report, bound to issue notice to the informant?*

(ii) *Whether the accused has indefeasible right to*

be released from custody if a report, popularly called final report, under Section 169 Criminal Procedure Code, is filed against some of the co-accused named in the First Information Report?

14. The case records of the learned Court below was called for. On perusal of the records, it is evident that the accused was kept in custody till 05.01.2016 pending *inquiry* pursuant to the notice issued to the informant. In other words, for about six (6) months after filing of the *charge sheet*, the case remained at that stage and accused remained confined to judicial custody. On 06.01.2016, the accused writ-petitioner moved a petition before the learned Additional Chief Judicial Magistrate, Gaya, praying therein that *cognizance* be taken so that the case moves to the next stage. Record reveals that the learned Additional Chief Judicial Magistrate, Gaya, passed an order, finally, on 02.09.2016, i.e., after nearly eight (8) months, whereby *cognizance* of the offences, under Section 304B and Section 201 of the Indian Penal Code, was taken and the case was committed to the Court of Session.

Courses open to a Magistrate on receipt of a police report, under Section 173 (2) (i) of the Code, disclosing a report partly under Section 170 of the Code (commonly called 'charge sheet') and partly under Section 169 of the Code (commonly called final report): -



15. In a case instituted by the police, when the investigation is conducted, it may culminate into a report under Section 169, ordinarily, called a *final report*, or a report, under Section 170 of the Code, ordinarily, called a *charge-sheet*. Be it a report under Section 169 or a report under Section 170, the report submitted to the Court shall be in the form and manner as provided in Section 173 of the Code and is termed *police report*.

16. It is Chapter-XII of the Code, which deals with information to the police and the power of the police to conduct investigation. Ordinarily, it is the First Information Report, which sets, in motion, the machinery of law.

17. Let us, therefore, consider, first, the provisions contained in Section 154 of the Code. Sub-Section (1) of Section 154 provides that every information relating to the commission of a cognizable offence, if given orally to an officer-in-charge of a Police Station, shall be reduced into writing by him or under his direction and be read over to the informant and every such information, whether given in writing or reduced into writing, shall be signed by the person giving it and sub-section (2) of Section 154 requires that a copy of such information shall be given, forthwith, free of cost, to the informant. Sub-section (1) of Section 156 vests, in the officer-in-charge of every Police Station, the power to investigate any

cognizable case without the order of a Magistrate and sub-section (3) of that Section authorizes the Magistrate, empowered under Section 190, to order an investigation as mentioned in sub-section (1) of that Section.

18. As regards the information given to an Officer-in-Charge of a Police Station of the commission of a non-cognizable offence, within the limits of such a Police Station, the duty of such an officer is to enter or cause to be entered the substance of the information in a book to be kept by such officer, in such form as the State Government may prescribe in this behalf, and refer the information to the Magistrate, but he cannot, in the light of Section 155 (2), investigate into such a case without the order of a Magistrate having the power to try such a case or commit the case for trial. When, however, a police officer receives an order from a Magistrate to investigate a non-cognizable case, his powers, according to Section 155 (3), to carry out investigation will be the same as in the case of a cognizable case.

19. Coupled with what is indicated hereinabove, one should also bear in mind that sub-section (1) of Section 157 lays down that if, from the information received or otherwise, an officer-in-charge of a Police Station has reason to suspect the commission of an offence, which he is empowered, under Section 156, to investigate, he shall, forthwith, send a report of



the same to a Magistrate empowered to take '*cognizance*' of such offence upon a *police report* and shall proceed to the spot to investigate the facts and circumstances of the case and, if necessary, to take measures for the discovery and arrest of the offender. But there are two provisos to this sub-section. Proviso (a) empowers the officer-in-charge not to investigate if the offence alleged is not of serious nature and proviso (b) states that if it appears to the officer-in-charge of a Police Station that there is no sufficient ground for entering on an investigation, he shall not investigate the case; but in such a case, sub-section (2) of Section 157 requires that the officer shall, forthwith, notify to the informant the fact that he will not investigate the case or cause it to be investigated.

20. Thus, in a given case, in the light of the proviso (a) and (b) to sub-section (1) of Section 157, the police officer has the option of not investigating a case if an information, as to the commission of any offence, is given against any person by name, provided that the case is not of a serious nature or if it appears to the Officer-in-Charge of the Police Station for reasons to be recorded by him that there is no sufficient ground for entering on an investigation into the case. Section 158 contemplates sending to the Magistrate a report, as envisaged in Section 157, through such superior police officer as the State Government may, by general or special order, appoint in that



behalf, and such superior police officer has the power to give such instruction as he thinks fit and such instruction shall also be transmitted to the Magistrate along with the report. Notwithstanding the fact that Section 157 empowers the police not to investigate a case, the Magistrate, on receiving the report as contemplated in Section 157 read with Section 158, has the power to direct investigation or, if he thinks fit, at once, proceed or depute any Magistrate subordinate to him to hold preliminary inquiry or, otherwise, to dispose of the case in the manner as provided in the Code.

21. What the officer-in-charge of a Police Station is required to do, on completion of the investigation, is set out in Section 173. Sub-section (2) (i) of Section 173 provides that as soon as an investigation is completed, the officer-in-charge of a Police Station shall forward to the Magistrate, empowered to take '*cognizance*' of the offence on a *police report*, a report, in the form prescribed by the State Government, setting out various particulars including whether, in the opinion of the officer, any offence appears to have been committed and if so, by whom.

22. What is, now, of utmost importance to note is that sub-section (2) (ii) of Section 173 states that the officer shall also communicate, in such manner as may be prescribed by the State Government, to the person, if any, by whom the



information relating to the commission of the offence was, first, given as to what action had been taken by him. Sub-section (1) of Section 190, then, proceeds to enact that any Magistrate of the First Class and any Magistrate of the Second Class, specially empowered in this behalf under sub-section (2) of Section 190, may take '*cognizance*' of any offence: (a) upon receiving a '*complaint*' of facts, which constitute such offence, or (b) upon a '*police report*' of such facts, or (c) upon '*information*' received from any person, other than a police officer, or upon his '*own knowledge*', that such offence has been committed. We are concerned, in this case, only with clause (b), because the question, we are examining here, is whether a Magistrate is bound to issue notice to the first informant or to the injured or to any relative of the deceased, when the Magistrate is considering a *police report* submitted under Section 173 (2) if the *police report* sends up only one or some of the accused, named by the first informant and not all the accused named in the First Information Report.

23. The Supreme Court, in ***Bhagwant Singh Vs. Commr. of Police***, reported in **(1985) 2 SCC 537**, has pointed out that when an informant lodges First Information Report with the officer-in-charge of a police station, he does not fade away with the lodging of the First Information Report; rather, he is very much concerned with what action is initiated



by the officer-in-charge of the police station on the basis of the First Information Report lodged by him. No sooner he lodges the First Information Report, a copy thereof has to be supplied to him, free of cost, under sub-section (2) of Section 154. If, notwithstanding the First Information Report, the officer-in-charge of a police station decides not to investigate the case on the ground that there is no sufficient ground for entering on an investigation, he is required, under sub-section (2) of Section 157, to notify to the informant the fact that he is not going to investigate the case or cause it to be investigated. This apart, the officer-in-charge of a police station is obligated, under sub-section (2) (ii) of Section 173, to communicate to the informant as to what the investigation, conducted by the police, has revealed. Furthermore, the officer-in-charge of the police station is also required to supply to the informant a copy of the *police report*, which he has forwarded to the Magistrate under Section 173 (2) (i).

24. The question, therefore, is as to why action, taken by the officer-in-charge of a police station, on the First Information Report, is required to be communicated to the informant along with the report, which is forwarded to the Magistrate under sub-section (2) (i) of Section 173. The reason is obvious and the reason, as pointed out in **Bhagwant Singh** (supra), is that the informant, who sets the machinery of



investigation into motion by filing the First Information Report, must know what is the result of the investigation initiated on the basis of the First Information Report, which he had lodged. The informant, having taken the initiative of lodging the First Information Report with a view to initiating investigation by the police for the purpose of ascertaining whether any offence has been committed and, if so, by whom, he is vitally interested in the result of the investigation and, hence, the law requires that the action taken by the officer-in-charge of a police station, on the First Information Report should be communicated to the informant. This apart, even the report, forwarded by such an officer to the Magistrate under sub-section (2) (i) of Section 173, should also be supplied to the informant.

25. Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate, under sub-section (2) (i) of Section 173, comes up for consideration by the Magistrate, one of the two different situations may, as pointed out in ***Bhagwant Singh*** (supra), arise. The report may conclude that an offence appears to have been committed by a particular person or persons and, in such a case, the Magistrate may do one of three things: (i) he may accept the report and take '*cognizance*' of the offence and issue process or (ii) he may disagree with the report and drop the proceeding or (iii) he may direct *further investigation* under sub-section (3) of



Section 156 and require the police to submit a further report. The report, submitted under Section 173 (2) (i), may, on the other hand, state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate, according to the Supreme Court, in ***Bhagwant Singh*** (supra), has, once again, the option to adopt one of three courses: (i) he may accept the report and drop the proceeding or (ii) he may disagree with the report and, taking the view that there is sufficient ground for proceeding further, take "*cognizance*" of the offence and issue process or (iii) he may direct *further investigation* to be made by the police under sub-section (3) of Section 156.

26. Where, in either of the two situations, indicated above, the Magistrate decides to take "*cognizance*" of the offence and issue process, the informant is not prejudicially affected nor can the injured or, in case of death, any relative of the deceased really feel aggrieved, because *cognizance* of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, but there is no sufficient ground for proceeding against others, mentioned in the First Information Report, the informant, as noted in



Bhagwant Singh (supra), would certainly be prejudiced, because the First Information Report, lodged by him, would have failed its purpose, wholly or in part. Moreover, when the interest of the informant, in prompt and effective action being taken on the First Information Report lodged by him, is clearly recognized by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-section (2) (ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes '*cognizance*' of the offence and issues process against all those, who may have been named by him in the First Information Report, because that would be culmination of the information lodged by him.

27. There can, therefore, be no doubt, as held in **Bhagwant Singh** (supra), that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2) (i) of Section 173, the Magistrate is not inclined to take '*cognizance*' of the offence and issue process against all or some of the accused named in the First Information Report, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take '*cognizance*' of the offence and issue process against the accused named in the *police report*.

28. To put it a little differently, but explicitly, the



position of law is thus: If, in a given case, the First Information Report names more than one person as accused and the police submits *charge sheet* only against one or some of them, the Magistrate is duty bound to give a notice to the informant before accepting such a report of exoneration of those persons, who were named as accused, in the First Information Report, by the informant, but the '*police report*' indicates no material having been found against them. Independent of the objection raised by an informant, the Magistrate has the duty to apply his mind to the facts of every given case and determine whether or not a '*final report*' or '*charge sheet*' or a partly *final report*, which exonerates some of the accused, shall or shall not be accepted in its entirety.

29. Situated thus, it becomes abundantly clear that if the Magistrate, upon hearing the informant, decides to accept the '*final report*' or a '*charge sheet*', which exonerates some of the persons named as accused in the First Information Report, it is necessary that the Magistrate records the reasons, in writing, so that the correctness of the reasons, for taking such a decision, can, if necessary, be examined by the superior court.

30. The question, which we, now, confront is: *whether the petitioner has acquired any indefeasible right to be released from custody upon filing of a charge sheet, in the event of*

pending inquiry regarding a report under Section 169 of the Code against some of the accused named in the First Information Report and not against all the accused named in the First Information Report?

31. It is not in dispute that the power of a Magistrate to detain an accused in custody during investigation lies in Section 167 of the Code and after he has taken *cognizance* of the offence, the power to detain lies in Section 309(2) of the Code. It is pertinent to observe that the scope of Section 167(2) of the Code is vastly different and distinct from the scope of Section 309(2) of the Code. Section 167(2) of the Code empowers a Magistrate to remand an accused until the time the Court either takes *cognizance* or declines to take *cognizance* of any offence, and it is only when the Court takes *cognizance* that further remand, if made, has to be pursuant to the power of the Magistrate under Section 309(2) of the Code.

32. The case of **Suresh Kumar Bhikamchand Jain v. State of Maharashtra**, reported in **(2013) 3 SCC 77**), clearly lays down the law to the effect that a Magistrate is empowered to remand an accused to judicial custody under Section 167(2) of the Code in the facts and circumstances, which is also the issue raised in the present case.

33. So far as issue of powers of a Magistrate to remand an accused and interpretation of Section 167(2) of the Code are



concerned the facts of the case of **Suresh Kumar Bhikamchand Jain** (supra) were, to some extent and in certain aspects, same as in the present case, because in the case of **Suresh Kumar Bhikamchand Jain** (supra), despite the fact that a *charge sheet* had been submitted, the Magistrate did not take *cognizance* and yet remanded the accused to custody. The argument, advanced, on behalf of the petitioner was that upon submission of *charge sheet*, the Magistrate could not have remanded the accused to custody without taking *cognizance* and because sanction was being awaited by the Magistrate, the accused was entitled, as of right, to be released on bail.

34. The question, therefore, arose if the remand of the accused, on submission of *charge sheet* without taking *cognizance*, is sustainable in law. This factual background becomes evident from the observations made, at paragraph 16, in **Suresh Kumar Bhikamchand Jain** (supra), which read as follows:-

".....it would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the petitioner's arrest and remand to police custody. **It is true that cognizance was not taken by Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the**

provisions of the PC Act, but does such failure amount to non-compliance with the provisions of Section 167(2) Criminal Procedure Code is the question with which we are confronted."

(Emphasis is added)

35. In other words, the Magistrate's power to remand an accused under Section 167(2) of the Code without taking cognizance was the question in controversy in **Suresh Kumar Bhikamchand Jain** (supra) in the factual background, which is similar to the facts of the case at hand. This position becomes transparent on reading the observations made, at paragraph 2 also, in **Suresh Kumar Bhikamchand Jain** (supra), which run as follows:--

*"One of such issues concerns the power of the Magistrate to pass orders of remand even beyond the period envisaged under Section 167(2) of the Code of Criminal Procedure. **In the instant case, despite charge-sheet having been filed, no cognizance has been taken on the basis thereof. The learned Magistrate has, however, continued to pass remand orders, without apparently having proceeded to the stage contemplated under Section 309 of the Code of Criminal Procedure."***

(Emphasis is added)

36. Considering the fact that *charge sheet* had been filed, in **Suresh Kumar Bhikamchand Jain** (supra), within the time stipulated by Section 167(2) of the Code of Criminal Procedure, but because sanction to prosecute the accused was not obtained, no *cognizance* was taken. The question, which, therefore, arose, if we may repeat, was whether the Magistrate, without taking *cognizance*, could have remanded the accused or, rather, continued to have remanded the accused by taking recourse to Section 167(2) of the Code of Criminal Procedure. This was the legal issue, and the same is apparent from the observations made, at paragraph 4, in **Suresh Kumar Bhikamchand Jain** (supra), which read as follows:-

*"What has been stressed upon on behalf of the petitioner is that, **although, charge sheet had been filed within the time stipulated under Section 167(2) of the Code of Criminal Procedure, sanction to prosecute the petitioner had not been obtained, as a result whereof, no cognizance was taken of the offence. Notwithstanding the above, remand orders continued to be made and the petitioner remained in magisterial custody.**"*

(Emphasis is supplied)

37. It was contended, on behalf of the petitioner, in **Suresh Kumar Bhikamchand Jain** (supra), that since the

statutory period of 90 days, envisaged by Section 167(2) of the Code of Criminal Procedure, had lapsed, though the *charge sheet* had been submitted before the statutory period of 90 days had elapsed, the petitioner could not have been remanded to custody by the Magistrate, who is yet to take *cognizance*, but cannot take *cognizance* for want of sanction.

38. The further submission, made on behalf of the petitioner, in ***Suresh Kumar Bhikamchand Jain*** (supra), was that as far as Section 309(2) of the Code is concerned, the same would be applicable only after *cognizance* stood taken and since *cognizance* had not been taken, trial could not have been said to have commenced and the petitioner was, therefore, entitled to be released on bail, forthwith, on the basis of the indefeasible right acquired by the petitioner on the failure of the investigating authority to obtain sanction. These were the submissions made, on behalf of the petitioner, in ***Suresh Kumar Bhikamchand Jain*** (supra), are clear from a reading of paragraph 7, which we reproduce below:-

"Mr. Lalit also submitted that Section 309 Criminal Procedure Code, which also deals with remand of the accused under certain circumstances, does not apply to the allegations relating to the provisions of the PC Act, inasmuch as, there is no committal proceeding contemplated in the proceeding before the learned Special Judge. However, as far as Section 309 Criminal Procedure Code is

concerned, Mr. Lalit submitted that the same would be applicable only after cognizance of the offence had been taken or upon the commencement of the trial before the Special Court. **In the absence of cognizance being taken by the Special Court, it could not be said that the trial had commenced and, therefore, further detention of the petitioner was wholly illegal and not authorized in law and he was, therefore, entitled to be released on bail forthwith on the basis of the "indefeasible right" acquired by him on the failure of the investigating authorities to obtain sanction for prosecuting the petitioner."**

(Emphasis is supplied)

39. The question, therefore, which fell for consideration, in **Suresh Kumar Bhikamchand Jain** (supra), was, in the words of Supreme Court, at paragraph 13, thus, *"the right of a Magistrate or the trial court to pass orders of remand in terms of Section 167(2) of the Code of Criminal Procedure beyond the period prescribed therein.*

40. Having taken note of the provisions embodied in Section 167 of the Code, as a whole, *vis-à-vis* Section 309(2) of the Code, the Supreme Court, in **Suresh Kumar Bhikamchand Jain** (supra), delineated the distinction between Section 167(2), on the one hand, and Section 309(2) of the Code, on the other, observing that grant of sanction is,



nowhere, contemplated under Section 167 of the Code. What Section 167(2) of the Code contemplates is, the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation, and, thereafter, upon taking of *cognizance*, indicates that the legislature intended investigation of certain crimes to be completed within 60 days and offences, punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of *charge sheet* having been filed, the court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as, the ones referred to hereinbefore.

41. Referring to the cases of ***Natabar Parida vs State of Orissa***, reported in **(1975) 2 SCC 220**, and ***Sanjay Dutt vs State***, reported in **(1994) 5 SCC 410**, the Supreme Court, in ***Suresh Kumar Bhikamchand Jain*** (supra), observed that these cases do not detract from the position that once a *charge*

sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise.

42. It is further observed, in **Suresh Kumar Bhikamchand Jain** (supra), that the Magistrate, exercising powers under Section 167(2) of the Code, to remand an accused to custody, is not concerned with the fact whether or not *cognizance* of the offence has been taken. The right, which may have accrued to the petitioner, had *charge sheet* not been filed, is not attracted to the facts of the case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 of the Code, it cannot be said that the accused is entitled to grant of statutory bail as envisaged in Section 167 of the Code. The scheme in Code of Criminal Procedure is such that once the investigation stage is completed, the court proceeds to the next stage, which is taking of *cognizance* and trial. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) of the Code, the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days, where the offences are punishable for over 10 years or even death sentence. In the



event, an investigating authority fails to file the *charge sheet* within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as *cognizance* is taken by the Court trying the offence, when the said court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 of Code. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.

43. Finally, the Supreme Court, in **Suresh Kumar Bhikamchand Jain** (supra), observed and concluded as under:-

*"Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, **the accused was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated under Section 167(2)(a) (ii) Criminal Procedure Code.** Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings. In that view of the matter, the special leave petition deserves to be and*

is hereby dismissed."

(Emphasis is added)

44. Closely following the decision in **Suresh Kumar Bhikamchand Jain** (supra), one must consider, in the context of the issues, which have been raised in the present petition, the decision of the Supreme Court, in **Central Bureau of Investigation vs. Rathin Dandapat**, reported in **(2016) 1 SCC 507**), wherein the Court has considered the scope and ambit of Section 167 of the Code and powers of a Magistrate to remand an accused for investigation. The issue before the Supreme Court was "*whether no remand in police custody can be given to the investigating agency in respect of the absconding accused who is arrested only after filing of the charge sheet*"?

45. The Supreme Court, relying on the judgment of a three Judge bench, in **Central Bureau of Investigation v. Dawood Ibrahim Kaskar and others**, reported in **(2000) 10 SCC 438**, held, in unequivocal terms, in **Rathin Dandapat** (supra), as follows:-

"...the High Court is not justified...in upholding refusal of remand in police custody by the Magistrate, on the ground that accused stood in custody after his arrest under Section 309 CrPC. We have already noted above the principle of law laid

down by the three judge bench of this Court in *State v. Dawood Ibrahim Kaskar (supra)* that **police remand can be sought under Section 167(2) CrPC in respect of an accused arrested at the stage of further investigation, if the interrogation is needed by the investigating agency. This Court has further clarified in said case that expression 'accused if in custody' in Section 309(2) CrPC does not include the accused who is arrested on further investigation before supplementary charge sheet is filed."**

(Emphasis is added)

46. What emerges from the decision, in ***Rathin Dandapat*** (supra), is that police remand can be sought under Section 167(2) of the Code in respect of an accused arrested even at the stage of further investigation.

47. In ***Jeewan Kumar Raut v. Central Bureau of Investigation***, reported in **(2009) 7 SCC 526**, too, the Supreme Court, while interpreting Section 167(2) of the Code, in the context of the Transplantation of Human Organs Act, 1994, has held, in clear terms, that only because the court itself took time in taking cognizance of the offence, i.e., after the expiry of the period of 90 days, the same would not mean that any new right would be created in favour of the appellants thereby.



48. From what has been laid down in **Suresh Kumar Bhikamchand Jain** (supra), **Rathin Dandapat** (supra) and **Jeewan Kumar Raut** (supra), it becomes abundantly clear that on submission of *charge sheet*, the Magistrate is empowered to remand an accused to custody by virtue of powers vested in him under Section 167(2) of the Code and it is only when he takes *cognizance* that the stage of Section 309(2) of the Code is reached and till then, the remand of the accused can be legally continued by taking resort to the provisions embodied in Section 167(2) of the Code. And even after a Magistrate has taken *cognizance*, an accused can still be remanded to custody, police or judicial, in exercise of the Magistrate's power under Section 167(2) of the Code, if the case falls for *further investigation*. [See: **Dawood Ibrahim Kaskar's** case (supra), and **Rathin Dandapat's** case (supra)]. Mere delay, on the part of the Magistrate in taking *cognizance* of an offence, on the basis of a *police report*, would not vest in the accused an indefeasible right to be released unconditionally or on bail. [See: **Jeevan Kumar Raut's** case (supra)]

49. In short, on submission of *charge sheet*, a Magistrate is not denuded of its power to remand an accused to custody by virtue of his power under Section 167(2) of the Code. However, once *cognizance* is taken, the remand, if any, would be pursuant to the Court's power under Section 309(2) of

the Code unless a case falls for *further investigation*. [See: **Rathin Dandapat's** case (supra)]. Only for the reason of delay in taking *cognizance*, on the submission of the *police report*, an accused cannot claim his release either unconditionally or on bail. [See: **Jeevan Kumar Raut's** case (supra)].

50. So far as the present case is concerned, even though *cognizance* had not been taken by the Magistrate on receipt of the *police report*, it is equally true that all of the courses, open to the Magistrate, as pointed out hereinbefore, were yet to be exhausted.

51. In other words, even though a *charge sheet* stood submitted disclosing commission of offences against the petitioner, the fact remains that the investigating officer had not sent up for trial all other accused persons named in the First Information Report and, hence, it cannot be said that the entire proceeding commencing from the stage of lodging of the First Information Report and subsequent investigation, if required, had come to its logical conclusion. As pointed out hereinbefore, there are several other factors, which will have to be considered before it can be said that the proceedings, which were borne out of the First Information Report, had come to an end, whereafter no further action, on the same cause of action was warranted.

52. In **Sanjay Bhagat's** case (supra), which Mr.



Akhileshwar Prasad Singh, learned Senior counsel, relies upon, the Division Bench of this Court, contrary to the present case, did not have to deal with a situation, wherein a *charge sheet*, under Section 173(2) of the Code, had been filed, but the Magistrate had not taken *cognizance*; rather, the Magistrate, in the present case, issued notice to the informant and conducted an enquiry under the mechanism provided in the Code, before taking *cognizance* of the offences, on the ground that in terms of the *charge sheet*, all the accused, named in the First Information Report, had not been sent up for trial [See law laid down in **Bhagwant Singh's** case (supra)]. It is also pertinent to note that in **Sanjay Bhagat** (supra), the Division Bench of this Court did not have the opportunity to consider the decision of the Supreme Court in **Jeevan Kumar Raut** (supra), **Suresh Kumar Bhikhamchand Jain** (supra) and **Rathin Dandapat** (supra).

53. Even in **Pawan Kumar Jaiswal** (supra) and **S.K. Lal** (supra), the Court had not been dealing with the situations, which we are to deal with in the present case.

54. In the present case, because of the fact that a notice, in the light of the law discussed in **Bhagwant Singh's** case (supra), was required to be sent — and was, indeed, sent — to the informant on the ground that the *charge sheet* had not been submitted against all the accused persons named in the

First Information Report, there was delay in taking *cognizance*. This Court, in **Pawan Kumar Jaiswal** (supra) and **S.K. Lal** (supra), did not also have the occasion to take into consideration the decisions in **Suresh Kumar Bhikhamchand Jain** (supra), **Jeevan Kumar Raut** (supra) and **Rathin Dandapat's case** (supra).

55. It is an undisputed fact that in the present case, the Magistrate had, at the material time, not exhausted the process of hearing the informant and passing necessary order(s) as to whether the *final report*, not sending up for trial all the accused, named in the First Information Report by the informant, ought to be accepted or not.

56. In the case at hand, the Magistrate took time in conducting the enquiry as to whether the decision of the investigating officer not to send up, for trial, some of the accused, named in the First Information Report, was correct or not. For the time taken by the Magistrate in conducting such an enquiry, the accused-petitioner, against whom *charge sheet* has been filed, within the stipulated period of 90 days, cannot claim that his custody is illegal for being in contravention of the provisions of the Code.

57. The conclusion, reached above, can be tested from yet another angle based on the doctrine of *implied powers*.

58. In the case of **Sakiri Vasu v. State of U.P.,**



reported in **(2008) 2 SCC 409**, the Supreme Court held that it is well settled that when a power is given to an authority to do something, it includes such incidental or implied powers, which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control, the denial of which would render the grant itself ineffective. Thus, where an Act confers jurisdiction, it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution.

59. The reason for the rule, popularly known as the doctrine of *implied power*, is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his *Statutory Construction* (3rd Edn., p. 267):

"... If these details could not be inserted by implication, the drafting of legislation would be an interminable process and the legislative intent would likely be defeated by a most insignificant omission."

60. In ascertaining a necessary implication, the court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein. [See **Sakiri Vasu** (supra)].

61. An express grant of statutory powers carries with

it, by necessary implication, the authority to use all reasonable means to make such grant effective. Thus, in ***ITO v. M.K. Mohammad Kunhi, (AIR 1969 SC 430)***, the Supreme Court held that the Income Tax Appellate Tribunal has implied powers to grant stay, although no such power has been expressly granted to it by the Income Tax Act.

62. In ***Savitri v. Govind Singh Rawat***, reported in **(1985) 4 SCC 337**, the Supreme Court held that the power conferred on the Magistrate, under Section 125 of the Code to grant maintenance to the wife, implies the power to grant *interim maintenance* during the pendency of the proceeding; otherwise, she may starve during this period. This position of law, on granting of *interim maintenance*, was enunciated before Section 125 of the Code was given the present shape making *interim maintenance* explicitly a statutory right.

63. There is yet another aspect of the matter, which hits the maintainability of the case. The petitioner has, admittedly, been in custody pursuant to the orders passed by the Court. The challenge, in this writ petition, has been made, primarily, on the ground of the jurisdiction of the Magistrate to pass remand orders after filing of *charge sheet*, but before taking *cognizance*.

64. The offences, which the accused person is alleged to have committed in the present case, are serious in nature.



No doubt, on merits of the case, the right of the accused to be granted bail is available to him; but the mere fact that a *final report*, under Section 169 of the Code, has been laid against the accused would not *ipso facto* entitle the present accused-petitioner to claim an indefeasible right of bail or to be released from custody. The power to detain the accused till the Magistrate conducts inquiry as to whether *cognizance* of offence needs to be taken or not against the remaining accused named in the First Information Report by the informant, who had not been sent up for trial by the investigating officer, has to be read into the provisions of Section 167 of the Code by applying the doctrine of *implied powers* or else, such an enquiry, as in the present case, would be illegal rendering Section 167 of the Code *otiose*.

65. Therefore, we hold that the learned Additional Chief Judicial Magistrate, Gaya, was competent to remand the accused to custody even after the expiry of 90 days, inasmuch as the *charge sheet* was filed, within the period stipulated under Section 167(2) of the Code, only against the present accused-petitioner and not against all the accused named in the First Information Report. As a corollary, it can be safely conclude that no indefeasible right had accrued to the accused-petitioner to demand his release on bail or otherwise, when the Magistrate had not taken *cognizance*, because the enquiry was,

in the light of the discussion held above, still pending.

66. Coupled with the above, one needs to bear in mind that as against an order of judicial remand, no writ of *habeas corpus* can be issued. In the case at hand, the orders are judicial orders. In the case of **Saurabh Kumar v. Jailor, Koneila Jail**, reported in **(2014) 13 SCC 436**, the Supreme Court, having found that the accused was involved in a criminal case for which he had been arrested, produced before the Magistrate and remanded to judicial custody, held that the only question of concern is whether the petitioner can be said to be in unlawful custody. The Supreme Court, in **Saurabh Kumar** (supra), answered the question in the negative and held that since the custody is pursuant to the order of remand made by the Court, a writ of *habeas corpus* is, in the circumstances, totally misplaced.

67. There is yet another issue of law, which the present writ petition, has raised and the issue is : whether, for the purpose of adjudicating a writ petition, praying for issuance of a writ of *habeas corpus*, the challenge to the legality of detention or custody of the accused-petitioner is to be considered as on the date of filing of such application and not on the date of filing of the writ petition.

68. In **Manubhai Ratilal Patel Tr. Ushaben Vs. State of Gujarat**, reported in **(2013) 1 SCC 314**, the



Supreme Court, having referred to some of its earlier decisions, in ***Ram Narayan Singh v. State of Delhi***, (AIR 1953 SC 277), ***B.R. Rao v. State of Orissa***, (AIR 1971 SC 2197), ***Kanu Sanyal v. District Magistrate, Darjeeling***, (AIR 1973 SC 2684), and ***Sanjay Dutt v. State through C.B.I., Bombay (II)***, reported in (1994) 5 SCC 410, held that “*any infirmity, in the detention of the Petitioner at the initial stage, cannot invalidate the subsequent detention and the same has to be judged on its own merits.*” In ***Sanjay Dutt’s*** case (supra), a Constitution Bench of the Supreme Court has held that a petition – seeking writ of *habeas corpus*, as to the illegality of detention or custody of an accused – has to be decided on the basis of legality or illegality of such detention as on ‘*the date of return of the rule issued*’. In other words, if on the date of return of the rule, the detention or custody is legal, a writ would not be issued to release the accused or any person in custody.

69. In short, therefore, a writ petition, seeking a writ of *habeas corpus*, has to be considered and decided in light of the legality or otherwise of such detention or custody as on the date of return of the rule issued upon presenting such writ petition before the Court.

70. Because of the fact that the learned Court below has already taken *cognizance* of the offences under Sections

304B and 201 of the Indian Penal Code, on 02.09.2016, against the present accused-petitioner, the remand of the accused-petitioner is pursuant to the Court's power under Section 309(2) of the Code and the accused-petitioner's detention is not, therefore, illegal today. Consequently, the question of issuance of a writ of *habeus corpus* does not arise.

71. Because of what has been discussed and pointed out above, we are clearly of the view that the writ petition, in the face of the facts of the present case and the law relevant thereto, is untenable and needs to be, therefore, dismissed.

72. While, accordingly, dismissing this writ petition, we make it clear that it shall remain open to the accused-petitioner to apply for regular bail if the situation so warrants.

73. Before we part with the record, we may point out that it has come to our notice, while going through the records, that on many occasions, the learned Magistrate has passed cryptic order of judicial custody even when the accused was not produced before him. The order-sheet does not disclose any reason as to why the accused had not been produced, on those dates, before the learned Magistrate. Sections 167 and 309 of the Code put an embargo on the power of the Magistrate to detain an accused in custody for more than 15 days at a time. This is a statutory right available to an accused person, whose personal liberty has been curtailed. His detention has to be in

accordance with the procedure established by law and, therefore, we direct that unless absolutely necessary and, for the reasons to be recorded in the order, no custody shall be allowed unless the accused is produced before the jurisdictional Magistrate.

74. Registry is directed to circulate a copy of this judgment to all the District Judges, who, in turn, would ensure that the directions contained hereinabove are complied with.

(I. A. Ansari, CJ)

Chakradhari Sharan Singh, J : I agree.

(Chakradhari Sharan Singh, J)

Pawan/-

AFR/NAFR	A.F.R.
CAV DATE	08.09.2016
Uploading Date	20.10.2016
Transmission Date	20.10.2016