

Navnath Waghmare (RA)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 253 OF 2026

Tauhid Alam Kitabullah Shaikh ...Applicant
Versus
The State Of Maharashtra ...Respondent

Mr. Advait Tamankar, Mr. Nilesh Bangar, Mr. Kamlesh Satre for the
Applicant.

Ms. Veera Shinde APP for the State

Mr. Mahesh Anjanwad PSI, Shivajinagar Police Station, Mumbai

CORAM: R. M. JOSHI, J.

JUDGMENT:- RESERVED ON 09th MARCH, 2026
PRONOUNCED ON 18th MARCH, 2026

1. This is an Application filed under Section 439 of the Code of Criminal Procedure, 1973 (for short “Cr.P.C”) for seeking bail in connection with C.R. No. 396 of 2024 registered on 18.05.2024 with Shivaji Nagar Police Station, Mumbai, for the offence punishable under Sections 8(c) r/w Sections 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”).

2. On 18.5.2024 at the instance of Bansi Baburao Khade, HC Buckle 5691 aforesaid offence came to be registered. On that day

while PSI Krushna Dige along with his staff was performing patrolling duty, at about 15.15 hrs. the applicant was intercepted in suspicious circumstances on the spot along with one plastic bag in his hand. After complying with the formalities mandated under the NDPS Act, he was found in possession of 15 bottles of cough syrup containing Codeine Phosphate in the said plastic bag which were being possessed illegally for sale for drug purposes. After drawing necessary panchanama regarding search and seizure of the muddemal in the presence of panchas, FIR came to be registered in C.R. No. 396 of 2024 in Shivaji Nagar under Section 8(c) r/w Sections 22 and 29 of the NDPS Act. During inquiry, the applicant disclosed that he is selling those bottles in the said vicinity along with his brother Faiyaz Alam Kitabullah Shaikh. The applicant/accused upon further interrogation and upon memorandum disclosed that, the alleged contraband was procured by him from Accused No.2 Faiyaz Alam Kitabullah Shaikh, to whom Anticipatory bail was granted by trial court on 24.05.2024, he was intercepted and nothing was recovered from him.

3. At the outset Ld. Counsel for the Applicant contends that he is not seeking bail on merits. According to him, Applicant would be entitled to get bail on the ground that custody of the Applicant from **04.10.2024 to 20.03.2026** is illegal. It is his submission that without taking cognizance of the offence, the Trial Court had no power to detain the Applicant in custody under Section 167 of Cr.P.C. To support his submission, he placed reliance on the judgment of the Karnataka High Court in the case of ***Devindrappa & Anr. vs. State***

of Karnataka (2004 SCC Online Kar 11). Apart from this, it is his submission that the liberty was granted by this Court by an order dated 17th October, 2025 to move fresh application for bail in case the CA Report is not received and charge is not framed within a period of three months.

4. Learned APP opposed the said contention by submitting that unless CA Report was received, it was not possible for the Trial Court to frame the charge. It is her contention that in any case now cognizance has been taken, having regard to the nature of offence, the Applicant is not entitled for bail.

5. The contention of the Ld. Counsel for the Applicant is that the Ld. Trial Court ceases to have power to grant custody under Section 167 of Cr.P.C. once the Chargesheet is filed and detention during the period of after the filing of chargesheet and before taking cognizance of the offence is illegal. He further contends that Magistrate can exercise power under Section 309 of Cr.P.C only after taking the cognizance of the chargesheet. For this purpose, he relied on the judgment of Karnataka High Court in the case of ***Devindrappa (supra)***, the relevant paragraph from the said judgment is extracted below:

“13. The power of Magistrate to remand the accused to custody could be exercised either under Section 167 or under Section 309 Cr. P.C. Once charge sheet is filed, period of remand under Section 167 Cr. P.C. comes to an end. If further custody is necessary, it can be done

only under Section 309 Cr. P.C. To remand the accused to custody under Section 309 Cr. P.C., the learned Magistrate has to apply his mind to the facts and material available in the final report i.e. charge sheet and decide whether cognizance of the offence could be taken or not. If he takes cognizance of the offence, then, he can exercise his power under Section 309(2) Cr. P.C. to remand the accused.

*14. In the present case, the two citations of the Apex Court are not applicable to the facts of the present case because it is not a case where an application under Section 167(2) Cr. P.C. came to be filed by the accused after the expiry of the period envisaged therein and the same was kept pending for a long time beyond filing of charge sheet. On the other hand, the Charge sheet came to be filed on 10.6.03 but till 27.6.03, no cognizance was taken. When once charge sheet is filed on 10.6.03, the custody cannot be under Section 167(2) Cr. P.C. In this case, they were arrested on 6.2.03 and the 90 days period would come to an end, at any cost by 6.5.03 or 7.5.03. The period for investigation allowed under the Act would come to an end at any cost before 7.5.03. After 7.5.03, no application under Section 167 Cr. P.C. came to be filed though such right was available to the accused. In view of the Supreme Court decision in 2001, the detention from 7.5.03 till 10.6.03, did not become unauthorised. **But however, after filing of the charge sheet on 10.6.03, he could***

not have been detained in custody under Section 167 Cr. P.C. The learned Magistrate ought to have exercised his mind to the material available on record to take cognizance. But unfortunately, he took cognizance on 27.6.03. Subsequent to taking cognizance, the custody is under Section 309(2) Cr. P.C. and the same would be authorised. Therefore, the detention in the present case between 10.6.03 to 27.6.03 becomes illegal and they are entitled to be released on bail under Section 439 Cr. P.C. as the custody was neither under Section 167 Cr. P.C. nor under Section 309 Cr. P.C.”

(emphasis supplied)

6. This court, with due respect to the view taken by the Karnataka High Court on this issue, would like to differ on the point that Magistrate ceases to have power once the police report i.e. chargesheet is filed and there is a vacuum for exercising power to remand the accused after filing of chargesheet and before taking the cognizance. It would be necessary to take note of Section 209 of Cr.P.C., which reads thus:

“209. Commitment of case to Court of Session when offence is triable exclusively by it.— When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall—

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.”

(emphasis supplied)

7. The Section 209 of Cr.P.C as reproduced above, in cases where there is committal of a case to the Court of Sessions by Magistrate such as the present case, through its clauses (a) and (b), empowers the Magistrate to exercise power to remand the accused until such commitment has been made as well as during and until the conclusion of trial. Therefore, Magistrate does not cease to have power to remand the accused even during the period of after filing of chargesheet and before taking the cognizance as he is empowered to exercise that power under Section 209 Cr.P.C.

8. On this issue, reference could be made to the judgment Full Bench of Patana High Court in the case of ***Sunita Devi and Anr. Vs State of Bihar and Anr. (2017 SCC OnLine Pat 3671)*** wherein reference was

made to the Full Bench of the High Court by Division Bench by framing a specific question as “Whether remand by the Magistrate to judicial custody after submission of charge-sheet but before taking cognizance of the offence in a Sessions case is legally permissible under the Criminal Procedure Code, 1973.” The Patana High Court while deciding the same issue held as follows:

*“30. We are of the view that section 209 of the Code itself confers the power of remand the accused to custody in order to commit the case to the Court of Sessions. Under the commitment proceeding as envisaged in section 209 of the Code, the remand of the accused, if in custody, is not made in terms of section 309(2) of the Code. **Therefore, the expression “after taking cognizance” which finds place in sections 309 (2) of the Code is not a pre-requisite and having no bearing, as to remand the accused to custody by the Magistrate, in order to commit the case to the Court of Sessions.***

31. The power of remand conferred to the Magistrate under section 209(a) and (b) is not subject to the other provisions of remand i.e., sections 167(2) and 309(2) of the Code, rather this power is independent in nature and only available to the Magistrate under commitment proceedings.

32. Therefore, after submission of charge-sheet, once it appears to the Magistrate that the offence is

triable exclusively by the Court of Session, the accused is remanded to custody in terms of section 209 of the Code under the commitment proceedings, not under section 309(2) of the Code.”

(emphasis supplied)

9. It would be relevant to take note of the fact that in all cases of committal of case to sessions court after filing of chargesheet before Magistrate, there is bound to be an intervening period, from **committal to taking cognizance** and hence in case contention of applicant is accepted that the said period to be treated as illegal judicial custody, practically in all committable cases bail would have to be granted. This is not contemplated by the Code of Criminal Procedure and in view of the specific provision of Section 209 of the Code, the magistrate does not cease to exercise power to remand the accused in further judicial custody.

10. Therefore, with due respect to the view taken by the Karnataka High Court, this court is of the different view that the Magistrate never ceases to have power to remand the accused. The provisions under 167 Cr.P.C. are provided to protect the liberty of the accused during and after the investigation and to avoid illegal detention beyond the provided maximum period, but it nowhere specifically states that it takes away the power of the Magistrate to remand the accused after filing of the chargesheet. The provisions under Section 309 of Cr.P.C. are provided to postpone or adjourn the proceedings wherein Sub-Section (2) empowers the Magistrate to remand the accused after taking cognizance or commencement of trial. Irrespective of the above-said provisions the Section 209 of the Cr.P.C. empowers the Magistrate to remand the accused until the committal of the case to the Court of Sessions,

moreover during and until the conclusion of the trial. Hence, it is held that the Applicant's judicial custody during 04.10.2024 to 20.03.2026, is not illegal as claimed by counsel for Applicant.

11. The application for bail therefore deserves to be dismissed and accordingly stands dismissed.

(R. M. JOSHI, J.)