Before M. M. Punchhi, J.

NIRMAL SINGH AND OTHERS,—*Petitioners.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Criminal Misc. No. 1294-M of 1983.

May 31, 1983.

Code of Criminal Procedure (II of 1974)—Sections 167, 173, 190, 209 and 309—Police report under section 173 submitted to Duty Magistrate—Duty Magistrate directing the same to be placed before the Magistrate having normal jurisdiction—Duty Magistrate—Whether could be said to have taken cognizance—Police report placed before Magistrate having normal jurisdiction after expiry of 90 days—Accused—Whether could claim bail as of right as envisaged under section 167.

Held, that an accused is not *ipso facto* entitled to bail on the expiry of 90 days as envisaged under section 167 of the Code of Criminal Procedure, 1973 but he has to avail of that right by showing his preparedness that he is willing to be released on bail. This is shown when he applies for bail but if before hand the challan stood presented before the Duty Magistrate, he would not be entitled to bail as of right. The designation 'Duty Magistrate' strictly speaking is not one which figures in the Code. or in the High Court Rules and Orders but is an expression which has come to acquire a practical meaning in procedural law as to mean 'the Magistrate having all comprehensive jurisdiction of the area for the day to meet all situations and eventualities of the day'. Thus for the purpose the proceedings which were undertaken by the Duty Magistrate are taken to mean a duty performed by the Magistrate having jurisdiction for the day. When the Police report was submitted to the Duty Magistrate, he received it as the Magistrate having jurisdiction to enquire into the matter and such act of his would be taking cognizance of the offence within meaning of section 190(1)(b) of the Code. The code cannot be assumed to have left a vacuum in that regard between culmination of the investigation on the filing of the Police report and the actual commencement of the proceedings of the enquiry or trial as the case may be. Steps which the Magistrate is required to take on receipt of the challan towards proceedings for enquiry under Chapter XVIII, would all the same be part of the process of enquiry and of a post-cognizance stage and, in the context, cognizance would mean his becoming aware of a cause revealing the commission of a cognizable offence and to be taking all preliminary steps towards actual holding of enquiry. The proceedings before the Duty Magistrate are, thus, in

the nature of taking cognizance of the offence, and, if the police report was submitted to the Duty Magistrate before the expiry of 90 days the accused would not be entitled to claim bail from the Magistrate as a matter of right, and equally so cannot from the High Court, for the stage of investigation was over.

(Para 8).

Petition under section 439 read with section 167(2) Cr. P.C. praying that the petitioners may be ordered to be released on bail during the pendency of trial of the case. F.I.R. No. 348, dated 27th October, 1982, P. S. Tanda under Sections 302/109/120-B, I.P.C.

G. S. Grewal, Adv. and T.P.S. Mann and H. S. Nagra Advocates with him, *for the Petitioners.*

D. S. Brar, A.A.G. Pb. *for the Respondent.*

JUDGMENT

M. M. Punchhi, J.

(1) The petitioners claim bail from this Court as a matter of right. Whether such claim is well-founded on the principles and scheme of sections 167, 209 and 309 of the Code of Criminal Procedure is the important procedural question to be determined in this petition.

(2) The petitioners were arrested for offences under sections 302/109/120-B of the Indian Penal Code on 1st November, 1982 in F.I.R. No. 348, dated 27th October, 1982 registered at Police Station Tanda, district Hoshiarpur. They were produced before the Magistrate having jurisdiction of the area on 2nd November, 1982 and were remanded to custody. The custody was extended from time to time, the last being uptill 4th February, 1983. On Sunday, January 30, 1983 the prosecution agency submitted the Police report within the meaning of section 173(2) of the Code, before a Duty Magistrate. It was obviously put not in the presence of the accused. The learned Duty Magistrate then passed the following order :—

"Present:—A.S.I. Angrez Singh for the State.

Challan presented today as Duty Magistrate. Ahalmad is directed to send the file to the Court of Shri C. S. Jawa, J.M.I.C., Dasuya, for 4th February, 1983, the date fixed on remand papers.

The 30th January, 1983 Sd/- Magistrate.

Now is the act of receiving the challan (police report) in the circumstances of this case tantamount to taking cognizance of the offence within the meaning of section 190(1)(b) of the Code ? This is the pivotal point on which the entire controversy has come to revolve.

(3) The three provisions in the present Code, 1973, which authorise the accused to be remanded to custody are sections 167, 209 and 309. In the old Code 1898, there were two provisions, namely, sections 167 and 344. Under the old Code the aforesaid two provisions were taken to be part and parcel of one scheme. It is for this reason that the Supreme Court in *Gauri Shankar Jha* v. *State of Bihar and others* (1), observed as follows :—

> ".....In cases falling under section 167, a Magistrate undoubtedly can order custody for a period at the most of 15 days in the whole and such custody can be either police or jail custody. Section 344, on the other hand, appears in Chapter XXIV which deals with inquiries and trials. Further, the custody which it speaks of is not such custody as the Magistrate thinks fit as in section 167, but only jail custody, the object being that once an inquiry or a trial begins it is not proper to let the accused remain under police influence. Under this section a Magistrate can remand an accused person to custody for a term not exceeding 15 days at a time provided that sufficient evidence has been collected to raise a suspicion that such an accused person may have committed an offence and it appears likely that further evidence may be obtained by granting a remand."

and further :—

> ".....The fact that Section 344 occurs in the Chapter dealing with inquiries and trials does not mean that it does not apply to cases in which the process of investigation and collection of evidence is still going on."

The New Code brought about certain changes. These were prominently noticed in *Natabar Parida and others* v. *State of Orissa* (2). It was held as follows :—

> ".....The law as engrafted in proviso (a) to Section 167(2) and Section 309 of the New Code confers the powers of

(1) A.I.R. 1972 S.C. 711.
(2) A.I.R. 1975 S.C. 1465.

remand to jail custody during the pendency of the investigation only for the former and not under the latter. Section 309(2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded. In such a situation what is the purpose of Explanation-I in Section 309 is not quite clear. But then 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.....
....."

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 .....
....."

It is also clear that after the taking of the cognizance the power of remand is to be exercised under Section 309 of the New Code. But if it is not possible to complete the investigation within a period of 60 days then given in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "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 instant case would, however, be governed by 90 days period on account of an amendment in the Code.

(4) On the expiry of the period of 60 days or 90 days, as the case may be, of the detention of an accused, as authorised under section 167, how is the right to be actuated was answered by the Supreme Court in *Hussainara Khatoon and others* v. *Home Secretary, State of Bihar, Patna* (3), in the following words :—

"When an undertrial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may be, the Magistrate must, before making an

(3) A.I.R. 1979, S.C. 1377.

order of *further remand to judicial custody*, point out to the undertrial prisoner that he is entitled to be released on bail." (Emphasis supplied).

And lately in *State of U.P.* v. *Laxmi Brahman and another* (4), the Supreme Court has shed light in the context of an inquiry relating to cases triable exclusively by the Court of Session in this manner :—

".....Thus, from the time the accused appears or is produced before the Magistrate with the police report under section 170 and the Magistrate proceeds to enquire whether section 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding, before the Magistrate would be an enquiry as contemplated by section 2(g) of the Code. We finding it difficult to agree with the High Court that the function discharged by the Magistrate under section 207 is something other than a judicial function and while discharging the functions of the Magistrate the Magistrate is not holding an inquiry as contemplated by the Code. If the Magistrate is holding the inquiry obviously section 309 would enable the Magistrate to remand the accused to the custody till the inquiry to be made is complete."

....

If, therefore, the proceedings before the Magistrate *since the submission of the police report under section* 170 *and till the order of commitment is made under section* 209 *would be an inquiry and if, it is an inquiry, during the period, the inquiry is completed, section* 309(2) *would enable the Magistrate to remand the accused to the custody.* Therefore, with respect, the High Court committed an error in holding "that the order remanding the respondents to custody, cannot be justified under section 167(2), 209 and 309 of the Code and no other provision under which the respondents can be remanded to custody at this stage, has been indicated by the learned Government Advocate, we feel that it would be proper to accede to the request made by the respondents and to direct that they would be released on bail after furnishing

(4) Cr. A. 249 of 1976 decided on 11th March, 1983=1983(1) Crimes 797.

adequate security to the satisfaction of the Chief Judicial Magistrate, Banda." ". (Emphasis supplied by me).

And in the aforesaid case, how the right of the accused it to be regulated was stated in the following words :—

".....The High Court after examining the scheme of section 167(1) and (2) with the proviso rightly concluded that, on the expiry of 60 days from the date of the arrest of the accused, *his further detention does not become* ipso facto *illegal or void, but if the charge-sheet* is not submitted within the period of 60 days, then notwithstanding anything to the contrary in section 437(1), the accused would be entitled to an order for being released on bail if he is prepared to and does furnish bail. In this case, it is an admitted position that the respondents did not apply to the Magistrate for being released on bail on the expiry of 60 days from the date of their arrest. The High Court was of the opinion that as the respondents did not apply for bail on the expiry of sixty days from the date of their arrest, their continued detention would not be illegal or without the authority of law. So far there is no controversy." (Emphasis supplied by me).

(5) The law as laid down by the Supreme Court in the aforeextracted passages from its decisions may well be summarised in this manner :—

(i) During investigation the accused can be put in custody (police and otherwise) under section 167 subject to the outer limit being of 60 days or 90 days, as the case may be, yet further remand in judicial custody is permissible in law;

(ii) On the expiry of 60 days or 90 days, during investigation, such detention does not *ipso facto* become illegal or void, but it furnishes the accused a reason for being released on bail if he is prepared to and does furnish bail.

(iii) The accused is entitled to be told by the Magistrate that such a right has accrued to him and for the enforcement of that right, he has to provide him legal assistance as pointed out in *Hussainara Khatoon's* case (supra);

(iv) Submission of a police report to the Magistrate and his receiving it is part of the inquiry under section 2(g) and is thus signifying his having taken cognizance of the offence;

(v) The Magistrate or the Court has otherwise the power to remand an accused to judicial custody during the pendency of the enquiry or trial under section 309, Code of Criminal Procedure ;

(vi) On taking cognizance of the offence, the Magistrate during enquiry can remand the accused to judicial custody under section 309 as also for the purposes of section 209, Code of Criminal Procedure; and

(vii) lastly, from the stage of the Magistrate taking cognizance of the offence, the custody of the accused has to be of an import different from the one under section 167 of the Code of Criminal Procedure.

(6) Now the aforeculled out principles have to be applied in the instant case. Beforehand, a few additional facts need be noticed. The accused-petitioners on 3rd February, 1983, made an application to the Magistrate having jurisdiction that on account of the expiry of 90 days' period they were entitled to be released on bail and they be allowed bail. This shows that they were prepared to be released on bail. The matter was then posted for 4th February, 1983 and then again adjourned. It is thereafter that the impugned order was passed on 8th February, 1983, rejecting their bail application, for the Magistrate took the view that the challan had been presented within 90 days. Can it be said that the Magistrate had taken cognizance, commenced inquiry, and the custody had become that as envisaged under section 309 in view of the aforesaid principles ?

(7) Here it also need be noticed that on 10th March, 1983 an application was made by the prosecution that a reasonable time be given to the police for further investigation in view of the pressing situation stated in it and till then the proceedings before the court be stayed. From this it was sought to be urged that the police report submitted by the prosecution was not a properly constituted report. This objection carries no weight in view of section 173(8) clearly permitting further investigation.

(8) On the application of the above principles, it is clear that the accused-petitioners were not *ipso facto* entitled to bail on the expiry of 90 days but had to avail of that right by showing their preparedness that they were willing to be released on bail. They showed it thus by applying for bail on 3rd February, 1983, but before hand the challan stood presented before the Duty Magistrate on 30th January, 1983 (Sunday). Now the designation "Duty Magistrate" is strictly speaking not one which figures in the Code of Criminal Procedure or in the High Court Rules and Orders, but is an expression which has come to acquire a practical meaning in procedural law to mean "the Magistrate having all comprehensive jurisdiction of the area for the day, to meet all situations and eventualities of the day". Thus for the purpose the proceedings which were undertaken on 30th January, 1983 by the Duty Magistrate on a holiday, are taken to mean a duty performed by the Magistrate having jurisdiction for the day. Further I am of the view that when the police report was submitted on 30th January, 1983, the Magistrate received it as the Magistrate having jurisdiction to enquire into the matter. And such act of his would be taking cognizance of the offence within the meaning of section 190(1)(b) of the Code. The Code cannot be assumed to have left a vacuum in that regard between culmination of the investigation on the filing of the police report and the actual commencement of the proceedings of enquiry or trial, as the case may be. Steps which the Magistrate is required to take on receipt of the challan towards proceeding for enquiry under Chapter XVIII, would all the same be, to my mind, part of the process of enquiry and of a post-cognizance stage. And in the context, cognizance would mean his becoming aware of a cause revealing the commission of a cognizable offence before him and to be taking all preliminary steps towards actual holding of enquiry. *Laxmi Brahman's case* (supra) is a clear authority for the proposition, wherein supplying of copies to the accused under section 207 was held to be a judicial and not an administrative function, and it being not part of trial was held necessarily to be part of an enquiry as envisaged under section 2(g) of the Code. Thus, I am of the considered view that the proceedings of 30th January, 1983 before the Magistrate were in the nature of taking cognizance of the offence. And for the purpose, on that date, he had required the case to be placed before the Magistrate having normal jurisdiction on 4th February, 1983—the date fixed for the production of the accused in the remand papers. Had the accused been produced before him on that date, he could have

passed suitable orders for their remand, but since the accused had not been produced before him on that date, his orders have to be taken in the legal sense to mean conversion of judicial custody of the accused of the pre-congnizance stage to be that of the post-cognizance stage, within the meaning of section 309 of the Code of Criminal Procedure. It is in this manner alone that the essence and spirit of these provisions can be preserved and be not self-defeating. And in any case no bail in the instant case had ever been furnished by the accused by the crucial days as is the second requisite propounded in *Laxmi Brahman's case* (supra). Thus, the filing of application, dated 3rd February, 1983 by the petitioners is of no consequence. They could not claim bail from the learned Magistrate as a matter of right, and equally so cannot from this Court, for the stage of investigation was over.

(9) The end result of the above discussion is that with effect from 30th March, 1983, the stage of section 167 was over and the custody of the accused got converted to custody within the meaning of section 309 of the Code of Criminal Procedure.

(10) The precedent of *Vijay Kumar and others* v. *State* (5), wherein it has been held that after the expiry of 60/90 days of arrest, the accused gets an indefeasible right to be enlarged on bail, obviously runs counter to *Laxmi Brahman's case* (supra). Also, the decision of *Narayan and others* v. *State of Rajasthan* (6), a decision of the Rajasthan High Court in which it has been held that the detention of the accused after the expiry of the period of 90 days was clearly illegal since cognizance had not been taken before hand, does not advance the case of the petitioner any further. And lastly, the decision of the Delhi High Court in *Harpinder Singh* v. *State* (*Delhi Admn.*), *Delhi* (7), which relates to the case of the detention of the accused before he is produced before a Magistrate has no bearing to the present case.

(11) Bail was also pressed on behalf of the petitioners on the ground that the only accusation against them was that they were conspirators in the murder and that the actual offence had allegedly been committed by the persons who had defied identity. On that matter as well, I do not consider it appropriate to discuss the

(5) 1982(2) C.L.R. 524.
(6) 1983(1) Crimes 322.
(7) 1983 Crl. L.J. 53.

merits of the case, but suffice it to say that the investigation has recorded statements of certain persons who have named the accused-petitioners to have entered into a conspiracy with others to commit the crime.

(12) Thus from all angles, no case has been made out for the petitioners to be released on bail. Accordingly, this petition fails and is hereby dismissed.

N. K. S.

Before S. S. Sandhawalia, C.J. and D. S. Tewatia, J.

NOTIFIED AREA COMMITTEE, MAHENDERGARH,—*Appellant.*

versus

MAHAVIR PARSHAD,—*Respondent.*

Regular Second Appeal No. 2114 *of* 1978

July 21, 1983.

Dismissal of Municipal Employees Rules, 1941—*Rule* 3—*Constitution of India* 1950—*Article* 311(2) *as it stood before the Constitution (Forty-Second Amendment) Act,* 1976—*Dismissal of a municipal employee—Show cause notice indicating the proposed punishment along with the charge-sheet—Clause mentioning the proposed punishment—Whether by itself gives rise to bias and vitiates the inquiry proceedings—Second show cause notice regarding the proposed punishment—Whether necessary for an employee dismissed under Rule* 3—*Such notice—Whether necessary under the rules of natural justice.*

Held, that the mere mention of the proposed punishment in the charge-sheet itself is not *per se* indicative of bias of the enquiry officer and the enquiry would be vitiated only if bias was established from other facts *de hors* the indication of the proposed punishment in the charge-sheet. If a provision envisages either expressly or by necessary implication that along with the serving of the charge-sheet the delinquent officer may also be served with a show cause notice regarding the punishment that may be awarded in the event of the establishing of the charges and then if such a show-cause notice is served alongwith the charge-sheet then it certainly would not mean that, because the punishment is indicated in advance, the