

## Rights Accrued Upon An Individual From The Time Of His Arrest Till The Completion Of Investigation: - A Balanced Analytical Approach

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### Abstract

*Though the literacy rate of India is 81.3% as per 2020 census, yet the prime concern of the day is the unauthorised curtailment of liberty and unlawful detention of an individual by the government agencies inspite of the knowledge that the same is a gross infringement of the rights conferred by Article 21 of the Indian Constitution. Many individuals who are later on found to be innocent at the end of the trial are detained by the investigation agencies without even intimating the grounds behind their detention and with respect to which they have to remain behind the bars inspite of the completion of their statutory period. An individual in the form of an accused is being deprived of his valuable rights at different point of time during the aforesaid period about which he is not at all aware of. The instant approach is an attempt to deal with the various rights and privileges which are accrued upon an accused from the moment of his arrest till the completion of investigation.*

**Key words:** Arrest, Rights of accused, Bail, Investigation

### I. INTRODUCTION

Not everyone is literate in this country and as such being legally literate is a distant dream. The Preamble of the Constitution starts with the words “We, the People of India” thereby vesting the command of sovereignty in the hands of the people. Even though said so, the exploitation of the common people in the hands of the administrative as well as law enforcement machinery is a regular practice being prevailing in the society which in itself is a mockery to the privileges conferred by The Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, 1989, United Nations Code of Conduct for Law Enforcement Officials and other Human Right Norms of the country. Our nation being a Sovereign, Socialist and Secular Democratic Republic has although enunciated the concepts like presumption of innocence, protection from ex-post facto laws etc. thereby keeping in conformity with the different international declarations, covenant and conventions, yet a lot has to be done in order to prevent the abuse and misuse of the penal as well as procedural laws inspite of the fact that there has been thankless efforts being made from the side of the judicial system. The offences described in the Penal and Procedural Code are eitherailable or nonailable in nature. As far asailable offences are concerned, section 436<sup>1</sup> is of the Code makes it ample clear that right to be enlarged on bail is the basic and preliminary right of every person, who has been accused of commission of an offence which is described to beailable in nature. The instant paper is inscribed keeping in mind about the abusive nature of treatment done to the common people by the law enforcement agency after they are being arrested in reference to nonailable cases vis-à-vis the rights conferred upon them from time to time right from the moment of their arrest to the completion of the investigation process by the police. More over care and caution is taken to ensure that the very purpose of the law is not being frustrated in the name of enforcement of the rights of the arrested individual. To put it in a nutshell, a balanced approach is being maintained to evaluate the rights of an arrested individual from the moment he is taken into custody thereby covering the rights accrued upon him during his custodial detention vis-a-

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<sup>1</sup> The Code of Criminal Procedure, 1973 as amended by the Criminal Law (Amendment) Act, 2013, s. 436.

vis the rights bestowed upon him by the Code on account of probable default from the side of the investigating agency to accomplish the investigation within the statutory period mandated by the law.

## II. ANALYTICAL APPROACH

According to the famous social rights activist of anti-apartheid movement, Nelson Mandela: “*To deny people their human rights is to challenge their very humanity*” The aforesaid quote gets analytically reflected within the ambit of Article 21<sup>2</sup> which states that no person shall be deprived of his life or personal liberty except in consonance with a procedure established by law. Moreover the Apex court in its different judgments have enunciated the same by reiterating that it is the claim to life which is prime for the existence of person and without which it is impossible to measure as a person's being. Simultaneously it also includes within its ambit all those aspects of life, without which the lifetime of a person's being shall not be meaningful, complete, and worth living. Adding supplementary force to Article 21, Article 22<sup>3</sup> of the Constitution of India rules out that no one who is arrested shall be detained in custody without informing him the grounds behind his arrest, nor shall his right to consult and to be defended by, a legal practitioner of his choice be denied to him and intrinsically after a person is arrested and detained in custody he must be mandatorily produced before the Magistrate nearest to him within a time period of twenty four hours immediately after such arrest is being executed, however the same shall exclude the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the aforesaid period without the authority of a Magistrate. The Constitution being the Grundnorm make the other subsidiary laws abide by its overall principle while the same are being drafted by the legislature and rightly said that any law deviating from the Constitution is ruled out to be ultra vires by the watch dog of the Constitution. Also pertinent to mention that keeping in conformity with the Constitution of India, the Indian Penal Code, 1860 and also the Code of Criminal Procedure 1973 including various other laws are enacted by the Parliament so as to uphold the dignity and liberty of an individual.

### RIGHTS OF AN ARRESTED INDIVIDUAL

The rights conferred by the Constitution as well as by the other procedural laws get accrued upon an individual from the very moment he is taken into custody by the police owing to his commission of an offence. The basic and indefeasible rights of an arrested person in the form of his right to meet a lawyer of his choice<sup>4</sup>, right to be produced before the Magistrate within twenty four hours of his arrest<sup>5</sup>, right to be medically examined on a prompt basis<sup>6</sup>, right to know the grounds behind his arrest<sup>7</sup>, right to get the relatives of the arrestee informed<sup>8</sup> etc have been clearly laid down by the Hon'ble Apex Court in the case of *D.K. Basu V. State Of West Bengal*<sup>9</sup> in order to uphold his basic humanitarian rights conferred by the Constitution. Moreover in the aforesaid case it was also stated that a memo must be compulsorily made at the time of the arrest<sup>10</sup> after which the memo, along with other relevant documents, must be sent to the Magistrate at the time of his production. There is also a mandate to make an entry regarding the arrest in the diary and the arresting officer has to carry

<sup>2</sup> The Constitution of India, art. 21.

<sup>3</sup> *Supra* note 4, art. 22.

<sup>4</sup> *Supra* note 3, s. 41D

<sup>5</sup> *Ibid*, s. 57

<sup>6</sup> *Ibid*, s. 54

<sup>7</sup> *Ibid*, s. 50

<sup>8</sup> *Ibid*, s. 50A

<sup>9</sup> AIR 1997 SC 610

<sup>10</sup> *Supra* note 3, s.41 B (b)

a badge which should clearly indicate his name as well as the designation at the time of making an arrest<sup>11</sup>.

Furthermore, keeping in mind about the inconvenience being faced by the female suspects at police lock-ups, the Hon'ble Apex Court in the case of *Sheela Barse V. State Of Maharashtra*<sup>12</sup> had issued direction for providing sufficient numbers of female lock-ups in the police stations being guarded by female constables coupled with a direction that as far as the interrogation of female suspects are concerned, it should be carried out only in the presence of female police personnels. Also it was directed that whenever a person is arrested by the police without a warrant, the grounds of his arrest must be immediately informed to him and also that he is entitled to apply for bail.

#### JUSTIFICATION OFFERED BY POLICE VIS-A-VIS THE PROCEDURE ESTABLISHED BY LAW

As regards curtailment of liberty by arresting an individual is concerned, a person is claimed to be arrested by the investigating authority with a justification that keeping him behind the bars would not only preclude him from tampering with the evidence but also to refrain him from gaining over the confidence of the witnesses related to the case so as to prevent them from turning hostile at a later stage and this plea is being raised by the investigating authority for their inability to complete the investigation with the time frame mandated by the Code. Being so, the investigating officer thereafter is duty bound to comply with the procedural mandate as has been envisaged by the Code within the periphery of section 57<sup>13</sup> which states that no Police Officer shall detain a person for a longer period in his custody who is arrested without a warrant, and such period shall not, in the absence of a special order of a Magistrate under section 167<sup>14</sup>, of the Code exceed twenty four hours, however the aforesaid time period of twenty four hours is exclusive of the time necessary to complete the journey from the spot of arrest to the Court of the Magistrate. Accordingly, the time period of twenty-four hours recommended under Section 57<sup>15</sup> of the Code is the maximum time beyond which an individual cannot be confined in Police guardianship without an order passed by a Magistrate. It is unquestionably not an approval for the Police to confine him for twenty-four hours in their guardianship. It is just for a situation where a Police Officer is of the opinion that the investigation conducted by him can be finished within the time frame of twenty-four hours fixed by Section 57<sup>16</sup> of the Code and the same is clear from a mere perusal of Section 167(1)<sup>17</sup>, of the Code. In such a situation, the investigating officer is duty bound to forward the accused person before the Magistrate along with the copies of the diary of investigation so as to enable the Magistrate to make up his mind as to whether a police remand if sought for is necessary to be granted and in case if the same is not necessary whether the accused should be forwarded to judicial custody or can be enlarged on bail. The object behind the enactment of section 57<sup>18</sup> of the Code is to ensure that the person who is arrested by the police is brought before a Magistrate with the least possible delay in order to enable the Magistrate to visualize as to whether the person so arrested is to be kept further in the police custody or should he be remanded to Judicial custody and also to enable the person so arrested make a representation in the matter of his arrest before the Magistrate. It is important to note that under section 167<sup>19</sup> of the Code,

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<sup>11</sup> *Supra* note 3, s.41 B (a)

<sup>12</sup> 1983 SCR (2) 337

<sup>13</sup> *Supra* note 3, s. 57

<sup>14</sup> *Ibid*, s. 167

<sup>15</sup> *Supra* note 3, s. 57

<sup>16</sup> *Ibid*, s. 57

<sup>17</sup> *Supra* note 3, s.167

<sup>18</sup> *Supra* note 3, s.57

<sup>19</sup> *Supra* note 3, s.167

the functions performed by the Magistrate are not only supplementary in nature wherein they are at a higher level, to those of the executive but are also intended to prevent abuse by the executive.<sup>20</sup>

### ROLE TO BE PLAYED BY THE COURT

Once the accused is produced before the Judicial Magistrate, it is mandatory for the Magistrate to ask the arrested person if in case he has got any complaint regarding any torture or maltreatment being done to him while he is in police custody and it is further obligatory for him to inform the accused that he has got the right under section fifty four of the Code of Criminal Procedure 1973 to be medically examined by a doctor. Also it is utmost important for the court to decide the need of enlarging the accused with the liberty of being remaining on bail keeping in mind about the progress of investigation, however it is also to be kept in mind that many a times the liberty of being enlarged on bail by the accused is being misused by the accused person who keeps on tempering with the evidence thereby adversely affecting the progress of investigation being done by the investigating officer. As such a just and balanced approach should be opted by the court while deciding an application made by or on behalf of an individual praying for liberty in the form of bail.

### REMAND OF AN ACCUSED

Once an accused is arrested and it appears to the investigating officer that the investigation cannot be completed within a time frame of twenty four hours, then he is under an obligation to physically produce the accused before the Magistrate for further orders. After the accused is forwarded before the Magistrate, the Magistrate is duty bound to consider all the facts and circumstances of the case in which the accused is arrested and accordingly if the Magistrate is of the considered opinion that the accused cannot be enlarged on bail or he cannot release the accused, then in such a situation the law empowers the Magistrate to remand the accused for a period of fifteen days at a time irrespective of the fact that he does or does not possess the jurisdiction to try the case against the accused person. Moreover, the proviso of section 167<sup>21</sup> reflects by way of inference that the initial fifteen days of remand can be given either in police or in judicial custody with respect to an accused whereas thereafter, the subsequent enhancement of the custody by a period of fifteen days shall mandatorily be judicial custody only.

In *State of Kerala v. Sadanadan*,<sup>22</sup> it was held that the initial detention period which by the Magistrate can order with respect to an accused can be only for fifteen days in total and the same may be either in police custody or judicial custody and during the period of the initial fifteen days, the Magistrate has jurisdiction as well as power to convert judicial custody into police custody and vice-versa and likewise the maximum period under which the accused can be so detained in any custody is only for fifteen days time period after the expiry of which the proviso to section 167<sup>23</sup> of the Code comes into operation which expressly refers to judicial custody and reiterates that there shall be no police custody and judicial custody is solely possible when power is exercised by a Magistrate under the proviso.

Also a similar view has been adopted by the Hon'ble Apex Court in the matter of *C.B.I V. Anupam J. Kulkarni*<sup>24</sup> wherein it was stated that the proviso to Section 167<sup>25</sup> of the Code is unambiguous in this aspect as because police custody is not usually favourable in the eyes of law. However, police custody is sometimes allowed and that too in very special circumstances where a

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<sup>20</sup> *The State Of Bihar V. Ram Naresh Pandey*, AIR 1957 SC 389.

<sup>21</sup> *Supra* note 3, s.167

<sup>22</sup> (1984) K.L.T.747

<sup>23</sup> *Supra* note 3, s.167

<sup>24</sup> 1992 JIC 720 (SC).

<sup>25</sup> *Supra* note 3, s.167

police remand is granted by a Magistrate after application of his judicial mind but only with respect to a limited purpose looking at the necessity of the case.

The scheme of Section 167<sup>26</sup> of the Code is clear in this aspect and is meant to guard the accused from various methods which is likely to be adopted by some overzealous and unscrupulous police personnels. As such a mandate is provided in the form of Article 22(2)<sup>27</sup> of the Constitution as well as under Section 57<sup>28</sup> of the Code with respect to any person who is arrested and detained in police custody and according to which the arrestee must be produced before the nearby Magistrate within a time period of twenty four hours from the moment of the arrest, however the aforesaid period shall exclude the time which is necessary for the conveyance and no such person shall be detained within the police custody beyond the aforesaid period without the authority of a Magistrate. The aforesaid provisions of law clearly indicates the intention laid down by the law in this regard with respect to an accused and accordingly the Magistrate has to judicially examine the facts as well as the circumstances of each case and if he is satisfied, then he can order the detention of the accused in police custody.

It is a mandate for a Magistrate under section 167(3)<sup>29</sup> of the Code to furnish reasons for authorising the detention of an accused person in the custody of the police. Being so and also considering Human Right Laws, it can be inferred that the entire scheme underlying the aforesaid section is meant to limit the period of police custody. However, keeping in mind about the difficulties which can arise at the time of completion of the investigation of cases of heinous nature, the legislature has even added a proviso in the aforesaid section with respect to further detention of the accused which is for a period of ninety days but in clear terms it has been mentioned therein that such a detention of the accused could only be within the ambit of judicial custody so that the police within that period can finish the investigation even with respect to cases of serious nature. Likewise in respect of other offences, the investigating agency is expected to complete the investigation within the period of sixty days. Moreover in the aforesaid case it was also held that the period of ninety days or sixty days has got to be calculated from the date of detention of the accused person as per the orders passed by the Magistrate and not from the date of arrest of the accused by the police.<sup>30</sup>

Furthermore, proviso (b) to section 167<sup>31</sup> of the Code makes it clear by reflecting that no police remand can be allowed by a Magistrate if the accused is not personally produced before him, however the aforesaid proposition of law is relaxed with respect to judicial remand as because an option is given to the Magistrate to extend further detention of the accused in judicial custody after the accused is produced before him either in person or is produced before him through the medium of electronic video linkage.

#### REMAND BY AN EXECUTIVE MAGISTRATE

Many a times, a situation might arise wherein the circumstances may demand that the arresting authority may have to produce the accused after his arrest before an Executive Magistrate for the reason being the immediate absence of a Judicial Magistrate in that area. It is pertinent to mention that in those circumstances, the Executive Magistrate is empowered to order detention of the accused only for seven days in total in such custody i.e. Police or Judicial as he thinks fit after which the Executive Magistrate is duty bound to either release the accused person or transmit him to the Nearest Judicial Magistrate along with the entries made in the diary before the expiry of seven days tenure. Also it is pertinent to mention that the Judicial Magistrate to whom the Executive Magistrate has forwarded the arrested accused is empowered to order his detention in such custody i.e. either police

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<sup>26</sup> *Ibid*, s. 167

<sup>27</sup> *Supra* note 4, art. 22 (2)

<sup>28</sup> *Supra* note 3, s.57

<sup>29</sup> *Supra* note 3, s.167

<sup>30</sup> *Supra* note 26

<sup>31</sup> *Supra* note 3, s.167

custody or judicial custody under Section 167(2)<sup>32</sup> for the remaining period out of the first fifteen days after deducting the period of detention ordered by the Executive Magistrate. The same has been discussed in the case of *C.B.I V. Anupam J. Kulkarni*<sup>33</sup> wherein it was reflected that “.....the period of remand by the Executive Magistrate should also be taken into account for computing the period specified in the proviso i.e. aggregate periods of ninety days or sixty days. Since the Executive Magistrate is empowered to order detention only for seven days in such custody as he thinks fit, he should therefore either release the accused or transmit him to the nearest Judicial Magistrate together with the entries in the diary before the expiry of seven days. The Section also lays down that the Judicial Magistrate who is competent to make further orders of detention, for the purposes of computing the period of detention has to take into consideration the period of detention ordered by the Executive Magistrate. Therefore on a combined reading of Section 167(2) and (2A) it emerges that the Judicial Magistrate to whom the Executive Magistrate has forwarded the arrested accused can order detention in such custody namely police custody or judicial custody under Section 167(2) for the rest of the first fifteen days after deducting the period of detention ordered by the Executive Magistrate.”<sup>34</sup>

### VERSION OF THE ACCUSED BEFORE PASSING AN ORDER OF POLICE REMAND

An accused has got the right of defending himself during the stage of investigation against the torture being done by the police and from compelling him to answer the self incriminating questions by the investigating officer during the investigation period. Being so it becomes very much necessary to hear the accused in order to determine as to whether the police remand as has been prayed for is really the need of the hour or is just a mechanical way of investigation being done by the I.O with a formal prayer without having any justifying reason behind the same. The court needs to be very much conscious while deciding the question of police custody and must apply its judicial mind in order to ensure that the ends of justice are well balanced. A Magistrate within the initial period of fifteen days of remand after hearing the accused may authorise custody to the police for the purpose of investigation, however must be careful and diligent enough so as to ensure that the accused is not prejudiced due to the rough and negligent interrogation done by the police. The Magistrate will have to satisfy himself that a good case is made out for detaining that accused in police custody in connection with the investigation of the case.

### INTERPRETATION OF ARTICLE 20(3) OF THE INDIAN CONSTITUTION IN CONSONANCE WITH SECTION 27 OF THE INDIAN EVIDENCE ACT

The need for police custody is found justifiable several times since its essence is felt for tracing out the discovery of an essential element related to investigation of the case which is in the knowledge of the accused. As such section 27<sup>35</sup> of Evidence Act, does not infringe Article 20(3)<sup>36</sup> of the Constitution to that extent when the self incriminatory information is given by the accused without any compulsion. It cannot be said that an accused person has been compelled to be a witness against himself merely for the reason being that he has made a statement while in police custody, without anything more from his side.<sup>37</sup>

Moreover the Hon'ble Supreme Court in the matter of *State (NCT of Delhi) V. Navjot Sandhu*<sup>38</sup> has elaborately dealt with the scope of section 27<sup>39</sup> with reference to a statement made by an accused wherein it was discussed that although in most of the cases the policeman is being himself

<sup>32</sup> *Ibid*, s.167

<sup>33</sup> *Supra* note 26

<sup>34</sup> *Supra* note 26

<sup>35</sup> Indian Evidence Act, 1872, s. 27

<sup>36</sup> *Supra* note 4, art. 20(3)

<sup>37</sup> *State of Bombay V. Kathikalu Ogaih*, AIR 1961SC 1808.

<sup>38</sup> (2005) 11 SCC 600

<sup>39</sup> *Supra* note 37

led by the one who makes the disclosure of a fact and points out the same to him, yet, it is not essential that in order to make the information admissible under Section 27<sup>40</sup> there should be such pointing out by the person himself. It is also possible that on the basis of information furnished by the accused person, the spot can be visited by the investigating officer along with other witnesses and the material object can be recovered. By doing so, the investigating officer will be discovering a fact which could be in the form of discovering the concealment of an incriminating article as per knowledge of the accused person. In other words, in a situation where the information furnished by the person present in custody of the police is being verified by the police officer by going to the spot indicated by the person and thereafter finds the same to be correct, then the finding of the article amounts to a discovery of a fact as per the provision of Section 27<sup>41</sup> of the Act.

#### CONSIDERATION OF OBJECTIONS (IF ANY) BEING RAISED BY AN ACCUSED DURING THE PERIOD OF INVESTIGATION BEFORE TRANSFERRING HIM FROM ONE PLACE OF REMAND TO ANOTHER

Not strange to believe that an accused may be required to be produced before different Courts having separate territorial jurisdiction, owing to the commission of series of offences from his side at different point of time in such places. Accordingly, an accused person is remanded to judicial custody by such Court by means of an order of remand that is passed by a Magistrate and the same is to be executed by means of an warrant which is to be addressed to the jail authorities who are responsible regarding the custody of the accused during that period. Also it is noteworthy to mention that the transfer of an accused from one place of his detention to another is to be executed by means of a production warrant which is issued by the court after proper application of its judicial mind. As such, it is obligatory for the Court to apply its mind fairly and objectively having a note about the circumstances in which the transfer is being prayed for and also it is desirable to take a considered view with respect to the objections which the prisoner may have to offer as because any order passed by the Court on a request for transfer of a prisoner may many a times affect him prejudicially. Being so, there lies an implicit duty upon the Magistrate to act fairly and also objectively or in other words to act judicially as because any order of transfer passed in any such proceedings is either a judicial order and if not then at least a quasi-judicial one.<sup>42</sup>

#### RIGHT OF REGULAR BAIL

There is always a presumption under the criminal jurisprudence that an accused is presumed to be innocent until he is proven guilty before a competent Court after following the due procedure established by law. Moreover if the trend which is set by the different Courts from time to time is analytically perused, then it appears that the process of enlarging on bail has been the general rule and detention behind the bars has always been an exception keeping in view about the gravity of offence and other serious consequences associated with the same. This is because the right of liberty has always been upheld by the Court of Law as compared to judicial custody for the reason being that putting an individual behind the bars would not only subject him to adverse physical and psychological consequences but also would deprive him from various other entitlement which he could have otherwise availed off being a member of the regular society. As regards the concept of bail is concerned, it is nothing but a security in the form of a promise from the side of an individual ensuring his presence before the Court as and when necessary. Furthermore the aim of provision of bail is to restore the liberty to an individual during the pendency of the adjudication proceeding before the Court of Law.

As regards offences punishable with less than seven years of imprisonment or extending up to seven years are concerned, the Hon'ble Apex Court in the case of *Arnesh Kumar V. State Of Bihar*<sup>43</sup> has categorically laid down that before a Magistrate authorises detention under

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<sup>40</sup> *Ibid*, s. 27

<sup>41</sup> *Ibid*, s. 27

<sup>42</sup> *State of Maharashtra V. Saeed Sohail Sheikh*, AIR 2013 SC 168.

<sup>43</sup> (2014) 8 SCC 273

Section 167<sup>44</sup> of the Code, he must be satisfied that the arrest of an accused person is being made on valid and legal grounds and in accordance with procedure established by law. Moreover it was also made clear that if the arrest that is effected by the police officer fails to comply with the requisite mandate of Section 41<sup>45</sup> of the Code, then the Magistrate is duty bound not to authorise further detention of the accused and is also duty bound to release the accused. To put it in simple words after an accused is being produced before a Magistrate, the arresting authority is required to furnish valid reasons behind his arrest and also the justification behind such arrest after which an obligation is imposed upon the Magistrate to satisfy himself that condition precedent necessary for effecting an arrest under section 41<sup>46</sup> of the Code are complied with. Once the Magistrate is satisfied that the condition precedent referred under section 41<sup>47</sup> of the Code are fulfilled, the Magistrate can only thereafter authorise the detention of an accused. Noteworthy to mention that the Magistrate before authorising such detention is needed to record his own satisfaction although in brief but the point of satisfaction must be reflected in the order. As such it becomes apparent that the Apex Court being the Custodian for enforcing the liberty of an individual has made it mandatory for the arresting authority and also for the Magistrate authorising detention to comply with various prerequisite formalities, failing which an indefeasible right accrues upon an accused to make a claim for being enlarged on regular bail before the Court.

### RIGHT OF DEFAULT BAIL

As far as the outlining tenure of detention of an accused is concerned, the proviso to section 167<sup>48</sup> of the Code contains a mandate that by no means the custody of the accused shall exceed above ninety days where the investigation relates to an offence punishable with death, imprisonment of life or imprisonment of term not less than 10 years and shall not exceed above sixty days where the investigation relates to any other offence. Section 167<sup>49</sup> of the Code also draws an inference that if the investigation cannot be completed within the time frame of sixty days or ninety days and if the accused is willing to go on bail, he should be mandatorily allowed to go on bail after the expiry of the statutory period referred above. As regards the duration of the statutory period is concerned, it should be counted from the day on which the accused was remanded and not from the date of arrest.<sup>50</sup>

Moreover the Hon'ble Supreme Court in *Raghubir Singh V. State of Bihar*<sup>51</sup> has held that the effect of the proviso is to entitle an accused to be released on bail due to the failure of the investigation agency to complete the investigation within sixty days or ninety days depending upon the nature and gravity of the case, and after a person is released on bail as per the proviso of section 167(2)<sup>52</sup> on account of the failure of investigation agency, then he is statutorily deemed to be released under the provisions of Chapter XXXIII of the Code of Criminal Procedure. As a matter of practice, it is not justified to say that on the expiry of such period, the accused secures the right to be enlarged on bail and as such the accused can be given the liberty to walk out of custody. To the contrary, the accused must exercise that exclusive right acquired by him in the form of expressing about the same before the Magistrate by reflecting that he is prepared to be enlarged on bail and also at the same time must express that he is ready to furnish bail and only after which the Magistrate can enlarge him on bail. As such, if the accused concerned fails to exercise his right to go out on bail, then the Magistrate can authorise the detention of the said accused beyond the statutory period, provided that the

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<sup>44</sup> *Supra* note 3, s.167

<sup>45</sup> *Supra* note 3, s.41

<sup>46</sup> *Ibid*,

<sup>47</sup> *Ibid*,

<sup>48</sup> *Supra* note 3, s.167

<sup>49</sup> *Ibid*

<sup>50</sup> *Shivanna V. State via Arasikere Rural Police*, 1992 Cr LJ 2287.

<sup>51</sup> (1986) 2 SCC 481.

<sup>52</sup> *Supra* note 3, s. 167

Magistrate is satisfied that there are sufficient grounds for doing so, after which the Magistrate would not be wrong in remanding the accused back to judicial custody.<sup>53</sup>

### SUBMISSION OF CHARGESHEET BY POLICE VERSUS RIGHT OF DEFAULT BAIL

“*Vigilantibus non dormientibus jura subveniunt.*” The legal maxim is a reflection of the principle that the law is in support of those who is vigilant and does not protect those who sleep over their rights. The same is applicable with respect to the situation which casts a duty upon an individual to be vigilant over his rights so that the same does not get waved due to its non enforcement. Henceforth, upon expiry of the statutory period of sixty days or ninety days, depending on the case, an indefeasible right is accrued in favour of the accused thereby making him entitled of being released on bail due to the inability by the investigating agency to complete their investigation within the period prescribed by the Code and as such the accused is entitled to be released on bail, however the accused must be prepared to go on bail and at the same time should furnish the bail bond as is directed by the Magistrate. Being so it becomes apparent that the indefeasible right which gets accrued upon an accused in the aforesaid circumstances is enforceable only in a situation that is prior to the filing of the charge sheet by the police and if the same is not availed of on a prior point of time i.e. before the filling of charge sheet by the police then the same does not survive or remain enforceable after the charge sheet is being submitted by the investigating authority. Moreover, once the charge sheet has been filed, the question of getting enlarged on bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail of an accused. The custody of the accused after the charge sheet has been filed is not governed by Section 167<sup>54</sup> of the Code but under different provision of the Code of Criminal Procedure. To be more specific, if the aforesaid right gets accrued upon an accused person but the same remains unenforced from the side of the accused till the filing of the charge sheet, then there is no question of its enforcement after the submission of challan as because it gets extinguished at the very moment the charge sheet is being submitted for the reason being that the proviso to Section 167<sup>55</sup> of the Code ceases to apply forthwith.<sup>56</sup>

As far as the term “if not already availed of” is concerned, the Hon’ble Apex court has elaborated the same in the matter of *Uday Mohanlal Acharya v. State of Maharashtra*<sup>57</sup> by stating that the same must be understood to mean a situation when the accused files an application for bail and is also prepared to offer bail on being directed by a Magistrate. In other words, after the expiry of the statutory period specified in paragraph (a) of the proviso to sub-section (2) of Section 167 CrPC, if an application for bail is being moved by the accused coupled with a situation in which the accused person also offers to furnish bail bond on being directed by a Magistrate as per the conditions imposed therein, then it has to be held that the indefeasible right is being availed by the accused even though the said application is not being considered by the court and the accused has not furnished the same.

Moreover the Hon’ble Apex court in the matter of *Rakesh Kumar Paul v. State of Assam*<sup>58</sup> has penetrated deep inside the impact of a situation where in the accused fails to furnish bail and has observed that “*If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and*

<sup>53</sup> *Gyan Madhu v. State of Karnataka*, 1977 Cri LJ 632 at 635 (Kant).

<sup>54</sup> *Supra* note 3, s. 167

<sup>55</sup> *Ibid*

<sup>56</sup> *Sanjay Dutt vs State Through C.B.I. Bombay*, (1994) 5 SCC 410

<sup>57</sup> (2001) 5 SCC 453

<sup>58</sup> (2017) 15 SCC 67

*therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.”<sup>59</sup>*

### FILING OF CHARGESHEET AFTER APPLICATION OF DEFAULT BAIL

Innovative techniques are being adopted by the investigative agencies in order to ensure that the right of default bail to which the accused is otherwise entitled as per law is somehow being compromised owing to the misuse of legal technicalities that are associated with the procedure related to investigation. A classic example of the same is a situation in which a petition seeking default bail is being moved in compliance to proviso (a) to section 167(2)<sup>60</sup> of the Code and also the charge sheet is being simultaneously filed by the investigating agency at the time of its hearing. In the initial stage although it was not clear with respect to the legal proposition as to how to deal with the same, yet later on it has been held that if an accused files an application praying for allowing him to go on default bail and at the same time is also willing to furnish bail then the law is clear in that aspect since he is deemed to have exercised his right to avail the liberty of bail and the same cannot be defeated by filing the charge-sheet thereafter.<sup>61</sup> Moreover a mandate is also being imposed upon the Magistrate in such a situation wherein it is directed that the Magistrate is under an obligation to deal with the default bail petition on a prompt basis after such an application is being filed by the accused under Section 167(2)<sup>62</sup> of the Code. It has also been held that failure on the part of the Magistrate to decide an application of that kind frustrates the legislative mandate.<sup>63</sup> There is always a presumption that every order passed by a Magistrate is deemed to have been passed by application of his judicial mind and being so the Magistrate or the court must dispose such a petition at the earliest, after he is being satisfied that the accused has been languishing in judicial custody till the completion of statutory period and no charge-sheet has been filed by the investigating agency till that time as because prompt disposal of the petition by the Magistrate will not enable the prosecution to frustrate the object of the Act. Moreover it will ensure that the legislative mandate of allowing an accused to be released on bail for the default on the part of the police is being maintained thereby compelling them to complete the investigation within the period stipulated.<sup>64</sup>

### CONTENTS OF A DEFAULT BAIL PETITION

As regards the contention to be mentioned in the petition seeking bail due to the failure of the investigating authority to complete its investigation within the statutory period is concerned, the same is not necessarily be a detailed one and should not mention all the facts related to the case. In such a situation, the accused is not legally bound to disclose or make out any grounds for granting him bail. All he has to mention in the application is that statutory period has expired and charge-sheet is yet to be filed from the side of the investigating authority and as such, he is entitled to be enlarged on bail regarding which he is willing to furnish bail. After an application of the said nature is being filed before the Magistrate, then the indefeasible right that gets accrued upon an accused cannot be defeated by filing the charge-sheet as because the accused has offered to furnish bail and he is deemed to have exercised his right to avail the liberty of bail.<sup>65</sup>

### APPLICABILITY OF SECTION 167(2) AND SECTION 309(2) OF CrPC

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<sup>59</sup> *Supra note 58*

<sup>60</sup> *Supra note 3, s. 167*

<sup>61</sup> *Supra note 58*

<sup>62</sup> *Supra note 3, s. 167*

<sup>63</sup> *Union of India v. Nirala Yadav, (2014) 9 SCC 457*

<sup>64</sup> *Uday Mohanlal Acharya v. State of Maharashtra (2001) 5 SCC 453*

<sup>65</sup> *Supra note 60*

As regards the applicability of the proviso (a) of section 167(2)<sup>66</sup> to that of section 309(2)<sup>67</sup> is concerned, there is a substantial point of difference between the applicability of both the sections, although both the sections confers the powers of remand to judicial custody. The significant difference between them is that the former confers the powers of remand to judicial custody only during the pendency of the investigation where as the later i.e. section 309(2)<sup>68</sup> is attracted at a stage when the cognizance of an offence has been taken by the court or at the commencement of trial.<sup>69</sup>

The intention of the legislature is very much clear with respect to the status of the accused released on bail under section 167<sup>70</sup> of the Code more particularly termed as default bail as because it is clearly reflected in proviso (a) that the accused released on bail under section 167<sup>71</sup> of the Code will be deemed to be so released under the provisions of Chapter XXXIII of the Code and also for the purposes of that Chapter. Being so, the same empowers the court releasing the accused on bail, if it considers necessary so to do, to direct that such person be arrested and committed to custody as provided in sub-section (5) of section 437<sup>72</sup> as per Chapter XXXIII. Moreover, after the taking of cognizance by the Court, the power of remand is to be exercised by the Court under section 309<sup>73</sup> of the new Code.<sup>74</sup>

### DUTY OF AN INVESTIGATING OFFICER AS WELL AS ROLE OF COURT WHEN THE CHARGESHEET CANNOT BE SUBMITTED WITHIN THE STATUTORY PERIOD

The actions carried out by the State and its authorities including its officers must be performed according to the provisions of the Constitution as well as keeping in mind about the limits and framework established by law. As such it is an obligation for the Investigating Agency to complete the investigation within the statutory period which is contemplated in section 167(2)<sup>75</sup> of the Code. Being so, the Investigating Officer is under a bounden duty to satisfy the Magistrate by furnishing the reasons which are responsible for his inability to submit the charge-sheet within the prescribed period, so as to enable the Magistrate to satisfy himself that the facts and circumstances of the case are of such a nature that the investigation carried out by the investigation officer could not have been completed within the period prescribed by the Code.<sup>76</sup>

Many a times the investigating officer in order to bind the accused behind the judicial custody submits a preliminary charge sheet with a justification reflecting the inability to procure the report of chemical or forensic examination or the like and as such could not furnish the final charge sheet. In these circumstances it is necessary for the Magistrate to ensure as to whether the only thing left with the police was just a minimal procedural formality and if it is so, then a mere formality left out cannot be said that the charge sheet is preliminary in nature. Being so it becomes a solemn duty of the Magistrate to apprise the prayer of bail, in case if the same is filed keeping in mind that the final charge sheet has been filed before the court.

### III. CONCLUSION

<sup>66</sup> *Supra* note 3, s. 167

<sup>67</sup> *Supra* note 3, s. 309

<sup>68</sup> *Supra* note 3, s. 309

<sup>69</sup> *Natabar Parida Bisnu Charan Parida Batakrushnaparida Babaji V. State of Orissa*, AIR 1975 SC 1465

<sup>70</sup> *Supra* note 3, s. 167

<sup>71</sup> *Ibid*

<sup>72</sup> *Supra* note 3, s. 437

<sup>73</sup> *Supra* note 3, s. 309

<sup>74</sup> *Supra* note 71

<sup>75</sup> *Supra* note 3, s. 167

<sup>76</sup> *Bhulabhai V. Shankar Barkaji*, 1999(3) Mah LJ 228.

To sum up in a nutshell it can be stated that the role entrusted upon the Judiciary is significant as it is apparent that justice is not only to be done merely on papers. It is also further expected that justice to the common people is seen to have been done thereby setting an exemplary procedure of dealing with the law breakers of the society. Judiciary being one of the important pillars of the democracy must play a fundamental role to ensure that the liberty and dignity of an individual is being upheld at all cost. Judiciary being the last resort for a common man must ensure that the sanctity of justice is maintained at all cost. As such going by the book, the judiciary must ensure that all the basic rights of an individual i.e. right from the moment of his arrest to the end of the trial are being made known to him so that at no point of time he is being deprived of his entitlement of the facets guaranteed by Article 21<sup>77</sup> of the Constitution of India as because it is believed that every person is expected to be innocent until proved guilty.