

# **Powell Nwawa Ogechi vs The State (Delhi Administration) on 30 July, 1986**

**Equivalent citations: 1986CRILJ2081**

**Author: Yogeshwar Dayal**

**Bench: Yogeshwar Dayal**

## **JUDGMENT**

Malik Shariefud-Din, J.

1. This petition came up before us on a reference having been made by a learned single Judge on the ground that the petition raises a legal question on which there is a conflict of judicial opinions and requires consideration by a larger bench.
2. The petitioner was arrested in case F.I.R. No. 60 of 1986 under Section 17/22/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 recorded at Police Station, Railway, New Delhi station. The arrest was made on 3-2-1986. He was remanded to judicial custody with effect from 4-2-86 and continued in judicial custody. We have, however, passed an order on 30th July 1986 directing his admission to bail.
3. By this petition the petitioner has sought bail under the provisions of Section 167(2) of the Cr. P.C. 1973 on the ground that an absolute right for being offered bail had accrued in his favor because of the failure of the Investigating Agency to file the charge-sheet against him within 90 days, as envisaged by proviso to Section 167(2) of the Code.
4. The 90th day of his custody had ended on 4-5-86 and his application for bail came up for consideration before the learned Addl. Sessions Judge, Shri P. L. Singla on 5th May 1986, who rejected it on 6-5-1986 holding that the petitioner was not entitled to bail. We may notice here that the charge-sheet against the petitioner was presented before the Court on 91st day when the right under Section 167(2) had already accrued in his favor.
5. The reasoning advanced by the learned Addl. Sessions Judge in refusing the bail is twofold. Firstly, it is stated that the normal rule is to exclude the first day and include the last day and, secondly, the learned Addl. Sessions Judge invoked the aid of Section 10 of General Clauses Act and stated that since the 90th day was Sunday, there was nothing wrong in producing charge-sheet on the 91st day and in this way the learned Addl. Sessions Judge justified that the custody of the petitioner was legal even after the 90th day. In doing so reliance was placed on N. Sureya Reddy v. State of Orissa 1985 Cri LJ 939 (Orissa) and also on Harinder Singh v. S. Karnail Singh. We may at

once point out that the reliance by the learned Addl. Sessions Judge on Harinder Singh case (supra) is misplaced. That was a petition under the Representation of the People Act wherein the period of limitation for presentation of petition is prescribed by the Representation of the People Act itself.

6. The short, though important, question that arises for our consideration in this petition is :

Whether an accused person against whom no charge-sheet has been filed within 90 days or 60 days, as prescribed by Proviso to Section 167(2), Cr. P.C. of his judicial custody is entitled to bail as of right and whether any discretion is left with the Court to refuse bail after the period of 90 days or 60 days of his custody and whether Section 10 of the General Clauses Act can be brought in aid in cases in which charge-sheet is not filed within 90 days and 60 days as envisaged by Section 167(2) of the Cr. P.C. ?

7. We may, therefore, take up the question regarding application of Section 10 of the General Clauses Act for consideration first. But before we do so we may notice Section 10 of the General Clauses Act of 1897 which reads as under:-

Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877 (XVI of 1877) applies.

In Harinder Singh case (Supra) the Supreme Court while interpreting Section 10 of the General Clauses Act ruled that the object of Section 10 is to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a Court or office, and that period expires on a holiday, then according to the section, the act should be considered to have been done within that period, if it is done on the next day on which the Court or office is open. It has further ruled that to attract the application of Section 10 of General Clauses Act all that is requisite is that there should be a period prescribed, and that period should expire on a holiday.

8. A plain reading of Section 10 of General Clauses Act would, therefore, go to show that there should be a period prescribed for the performance of an act in a Court or office. It is only in such cases that if the last date of limitation prescribed expires on a holiday then Section 10 comes into play and makes it permissible to do that act on the next day when the Court or office opens. Section 10 of the General Clauses Act, therefore, clearly pre-supposes that there must be in existence a positive act to be performed by person and for the performance of which there is in existence a

period prescribed by law. It will have no application in any other situation.

9. With this in mind let us now examine the provisions of Sub-section (2) of Section 167, Cr. P.C. which reads as under :

Section 167(2) : The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that:

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding:

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years:

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released<sup>1</sup> on bail under this subsection shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

10. A bare reading of the aforesaid provision of the Code would go to show that this provision merely confers power on the Magistrate to commit to custody an accused person and there is limitation of 90 days and 60 days, as the case may be. This provision of the Code falls under Chap. XII of the Code relating to information to the police and their powers to investigate. It is thus clear that this is a power which is only exercisable during the course of investigation of a case. The power to commit an accused person to custody after investigation is over and after the charge-sheet is presented before the Court, is derived from Section 309, Cr. P.C. Any further remand to judicial custody beyond 90 days and 60 days without the charge-sheet being presented before the Court will be without the authority of law.

11. Sub-section (2) of Section 167 of the Code nowhere prescribes a period within which the police is required to present charge-sheet before the court nor does it envisage the performance of an act by an accused person within a particular period before a Court or office. In fact, nowhere in the Code a period is prescribed for investigation to produce the charge-sheet before a Court of law. Since the Legislature in its wisdom has not prescribed a period within which the investigation has to present charge-sheet against an accused person before a Court, it would be wrong to say that the provision

of Section 167(2) of Code had prescribed the limit by implication. If the Legislature had aimed it to be so, there was nothing to prevent it from saying so explicitly. By invoking the doctrine of implication we will be importing something in the provision which the Legislature has deliberately refrained to do. It will not only have the effect of distorting the provision but will also defeat the legislative intent.

12. In *N. Sureya Reddy's case* (1985 Cri LJ 939) (supra) a Division Bench of Orissa High Court has ruled that Section 10 of the General Clauses Act is attracted if the charge-sheet against the accused person could not be presented on the 60th or 90th day for the reason of being a public holiday and this is so ruled on the ground that by implication Section 167(2) does prescribe a period for presentation of charge-sheet before a Court. We have carefully considered this proposition but we respectfully do not agree with the aforesaid view for the reasons stated above.

13. A contrary view to the aforesaid authority, with which we agree, has been taken by the High Court of Bombay in *State of Maharashtra v. Sharad B. Sarda* (1983 (2) Cri LC 18) wherein it was held that in a case such as this, Section 10 of the General Clauses Act has no application as the Code does not prescribe any time limit for presentation of charge-sheet by the investigation. The learned Judge further ruled that after the expiry of time of 90 or 60 days, the right accruing to the accused is absolute. One of our own Judges in Criminal Misc. (Main) 504 of 1985, *Bhagwat Singh v. State*, has had an occasion to consider the proposition regarding application of Section 10 of General Clauses Act and has opined that it has no application and the accused person after the expiry of 90 days or 60 days as the case may be, is entitled to be released on bail. We are in respectful agreement with the view taken in the aforesaid cases i.e. by the learned Judge of Bombay High Court and by the learned Judge of our own High Court.

14. Adverting to the scope and object of Sub-section (2) of Section 167, Cr. P.C. we may at once point out that this is essentially a power given to the Magistrates to be exercised pending investigation. This power ceases to exist after the expiry of 90 days or 60 days as the case may be and, there is no lawful authority left with the Magistrate to detain a person in custody for a further period unless he offers him bail and the accused person fails to furnish the same. This section in turn does not require an accused person to make an application for bail. The entitlement to be released on bail accrues to him by operation of statute at the end of 90 days or 60 days as the case may be. He is to be offered bail and has to be released unless he fails to furnish the same. At the end of the expiry of the aforesaid period this right accruing to the accused person would be deemed to be absolute and indefeasible and, without offering bail his further custody, may be, for even a day, without the charge-sheet being presented, would be without any justification. It is not a right of doing an act but a right to be freed without his asking for the same. The provisions of Section 167(2) of the Code cast a duty upon the Magistrate to offer bail. In this regard we may make reference also to *Natabar Parida v. State of Orissa*. While considering the scope of the provisions of Section 167(2) of the Code their Lordships of the Supreme Court in para 8 of the judgment at page 1469 (of AIR) : (at p. 1216 of Cri LJ) have made the following observations :

In serious offences of criminal conspiracy - murders, dacoities, robberies by inter-State gangs or the like, it may not be possible for the police, in the

circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the Court and to make it obligatory for it to release the accused on bail. Of course, it has been provided in proviso (a) that the accused released on bail under Section 167 will be deemed to be so released under the provisions of Chap. XXXIII and for the purposes of that Chapter. That may empower the Court releasing him 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 occurring in Chap. XXXIII. 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 even 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.

Similar views have been expressed in respect of the scope of Section 167(2) in *Noor Mohammad v. State* .

15. Having given our careful consideration to the facts of the present case, the arguments of the learned Counsel for the parties, the relevant statutes and case law on the subject, we are of the view that under the provision of Section 167(2) of the Code an accused person against whom charge-sheet is not presented before the Court within the period of 90 or 60 days, as the case may be, is entitled to be offered bail as a matter of right. For this there is no requirement of law for him to apply. The bail has to be offered to him and he can only be detained in further custody if he fails to furnish bail. The only provision under which an accused person can be detained thereafter is Section 309 of the Code but for the exercise of that power the pre-requisite is that there must be a charge-sheet pending before the Court. This right of the accused person, therefore, under Section 167(2) of the Code is absolute and indefeasible unless he fails to furnish the bail. We are also in full agreement with the observations made in *Noor Mohammad's* case (supra) that Section 167(2) of the Code does not cease to apply even if the charge-sheet is submitted after 90 or 60 days and the accused is entitled to ask for the right which had already accrued to him. We are also of the view that Section 10 of the General Clauses Act is not applicable in such a situation and it cannot be invoked to defeat the accrued right of an accused person to be freed. We are further of the view that the Magistrates should monitor the remand proceedings during investigation in such a manner so that a full account of the remand. is handy and bail is offered to such accused person at the end of 90 or 60 days, as the case may be. We are giving these reasons in support of our order dt. 30th July, 1986.

16. The Reference is accordingly answered and the petition is accepted. A copy of this order be circulated among the Magistrates.