SURESH KUMAR BHIKAMCHAND JAIN

v.

STATE OF MAHARASHTRA & ANR.

(Special Leave Petition (Crl.) No.147 of 2013)

FEBRUARY 13, 2013

[ALTAMAS KABIR, CJI, J. CHELAMESWAR AND VIKRAMAJIT SEN, JJ.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 167 (2) – Statutory bail – Charge-sheet filed within the stipulated period, but cognizance not taken as sanction for prosecution had not been obtained – Held: Grant of sanction is nowhere contemplated u/s 167 – Once a charge-sheet is filed within the stipulated time, question of grant of default bail or statutory bail does not arise – Filing of charge-sheet is sufficient compliance with provisions of s.167(2)(a)(ii) in the instant case – Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of s.309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in s.167.

During investigation of a case of misappropriation of amount meant for development of slums, the petitioner, who was an MLA and was functioning as the Minster of Housing and Slum Area Development, at the relevant time, was arrested on 11.3.2012. The case against him pertained to offences punishable u/ss 120-B, 409, 411, 406, 408, 465, 466, 468, 471, 177, 109 read with s.34 IPC and also u/ss 13(1)(c), 13(1) (d) and 13(2) of the Prevention of Corruption Act, 1988. The first charge-sheet against four other accused was filed on 25.4.2012 and the supplementary charge-sheet in which the petitioner was named was filed on 1.6.2012.

A In the instant petition for special leave to appeal, the issue for consideration before the Court was regarding the right of the petitioner to be released on bail u/s 167(2) CrPC, as though the charge-sheet in the case had been filed within the stipulated period, the sanction for his B prosecution was not obtained as a result of which no cognizance was taken of the offence and remand orders continued to be made and the petitioner remained in magisterial custody.

C Dismissing the petition, the Court

HELD: 1.1. The power of remand is vested in the court at the very initial stage before taking of cognizance u/s 167(2) Cr.P.C. During the period of investigation, the accused is under the custody of the Magistrate before D whom he or she is first produced. During that stage, u/s 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences E punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. [para 15 and 18] [1047-G; 1052-B-C]

1.2. The scheme of the Cr.P.C. is such that once the F investigation stage is completed, the court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. Once cognizance is taken, the power to remand shifts to the provisions of s.309 Cr.P.C., under which the trial court is empowered to postpone or adjourn proceedings and, G for the said purpose, to extend the period of detention from time to time. However, the provisions of s. 309 Cr.P.C. have no application to the facts of the instant case. [para 15 and 18] [1047-G-H; 1048-B; 1052-A]

H 1.3. In the event, an investigating authority fails to file

the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the court trying the offence, when the said court assumes custody of the accused for purposes of remand during the trial in terms of s.309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court. [para 18] [1052-C-E]

1.4. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings. Merely because sanction has not been obtained to prosecute the accused and to proceed to the stage of s.309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in s.167 Cr.P.C. Grant of sanction is nowhere contemplated u/s 167 Cr.P.C. What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. Once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. Whether cognizance is taken or not is not material as far as s.167 Cr.P.C. is concerned. [para 17-19] [1050-G-H; 1051-F-G; 1052-F-G]

1.5. In the instant case, both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the petitioner's arrest and remand to police custody. It is true that cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but such failure does not amount to non-compliance of the provisions of

A **s.167(2) CrPC. The filing of charge-sheet is sufficient compliance with the provisions of s.167(2)(a)(ii). The right which may have accrued to the petitioner, had charge-sheet not been filed, is not attracted to the facts of the instant case. [para 17 & 18] [1050-F-G; 1051-F-G]**

B

Sanjay Dutt v. State **1994 (3) Suppl. SCR 263 = (1994) 5 SCC 410;** *Natabar Parida v. the State of Orissa* **1975 Suppl. SCR 137 = (1975) 2 SCC 220 – referred to.**

1.6 . This Court, therefore, holds that though the
C **prosecution had not been able to obtain sanction to prosecute the accused, he was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated u/s 167(2)(a)(ii) Cr.P.C. [para 19] [1052-F]**

D

Case Law Reference:

1994 (3) Suppl. SCR 263	**referred to**	**para 10**
1975 Suppl. SCR 137	**referred to**	**para 10**

E CRIMINAL APPELLATE JURISDICTION : SLP (Criminal) No. 147 of 2013.

From the Judgment & Order dated 17.12.2012 of the High Court of Judicature at Bombay Bench at Aurangabad in
F Criminal Application No. 4601 of 2012.

U.U. Lalit, Nagendra Rai, Harish Salve, Siddharth Aggarwal, Shyel Trehan, Subhash Jadhav, Adit S. Pujari, Arjun S. Suri, Nikhil Pillai, Sudesh Kotwal, Kumar Rachit, Liz Mathew for the Petitiioner.

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B.H. Marlapalle, Amol B. Karande, Kunal Cheema, Naresh Kumar, Sanjay V. Kharde, Sachin J. Patil, Preshit V. Surshe, Asha Gopalan Nair for the Respondents.

H The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. This Special Leave Petition arises out of the judgment and order dated 17th December, 2012, passed by the Aurangabad Bench of the Bombay High Court in CRLA No. 4601 of 2012, dismissing the same and directing the Special Judge, in seisin of the matter, to expedite the hearing on framing of charge, as had been directed by this Court on 12th October, 2012, while disposing of Special Leave to Appeal (Crl.) No. 6463 of 2012, filed by the co-accused Pradeep Raisoni.

2. This case has thrown into focus certain important issues regarding the right of an accused to be released on bail under Section 167(2) of the Code of Criminal Procedure, 1973, hereinafter referred to as "Cr.P.C.". One of such issues concerns the power of the Magistrate to pass orders of remand even beyond the period envisaged under Section 167(2) Cr.P.C. In the instant case, despite charge-sheet having been filed, no cognizance has been taken on the basis thereof. The learned Magistrate has, however, continued to pass remand orders, without apparently having proceeded to the stage contemplated under Section 309 Cr.P.C. In order to appreciate the issues which have cropped up during the hearing of the instant case, it is necessary to briefly set out the facts giving rise to the said questions, which have fallen for determination.

3. As per the prosecution case, the Petitioner, Suresh Kumar Bhikamchand Jain, is alleged to have misappropriated amounts meant for development of slums in Jalgaon city, when he was functioning as the Minister of Housing and Slum Area Development, as a Member of the Legislative Assembly. Initially, charge-sheet was filed against certain persons claiming to be the contractors and the Vice-President of the Municipal Corporation, Jalgaon. Thereafter, during investigation the Petitioner was arrested on 11th March, 2012, and while charge-sheet was filed against the four other accused persons on 25th April, 2012, a supplementary charge-sheet came to be filed against the Petitioner herein on 1st June, 2012. For a while,

A the Petitioner was released on interim bail, but upon rejection of his application for bail on merit, he was again taken into custody on 5th July, 2012.

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

5. At this stage, it may be pertinent to point out that the Petitioner is an accused in respect of offences punishable under Sections 120B, 409, 411, 406, 408, 465, 466, 468, 471, 177, 109 read with Section 34 of the Indian Penal Code, D hereinafter referred to as "IPC" and also under Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, hereinafter referred to as "the PC Act", in Crime No. 13 of 2006, registered with the City Police Station Jalgaon.

6. Appearing in support of the Special Leave Petition, Mr. E U.U. Lalit, learned senior Advocate, submitted that since the statutory period of 90 days, envisaged under Section 167(2) Cr.P.C., had lapsed, the Petitioner could not have been remanded to custody, as had been done by the learned Special Judge, who is yet to take cognizance for want of sanction. Mr. F Lalit submitted that the Petitioner was, therefore, entitled to be released on bail forthwith, since the orders of remand passed by the learned Magistrate after a period of 90 days were without jurisdiction and, therefore, invalid in the facts and circumstances of the case.

G

7. Mr. Lalit also submitted that Section 309 Cr.P.C., which also deals with remand of the accused under certain circumstances, does not apply to the allegations relating to the provisions of the PC Act, inasmuch as, there is no committal H proceeding contemplated in the proceeding before the learned

Special Judge. However, as far as Section 309 Cr.P.C. is concerned, Mr. Lalit submitted that the same would be applicable only after cognizance of the offence had been taken or upon the commencement of the trial before the Special Court. In the absence of cognizance being taken by the Special Court, it could not be said that the trial had commenced and, therefore, further detention of the Petitioner was wholly illegal and not authorised in law and he was, therefore, entitled to be released on bail forthwith on the basis of the "indefeasible right" acquired by him on the failure of the Investigating Authorities to obtain sanction for prosecuting the Petitioner.

8. Mr. Lalit submitted that the High Court also went wrong in holding that in the absence of sanction, the actual trial could not be stayed and could be proceeded with and that the question of grant of sanction could be considered at the stage of framing of charge, as to whether such sanction was actually required to prosecute the accused.

9. In support of his submission, Mr. Lalit referred to and relied upon the Constitution Bench decision of this Court in *Sanjay Dutt v. State* [(1994) 5 SCC 410], wherein the said Bench had occasion to consider the effect of non-completion of investigation within the time stipulated under Section 167(2) Cr.P.C. Learned counsel pointed out that in the said decision, it has, *inter alia*, been held that default in completion of investigation within 180 days did not give a fully indefeasible right to the accused to be released on bail. Such a right arises from the time of default in filing of the charge-sheet and continues till the filing thereof, but does not survive once the charge-sheet is filed. Thereafter, grant of bail would be decided on merits. Mr. Lalit submitted that the indefeasible right referred to in the said decision would become absolute in the event an application for bail was filed after the expiry of the statutory period stipulated by the statute, but before filing of the charge-sheet. In such a case, Mr. Lalit submitted that the concerned accused was entitled as a matter of right to be released on bail.

A 10. Mr. Lalit also referred to the decision of this Court in *Natabar Parida v. the State of Orissa* [(1975) 2 SCC 220], which was decided by a Bench of 2-Judges, who also had occasion to consider the impact of Section 167(2) Cr.P.C. and the proviso (a) thereto. In the said case, the powers of the High B Court to pass an order of remand of an accused on the basis of inherent powers, was sought to be negated. It was ultimately held that the Court will have no inherent power of remand of an accused to any custody, unless the power is conferred by law. Mr. Lalit urged that since remand orders passed against the C Petitioner in the present case did not have the sanction either of Section 167(2) Cr.P.C. or Section 309 Cr.P.C., the Petitioner was entitled to be released on statutory bail forthwith.

11. Appearing for the State of Maharashtra, Mr. Sanjay V. Kharde, learned Advocate, supported the decision of the High D Court and urged that with the filing of the charge-sheet under Section 167(2) Cr.P.C., the conditions of the said Section stood satisfied and even if sanction had not been obtained for prosecuting the Accused, the Trial Court was entitled to proceed further in the matter. Mr. Kharde submitted that the orders of E remand passed by the Trial Court were not vitiated since charge-sheet had already been filed within 90 days of the arrest of the Petitioner.

12. Also referring to the decision in *Sanjay Dutt's* case F (supra), Mr. Kharde submitted that the "indefeasible right" of the accused to be released on bail under Section 167(2) Cr.P.C., in default of completion of the investigation and filing of charge-sheet within the time allowed, is a right which accrued to and is enforceable by the accused only from the time of default till G the filing of the charge-sheet and it does not survive or remain enforceable on the charge-sheet being filed. Accordingly, if in a given case, the accused applies for bail, under the aforesaid provision, on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail H forthwith. However, once the charge-sheet is filed, the question

of bail has to be decided only with reference to the merits of the case under the principles relating to grant of bail to an accused after filing of the charge-sheet. Mr. Kharde reiterated that in the instant case since the charge-sheet had already been filed, notwithstanding the fact that sanction had not been obtained, it could not be said that the powers of the learned Magistrate or the Trial Court to pass orders of remand came to an end, even if sanction had not been obtained for prosecuting the accused under the provisions of the PC Act.

13. The question posed in this Special Leave Petition concerns the right of a Magistrate or the Trial Court to pass orders of remand in terms of Section 167(2) Cr.P.C. beyond the period prescribed therein. Section 167(2) Cr.P.C., which is relevant for an understanding of the issues involved in this case, is extracted hereinbelow:

> "**167. Procedure when investigation cannot be completed in twenty-four hours.**
>
> (1) *** *** ***
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> (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 authorize 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

A 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;

B (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 C released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

D (b) no Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused E either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise F detention in the custody of the police.

Explanation I. - For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

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Explanation II. - If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising H detention or by the order certified by the Magistrate as to

production of the accused person through the medium of electronic video linkage, as the case may be. A

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution." B

14. From the above provision, it would be amply clear that the Magistrate may authorise the detention of an accused person, otherwise than in the custody of the police, beyond a period of 15 days, if he is satisfied that there are adequate C grounds for doing so, but no Magistrate is authorised to detain the accused person in custody for a total period exceeding 90 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 and 60 days where the investigation D relates to any other offence. In other words, if an accused was ready to offer bail, once the stipulated period for the investigation had been completed, then the Magistrate no longer had the authority to extend the period of detention beyond the said period of 90 days and, consequently, he had no option E but to release the accused on bail. The language used in Sections 167(2)(a)(i) and (ii) is that on the expiry of the period of 90 days or 60 days, as the case may be, the accused person shall be released on bail, if he is prepared to and does furnish bail. The direction upon the learned Magistrate or the Trial Court F is mandatory in nature and any detention beyond the said period would be illegal.

15. The power of remand is vested in the Court at the very initial stage before taking of cognizance under Section 167(2) Cr.P.C. Once cognizance is taken, the power to remand shifts G to the provisions of Section 309 Cr.P.C., under which the Trial Court is empowered to postpone or adjourn proceedings and, for the said purpose, to extend the period of detention from time to time. Section 309(2) Cr.P.C. contemplates a situation where if the Court **after taking cognizance** of an offence or H

A commencement of trial finds it necessary to postpone the commencement of, or adjourn, any inquiry or trial, it may, for reasons to be recorded, postpone or adjourn the inquiry or trial on such terms as it thinks fit, for such time as it considers reasonable, and **may by a warrant remand the accused if** B **in custody**, for a period of fifteen days at a time. Although, the provisions of Section 309 Cr.P.C. may not have any application to the facts of this case, in order to appreciate the view that we have taken, the same are reproduced hereinbelow:

C "**309. Power to postpone or adjourn proceedings.**— (1) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds D the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

Provided that when the inquiry or trial relates to an offence under Sections 376 to Section 376 D of the Indian Penal E Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.

F (2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by G a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

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Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that –

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanation 1 – If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand.

Explanation 2 – The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

16. At this juncture, we may refer to certain dates which are relevant to the facts of this case, namely:

(a) 11.03.2012 - Petitioner arrested and remanded to police custody;

(b) 25.04.2012 - First charge-sheet filed against the four accused;

(c) 1.06.2012 - Supplementary charge-sheet filed in which the Petitioner is named;

(d) 30.07.2012 - The Trial Court rejected the Petitioner's prayer for grant of bail;

(e) 13.09.2012 - The High Court confirmed the order of the Trial Court;

(f) 2.10.2012 - Application filed under Section 167(2) Cr.P.C. before the Trial Court;

(g) 5.10.2012 - Trial Court rejected the application under Section 167(2) Cr.P.C.

17. From the above dates, it would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the Petitioner's arrest and remand to police custody. It is true that cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but does such failure amount to non-compliance of the provisions of Section 167(2) Cr.P.C. is the question with which we are confronted. In our view, grant of sanction is nowhere contemplated under Section 167 Cr.P.C. What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused,

first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the Court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in *Natabar Parida's* case(supra) and in *Sanjay Dutt's* case (supra) were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) Cr.P.C. and an application having been made for grant of bail prior to the filing of charge-sheet, this Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.P.C. is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Cr.P.C. The

A scheme of the Cr.P.C. is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom B he or she is first produced. During that stage, under Section 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 C years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the D custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the E custody of the accused with a court.

19. Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the F charge-sheet had been filed well within the period contemplated under Section 167(2)(a)(ii) Cr.P.C. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings.

G 20. In that view of the matter, the Special Leave Petition deserves to be and is hereby dismissed.

R.P. SLP dismissed.