The Human Rights Law Network (HRLN) is a collective of lawyers and social activists dedicated to the use of the legal system to advance human rights, struggle against violations, and ensure access to justice for all. A not-for-profit, non-governmental organisation, HRLN defines rights to include civil and political rights as well as economic, social, cultural and environmental rights. We believe human rights are universal and indivisible, and their realisation is an immediate goal.

Starting in 1989 as an informal group of lawyers and social activists, HRLN has evolved into a human rights organisation with an active presence in many states of India. The organisation provides pro bono legal services to those with little or no access to the justice system.

It participates in the struggle for rights through its various activities including public interest litigation, advocacy, legal awareness programmes, investigations into violations, publishing 'know your rights' materials, and participating in campaigns.

HRLN collaborates with social movements, human rights organizations, and grass-roots development groups to enforce the rights of children, dalits, people with disabilities, farmers, HIV positive people, the homeless, indigenous peoples, prisoners, refugees, religious and sexual minorities, women, and workers, among others.

HRLN views the legal system as a limited but crucial instrument for realising human rights. We believe that large scale struggles against human rights violations have to be waged by social and political movements, and that the legal system can play a significant supportive role in these struggles.

The Centre for Constitutional Law, Policy and Governance (CLPG) is a research centre at the National Law University, Delhi. CLPG focuses on foregrounding rights, rightslessness, and other vulnerabilities in understanding, critiquing, and reforming laws, legal institutions, and modes of governance, so that they reflect the constitutional ideals of justice. The Centre works on issues of Human Rights and Access to Justice, and has been actively involved in research and policy making on criminal justice, judicial process reform, and violence against women. CLPG undertakes a variety of research activities aimed at providing empirically grounded and data driven inputs into law reform and policy making.

HUMAN RIGHTS LAW NETWORK
576, Masjid Road, Jangpura,
New Delhi-110014 • Ph: +91-11-24379855/56,
Email: contact@hrln.org, publications@hrln.org
Website: www.hrln.org

PRISONERS' RIGHTS-I

PRISONERS' RIGHTS

4TH EDITION Vol-I

Compiled and Edited by:
Aparna Chandra, Mrinal Satish, Ritu Kumar & Suma Sebastian

Human Rights Law Network

**Centre for Constitutional Law, Policy and Governance,
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HRLN
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NLU
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This book is dedicated to Tanvi Ahuja, Coordinator of the Human Rights Law Network's Prisoners Rights Initiative, who died very young while this Edition was being completed.

Brave and kind, we miss her very much.

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Introduction to the Fourth Edition

Nothing can better explain the pitiable and unchanging situation of undertrials and convict prisoners in India than the 2015 report of the Bihar State Legal Services Authority, titled Prisons of Bihar. This study was done in collaboration with the Human Rights Law Network, where a team of lawyers inspected 58 prisons and interviewed over 30,000 prisoners.

Many buildings that house prisons in Bihar are over 100 years old. The Ara District Prison was used as a stable for horses during the British era. Little sunlight reaches the inmates and the place becomes unbearably hot in summer. The Gaya Central Prison was constructed in 1854 and is not suitable to contain human beings. The ceilings, walls and floors are damp with water seepage. As one enters the wards, prisoners can be seen in hot and humid pits. There are not enough fans as the ceilings are not strong enough to bear the their weight. In the Aurangabad District Prison, there is no ventilation or sunlight. A garbage full of rotten food is kept next to the ward and the unpleasant odor makes it difficult for the inmates to breathe. Problem of overcrowding is continual.

In the women's ward of the Araria District Prison, though the capacity is only for two inmates, there were 23 adult inmates and two juveniles at the time of the inspection. There was barely any space to sit together, let alone lying down or sleeping. In the Barh Prison, 376 inmates crowd into a prison with a capacity of less than half of it, at 167. The asbestos ceiling has cracked and water pours down during the rains. The walls, floors, pillars, doors and windows are falling apart. The row of toilets, as in most prisons, is dysfunctional. This prison had 9 functioning toilets for 375 inmates on the date of inspection.

Jammui District Prison is dreadfully overcrowded with 450 inmates lodged in a jail for 188. The Madhepur District Prison had the toilets overflowing. There was no toilet for prison staff. The Udakisangunj Sub Divisional Prison did not have a bank account and, as a result, the prison had no money even for buying food and prison necessities. The staff were not paid at the time of the inspection. There was a severe scarcity of drinking water in all the prisons. The Mulla Committee Report 1983 made recommendation 66 to the effect that clean drinking water should be available to all prisoners and the water should be tested periodically. Recommendations 37, 73 and 74 suggested that all wards/cells should be fitted with flush type of

latrines in a ratio of latrines to prisoners of 1:6 and the system of open basket type latrines ought to be discontinued. There were no fire alarms, fire extinguishers, fire hydrants or fire fighting equipment in any prison. Undertrials and convicts were forced to do unremunerated hard labour in the kitchens.

Statutory provisions enacted to realise access to justice remain only on paper. Many prisoners narrated that when they are brought from the jail,they remain in Court lockups throughout the day and are not taken to the court. And when taken to the court, the Magistrate does not speak to them and are often kept at the back of the courtroom, while the prison staff and court clerks record the presence of the accused and adjourn the matter. Many prisoners reported that they are kept in the police vans outside the court on the day of their case. Most poor accused persons find in very difficult to interact with their lawyers. Most do not even know whether they have access to a lawyer or not. The lawyers rarely ever come to meet them in prison and do not have time to interact with them in court.

The provision in the jail manual related to visits by inmates' relatives has been reduced in practice to a very demeaning system where a large number of prisoners have to speak simultaneously to an equally large group of relatives standing behind a wire mesh. Jostling each other and shouting at the top of their voices has been described in the report as a "roaring chaos". This is an extremely sad state of affairs as family members often come from faraway places where public transport is not easily available. Once they reach the prison they are at the mercy of the prison staff. Many return without meeting their loved ones. There is no facility for drinking water or toilets for these visitors.

The conditions of women prisoners is equally bad. In the Buxar Women's Sub Prison, there is no hospital, permanent doctor, facility for heating water, crèche, kitchen, hospital ward or provision of clean and safe drinking water. At the time of the inspection, 476 inmates claimed to be juveniles. Their detention in jail was illegal as no person less than the age of 18 years can be sent to jail. Instead, they are to be kept in institutions for juveniles and are governed by the Juvenile Justice Act. There are also many senior citizens in these prisons. While, there is a 104-year old inmate in Chapra prison, Beur prison houses a 96-year old inmate. Even worse than the other facilities in the prison, is the availability of medical expertise and equipment in the prisons.. X-ray machines and refrigerators in the medical stores of these prisons are dysfunctional. The medical clinics are run by compounders who only certain medicines, such as paracetamol and some B complex tablets. Pregnancy kits and HIV kits are not available for women inmates.

There is also a severe shortage of medical staff. Lady doctors are available in only 6 of the 58 prisons. During the inspection, we found there were 102 inmates were mentally ill, 26 were terminally ill, 23 were disabled, 176 were in need of serious medical assistance and 4 women were pregnant. A certain inmate, Ramnath Mahto, from Motihari Prison suffers from paralysis and the prison administration seeks help from the other inmates to take his care. There are many others inmates that require immediate and serious medical assistance. For example, Mahinder Mahto doesn't have legs and walks on his hands, Dilip Kumar was found with an open head injury and still seeks treatment and Mahinder Choudhary, 70 years old, suffers from severe breathing problem.

In many prisonsm The HIV+ patients were kept with the TB patients. In a common medical knowledge, this is very dangerous for persons living with HIV. Many inmates reported torture, including severe and repeated beatings with sticks and suspension from the ceilings. The death sentence prisoners are kept in isolation for years. One such Sanaullah Khan was kept in isolation in Beur Central Prison for nine years, before he lost his mental balance. He has made several attempts to burn himself. He is often heard wailing, weeping and shouting and stops eating for long periods of time.

Earlier, the High Courts had held that prisoners who labour in the prisons ought to be paid minimum wages. This was reversed by the Supreme Court in State of Gujarat vs. Hon'ble High Court of Gujarat (1987 7 SCC 392) and the Court held that prisoners should be paid equitable wages. What constitutes equitable wages is anybody's guess. In a petition filed in the Supreme Court by the Bandi Adhikar Andolan Bihar, the prison wages were found to range between Rs. 12-70 per day, which was invariably less than half the minimum wage and 20% of the minimum wage in some cases. Going by the Supreme Court judgements, this amounts to servitude, bonded labour and slavery.

A petition filed in the Supreme Court by Human Rights Law Network's prison legal aid lawyer Sr. Suma Sebastian details of the barbarism of the Indian prison system was once again laid bare. In the petition, she puts on record publications of the Commonwealth Human Rights Initiative, India that found persons languishing for long periods as undertrials in bailable offences where bail is available as a matter of right. The reports found persons in jail way past the maximum period of incarceration if the charges were found to be proved by the Trial Court. It also speaks of persons arrested on suspicion without the commission of any offence. Persons so taken to custody with reference to Section 107 and Section 110 of the Criminal Procedure Code were all illegally arrested despite the judgment

of the Supreme Court in Madhu Limaye vs. Ved Murthy (1970 3 SCC 739). The Court in this judgment held that no arrests can be made under these sections and those suspected of being likely to commit a crime may only be asked to sign a bond and after an enquiry is conducted by the Magistrate. Thousands of persons languish in jail in complete disregard of the law. The report found persons rotting in jail for petty offences, many of which were were young and first time offenders.

Legal aid for prisoners continues to remain an illusion. It is only in Delhi, under the watchful eye of the Delhi High Court and the Supreme Court of India, that the Delhi State Legal Aid Services Authority and the National Legal Services Authority have put together a scheme for legal aid which is the best in the country. The Human Rights Law Network, in collaboration with others and assisted by the Open Society Foundation, improvised on the Delhi Scheme and suggested to the Supreme Court that directions be issued to all the States and Union Territories for the draft scheme to be adopted throughout the country. This draft scheme calls for legal aid to be provided to the accused from the point of arrest, remand lawyers in the Trial Courts when the accused are produced before the Magistrate within 24 hours of their arrest, substantial increases in the fees paid to legal aid lawyers, jail visiting lawyers, legal clinics in jails properly equipped with computers and law books, release of prisoners on personal bonds rather than the provision of sureties and cash, legal aid for juveniles before the Juvenile Justice Boards and Child Welfare Committees, release of convict prisoners on probation and so on.

The darkness and depravity of the prison justice system can be gauged by the deaths in custody at Tihar Jail at Delhi.. A former Director General of Prisons, Kiran Bedi, who attempted to reform the system and succeeded for a period of time, wrote a book about herself titled “I dare”. She was the only high profile personality who publicly campaigned for prison reform. After she left, however, and entered into politics, the cancer in the system remerged with greater venom.

A petition was filed before the Delhi High Court recently by the Multiple Action Research Group putting on record torture and deaths in Tihar. Sr. Suma of the Human Rights Law Network had received many complains of torture from prisoners of Tihar Jail. She documented these and filed them in the High Court. These complaints spoke of the free flow of drugs, the misappropriation of funds from the prisoner welfare fund, extortion of money by jail Superintendents with a gang of convict prisoners and undertrials, instances of torture, beating and blading, instances of visitors being forced to pay money to the prison administration to get priority in speaking to their loved ones, and serious injuries and deaths of inmates

due to torture in custody. Suspicious deaths in judicial custody, however, still remain unchecked. About 16 prisoners have died in Tihar Jail in 2012 while two committed suicide. In 2013, 35 prisoners died and two committed suicide. It should not go unnoted that if this is the situation in the capital city of the country, one can only imagine how frightening the situation must be elsewhere.

When Human Rights Law Network published the first edition of this book, we were given a tiny but timely grant to publish. In 1985, I wrote the introduction to the firstt edition titled In Honour of Krishna Iyer. The Supreme Court judge had singlehandedly raised the level of prison jurisprudence. The great man died recently. There are very few judges in the country today interested in continuing in that tradition. Prisoners and prisoners rights remains a lost cause - unfunded and ignored. I wrote the introduction to the second edition in May 1996 commenting, that in the interregnum, the Indian police had hardened into the largest body of organised crime. I characterised the Indian State as moving into the Fourth Quarter of Time - Kaliyug - a period of mythical darkness and ethical decay where the universe is ruled by evil forces. The third edition was brought out by the Human Rights Law Network in 2008. We present the fourth edition of this book. This edition is being done in collaboration with The Centre for Constitutional Law, Policy and Governance, National Law University, Delhi. Aparna Chandra and Mrinal Satish have done an extraordinary job updating this edition.

This book will be distributed to pro bono lawyers and academics throughout the country in the hope that they would use the material contained therein to cut off the heads of the rakshasas that dominate this nation and rule the prisons.

Colin Gonsalves

January 2017

INTRODUCTION TO THE THIRD EDITION

The third edition of the Prisoners Rights: a compilation of landmark judgements comes after a decade since its second edition and at a time when serious attempts are being made by government to change the entire criminal justice system with the sole aim that every arrested person should be held guilty. These changes in the criminal laws are being brought on the pretext of fighting terrorism and to deliver justice to the victims. Yet rules of free and fair trial and the basic time tested principles of criminal law are being tampered with and torturous procedures such as the Narco Analysis test and brain mapping are being resorted to, without any scientific credibility to these tests.

The system of video conferencing for the production of accused in court has been introduced in various parts of the country. In some states even criminal trials are being conducted through video conferencing. This system of production and trial through video conferencing is full of flaws. The trial conducted via video conferencing cannot be termed as free and fair trial with prisoner being in jail where he cannot deemed to be free to instruct his lawyer. Besides he might be under duress where he may not be able to communicate freely. The visits to the Courts once a fortnight, or a month, are the only times a prisoner can meet his family members. Considering the faulty prison visitation system, the visit to by the prisoners is very important as it gives them a chance to meet the family members and speak to them.

Recently the government has introduced the concept of 'Fast Track Court' across the country for speedy disposal of criminal trials: Many times criminal trials have been completed in matter of days. This is a dangerous trend as from delayed trials at one point of time, the system is now moving towards ultra quick trials, where the notion of justice may be forgotten for the sake of the speed. The Bombay High Court while hearing an appeal from one of the 'Fast Track Courts' came down heavily on the functioning of these courts and stated that, "We are certainly of the view that though the Fast Track Courts should act fast and justice should be delivered as quickly as possible, decision of a criminal trial cannot be speedily given at the cost of justice."

In last couple of years, the country has also witnessed media frenzy over criminal cases and has held trials almost through the electronic and the print media. Several bar associations passed resolutions appealing

to its members to not defend the accused in the trial in certain cases. In these cases, the constitutional right of an accused to be represented by an advocate has been ignored. Justice for victim does not mean that the basic principles of criminal justice should be ignored. The thin line between the media campaign and media trial has often been breached in a number of cases.

The Malimath Committee, which was formed for the reforms in the criminal justice system, tried its best to dismantle the minimum protection given to an accused during the trials and bring in the draconian provisions in the mainstream criminal law. Though the Malimath Committee Report was rejected by government, efforts are afoot to give it a backdoor entry through the committee formed to draft the criminal law policy for the country.

The attack on parliament resulted in the smooth passing of the Prevention of Terrorism Act (POTA). The draconian provisions of the earlier TADA were incorporated in POTA and there have been reports of its widespread misuse across the country. The Act was eventually repealed under sustained pressure from the groups fighting for civil liberties and human rights but the amendment of the Unlawful Activities Act, resulted in some of the provision of POTA being incorporated in it.

Today almost every state in the country has its own anti-terror law or the anti-organised crime Act. All these Acts are basically draconian provisions, enacted to strengthen the hands of the police and see that convictions take place on very little, or flimsy evidence, or no evidence worth the name.

Armed Forces Special Powers Act, one of the most draconian legislation, continues to be imposed in the Northeastern states of the country and citizens continue to be tortured and killed under the pretext of fighting insurgency without any proper investigation or enquiry in any of the killings.

The last decade also saw a huge increase in the extra-judicial killings through custodial deaths and encounter killings. Apart from a few convictions in the cases of custodial violence and encounter killings many of the extra judicial killings go un-noticed and un-questioned

In the beginning of the decade jail courts were initiated across the country for speedy disposal of cases. The jail courts were mainly handing out convictions to the accused who were pleading guilty Many times the accused without understanding the consequences of a conviction use to plead guilty only to avoid prolonged trials which took years to finish owing to the non-production of prisoners in courts.

The prisons in the country continue to be populated with mainly under trials who are poor, illiterate and from minority or fringe groups. These

prisons across the country are crowded without basic amenities such as clean drinking water and essential medical facilities. The legal aid system remains in shambles, resulting in denial of basic right of free and fair trial to the poor prisoners.

The much hyped Criminal Law Amendment Act of 2005, which the government authorities claimed will almost empty the prisons across the country, has not brought in any major changes vis-a-vis the prison population as was claimed by the government. Lakhs of people continue to languish behind the bars mainly because they are poor.

Not a lot has changed vis-a-vis the conditions of prisons and prisoners' rights since the last edition of the Prisoners Rights book. There have been few landmark judgements but the implementation of these judgements remains a distant possibility.

The Mulla Committee report on jail reforms came out in the early 1980's but it has not been implemented until this day though over two decades have elapsed since the report was submitted to government. The visitation rights of the prisoners' leave much to be desired where whims and fancies of the jail administration matter the most. Prisoners continue to get food which can hardly be termed fit for human consumption and they continue to live under most unhygienic or even hazardous conditions.

On the other hand there are instances of prisoners who have stayed in prison for many years beyond their sentence period. The overall conditions of the prisons and the prisoners show that they are the most ignored section of the people in this country.

The need of the hour is to move towards a genuine reformative system. Changing the name of prisons as 'Reformation Centres' is not going to help as these are just superficial changes and do not, in actual terms, bring in any reform to the life of the prisoners. It is high time the voting rights and the conjugal rights of the prisoners in India are recognised. Though in prison it should not be forgotten that the prisoner still has a right to live with dignity.

This book is divided in two volumes where best efforts have been made to bring in under its covers all the landmark judgements regarding prisons and prisoners passed by courts until this day, or the year 2007, in the fervent hope that it serves as resource material for lawyers, activists and conscientious citizens and civil society groups.

— Editorial Team

2008

INTRODUCTION TO THE FIRST EDITION IN HONOUR OF KRISHNA IYER

The level of barbarism in respect of a nations treatment of its prisoners is perhaps more uniform than we Indians expect. Developed and developing countries alike treat their convicts with a kind of depravity, which speaks volumes for the nature of the contemporary civilization and their attitudes towards the human person.

To know the degree of development of any society, one must not go by what these societies name themselves, not by the principles they profess, but by what they actually are.

As you land at the airport of this mythical country whose societal level you have set out to determine, drive to the nearest central prison. Ask the guards at the entrance for permission to enter and interview the inmates. If you are turned away at the gate with derisive laughter and as a person having no standing, your task is over and you may as well return and confirm in your report that the country does not deserve further consideration.

You will, of course, be surprised if you are permitted to enter. And if the warden tells you expansively that you are free to talk to any inmate in privacy and you do and find creative activity everywhere and laughter, freedom and repentance;, castaway and settle down for you have found a truly socialist state.

India is certainly not that country. For applying even the most regressive standards, Indian prisons are the pits - a level of perversity matched only by our pious, moralistic and sanctimonious preachings abroad. In the land of Gandhi and non-violence, prisons remain depraved and brutish. Internally, the prisoners rot.

Rape, buggery, torture, custody without legal sanction, bars and fetters, detention far in excess of the sentence, solitary confinement, lunacy, brutalizing of children and women, drug trafficking and prostitution rackets run by the Superintendents are but the daily routine of prison life. Pulling out eyes as in the Bhagalpur Blinding case or pushing the baton up the anus of prisoners as in Batra's case perhaps Sunday's schedule.

If the complete absence of human rights moorings in India has escaped notice it is only because a state has through law and lathi shrouded the prison system with an iron curtain through which only those may pass who have no hope of returning. And while the press, the public and the social activist is debarred the Courts turn a blind eye. While crores of rupees are spent in esoteric research of dubious standards, with manuscripts thrown into the dustbin after the degrees are awrded, not a thing is done about prison research. As a consequence the criminalization of the prison administration proceeds apace and is the main factor contributing to the hardening of the offender and to the inmates physical and psychological breakdown.

Apart from the human rights issue, the Indian state has so little intelligence that it cannot comprehend that in purely bourgeois terms it is neither economically feasible not practical to have such a large part of the population fettered and decapacitated.

Judicial reform has been slow - too slow. In the last decade it has merged with the forenso-personal history of one man whom all associated with the struggle for civil liberties and human rights must stand up and applaud- Krishna Iyer, a former Justice of the Supreme Court who even after retirement championed the cause with renewed fervor. This book is virtually a recount of his struggle against the tide of foul precedent, colonial prison regulations and a defiant lower judiciary, not only unwilling to accept his views but also uniformly subservient to the prison administration and the police. In the seventies and early eighties, he transformed Indian prison jurisprudence and a few other judges inspired by him contributed to this change. By the time of his retirement in the mid eighties, he had led India through a decade of forensic change. But he is left a sad man noticing in powerless retirement, the flouting of his decisions and the derision of the criminals in the uniform. The passage of time settles all things and India returned to its normal state - the eccentric has passed on.

The ebb tide set in. Whereas in Hussainara Khatoon's case and Motiram's Case the Court had spoken against the high bail amounts for poverty stricken accused and had recommended their enlargement on bail on personal bond and even without sureties, today millions of people are jailed pending trial because they are either illetarate to apply for bail or too poor to furnish the bail amount. Notwithstanding Hoskot's case legal aid remains on paper with more money spent on committees, reports and seminars than on legal aid itself. Sheela Barse's case, likewise, indicates the flagging interest in public interest matters. Now the right of the press

to interview the prisoners has been couched in a language as vague as to practically operate against the press. Despite Khan's case prisoners are often denied access to newspapers and books. Despite Waalcot's case, the awarding prison punishment is like the emperor's fiat. Despite Mallik's case, children are brutalized on par with adults. The International Year of the Child saw seminars organized and films made but no children released. All the recommendations laid down in Batra's case and Kaushik's case are ignored. Overcrowding has increased many times over. The Board of Visitors is a bloody farce. The prison manual and other regulations are kept top secret and even defending advocates find it impossible to lay their hands on one. Liberal visits by family members depend on bribe money. The ombudsmanic task of policing the police that Krishna Iyer advocated is now an impossibility.

The Standard Minimum Rules for the Treatment of Prrisoners is not only not followed but the Rules cannot be found; Section 235 (2) and 248 (2) off the Criminal Procedure Code in respect of human sentences is overlooked despite Giasuddins's case and Santa Singh's case. Despite Varghese's case poverty stricken judgement debtors are jailed. Notwithstanding the prison Reforms Enhancment of Wages case convicts perform slave labour on national or illusory wages. If, as in Nandini Satpathy's case, the methods, manners and morals of the police force were a measure of Government's real refinement, ours would be tyranny. Censorship of correspondence contrary to the directions in Madhuka Jambhale's case, and solitary confinement, contrary to the Sunil Batr's case, thrives. Likewise, bar fetters are commonly used, and the accused are tied together like cattle and paraded to court through the streets in defiance of the decisions in Shukla's case. The little Hitler found lingering around Tihar Jail in Batra's case is now fully grown and well fed. Despite Sah's case and Hongray's case compensation is rarely awarded. In the face of Veena Sethi's case mentally disturbed prisoners are maltreated and same rendered insane. The 'hope and trust' placed in the prison administration and the police by the Supreme Court has turned out to be a joke. Even after Barse's case women's rights are not implemented. Despite Nabachandra's case remand is done as a matter of role. Nothing changes in India - ever.

As we age towards nineties, Krishna Iyer's passions recede in the memory of the bench and bar. A new conservatism has taken over. Once again, judicial apathy and unconcern fuel prison sadness.

The decisions in this book are largely therefore of academic interest;

perhaps the only merit of the decisions being, as Justice Hughes once said, That they are, “an appeal to the brooding spirit of the law (and) to the intelligence of a future day.”

They display overall certain common trends and characteristics. Firstly that judicial standards in human rights are uniformly pathetic and secondly the judges in India are universally unwilling to punish prison officials and policemen even in the face of cast iron evidence of major offences committed by them.

Judicial reluctance, administrative callousness and the absence of any State recognition of White collar crime, takes India rapidly towards the precipice where the working class find themselves brutalized and isolated and the justice system is seen by all - as it essentially is - as a class weapon perpetrating and perpetuating injustice.

As this happens the story foretold by Krishna Iyer in Veena Sethi’s case may well come true; “One day the cry and despair of large number of people would shake and the very foundation of our society and imperil the entire democratic structure. When that happens we shall have only ourselves to blame. “

COLIN GONSALVES
Bombay, 1985.

INTRODUCTION TO THE SECOND EDITION
THE FOURTH QUARTER OF TIME

'In Honour of Krishna Iyer' was the foreword to 'Leading Cases on Prisoner's Rights'. Published in 1989, it was the forerunner to this book and filled a void as there was very little available on prisoner's rights and penal reform. It put together in one place the existing law covering the rights of undertrials, convicts, juveniles, women, the mentally ill, detenus and others. The book went out of stock almost immediately and shortage of funds prevented the publication of this substantially updated edition.

I met with Jan Essner of the Swedish International Development Authority (SIDA) last year and he agreed almost immediately to finance the printing of this book. Then Vivek Pandit and his human rights team at 'Samarthan' agreed to publish. I am deeply indebted both to 'SIDA' and 'Samarthan' for making this book possible. I would like to emphasize however that the views contained in this and the previous Foreword are entirely my own and neither SIDA nor Samarthan have had anything to do with what I have written. I am also thankful to Abhay and Jai Vaidya of Art Vision, for doing excellent printing job.

Although this book is concerned with a specific aspect of human rights, it is important to situate the increasing violations of civil and political rights in the context of the overall decline in the exercise of economic, social and cultural rights. With the introduction of the New Economic Policy State investments and subsidies that hitherto went towards the 400 million poor were gradually diverted upwards. Cheap food in the ration shops, free medical treatment in hospitals, free education in government schools and subsidized transportation for the working people went on the chopping block. If, as made out to be, government expected business to respond responsibly it was not to be. Government policy was rightly seen as a licence to loot. Corporate crime flourished. Large volumes of flight capital were sent abroad by politicians, officials and industrialists with the assistance of transnational banks. And the 'den of thieves', if you know what I mean, participated in this free-for-all. India, already poor, became immeasurably poorer.

In the interregnum between these two editions, the exercise of civil and political rights precipitously deteriorated. State sponsored death squads - as in Columbia, Argentina, Chile, Spain and elsewhere- were institutionalized and routinely carried out 'encounters' and executions. Hundreds of people

disappeared. Those who excelled in these ‘disappearances’ - as did the ‘Butcher of Punjab’ - were given high civilian honours. The police and the armed forces were licenced to kill. Thus when army personnel were found guilty of raping Kashmiri women and international attention turned to India, the punishments imposed were ‘reprimands’ and ‘censures’!

During these years the Indian police hardened into the largest body of organized crime. They supervise and oversee a diverse range of activities from drug running, prostitution, booze and pornography to real estate rackets and the cover up of corporate crime - joining and participating in gang wars being their latest pastime. Thus, when as in Delhi, the police permitted the massacre of thousands of Sikhs on the streets of India’s capital after Indira Gandhi’s assassination and when the Bombay police actively participated in the communal riots, slaughtering Muslims, it became clear that the rot within was complete. No change was possible. Kiran Bedi, then the Inspector General of Prisons tried mere cosmetic improvements at Tihar Central Prison and thus learnt lesson quick enough. There was no room for reform.

A state thus moved into the fourth quarter of time, Kaliyug.

After having let off the police for a long time it slowly dawned on the judiciary that things were getting out of hand. A tightening up was discernible in the orders of the Apex Court. But years of tolerance had taken its toil and the attempt was feeble and piece meal. When, for example, the police bashed up an undertrial in the premises of the Supreme Court the havaldars were fined Rs. 1,000/-

Intemational attention mercifully turned to India during this period. Amnesty International, Asia Watch and others did excellent coverage of the deplorable situation. For years the West would ignore reports coming from India. This was after all the largest democracy in the world. Slowly it dawned that the East-West differences were largely mythical. There was as much (if not more) materialism in the East as there was in the West, and in the land of Gandhi and all his talk on non-violence, there was more violence directed against the poor than possibly any other country. So much for Indian spiritualism.

To counter this adverse publicity, Government of India set up a National Human Rights Commission. Appointed to the Commission were persons of high rank but no track record of commitment to human rights. Their intervention was feeble, pathetic and unconvincing. The Indian Government, so excellent at setting up committees, passing grand legislations and promising the world, had done it again.

COLIN GONSALVES
MAY, 1996

FOREWORD

This edition of the Prisoners' Rights Manual is a collaboration between Human Rights Law Network (HRLN) and the Centre for Constitutional Law, Policy and Governance, National Law University, Delhi (CLPG). Spread over two volumes, the 4th edition revises and updates the 2008 edition. We have endeavoured to provide a comprehensive collection of judgments relating to various aspects of prisoners'rights in India.

The volumes reflect judicial developments till August 2015. A few later developments of significance have also been incorporated.This volume includes new cases and additional areas that were not covered in the previous edition. Newchapters include those on enforced disappearances and encounter killings. Further, instead of providing a separate chapter on the rights of women prisoners, cases and issues relating to women prisoners have been covered under the relevant subject headings. Similarly, the chapter on compensation in the previous edition has also been incorporated within the relevant substantive chapters.

Each chapter begins with a brief summary of issues and the relevant case law. The summary is followed by a series of extracts from relevant cases. For each case, a short headnote indicates the relevant facts and issue under consideration.

We present to you this edition of the Manual with the hope that it is useful for academicians and students, activists and practitioners, alike.

Aparna Chandra & Mrinal Satish,
Centre for Constitutional Law, Policy, and Governance,
National Law University, Delhi

October 2016

Abreviation

-	FIR	First Information Report
-	CrPC	Code of Criminal Procedure
-	POTA	Prevention of Terrorism Act
-	IPC	Indian Penal Code
-	NDPS Act	Narcotic Drugs and Psychotropic Substances Act
-	TADA	Terrorist and Disruptive Activities (Prevention) Act
-	MCOCA	Maharashtra Control of Organised Crime Act
-	CBI	Central Bureau of Investigation
-	PCA	Prevention of Corruption Act
-	IEA	Indian Evidence Act
-	FERA	Foreign Exchange Regulation Act
-	DPA	Delhi Police Act
-	PA	Prisons Act
-	NSA	National Security Act
-	PDA	Preventative Detention Act
-	BEAP	Brain Electrical Activation Profile
-	CFEPSA	Conservation of Foreign Exchange and Prevention of Smuggling Activities Act
-	PBMMSECA	Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act
-	TN GOONDAS ACT	Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act
-	MPDA Act	Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act,

CONTENTS

CHAPTER 1
ARREST

ARREST

An Arbitrary arrest is one of the most serious problems facing of India's criminal justice system. **Joginder Kumar v. State of Uttar Pradesh**,[1] **Arnesh Kumar v. State of Bihar**[2] and **Lalita Kumari v. Govt. of Uttar Pradesh**[3] have reiterated this point. All these cases have unequivocally adopted the position that arrest is an exception and not the rule. In ***Arnesh Kumar***, the Court laid down guidelines to be followed by police officials before arresting a person, and Magistrates before remanding that person to custody at the time of arrest. The guidelines aim to reduce the incidents of arbitrary arrests.

What Constitutes Arrest

The Apex Court in **State of Haryana v. Dinesh Kumar**,[4] observed that from a reading of Section 46 of IPC, it is clear that in order to make an arrest, the police officer or other person making the arrest should actually touch or confine the body of the person to be arrested. The Court also discussed the difference between the concepts of "arrest" and "custody."

Pre-conditions for Arrest

In **Joginder Kumar v. State of Uttar Pradesh**,[5] the Supreme Court held that no arrest should be made without conducting an investigation as to the bonafides of a complaint, reasonable belief of a person's complicity, and the need to arrest. In its judgment, the Court clearly laid down the principle that arrest is an exception and not the rule. The same holding was reiterated in *Lalita Kumari v. Government of Uttar Pradesh*,[6] and *Arnesh Kumar v. State of Bihar.*[7]

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1 (1994) 4 SCC 260
2 (2014) 8 SCC 469
3 (2014) 2 SCC 1
4 (2008) 3 SCC 222
5 (1994) 4 SCC 260
6 (2014) 2 SCC 1
7 (2014) 8 SCC 469

Procedure for Arrest

The most important case on the procedure post-arrest is **D.K. Basu v. State of West Bengal**,[8] where the Court laid down detailed guidelines in relation to arrest and the rights of an arrested person. These guidelines operate as safeguards against wrongful arrest.

In **Sheela Barse v. State of Maharashtra**,[9] and **Amrik Singh v. State of Punjab and Others,**[10] the Supreme Court, and the Punjab and Haryana High Court respectively, ruled that on being arrested, the accused must be told the grounds of arrest and the nearest legal aid committee must be intimated to enable them to assist the arrestee.

Consequences of Illegal Arrest

It had been held in **D.K. Basu v. State of West Bengal**,[11] that non-compliance with guidelines laid down by the Court would lead to officers being tried for contempt of Court and the victim would be entitled to compensation. In **Raghuvansh Dewanchand Bhasin v. State of Maharashtra**,[12] the Court reiterated that a victim of wrongful arrest will be entitled to compensation.

Arrest Provisions in Special Legislations

Special laws often contain different procedures for arrest. In **Union of India v. Padam Narain Aggarwal**,[13] the Court discussed the scope of arrest under the Customs Act, 1962. It was held that the power must be exercised on objective facts of commission of an offence, and the customs officer must have reason to believe that a person sought to be arrested was guilty of commission of such offence.

In **Balbir Singh v. State of Punjab**,[14] the Court discussed in detail the applicability of the Code of Criminal Procedure, 1973 to the National Drugs and Psychotropic Substances Act, 1985. Several guidelines were also laid down to be followed by officers at the time of arrest. The procedure for arrest under Section 42, National Drugs and Psychotropic Substances

8 (1997) 1 SCC 416
9 (1983) SCC (Cri.) 353
10 (2000)Cri.L.J. 4305 (P&H)
11 (1997) 1 SCC 416
12 (2012) 9 SCC 791
13 (2008) 13 SCC 305
14 (1994) 3 SCC 299

Act, 1985 was examined in **Sukhdev Singh v. State of Haryana**.[15] The Court held that except in exceptional situations, permission of a senior officer must be sought in all cases of arrest.

In **Bhavesh Jayanti Lakhani v. State of Maharashtra & Ors**.,[16] the Court discussed the procedure to be followed by Indian Courts on the receipt of a red corner notice from Interpol. The Court held that in such cases, arrest cannot be made unless the requisite permission is taken from the Central Government, as per the provisions of the Indian Extradition Act.

Safeguards for Women Arrestees

In **Sheela Barse v. State of Maharshtra**,[17] the Supreme Court issued directions for the arrest of women, including directions to provide separate lock ups and areas for male and female prisoners.

In **State of Maharashtra v. Christian Community Welfare Council of India**,[18] the Supreme Court held that while in exceptional circumstances, a woman can be arrested at any time of the day even in the absence of a woman police officer, however, all efforts should be made to keep a lady constable present and reasons for arresting in the absence of a lady constable must be recorded before or immediately after the arrest. Subsequently, the CrPC was amended in 2005 to insert Section 46(4) which provides that while a woman may be arrested post-sunset and pre-sunrise in exceptional circumstances, the arrest can be made only by a woman police officer, who shall make a written report and obtain prior permission of the Judicial Magistrate of the First Class within whose local jurisdiction the offence is committed or arrest is to be made.

15 (2013) 2 SCC 212
16 (2009) 9 SCC 551
17 (1983) SCC (Cri.) 353
18 (2003) 8 SCC 546

IN THE SUPREME COURT OF INDIA

Sheela Barse v. State of Maharashtra

(1983) SCC (Cri.) 353

P.N. Bhagwati, Amarendra Nath Sen & R.S. Pathak, JJ.

This Writ Petition was based on a letter addressed by a Journalist to the Supreme Court, complaining of custodial violence inflicted on women whilst in Jail. In its judgment, the Court issued directions pertaining to legal aid, arrest of women detainees, their treatment, and other safeguards.

Bhagwati, J.: "3. But, this incident highlights the need for setting up a machinery for providing legal assistance to prisoners in jails. There is fortunately a legal aid organization in the State of Maharashtra headed by the Maharashtra State Board of Legal Aid and Advice which has set up committees at the High Court and district levels. We would therefore direct the Inspector-General of Prisons in Maharashtra to issue a circular to all Superintendents of Police in Maharashtra requiring them—

(1) To send a list of all under-trial prisoners to the Legal Aid Committee of the district in which the jail is situated giving particulars of the date of entry of the under-trial prisoners in the jail and to the extent possible, of the offences with which they are charged and showing separately male prisoners and female prisoners;

(2) To furnish to the concerned District Legal Aid Committee a list giving particulars of the persons arrested on suspicion under Section 41 of the Code of Criminal Procedure who have been in jail beyond a period of 15 days;

(3) To provide facilities to the lawyers nominated by the concerned District Legal Aid Committee to enter the jail and to interview the prisoners who have expressed their desire to have their assistance;

(4) To furnish to the lawyers nominated by the concerned District Legal Aid Committee whatever information is required by them in regard to the prisoners in jail;

(5) To put up notices at prominent places in the jail that lawyers

nominated by the concerned District Legal Aid Committee would be visiting the jail on particular days and that any prisoner who desires to have their assistance can meet them and avail of their counseling services; and

(6) To allow any prisoner who desires to meet the lawyers nominated by the concerned District Legal Aid Committee to interview and meet such lawyers regarding any matter for which he requires legal assistance and such interview should be within site but out of hearing of any jail official.

We would also direct that in order to effectively carry out these directions which are being given by us to the Inspector-General of Prisons, the Maharashtra State Board of Legal Aid and Advice will instruct the District Legal Aid Committees of the districts in which jails are situated to nominate a couple of selected lawyers practicing in the District Court to visit the jail or jails in the district at least once in a fortnight; with a view to ascertaining whether the law laid down by the Supreme Court and the High Court of Maharashtra in regard to the rights of prisoners including the right to apply for bail and the right to legal aid is being properly and effectively implemented, and to interview the prisoners who have expressed their desire to obtain legal assistance and to provide them such legal assistance as may be necessary for the purpose of applying for release on bail or parole and ensuring them adequate legal representation in courts, including filing or preparation of appeals or revision applications against convictions and legal aid and advice in regard to any other problems which may be facing them or the members of their families. The Maharashtra State Board of Legal Aid and Advice will call for periodic reports from the District Legal Aid Committees with a view to ensuring that these directions given by us are being properly carried out. We would also direct the Maharashtra State Board of Legal Aid and Advice to pay an honorarium of Rs 25 per lawyer for every visit to the jail together with reasonable travelling expenses from the court house to jail and back. These directions insofar as the city of Bombay is concerned, shall be carried out by substituting the High Court Legal Aid Committee for the District Legal Aid Committee, since there is no district legal aid committee in the city of Bombay but the Legal Aid Programme is carried out by the High Court Legal Aid Committee. We may point out that this procedure is being followed with immense benefit to the prisoners in jails by the Tamil Nadu State Legal Aid and Advice Board.

4. We may now take up the question as to how protection can be accorded to women prisoners in police lock-ups. We put forward several suggestions to the learned Advocate appearing on behalf of the petitioner and the State of Maharashtra in the course of the hearing, and there was a meaningful

and constructive debate in court. The State of Maharashtra offered its full cooperation to the Court in laying down the guidelines which should be followed so far as women prisoners in police lock-ups are concerned and most of the suggestions made by us were readily accepted by the State of Maharashtra. We propose to give the following directions as a result of meaningful and constructive debate in court in regard to various aspects of the question argued before us:

(i) We would direct that four or five police lock-ups should be selected in reasonably good localities where only female suspects should be kept and they should be guarded by female constables. Female suspects should not be kept in a police lock-up in which male suspects are detained. The State of Maharashtra has intimated to us that there are already three cells where female suspects are kept and are guarded by female constables and has assured the Court that two more cells with similar arrangements will be provided exclusively for female suspects.

(ii) We would further direct that interrogation of females should be carried out only in the presence of female police officers/ constables.

(iii) Whenever a person is arrested by the police without warrant, he must be immediately informed of the grounds of his arrest and in case of every arrest it must immediately be made known to the arrested person that he is entitled to apply for bail. The Maharashtra State Board of Legal Aid and Advice will forthwith get a pamphlet prepared setting out the legal rights of an arrested person and the State of Maharashtra will bring out sufficient number of printed copies of the pamphlet in Marathi, which is the language of the people in the State of Maharashtra, as also in Hindi and English, and printed copies of the pamphlet in all the three languages shall be affixed in each cell in every police lock-up and shall be read out to the arrested person in any of the three languages which he understands as soon as he is brought to the police station.

(iv) We would also direct that whenever a person is arrested by the police and taken to the police lock-up, the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance. The State Government will provide necessary funds

to the concerned Legal Aid Committee for carrying out this direction.

(v) We would direct that in the City of Bombay, a City Sessions Judge, to be nominated by the principal Judge of the City civil court, preferably a lady Judge, if there is one, shall make surprise visits to police lock-ups in the city periodically with a view to providing the arrested persons an opportunity to air their grievances and ascertaining what are the conditions in the police lock-ups and whether the requisite facilities are being provided and the provisions of law are being observed and the directions given by us are being carried out. If it is found as a result of inspection that there are any lapses on the part of the police authorities, the City Sessions Judge shall bring them to the notice of the Commissioner of Police and if necessary to the notice of the Home Department and if even this approach fails, the City Sessions Judge may draw the attention of the Chief Justice of the High Court of Maharashtra to such lapses. This direction in regard to police lock-ups at the district headquarters shall be carried out by the Sessions Judge of the district concerned.

(vi) We would direct that as soon as a person is arrested, the police must immediately obtain from him the name of any relative or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform him about the arrest; and lastly

(vii) We would direct that the Magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody and inform him that he has right under Section 54 of the Code of Criminal Procedure, 1973 to be medically examined. We are aware that Section 54 of the Code of Criminal Procedure, 1973 undoubtedly provides for examination of an arrested person by a medical practitioner at the request of the arrested person and it is a right conferred on the arrested person. But, very often the arrested person is not aware of this right and on account of his ignorance, he is unable to exercise this right even though he may have been tortured or maltreated by the police in police lock-up. It is for this reason that we are giving a specific direction requiring the Magistrate to inform the arrested person about this right of medical examination in case he has any complaint of torture or maltreatment in police custody."

IN THE SUPREME COURT OF INDIA

State of Punjab v. Balbir Singh

(1994) 3 SCC 299

S.R. Pandian & K. Jayachandra Reddy, JJ.

The question in this case was whether any search or arrest of an individual not conforming to the provisions of the NDPS Act 1985 becomes illegal, and consequently vitiates conviction. The Court discussed and clarified the procedure for search and arrest under the NDPS Act. Further, the Court also dealt with consequences of non-compliance with arrest and seizure related provisions.

Reddy, J.: "5. In most of the cases before us, the police officers did not proceed to act under the provisions of the NDPS Act after having necessary information or after having reasons to believe as contemplated under Section 42. The search, seizure or arrests carried out by them were obviously under the provisions of the CrPC. The provisions of arrest, warrant, search and seizure are incorporated in Sections 41 to 60, 70 to 81, 93 to 105 and 165 CrPC. It may also be noticed at this stage that NDPS Act is not a complete code incorporating all the provisions relating to search, seizure or arrest etc. The said Act after incorporating the broad principles regarding search, seizure or arrest etc. in Sections 41, 42, 43 and 49 has laid down in Section 51 that the provisions of CrPC shall apply insofar as they are not inconsistent with the provisions of the NDPS Act to all warrants issued and arrests, searches and seizures made under that Act. Therefore the provisions of Sections 100 and 165 CrPC which are not inconsistent with the provisions of the NDPS Act are applicable for effecting search, seizure or arrest under the NDPS Act also. The words "insofar as they are not inconsistent with the provisions of this Act" in Section 51 of the NDPS Act are significant. It may also be noted that Section 4 of the CrPC, 1973 provides that all the offences under any other law shall be investigated and inquired as mentioned therein. Section 4 of the CrPC, 1973 reads thus:

> "4. Trial of offences under the Indian Penal Code and other laws.—

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

Therefore, under this section the provisions of the CrPC are applicable where an offence under the Indian Penal Code or under any other law is being inquired into, tried and otherwise dealt with. From the words "otherwise dealt with" it does not necessarily mean something which is not included in the investigation, inquiry or trial and the word "otherwise" points to the fact that the expression "dealt with" is all comprehensive and that investigation, inquiry and trial are some of the aspects dealing with the offence. Consequently, the provisions of the CrPC shall be applicable insofar as they are not inconsistent with the NDPS Act to all warrants, searches, seizures or arrests made under the Act. But when a police officer carrying on the investigation including search, seizure or arrest; empowered under the provisions of the CrPC comes across a person being in possession of the narcotic drugs or psychotropic substances then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. But at this stage the question of resorting to Section 50 and informing the accused person that if he so wants, he would be taken to a Gazetted Officer and taking to Gazetted Officer thus would not arise because by then search would have been over. As laid down in Section 50, the steps contemplated thereunder namely, informing and taking him to the Gazetted Officer should be done before the search. When the search is already over in the usual course of investigation under the provisions of CrPC then the question of complying with Section 50 would not arise.

…

25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorization to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1), the empowered officer, if has a prior information given by any person, it should necessarily be taken

down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer, while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 of CrPC, including the requirement to record reasons, such failure would only amount to an irregularity.

…

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

IN THE SUPREME COURT OF INDIA

Joginder Kumar v. State of Uttar Pradesh

(1994) 4 SCC 260

M.N. Venkatachalliah, C.J., S. Mohan & Dr. A.S. Anand, JJ.

The Petitioner, a lawyer, was illegally detained by the police. When he was not produced before the Magistrate, the relatives of the accused moved a writ under Article 32 of the Constitution of India. The Court considered the scope of the power to arrest.

Venkatachaliah, C.J.: "20. … No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to the person to attend the Station House and not to leave the Station without permission would do."

IN THE SUPREME COURT OF INDIA

D.K. Basu v. State of West Bengal

(1997) 1 SCC 416

Kuldip Singh & Dr. A.S. Anand, JJ.

The Executive Chairman, Legal Aid Services, West Bengal, wrote a letter to the Chief Justice of India drawing his attention to certain news items published in newspapers regarding deaths in police lock-ups and custody. In its decision, the Court formulated several guidelines and safeguards, which are available to the accused at the time of arrest.

Anand, J.: "35. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

36. Failure to comply with the requirements hereinabove mentioned shall, apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter."

IN THE PUNJAB AND HARYANA HIGH COURT

Amrik Singh v. State of Punjab & Ors.

2000 Cri. L.J. 4305 (P&H)

T.H.B. Chalapathi, J.

The instant petition was filed under Section 482 of the CrPC seeking disclosure of the charges under which the petitioner was arrested, protection of his right to life, and the right to be produced before the Magistrate within 24 hours. The Court, in this decision, also laid down guidelines pertaining to the safety of detainees in jail.

Chalapathi, J.: "4. The right to liberty is the most crystallised right. Article 21 of the Constitution guarantees the protection of life and personal liberty. No person can be deprived of his personal liberty except according to procedure established by law. Article 22 protects the right of the persons arrested or detained to be produced before the nearest Magistrate within a period of 24 hours from such arrest excluding the time that is required for the Police to report the arrest of the person. It also provides that no person shall be detained in custody beyond 24 hours without authority of the Magistrate. Thus the constitutional guarantee has been provided to the citizens of India that they should not be kept in detention by the Police for more than 24 hours. Even the procedural law mandates the police to produce the person arrested or detained before the nearest Magistrate within the aforesaid period of 24 hours under Section 57 of the Code of Criminal Procedure.

5. As already observed, several petitions have been filed in this Court alleging detention of the arrested person in the police lock-ups beyond 24 hours, in some cases for days and months together in police lock-ups. Thus, there is a clear violation of the mandatory provisions contained in Article 22 of the constitution of India and Section 57 of the Code of Criminal Procedure. I therefore, deem it fit and necessary to give the following directions to all the Sessions Judges in the States of Punjab and Haryana so as to prevent the violation of the rights of the citizens of the States guaranteed both under the Constitution and procedural law. These directions are also in conformity with the view expressed by the Apex Court in Sheela Barse v. State of Maharashtra [(1983) 2 SCC 96: A.I.R. 1983 S.C. 378]:

(i) Whenever a person is arrested and taken into custody by the Police without warrant, he has to be immediately informed of the grounds of his arrest as required under Section 50 of the Code of Criminal Procedure.

(ii) When a person is arrested by the police, the police will give intimation of the fact of such arrest to Legal Aid Cell of District concerned.

(iii) Whenever any illegal detention is brought to the notice of Sessions Judge by any person, the Sessions Judge of the District shall make a surprise visit of police lock-up to find out whether any person is detained in the police lock-up without being produced before the concerned Magistrate in contravention of Section 57 of the Code of Criminal Procedure and the Constitutional Provisions as contained in Article 22."

IN THE SUPREME COURT OF INDIA

State of Maharashtra v. Christian Community Welfare Council of India

(2003) 8 SCC 546

N. Santosh Hegde & B.P Singh, JJ.

Junious Adam Illamatti was taken into custody and he died while he was in custody. His wife was also locked up and molested by the police. The High Court directed the State government to pay Rs. 1,50,000 to the widow of the deceased. On appeal, the Supreme Court, while deciding the case, discussed the applicability of the D.K. Basu guidelines to the High Court order.

Hegde, J.:"5. At this stage it is necessary to note that this Court while granting leave has confined the same to consider whether the directions issued by the High Court in sub-paras (iv), (v) and (vii) of the operative part of the judgment in para 29 need to be retained, modified or deleted. There is no dispute in regard to this limited scope of the appeal. Sub-paras (iv) and (v) of the operative portion of the judgment read thus:

> "(iv) The State Government is directed to issue immediately necessary instructions to all police officials concerned of the State that in every case after arrest and before the detainee is taken to the Magistrate, he should be medically examined and the details of his medical report should be noted in the station house diary of the police station and should be forwarded to the Magistrate at the time of production of the detainee;
>
> (v) The State Government should also issue instructions to all police officials concerned in the State that even after the police remand is ordered by the Magistrate concerned for any period, every third day, the detainee should be medically examined and such medical reports should be entered in the station house diary."

…

7. We are in agreement with the submission made by the learned counsel for the State that in view of the said requirement laid down by this Court in the said judgment the directions issued by the High Court in sub-paras (iv) and (v) of its operative part will have to stand modified and will be substituted by the requirement laid down by this Court in sub-paras (7) and (8) of para 35 of the judgment in Basu case [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] .

…

9. Herein we notice that the mandate issued by the High Court prevents the police from arresting a lady without the presence of a lady constable. The said direction also prohibits the arrest of a lady after sunset and before sunrise under any circumstances. While we do agree with the object behind the direction issued by the High Court in sub-para (vii) of the operative part of its judgment, we think a strict compliance with the said direction, in a given circumstance, would cause practical difficulties to the investigating agency and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the police from police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises, therefore, we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the arresting authority that while arresting a female person, all efforts should be made to keep a lady constable present but in the circumstances where the arresting officers are reasonably satisfied that such presence of a lady constable is not available or possible and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation, such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable. We also direct that with the above modification in regard to the direction issued by the High Court in sub-para (vii) of this appeal, this appeal is disposed of.

10. As noted above, this appeal is filed against an observation made by the High Court that the compensation of Rs. 1,50,000 paid to the widow of the deceased may be recovered from the erring Police officials. The

challenge to this observation is based on the ground that the same is made without hearing the appellants who were not the parties to the said writ petition. So far as the liability to pay compensation to the aggrieved party who has suffered because of the Police excesses there can be no doubt in view of the judgment of this Court in Smt. Nilabati Behera alias Lalita Behera v. State of Orissa and Ors. The question whether such compensation paid by the State can be recovered from the officers concerned will depend on the fact whether the alleged misdeeds by the officer concerned is committed in the course of the discharge of his lawful duties, beyond or in excess of the same which will have to be determined in a proper enquiry. The High Court by the impugned judgment has not conclusively held that the amount should in any circumstance be recovered from the officers therefore at this stage it is too premature for us to go into this question whether the appellants in this case are liable to reimburse the State the amount paid by it to the widow of the deceased as directed by the High Court. This will have to be as stated above adjudicated in an inquiry wherein it will have to be decided whether the acts of the concerned Police Officers were in the performance of State duty (a sovereign function) or outside the same. If it is found that the appellant officers did cause the death of the deceased and the same is not in the performance of their official duty or in excess of the same then they cannot escape the liability. However as stated above this question would arise only as and when an inquiry specifically in this regard is conducted. Therefore for the present there need for any direction in this regard does not arise."

IN THE SUPREME COURT OF INDIA

State of Haryana v. Dinesh Kumar

(2008) 3 SCC 222

C.K. Thakker & Altamas Kabir, JJ.

The respondent had applied for a position of Constable Driver in the Haryana Police. The application contained a query as to whether the applicant had been arrested, to which he responded in the negative. During verification, it was found that he had been arrested in connection with a case arising out of a FIR in 1994. The Selection Committee did not offer him an appointment on grounds of failure to disclose this information. The respondent contended that since he had not actually been arrested and the case against him had ended in acquittal, it must be deemed that no case had ever been filed against him and hence he had not suppressed any information by replying in the negative. The Court extensively discussed the concepts of 'arrest' and 'custody' in relation to a criminal proceeding.

Kabir, J.: "14. We are concerned with sub-sections (1) and (2) of Section 46 of the Code from which this much is clear that in order to make an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be submission to the custody by word or action.

15. Similarly, the expression "custody" has also not been defined in the Code.

16. The question as to what would constitute "arrest" and "custody" has been the subject-matter of decisions of different High Courts, which have been referred to and relied upon by Mr Patwalia appearing for Dinesh Kumar, the respondent in the first of the two appeals. This Court has also had occasion to consider the said question in a few cases, which we will refer to shortly. Reliance was also placed on the dictionary meaning of the two expressions which will also be relevant to our decision.

…

18. Mr Chaudhari submitted that the ordinary dictionary meaning of "arrest" is to legally restrain a person's movements for the purpose of

detaining a person in custody by authority of law. He submitted that in Dinesh Kumar's writ petition the High Court had erred in coming to a finding that he had never been arrested since he had voluntarily appeared before the Magistrate and had been granted bail immediately.

19. Opposing Mr Chaudhari's submission, Mr Patwalia, relying on various decisions of different High Courts and in particular a Full Bench decision of the Madras High Court in Roshan Beevi v. Jt. Secy. to the Govt. of T.N. [1984 Cri LJ 134 (Mad)] submitted that although technically the appearance of the accused before the Magistrate might amount to surrender to judicial custody, in actuality no attempt had been made by anyone to restrict the movements of the accused which may have led him to believe that he had never been arrested. It is on a layman's understanding of the principle of "arrest" and "custody" that prompted the respondent in the first of the two appeals and the appellants in the second appeal to mention in Column 13(A) that they had never been arrested in connection with any criminal offence.

20. Mr Patwalia referred to certain decisions of the Allahabad High Court, the Punjab High Court and the Madras High Court which apparently support his submissions. Of the said decisions, the one in which the meaning of the two expressions "arrest" and "custody" have been considered in detail is that of the Full Bench of the Madras High Court in Roshan Beevi case [1984 Cri LJ 134 (Mad)]. The said decision was, however, rendered in the context of Sections 107 and 108 of the Customs Act, 1962. Sections 107 and 108 of the Customs Act authorize a Customs Officer empowered in that behalf to require a person to attend before him and produce or deliver documents relevant to the enquiry or to summon such person whose attendance is considered necessary for giving evidence or production of a document in connection with any enquiry being undertaken by such officer under the Act. In such context the Full Bench of the Madras High Court returned a finding that "custody" and "arrest" are not synonymous terms and observed that it is true that in every arrest, there is custody but not vice versa. A custody may amount to "arrest" in certain cases, but not in all cases. It is in the aforesaid circumstances that the Full Bench came to the conclusion that a person who is taken by the Customs Officer either for the purpose of enquiry or interrogation or investigation cannot be held to have come into the custody and detention of the Customs Officer and he cannot be deemed to have been arrested from the moment he was taken into custody.

21. In coming to the aforesaid conclusion, the Full Bench had occasion to consider in detail the meaning of the expression "arrest". Reference was made to the definition of arrest in various legal dictionaries and Halsbury's

Laws of England as also Corpus Juris Secundum. In para 16 of the judgment it was observed as follows: (Cri LJ p. 142)

> "16. From the various definitions which we have extracted above, it is clear that the word 'arrest', when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested. In this connection, a debatable question that arises for our consideration is whether the mere taking into custody of a person by an authority empowered to arrest would amount to 'arrest' of that person and whether the terms 'arrest' and 'custody' are synonymous."

22. Faced with the decision of this Court in Niranjan Singh v. Prabhakar Rajaram Kharote [(1980) 2 SCC 559: 1980 SCC (Cri) 508 : AIR 1980 SC 785] the Full Bench distinguished the same on an observation made by this Court that equivocatory quibbling that the police have taken a man into informal custody but have not arrested him, have detained him in interrogation but have not taken him into formal custody, were unfair evasion of the straightforwardness of the law. This Court went on to observe further that there was no necessity of dilating on the shady facet as the Court was satisfied that the accused had physically submitted before the Sessions Judge giving rise to the jurisdiction to grant bail. Taking refuge in the said observation, the Full Bench observed that the decision rendered by this Court could not be availed of by the learned counsel in support of his contentions that the mere taking of a person into custody would amount to arrest. The Full Bench observed that mere summoning

of a person during an enquiry under the Customs Act did not amount to arrest so as to attract the provisions of Article 22(2) of the Constitution of India and the stand taken that the persons arrested under the Customs Act should be produced before a Magistrate without unnecessary delay from the moment the arrest is effected, had to fail.

23. We are unable to appreciate the views of the Full Bench of the Madras High Court and reiterate the decision of this Court in Niranjan Singh case [(1980) 2 SCC 559 : 1980 SCC (Cri) 508 : AIR 1980 SC 785] . In our view, the law relating to the concept of "arrest" or "custody" has been correctly stated in Niranjan Singh case [(1980) 2 SCC 559 : 1980 SCC (Cri) 508 : AIR 1980 SC 785] . Paras 7, 8 and the relevant portion of para 9 of the decision in the said case state as follows: (SCC pp. 562-63)

> 7. When is a person in custody, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.
>
> 8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.
>
> 9. He can be in custody not merely when the police

> arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions."
>
> (emphasis in original)

…

25. We also agree with Mr Anoop Chaudhary's submission that unless a person accused of an offence is in custody, he cannot move the court for bail under Section 439 of the Code, which provides for release on bail of any person accused of an offence and in custody. (emphasis supplied) The precondition, therefore, for applying the provisions of Section 439 of the Code is that a person who is an accused must be in custody and his movements must have been restricted before he can move for bail. This aspect of the matter was considered in Niranjan Singh case [(1980) 2 SCC 559 : 1980 SCC (Cri) 508 : AIR 1980 SC 785] where it was held that a person can be stated to be in judicial custody when he surrenders before the court and submits to its directions.

26. The aforesaid definition is similar in spirit to what is incorporated in Section 46 of the Code of Criminal Procedure. The concept was expanded by this Court in State of Uttar Pradesh v. Deoman Upadhyaya [1961SCR 14] wherein it was interalia observed as follows:

Section 46, CrPC does not contemplate any formality before a person can be said to be taken in custody. Submission to the custody by words of mouth or action by a person is sufficient. A person directly giving a police officer by word of mouth information which may be used as evidence against him may be deemed to have submitted himself to the custody of the Police Officer.

27. The sequatur of the above is that when a person, who is not in custody, approaches the police officer and provides information, which leads to the discovery of a fact, which could be used against him, it would be deemed that he had surrendered to the authority of the investigating agency."

IN THE SUPREME COURT OF INDIA

Union of India v. Padam Narain Aggarwal

(2008) 13 SCC 305

C.K. Thakker & D.K. Jain, JJ.

The respondent was accused of fraudulently availing drawback in income tsax amounting to Rs. 75 lakhs approx. A complaint was filed against him for commission of offences punishable under Sections 174 and 175, Indian Penal Code, 1860. In deciding the correctness of the High Court's order relating to anticipatory bail, the Supreme Court examined the scope of 'arrest' in the Customs Act, 1962.

Thakker, J.: "20. The term "arrest" has neither been defined in the Code of Criminal Procedure, 1973 nor in the Penal Code, 1860 nor in any other enactment dealing with offences. The word "arrest" is derived from the French word "arrater" meaning "to stop or stay". It signifies a restraint of a person. "Arrest" is thus a restraint of a man's person, obliging him to be obedient to law. "Arrest" then may be defined as "the execution of the command of a court of law or of a duly authorized officer".

…

22. So far as the Customs Act, 1962 is concerned, the power to arrest is contained in Section 104 thereof. It reads thus:

> "104. Power to arrest.—
>
> (1) If an officer of Customs empowered in this behalf by general or special order of the Commissioner of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under Section 132 or Section 133 or Section 135 or Section 135-A or Section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.

(3) Where an officer of Customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer in charge of a police station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable."

Section 104 thus empowers a Customs Officer to arrest a person if he has "reason to believe" that such person has committed any offence mentioned therein. It also enjoins the officer to take the arrested person to a Magistrate "without unnecessary delay". The section also provides for release of such person on bail.

…

Safeguards against abuse of power

36. … [The] power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Customs Officer has "reason to believe" that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135-A or 136 of the Act. Thus, the power must be exercised on objective facts of commission of an offence enumerated and the Customs Officer has reason to believe that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be exercised on whims, caprice or fancy of the officer.

37. The section [Ed.: Section 104 of the Customs Act, 1962.] also obliges the Customs Officer to inform the person arrested of the grounds of arrest as soon as may be. The law requires such person to be produced before a Magistrate without unnecessary delay."

IN THE SUPREME COURT OF INDIA

Bhavesh Jayanti Lakhani v. State of Maharashtra & Ors.

(2009) 9 SCC 551

S.B. Sinha & Mukundakam Sharma, J.J.

An arrest warrant had been issued against the appellant by a court in the United States of America. On the basis of this arrest warrant, a red corner notice was issued by Interpol, which was communicated to the Government of India. Aggrieved by this warrant, the appellant filed a Writ Petition in the Bombay High Court questioning the legality of the said warrant. The Supreme Court, in appeal, examined whether or not arrest automatically follows from the issuance of a red corner notice. It also clarified the procedure to be followed by Indian courts on receipt of a red corner notice.

S.B. Sinha J.: "35. A red corner notice has large number of consequences, some of which are:

(i) The requesting country may make a deportation request.

(ii) The law enforcement agency in India is required to "take follow-up action with regard to the arrest of a fugitive criminal".

(iii) The information emanating from the red corner notice is required to be distributed all over the Interpol website.

(iv) The requesting Embassy would instruct CBI to carry out its instructions for surveillance, arrest and detention.

(v) The requesting Embassy can even contact the Indian police directly.

(vi) Thereafter extradition proceedings may follow.

Indisputably, therefore, when a proceeding under the Act is initiated, the civil liberty of a person would be directly affected. The provisions of the Act, therefore, should be strictly construed. Any request for extradition therefore must undergo the strict scrutiny test. Extradition offence keeping in view its definition in Section 2(c) of the Act in relation to a treaty State must be one provided for in the extradition treaty therewith. Application of

the provisions of the Act, thus, in a case of this nature must be held to be imperative in character.

36. We have noticed hereinbefore that for the purpose of applying the provisions of the Act, existence of a treaty between the requesting State and the requested State plays an important role. It makes a distinction between an extraditable offence and other offences including political offences subject of course to the condition that offences relating to illegal tax are not to be treated to be a political offence. Sections 4-18 provide for the mode and manner in which a request for extradition of a person is required to be made by the country concerned. The requirements are specific in nature and are required to be accompanied by a large number of documents.

37. It is accepted at the Bar that no request has yet been made to the executive Government of the Government of India for extradition of the appellant upon compliance with the provisions of Sections 2-18 or otherwise. It is but imperative to note the provisions of the Treaty here vis-à-vis the implementation of a red/yellow corner notice.

38. Article 1 of the Treaty provides that the contracting States agree to extradite to each other, persons who are accused of, charged with or convicted of an extraditable offence. Article 2 provides for the extraditable offence. Article 4 provides for political offences which are outside the purview of the Treaty. Article 9 provides for the extradition procedures and required documents.

39. It is beyond any doubt or dispute that no request for extradition has been received by the Government of India. It could act only when a request is received. It is accepted at the Bar that a red corner notice by itself cannot be a basis of arrest or transfer of an Indian citizen to a foreign jurisdiction. There is furthermore no dispute that the Act cannot be bypassed in red corner cases concerning Indian citizens. Hence, the Extradition Treaty is subject to the provisions of the Act.

...

96. Extradition of a fugitive criminal from India to any other foreign country, irrespective of the fact as to whether any treaty has been entered into or with that country, is within the exclusive domain of the Central Government. The extradition of a person from India to any other foreign country is covered by the Parliament Act, namely, the Act. Keeping in view the Constitution of Interpol vis-à-vis the resolutions adopted by CBI from time to time, although a red corner notice per se does not give status of a warrant of arrest by a competent court, it is merely a request of the issuing authority to keep surveillance on him and provisionally or finally arrest the wanted person for extradition."

IN THE SUPREME COURT OF INDIA

Raghuvansh Dewanchand Bhasin v. State of Maharashtra

(2012) 9 SCC 791

D.K. Jain & H.L. Dattu, JJ.

A writ petition was filed challenging the issue of a non-bailable warrant by the Magistrate. The Petitioner alleged that he was frequently harassed by the police and his right to life and liberty was threatened. The Court looked into the question of jurisdiction of Courts to sanction arrest warrants and the guidelines to be followed for the same. In its decision, the Court also deliberated on the question of the consequences of wrongful arrest.

Jain, J.:"19. In Bhim Singh v. State of J&K [(1985) 4 SCC 677: 1986 SCC (Cri) 47], holding the illegal detention in police custody of the petitioner Bhim Singh to be violative of his rights under Articles 21 and 22(2) of the Constitution, this Court, in exercise of its power to award compensation under Article 32, directed the State to pay monetary compensation to the petitioner. Relying on Rudul Sah [(1983) 4 SCC 141: 1983 SCC (Cri) 798], O. Chinnappa Reddy, J. echoed the following views: (SCC p. 686, para 2)

> "2. … When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation…."

…

22. The power and jurisdiction of this Court and the High Courts to grant monetary compensation in exercise of their jurisdiction respectively under Articles 32 and 226 of the Constitution of India to a victim whose fundamental rights under Article 21 of the Constitution are violated are thus, well established."

IN THE SUPREME COURT OF INDIA

Sukhdev Singh v. State of Haryana

(2013) 2 SCC 212

Swatanter Kumar & Madan B. Lokur, JJ.

The appellant, who was caught with gunny bags filled with drugs, appealed to the Court on the ground that the guidelines in Section 42, NDPS Act that provide for the power to seize and arrest, were not followed in this case. The question for consideration was at what stage and by what time should authorities comply with Section 42.

Kumar, J.: "22. This question is no more res Integra and stands fully answered by the Constitution Bench judgment of this Court in Karnail Singh v. State of Haryana [(2009) 8 SCC 539]. The Constitution Bench had the occasion to consider the conflict between the two judgments i.e. in the case of Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513] and Sajan Abraham (supra) and held as under:

35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in Sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of Clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per Clauses (a) to (d) of

Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of Sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

…

25. There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total noncompliance, thus the question of substantial compliance would not even arise for consideration of the Court

in the present case. The twin purpose of the provisions of Section 42 which can broadly be stated are that: (a) it is a mandatory provision which ought to be construed and complied strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery.

26. Once the contraband is recovered, then there are other provisions like Section 57, which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the NDPS Act. It is to provide fairness in the process of recovery and investigation which is one of the basic features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of NDPS Act mandatory and not optional as stated by this Court in the case of Karnail Singh (supra)."

IN THE SUPREME COURT OF INDIA

Lalita Kumari v. Govt. of Uttar Pradesh

(2014) 2 SCC 1

P. Sathasivam, C.J., Dr. B.S. Chauhan, Ranjana P. Desai, Ranjan Gogoi & B.S. Bobde, JJ.

A writ petition under Article 32 of the Constitution was filed by Lalita Kumari (minor) through her father, for the issuance of a writ of Habeas Corpus against the respondents for protection of the Petitioner, who had been abducted. The Court held that lodging a first information report does not and should not result in immediate arrest of the suspect. The Court also reiterated safeguards to prevent arbitrary arrests.

Sathasivam, C.J.: "108. It is also relevant to note that in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] , this Court has held that arrest cannot be made by the police in a routine manner. Some important observations are reproduced as under: (SCC pp. 267-68, para 20)

> "20. … No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person

> is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

109. The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately. It is the imaginary fear that "merely because FIR has been registered, it would require arrest of the accused and thereby leading to loss of his reputation" and it should not be allowed by this Court to hold that registration of FIR is not mandatory to avoid such inconvenience to some persons. The remedy lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence."

IN THE SUPREME COURT OF INDIA

Arnesh Kumar v. State of Bihar

(2014) 8 SCC 273

Chandramouli Kr. Prasad & P.C. Ghose, JJ.

The petitioner in this case approached the Apex Court under Special Leave petition, appealing against the order of the lower Court which refused anticipatory bail to the petitioner. In its judgment, the Court extensively discussed the powers of arrest, especially for offences punishable with imprisonment of seven years or less.

Prasad, J.:"5. Arrest brings humiliation, curtails freedom and casts scars forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson: the lesson implicit and embodied in CrPC. It has not come out of its colonial image despite six decades of Independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

6. Law Commissions, Police Commissions and this Court in a large number of judgments emphasised the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from the power to arrest, the police officers must be able to justify the reasons

thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short "CrPC"), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest.

7. As the offence with which we are concerned in the present appeal, provides for a maximum punishment of imprisonment which may extend to seven years and fine, Section 41(1) (b) CrPC which is relevant for the purpose reads as follows:

> "41. When police may arrest without warrant.—(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—
>
> (a) ***
>
> (b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely—
>
> (i) ***
>
> (ii) the police officer is satisfied that such arrest is necessary—
>
> (a) to prevent such person from committing any further offence; or
>
> (b) for proper investigation of the offence;

or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to the police officer; or

(e) as unless such person is arrested, his presence in the court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest."

7.1. From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.

7.2. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest.

7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 CrPC.

8. An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57 CrPC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey:

8.1. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power under Section 167 CrPC. The power to authorise detention is a very solemn function. It affects the liberty and freedom of citizens and needs to be exercised with great care and caution. Our experience tells us that it is not exercised with the seriousness it deserves. In many of the cases, detention is authorised in a routine, casual and cavalier manner.

8.2. Before a Magistrate authorises detention under Section 167 CrPC, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested are satisfied. If the arrest effected by the police officer does not satisfy the requirements of Section 41 of the Code, Magistrate is duty-bound not to authorise his further detention and release the accused. In other words,

when an accused is produced before the Magistrate, the police officer effecting the arrest is required to furnish to the Magistrate, the facts, reasons and its conclusions for arrest and the Magistrate in turn is to be satisfied that the condition precedent for arrest under Section 41 CrPC has been satisfied and it is only thereafter that he will authorise the detention of an accused.

8.3. The Magistrate before authorising detention will record his own satisfaction, may be in brief; but the said satisfaction must reflect from his order. It shall never be based upon the ipse dixit of the police officer, for example, in case the police officer considers the arrest necessary to prevent such person from committing any further offence or for proper investigation of the case or for preventing an accused from tampering with evidence or making inducement, etc. the police officer shall furnish to the Magistrate the facts, the reasons and materials on the basis of which the police officer had reached its conclusion. Those shall be perused by the Magistrate while authorising the detention and only after recording his satisfaction in writing that the Magistrate will authorise the detention of the accused.

8.4. In fine, when a suspect is arrested and produced before a Magistrate for authorising detention, the Magistrate has to address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny.

9. Another provision i.e. Section 41-A CrPC aimed to avoid unnecessary arrest or threat of arrest looming large on the accused requires to be vitalised. Section 41-A as inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), which is relevant in the context reads as follows:

"41-A. Notice of appearance before police officer.—

(1) The police officer shall, in all cases where the arrest of a person is not required under the

provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent court in this behalf, arrest him for the offence mentioned in the notice."

The aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) CrPC, the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 CrPC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

10. We are of the opinion that if the provisions of Section 41 CrPC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be

reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 CrPC for effecting arrest be discouraged and discontinued.

11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from

rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A IPC or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine."

CHAPTER 2
HANDCUFFING

HANDCUFFING

The jurisprudence on handcuffing of prisoners has been clearly laid down by the Apex Court and High Courts in many cases. **Prem Shankar Shukla v. Delhi Administration**,[1] is the landmark judgment on this point. It relies on **Sunil Batra v. Delhi Admin**.,[2] where the Court, while stating that the convicts are not wholly denuded of their fundamental rights, held that:

> The indiscriminate resort to handcuffs when accused persons are taken to and from court and the expedient of forcing irons on prison inmates are illegal and shall be stopped forthwith save in a small category of cases dealt with next below. Reckless handcuffing and chaining in public degrades, puts to shame finer sensibilities and is a slur on our culture.
>
> Where an undertrial has a credible tendency for violence and escape a humanely graduated degree of 'iron' restraint is permissible if only if-other disciplinary alternatives are unworkable. The burden of proof of the ground is on the custodian. And if he fails, he will be liable in law.

In ***Prem Shankar Shukla***, it was held that handcuffing can only be resorted to on reasonable grounds and cannot be routinely used. The escorting officer has to inform the Judicial Officer before whom the accused is produced and take his permission for using handcuffs on the accused. Only when permission is granted can the accused be placed in handcuffs.

Similarly, in **Kishore Singh Ravinder Dev and Ors. v. State of Rajasthan**,[3] the Supreme Court held that solitary confinement or the use of fetters in prisons is impermissible except in extreme cases of compelling necessity

1 (1980) 3 SCC 526
2 (1980) 3 SCC 488
3 (1981) 1 SCC 503

such as for the security of other prisoners or to prevent escape, and only after complying with rules of natural justice. The Court also emphasized that old rules, circulars and instructions issued under the Prisons Act have to be read congruously with the Constitution, especially Article 21 in its various dimensions.

In **Citizens for Democracy v. State of Assam**,[4] the Court stated that when the police arrests a person in execution of a warrant of arrest obtained from a Magistrate, the person arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested. When a person is arrested by the police without warrant, the concerned police officer may, if he is satisfied, handcuff such a person till the time he is taken to the police station and thereafter till he is produced before the Magistrate. Further use of fetters thereafter can only be under the orders of the Magistrate. The Court also held that any violation of these directions shall be summarily punishable under the Contempt of Courts Act, apart from inviting other penal consequences under law. In **R. P. Vaghela v. State of Gujarat**,[5] the Gujarat High Court has clarified that not only the Supreme Court, but also any High Court having territorial jurisdiction over the matter, can take cognizance of a contempt petition alleging violation of the Supreme Court's decision in *Citizens for Democracy*.

In **Khedut Mazdoor Chetna Sangathan v. State of Madhya Pradesh**,[6] members of the petitioner organization were arrested and handcuffed while being taken to court from jail and to jail from court. The Supreme Court relied on ***Prem Shankar Shukla*** and **Sunil Gupta v. State of Madhya Pradesh**,[7] and held that the plea of ignorance of the law by the escort officers cannot be accepted. The court allowed the writ petition and permitted contempt proceedings to commence. Pursuant to this order, in **M. P. Dwivedi v. Unknown**,[8] the members of the Khedut Mazdoor Chetna Sangathan filed contempt charges against the police officers involved in handcuffing them. As the fact of the handcuffing was not in dispute, the Court issued notice to the contemnors to show cause as to why they should not be punished for committing contempt of court. The justification offered was that handcuffing was resorted to, to prevent the petitioners from escaping custody. The Court rejected this argument, and

4 (1995) 3 SCC 743
5 2002 Cri. L.J. 3082 (Guj.)
6 (1994) 6 SCC 260
7 (1990) 3 SCC 119
8 (1996) 4 SCC 152

held that the police intentionally disobeyed the handcuffing regulations. It found the police officers guilty of contempt of court.

In **Aeltemesh Rein v. Union of India**,[9] the Supreme Court ordered the Union of India to issue within three months a complete set of guidelines regarding the usage of handcuffing in accordance with *Prem Shankar Shukla*, and to circulate these to all state and territory governments.

In **Gurdeep Singh @ Deep v. State (Delhi Admin)**,[10] the question before the Court was whether a confessional statement of an accused person, while he was in handcuffs, could be considered voluntary under Section 15 of TADA. The Court held that handcuffing and the presence of a policeman during recording of confessions under TADA would not by itself vitiate the confession. It is to be noted that this was a case under TADA, where confessions to a police officer were admissible as evidence. The applicability of this decision to cases where the accused is charged with offences, for which confessions to a police officer are not admissible in evidence is doubtful.

In **Sunil Gupta v. State of Madhya Pradesh**,[11] the petitioners were arrested, abused, beaten and taken to the Magistrate by handcuffing them and parading them in public. It was held that the petitioners were entitled to compensation because the police completely disregarded the guidelines on handcuffing laid down by the Court and violated the basic liberties of the petitioners.

In **State of Maharashtra v. Ravikant S Patel**,[12] it was held that while the escorting officer cannot be held personally liable for handcuffing prisoners while he is acting in his official capacity, in such cases the State has to pay compensation to the prisoner.

9 (1988) 4 SCC 54
10 (2000) 1 SCC 498
11 (1990) 3 SCC 119
12 (1991) 2 SCC 373

IN THE SUPREME COURT OF INDIA

Prem Shankar Shukla v. Delhi Administration

(1980) 3 SCC 526

O. Chinnappa Reddy, R.S. Pathak & V.R. Krishna Iyer, JJ.

A prisoner sent a telegram to the Supreme Court complaining that he and other prisoners were being handcuffed when they were taken from the prison to court for trial. The practice persisted despite the Court's direction not to use irons on him, and this led to him sending the telegram. The Court in this judgment laid down the law on when a prisoner can be handcuffed.

Iyer, J.:"1. When they arrested my neighbour I did not protest. When they arrested the men and women in the opposite house I did not protest. And when they finally came for me, there was nobody left to protest. [Pastor Niemoller]

This grim scenario burns into our judicial consciousness the moral emerging from the case being that if today freedom of one forlorn person falls to the police somewhere, tomorrow the freedom of many may fall elsewhere with none to whimper unless the court process invigilates in time and polices the police before it is too late. This futuristic thought, triggered off by a telegram from one Shukla, prisoner lodged in the Tihar Jail, has prompted the present 'habeas' proceedings. The brief message he sent runs thus:

In spite of court order and directions of your Lordship in Sunil Batra v. Delhi Admn., [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] handcuffs are forced on me and others. Admit writ of Habeas Corpus.

Those who are inured to handcuffs and bar fetters on others may ignore this grievance, but the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21, spring into action when we realise that to manacle man is more

than to mortify him; it is to dehumanize him and, therefore, to violate his very personhood, too often using the mask of "dangerousness" and security. This sensitized perspective, shared by court and counsel alike, has promoted us to examine the issue from a fundamental viewpoint, and not to dismiss it as a daily sight to be pitied and buried. Indeed, we have been informed that the High Court had earlier dismissed this petitioner's demand to be freed from fetters on his person but we are far from satisfied going by what is stated in Annexure 'A' to the counter-affidavit of the Assistant Superintendent of Police, that the matter has received the constitutional concern it deserves. Annexure 'A' to the counter-affidavit is a communication from the Delhi Administration for general guidance and makes disturbing reading as it has the flavour of legal advice and executive directive and makes mention of a petition for like relief in the High Court:

> "The petition was listed before Hon'ble Mr. Justice Yogeshwar Dayal of Delhi High Court. After hearing arguments, the Hon'ble Court was pleased to dismiss the petition filed by the petitioner Shri P.S. Shukla asking for directions for not putting the handcuffs when escorted from jail to the court and back to the jail. In view of the circumstances of the case, it was observed that no directions were needed. However, it came to my notice that the requirements of Punjab Police Rules contained in Vol. III, Chapter 25, Rules 26, 22, 23 and High Court Rules and Orders, Vol. III, Chapter 27, Rule 19 are not being complied with. I would also draw the attention of all concerned to the judgment delivered by Mr. Justice R.N. Aggarwal in Vishwa Nath v. State [Cri Misc. Main No. 430 of 1978, decided on April 6, 1979] , wherein it has been observed that a better class under trial be not handcuffed without recording the reasons in the daily diary for considering the necessity of the use of such a prisoner in being escorted to and from the court by the police, use of handcuffs be not resorted to unless there is a reasonable expectation that such prisoner will use violence or that an attempt will be made to rescue him. The practice of use of handcuffs be

> followed in accordance with the rules mentioned above."

In plain language, it means that ordinary Indian under trials shall be routinely handcuffed during transit between jail and court and the better class prisoner shall be so confined only if reasonably apprehended to be violent or rescued.

2. The facts are largely beyond dispute and need brief narration so that the law may be discussed and declared. The basic assumption we humanistically make is that even a prisoner is a person, not an animal, that an under trial prisoner a fortiori so. Our nation's founding document admits of no exception on this subject as Sunil Batra case [(1978) 4 SCC 494: 1979 SCC (Cri) 155] has clearly stated. Based on this thesis all measures authorized by the law must be taken by the court to keep the stream of prison justice unsullied.

3. A condensed statement of the facts may help concretize the legal issue argued before us. A prisoner sent a telegram to a Judge of this Court (one of us) complaining of forced handcuffs on him and other prisoners, implicitly protesting against the humiliation and torture of being held in irons in public, back and forth, when, as under trials kept in custody in the Tihar Jail, they were being taken to Delhi courts for trial of their cases. The practice persisted, bewails the petitioner, despite the court's direction not to use irons on him and this led to the telegraphic "litany" to the Supreme Court which is the functional sentinel on the qui vive where "habeas" justice is in jeopardy. If iron enters the soul of law and of the enforcing agents of law — rather, if it is credibly alleged so — this Court must fling aside forms of procedure and defend the complaining individual's personal liberty under Articles 14, 19 and 21 after due investigation. Access to human justice is the essence of Article 32, and sensitized by this dynamic perspective we have examined the facts and the law and the rival versions of the petitioner and the Delhi Administration. The blurred area of "detention jurisprudence" where considerations of prevention of escape and personhood of prisoner come into conflict, warrants fuller exploration than this isolated case necessitates and counsel on both sides (Dr Chitale as amicus curiae, aided ably by Shri Mudgal, and Shri Sachthey for the State) have rendered brief oral assistance and presented written submissions on a wider basis. After all, even while discussing the relevant statutory provisions and constitutional requirements, court and counsel must never forget the core principle found in Article 5 of the Universal Declaration of Human Rights, 1948:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

And read Article 10 of the International Covenant on Civil and Political Rights:

> "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Of course, while these larger considerations may colour our mental process, our task cannot overflow the actual facts of the case or the norms in Part III and the provisions in the Prisoners (Attendance in Courts) Act, 1955 (for short, the Act). All that we mean is that where personal freedom is at stake or torture is in store to read down the law is to write off the law and to rise to the remedial demand of the manacled man is to break human bondage, if within the reach of the judicial process. In this jurisdiction, the words of Justice Felix Frankfurter are a mariner's compass:

> "The history of liberty has largely been the history of observance of procedural safeguards."

And, in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 2 SCR 621, 647: (1978) 1 SCC 248] it has been stated:

> "The ambit of personal liberty protected by Article 21 is wide and comprehensive. It embraces both substantive rights to personal liberty and the procedure provided for their deprivation."

Has the handcuffs device — if so, how far — procedural sanction? That is the key question.

4. The prisoner complains that he was also chained but that fact is controverted and may be left out for the while. Within this frame of facts we have to consider whether it was right that Shukla was shackled. The respondent relies upon the provisions of the Act and the rules framed thereunder and under the Police Act as making shackling lawful. This plea of legality has to be scanned for constitutionality in the light of the submissions of Dr Chitale who heavily relies upon Article 21 of the Constitution and the collective consciousness relating to human rights burgeoning in our half-century.

5. The petitioner is an under trial prisoner whose presence is needed in several cases, making periodical trips between jail house and Magistrate's courts inevitable. Being in custody he may try to flee and so escort duty to prevent escape is necessary. But escorts, while taking responsible care not to allow their charges to escape, must respect their personhood. The dilemma of human rights jurisprudence comes here. Can the custodian fetter the person of the prisoner, while in transit, with irons, may be handcuffs or chains or bar fetters? When does such traumatic treatment break into the inviolable zone of guaranteed rights? When does disciplinary measure end and draconic torture begin? What are the constitutional parameters, viable guidelines and practical strategies which will permit the peaceful coexistence of custodial conditions and basic dignity? The decisional focus turns on this know-how and it affects tens of thousands of persons languishing for long years in prisons with pending trials. Many Shuklas in shackles are invisible parties before us that makes the issue a matter of moment. We appreciate the services of Dr Chitale and his junior Shri Mudgal who have appeared as amicus curiae and belighted the blurred area of law and recognize the help rendered by Shri Sachthey who has appeared for the State and given the full facts.

6. The petitioner claims that he is a "better class" prisoner, a fact which is admitted, although one fails to understand how there can be a quasi-caste system among prisoners in the egalitarian context of Article 14. It is a sour fact of life that discriminatory treatment based upon wealth and circumstances dies hard under the Indian sun. We hope the Ministry of Home Affairs and the Prison Administration will take due note of the survival after legal death of this invidious distinction and put all prisoners on the same footing unless there is a rational classification based upon health, age, academic or occupational needs or like legitimate ground and not irrelevant factors like wealth, political importance, social status and other criteria which are a hangover of the hierarchical social structure hostile to the constitutional ethos. Be that as it may, under the existing rules, the petitioner is a better class prisoner and claims certain advantage for that reason in the matter of freedom from handcuffs. It is alleged by the State that there are several cases where the petitioner is needed in the courts of Delhi. The respondents would have it that he is "an inter-State cheat and a very clever trickster and tries to browbeat and misbehave with the object to escape from custody". Of course, the petitioner contends that his social status, family background and academic qualifications warrant his being treated as a better class prisoner and adds that the court had directed that for that reason he be not handcuffed. He also states that under the

relevant rules better class prisoners are exempt from handcuffs and cites in support the view of the High Court of Delhi that a better class under trial should not be handcuffed without recording of reasons in the daily diary for considering the necessity for the use of handcuffs. The High Court appears to have observed (Annexure 'A' to the counter-affidavit on behalf of the State) that unless there be reasonable expectation of violence or attempt to be rescued the prisoner should not be handcuffed.

7. The fact, nevertheless, remains that even apart from the High Court's order the trial Judge (Shri A.K. Garg) had directed the officers concerned that while escorting the accused from jail to court and back handcuffing should not be done unless it was so warranted.

> " … I direct that the officers concerned while escorting the accused from jail to court and back, shall resort to handcuffing only if warranted by rule applicable to better class- prisoners and if so warranted by the exigency of the situation on obtaining the requisite permission as required under the relevant rules."

Heedless of judicial command the man was fettered during transit, under superior police orders, and so this habeas corpus petition and this Court appointed Dr Y.S. Chitale as amicus curiae, gave suitable directions to the prison officials to make the work of counsel fruitful and issued notice to the State before further action. "To wipe every tear from every eye" has judicial dimension. Here is a prisoner who bitterly complains that he has been publicly handcuffed while being escorted to court and invokes the court's power to protect the integrity of his person and the dignity of his humanhood against custodial cruelty contrary to constitutional prescriptions.

8. The Superintendent of the Jail pleaded he had nothing to do with the transport to and from court and Shri Sachthey, counsel for the Delhi Administration, explained that escorting prisoners between custodian campus and court was the responsibility of a special wing of the police. He urged that when a prisoner was a security risk, irons were not allergic to the law and the rules permitted their use. The petitioner was a clever crook and by enticements would escape from gullible constables. Since iron was too stern to be fooled, his hands were clad with handcuffs. The safety of the prisoner being the onus of the escort police the order of the trial court was not blindly binding. The rules state so and this explanation must absolve the police. Many more details have been mentioned in the return of the police officer concerned and will be referred to where necessary

but the basic defence, put in blunt terms, is that all soft talk of human dignity is banished when security claims come into stern play. Surely, no cut-and-dried reply to a composite security-versus-humanity question can be given. We have been persuaded by counsel to consider this grim issue because it occurs frequently and the law must be clarified for the benefit of the escort officials and their human charges. Dr Chitale's contention comes to this: Human rights are not constitutional claptrap in silent meditation but part of the nation's founding charter in sensitized animation. No prisoner is beneath the law and while the Act does provide for rules regarding journey in custody when the court demands his presence, they must be read in the light of the larger backdrop of human rights.

9. Here is a prisoner — the petitioner — who protests against his being handcuffed routinely, publicly, vulgarly and unjustifiably in the trips to and fro between the prison house and the court house in callous contumely and invokes the writ jurisdiction of this Court under Article 32 to protect, within the limited circumstances of his lawful custody. We must investigate the deeper issues of detainee's rights against custodial cruelty and infliction of indignity, within the human rights parameters of Part III of the Constitution, informed by the compassionate international charters and covenants. The raw history of human bondage and the roots of the habeas-corpus writ enlighten the wise exercise of constitutional power in enlarging the person of men in unlawful detention. No longer is this liberating writ trammelled by the traditional limits of English vintage; for, our founding fathers exceeded the inspiration of the prerogative writs by phrasing the power in larger diction. That is why, in India, as in the similar jurisdiction in America, the broader horizons of habeas corpus spread out, beyond the orbit of release from illegal custody, into every trauma and torture on persons in legal custody, if the cruelty is contrary to law, degrades human dignity or defiles his personhood to a degree that violates Articles 21, 14 and 19 enlivened by the preamble.

10. The legality of the petitioner's custody is not directly in issue but, though circumscribed by the constraints of lawful detention, the indwelling essence and inalienable attributes of man qua man are entitled to the great rights guaranteed by the Constitution.

11. In Sunil Batra case [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] it has been laid down by a Constitution Bench of this Court that imprisonment does not, ipso facto, mean that fundamental rights desert the detainee.

12. There is no dispute that the petitioner was, as a fact, handcuffed on several occasions. It is admitted, again, that the petitioner was so

handcuffed on October 6, 1979 under orders of the Inspector of Police whose reasons set out in Annexure 'E', to say the least, are vague and unverifiable, even vagarious.

13. Counsel for the respondent in his written submissions states that the petitioner is involved in over a score of cases. But that, by itself, is no ground for handcuffing the prisoner. He further contends that the police authorities are in charge of escorting prisoners and have the discretion to handcuff them, a claim which must be substantiated not merely with reference to the Act and the Rules but also the Articles of the Constitution. We may first state the law and then test that law on the touchstone of constitutionality.

14. Section 9(2)(a) of the Act empowers the State Government to make rules regarding the escort of persons confined in a prison to and from courts in which their attendance is required and for their custody during the period of such attendance. The Punjab Police Rules, 1934 (Vol. III), contain some relevant provisions although the statutory source is not cited. We may extract them here:

> "26.22. Conditions in which handcuffs are to be used.—(1) Every male person falling within the following category, who has to be escorted in police custody, and whether under police arrest, remand or trial, shall, provided that he appears to be in health and not incapable of offering effective resistance by reason of age, be carefully handcuffed on arrest and before removal from any building from which he may be taken after arrest:
>
> (a) Persons accused of a non-bailable offence punishable with any sentence exceeding in severity a term of three years' imprisonment.
>
> (b) Persons accused of an offence punishable under Section 148 or Section 226 of the Indian Penal Code.
>
> (c) Persons accused of, and previously convicted of, such an offence as to bring the case under Section 75 of the Indian Penal Code.

(d) Desperate characters.

(e) Persons who are violent, disorderly or obstructive or acting in a manner calculated to provoke popular demonstration.

(f) Persons who are likely to attempt to escape or to commit suicide or to be the object of an attempt at rescue. This rule shall apply whether the prisoners are escorted by road or in a vehicle.

(2) Better class under trial prisoners must only be handcuffed when this is regarded as necessary for safe custody. When a better class prisoner is handcuffed for reasons other than those contained in (a), (b) and (c) of sub-rule (1) the officer responsible shall enter in the Station Diary or other appropriate record his reasons for considering the use of handcuffs necessary."

This para sanctions handcuffing as a routine exercise on arrest, if any of the conditions, (a) to (f) is satisfied. "Better class" under trial prisoners receive more respectable treatment in the sense that they shall not be handcuffed unless it is necessary for safe custody. Moreover, when handcuffing better class under trials the officer concerned shall record the reasons for considering the use of handcuffs necessary.

15. Better class prisoners are defined in Rule 26.21-A which also may be set out here:

"26.21-A. Classification of under trial prisoners.— Undertrial prisoners are divided into two classes based on previous standard of living. The classifying authority is the trying court subject to the approval of the District Magistrate, but during the period before a prisoner is brought before a competent court, discretion shall be exercised by the officer in-charge of the police station concerned to classify him as either 'better class' or 'ordinary'. Only those prisoners should be classified provisionally as 'better class' who by social status, education or habit of life have been accustomed to a superior

> mode of living. The fact, that the prisoner is to be tried for the commission of any particular class of offence is not to be considered. The possession of a certain degree of literacy is in itself not sufficient for 'better class' classification and no under trial prisoner shall be so classified whose mode of living does not appear to the police officer concerned to have been definitely superior to that of the ordinary run of the population, whether urban or rural under trial prisoners classified as 'better class' shall be given the diet on the same scale as prescribed for A and B class convict prisoners in Rule 26.27(1)."

The dichotomy between ordinary and better class prisoners has relevance to the facilities they enjoy and also bear upon the manacles that may be clamped on their person. Social status, education, mode of living superior to that of the ordinary run of the population, are the demarcating tests.

16. Rule 27.12 directs that prisoners brought into court in handcuffs shall continue in handcuffs unless removal thereof is "specially ordered by the Presiding Officers", that is to say, handcuffs even within the court is the rule and removal an exception.

17. We may advert to revised police instructions and standing orders bearing on handcuffs on prisoners since the escort officials treat these as of scriptural authority. Standing Order 44 reads:

> (1) The rules relating to handcuffing of political prisoners and others are laid down in Police Rules 18.30, 18.35, 26.22, 26.23 and 26.24. A careful perusal of these provisions shows that handcuffs are to be used if a person is involved in serious non-bailable offences, is a previous convict, a desperate character, violent, disordered or obstructive or a person who is likely to commit suicide or who may attempt to escape.
>
> (2) In accordance with the instructions issued by the Government of India, Ministry of Home Affairs, New Delhi vide their letters No. 2/ 15/57-P.IV dated July 26, 1957 and No. 8/70/74-GPA-I dated November 8, 1974, copies of which were sent to all concerned vide this Hdqrs. and St. No. 19143-293/C&T dated September 3, 1976, handcuffs

are normally to be used by the police only where the accused/prisoner is violent, disorderly, obstructive or is likely to attempt to escape or commit suicide or is charged with certain serious non-bailable offences.

(3) * * *

(4) It has been observed that in actual practice prisoners/persons arrested by the police are handcuffed as a matter of routine. This is to be strictly stopped forthwith.

(5) Handcuffs should not be used in routine. They are to be used only where the person is desperate, rowdy or is involved in non-bailable offence. There should ordinarily be no occasion to handcuff persons occupying a good social position in public life, or professionals like jurists, advocates, doctors, writers, educationists and well known journalists. This is at best an illustrative list; obviously it cannot be exhaustive. It is the spirit behind these instructions that should be understood. It shall be the duty of supervisory officers at various levels, the SHO primarily, to see that these instructions are strictly complied with. In case of non-observance of these instructions severe action should be taken against the defaulter.

There is a procedural safeguard in sub-clause (6):

(6) The duty officers of the police station must also ensure that an accused when brought at the police station or despatched, the facts where he was handcuffed or otherwise should be clearly mentioned along with the reasons for handcuffing in the relevant daily diary report. The SHO of the police station and ACP of the Sub-Division will occasionally check up the relevant daily diary to see that these instructions are being complied with by the police station staff.

18. Political prisoners, if handcuffed, should not be walked through the streets (sub-para 7) and so, by implication others can be.

19. These orders are of April 1979 and cancel those of 1972. The instructions on handcuffs of November 1977 may be reproduced in fairness:

In practice it has been observed that handcuffs are being used for under trials who are charged with the offences punishable with imprisonment of less than 3 years which is contrary to the instructions of P.P.R. unless and until the officer handcuffing the undertrial has reasons to believe that the handcuff was used because the under trial was violent, disorderly or obstructive or acting in the manner calculated to provoke popular demonstrations or he has apprehension that the person so handcuffed was likely to attempt to escape or to commit suicide or any other reason of that type for which he should record a report in D.D. before use of handcuff when and wherever available.

The above instructions should be complied with meticulously and all formalities for use of handcuffs should be done before the use of handcuffs.

20. This collection of handcuff law must meet the demands of Articles 14, 19 and 21. In Sobraj case [Sunil Batra v. Delhi Administration, (1978) 4 SCC 494, 545: 1979 SCC (Cri) 155, 206] the imposition of bar fetters on a prisoner was subjected to constitutional scrutiny by this Court. Likewise, irons forced on under trials in transit must conform to the humane imperatives of the triple Articles. Official cruelty, sans constitutionality, degenerates into criminality. Rules, standing orders, instructions and circulars must bow before Part III of the Constitution. So the first task is to assess the limits set by these Articles.

21. The preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual. Article 14 interdicts arbitrary treatment, discriminatory dealings and capricious cruelty. Article 19 prescribes restrictions on free movement unless in the interest of the general public. Article 21 after the landmark case in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 2 SCR 621, 647: (1978) 1 SCC 248] followed by Sunil Batra [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] is the sanctuary of human values, prescribes fair procedure and forbids barbarities, punitive or processual. Such is the apercu, if we may generalize.

22. Handcuffing is prima facie inhuman and, therefore, unreasonable, is over-harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons', is to resort to zoological strategies repugnant to Article 21. Thus, we must critically examine the justification offered by the State for this mode of restraint. Surely, the competing claims of securing the prisoner from fleeing and protecting his personality from barbarity, have to be harmonized. To prevent the escape of an under trial

is in public interest, reasonable, just and cannot, by itself, be castigated. But to bind a man hand-and-foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the courts is to torture him, defile his dignity, vulgarize society and foul the soul of our constitutional culture. Where then do we draw the humane line and how far do the rules err in print and praxis?

23. Insurance against escape does not compulsorily require handcuffing. There are other measures whereby an escort can keep safe custody of a detenu without the indignity and cruelty implicit in handcuffs or other iron contraptions. Indeed, binding together either the hands or the feet or both has not merely a preventive impact, but also a punitive hurtfulness. Manacles are mayhem on the human person and inflict humiliation on the bearer. The Encyclopaedia Britannica, Vol. II (1973 Edn.) at p. 53 states "Handcuffs and fetters are instruments for securing the hands or feet of prisoners under arrest, or as a means of punishment". The three components of 'irons' forced on the human person must be distinctly understood. Firstly, to handcuff is to hoop harshly. Further, to handcuff is to punish humiliatingly and to vulgarize the viewers also. Iron straps are insult and pain writ large, animalizing victim and keeper. Since there are other ways of ensuring security, it can be laid down as a rule that handcuffs or other fetters shall not be forced on the person of an under trial prisoner ordinarily. The latest police instructions produced before us hearteningly reflect this view. We lay down as necessarily implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 (see Sunil Batra [(1978) 4 SCC 494: 1979 SCC (Cri) 155]) cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreason able so to do unless the State is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safe keeping.

24. Once we make it a constitutional mandate that no prisoner shall be handcuffed or fettered routinely or merely for the convenience of the custodian or escort — and we declare that to be the law — the distinction between classes of prisoners becomes constitutionally obsolete. Apart from the fact that economic and social importance cannot be the basis for classifying prisoners for purposes of handcuffs or otherwise, how can

we assume that a rich criminal or under trial is any different from a poor or pariah convict or under trial in the matter of security risk? An affluent in custody may be as dangerous or desperate as an indigent, if not more. He may be more prone to be rescued than an ordinary person. We hold that it is arbitrary and irrational to classify prisoners, for purposes of handcuffs, into 'B' class and ordinary class. No one shall be fettered in any form based on superior class differentia, as the law treats them equally. It is brutalising to handcuff a person in public and so is unreasonable to do so. Of course, the police escort will find it comfortable to fetter their charges and be at ease but that is not a relevant consideration.

25. The only circumstance which validates incapacitation by irons — an extreme measure — is that otherwise there is no other reasonable way of preventing his escape, in the given circumstances. Securing the prisoner being a necessity of judicial trial, the State must take steps in this behalf. But even here, the policeman's easy assumption or scary apprehension or subjective satisfaction of likely escape if fetters are not fitted on the prisoner is not enough. The heavy deprivation of personal liberty must be justifiable as reasonable restriction in the circumstances. Ignominy, inhumanity and affliction, implicit in chains and shackles are permissible, as not unreasonable, only if every other less cruel means is fraught with risks or beyond availability. So it is that to be consistent with Articles 14 and 19 handcuffs must be the last refuge, not the routine regimen. If few more guards will suffice, then no handcuffs. If a close watch by armed policemen will do, then no handcuffs. If alternative measures may be provided, then no iron bondage. This is the legal norm.

26. Functional compulsions of security must reach that dismal degree where no alternative will work except manacles. We must realise that our fundamental rights are heavily loaded in favour of personal liberty even in prison, and so, the traditional approaches without reverence for the worth of the human person are obsolete, although they die hard. Discipline can be exaggerated by prison keepers; dangerousness can be physically worked up by escorts and sadistic disposition, where higher awareness of constitutional rights is absent, may overpower the finer values of dignity and humanity. We regret to observe that cruel and unusual treatment has an unhappy appeal to jail keepers and escorting officers, which must be countered by strict directions to keep to the parameters of the Constitution. The conclusion flowing from these considerations is that there must first be well grounded basis for drawing a strong inference that the prisoner is likely to jump jail or break out of custody or play the

vanishing trick. The belief in this behalf must be based on antecedents which must be recorded and proneness to violence must be authentic. Vague surmises or general averments that the under trial is a crook or desperado, rowdy or maniac, cannot suffice. In short, save in rare cases of concrete proof readily available of the dangerousness of the prisoner in transit — the onus of proof of which is on him who puts the person under irons — the police escort will be committing personal assault or mayhem if he handcuffs or fetters his charge. It is disgusting to see the mechanical way in which callous policemen, cavalier fashion, handcuff prisoner in their charge, indifferently keeping them company assured by the thought that the detainee is under "iron" restraint.

27. Even orders of superiors are no valid justification as constitutional rights cannot be kept in suspense by superior orders, unless there is material, sufficiently stringent, to satisfy a reasonable mind that dangerous and desperate is the prisoner who is being transported and further that by adding to the escort party or other strategy he cannot be kept under control. It is hard to imagine such situations. We must repeat that it is unconscionable, indeed, outrageous, to make the strange classification between better class prisoners and ordinary prisoners in the matter of handcuffing. This elitist concept has no basis except that on the assumption the ordinary Indian is a sub-citizen and freedoms under Part III of the Constitution are the privilege of the upper sector of society.

28. We must clarify a few other facets, in the light of Police Standing Orders. Merely because a person is charged with a grave offence he cannot be handcuffed. He may be very quiet, well-behaved, docile or even timid. Merely because the offence is serious, the inference of escape-proneness or desperate character does not follow. Many other conditions mentioned in the Police Manual are totally incongruous with what we have stated above and must fall as unlawful. Tangible testimony, documentary or other, or desperate behaviour, geared to making good his escape, alone will be a valid ground for handcuffing and fettering, and even this may be avoided by increasing the strength of the escorts or taking the prisoners in well protected vans. It is heartening to note that in some States in this country no handcuffing is done at all, save in rare cases, when taking under trials to courts and the scary impression that unless the person is confined in irons he will run away is a convenient myth.

29. Some increase in the number of escorts, arming them if necessary, special training for escort police, transport of prisoners in protected

vehicles, are easily available alternatives and, in fact, are adopted in some States in the country where handcuffing is virtually abolished e.g. Tamil Nadu.

30. Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reasons for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. Nor will mere recording the reasons do, as that can be a mechanical process mindlessly made. The escorting officer, whenever he handcuffs a prisoner produced in court, must show the reasons so recorded to the Presiding Judge and get his approval. Otherwise, there is no control over possible arbitrariness in applying handcuffs and fetters. The minions of the police establishment must make good their security recipes by getting judicial approval. And, once the court directs that handcuffs shall be off, no escorting authority can overrule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the very procedure which authorises stringent deprivation of life and liberty. The ratio in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 2 SCR 621, 647: (1978) 1 SCC 248] and Sunil Batra case [(1978) 4 SCC 494: 1979 SCC (Cri) 155], read in its proper light, leads us to this conclusion.

31. We, therefore, hold that the petition must be allowed and handcuffs on the prisoner dropped. We declare that the Punjab Police Manual insofar as it puts the ordinary Indian beneath the better class breed (paras 26.21-A and 26.22 of Chapter XXVI) is untenable and arbitrary and direct that Indian humane shall not be dichotomised and the common run discriminated against regarding handcuffs. The provisions in para 26.22(1)(a) that every under trial who is accused of a non-bailable offence punishable with more than 3 years' prison term shall be routinely handcuffed is violative of Articles 14, 19 and 21. So also para 26.22(1)(b) and (c). The nature of the accusation is not the criterion. The clear and present danger of escape (sic escapee) breaking out of the police control is the determinant. And for this there must be clear material, not glib assumption, record of reasons and judicial oversight and summary hearing and direction by the court where the victim is produced. We go further to hold that para 26.22(1)(d), (e) and (f) also hover perilously near unconstitutionality unless read down as we herein direct. "Desperate character" is who? Handcuffs are not summary punishment vicariously imposed at police level, at once obnoxious and irreversible. Armed escorts, worth the salt, can overpower any unarmed under trial and extra guards can make up exceptional needs.

In very special situations, we do not rule out the application of irons. The same reasoning applies to (e) and (f). Why torture the prisoner because others will demonstrate or attempt his rescue? The plain law of under trial custody is thus contrary to the unedifying escort practice. We remove the handcuffs from the law and humanise the police praxis to harmonize with the satwic values of Part III. The law must be firm, not foul, stern, not sadistic, strong, not callous.

32. Traditionally, it used to be thought that the seriousness of the possible sentence is the decisive factor for refusal of bail. The assumption was that this gave a temptation for the prisoner to escape. This is held by modern penologists to be a psychic fallacy and the bail jurisprudence evolved in the English and American jurisdictions and in India now takes a liberal view. The impossibility of easy recapture supplied the temptation to jump custody, not the nature of the offence or sentence. Likewise, the habitual or violent "escape propensities" proved by past conduct or present attempts are a surer guide to the prospects of running away on the sly or by use of force than the offence with which the person is charged or the sentence. Many a murderer, assuming him to be one, is otherwise a normal, well-behaved, even docile, person and it rarely registers in his mind to run away or force his escape. It is an indifferent escort or incompetent guard, not the section with which the accused is charged, that must give the clue to the few escapes that occur. To abscond is a difficult adventure. No study of escapes and their reasons has been made by criminologists and the facile resort to animal keeping methods as an easy substitute appeals to authority in such circumstances. "Human rights" seriousness loses its valence where administrator's convenience prevails over cultural values. The fact remains for its empirical worth, that in some States, e.g. Tamil Nadu and Kerala, handcuffing is rarely done even in serious cases, save in those cases where evidence of dangerousness, underground operations to escape and the like is available. It is interesting that a streak of humanism had found its place in the law of handcuffing even in the old Bombay Criminal Manual [Criminal Manual published by the Bombay High Court, Chapter 5 : handcuffing of (contd.) Prisoners, para 67 (and also para 213 of Criminal Manual Gujarat).(1) Unless the court otherwise directs, no prisoner shall be handcuffed or bound while being taken from the court premises to a jail or a borstal school : Provided that if a police officer escorting such prisoner from the court premises to a jail or a borstal school, considers it necessary to do so in exceptional circumstances such as violence on the part of the prisoner after leaving the court premises,

and cannot get the directions of the court, he may handcuff or bind such prisoner after leaving the premises. (2) No prisoner shall be handcuffed or bound when being taken from a jail or a borstal school to the court premises, unless the jailor of the jail or the superintendent of the borstal school otherwise directs in writing. If the jailor of a jail or the superintendent of a borstal school from which the prisoner is being taken to the court considers in the circumstances stated in clause (1) above necessary to bind or handcuff the prisoner he may direct in writing the officer-in-charge of the escort to do so and the officer shall obey such direction: Provided that the officer-in-charge of the escort may handcuff and/or bind the prisoner when he considers it necessary to do so in exceptional circumstances arising after leaving the jail or the borstal school premises and it is not possible to obtain a direction from the jailor or the superintendent of the borstal school or the court] which now prevails in the Gujarat State and perhaps in the Maharashtra State. But in the light of the constitutional imperatives we have discussed, we enlarge the law of personal liberty further to be in consonance with fundamental rights of persons in custody.

33. There is no genetic criminal tribe as such among humans. A disarmed arrestee has no hope of escape from the law if recapture is a certainty. He heaves a sigh of relief if taken into custody as against the desperate evasions of the chasing and the haunting fear that he may be caught any time. It is superstitious to practise the barbarous bigotry of handcuffs as a routine regimen — an imperial heritage, well preserved. The problem is to get rid of mind-cuffs which make us callous to handcuffing a prisoner who may be a patient even in the hospital bed and tie him up with ropes to the legs of the cot! Zoological culture cannot be compatible with reverence for life, even of a terrible criminal.

34. We have discussed at length what may be dismissed as of little concern. The reason is simple. Any man may, by a freak of fate, become an under trial and every man, barring those who through wealth and political clout, are regarded as V.I.P.'s, are ordinary classes and under the existing Police Manual may be manhandled by handcuffs. The peril to human dignity and fair procedure is, therefore, widespread and we must speak up. Of course, the 1977 and 1979 'instructions' we have referred to earlier show a change of heart. This Court must declare the law so that abuse by escort constables may be repelled. We repeat with respect, the observations in William King Jackson v. D.E. Bishop [Federal Reports, 2nd Series, Vol. 404, p. 571]:

(1) We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. The present record discloses misinterpretation even of the newly adopted. . . .

(2) Rules in this area are seen often to go unobserved.

(3) Regulations are easily circumvented.

(4) Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous.

(5) Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power.

35. Labels like "desperate" and "dangerous" are treacherous. Kent S. Miller, writing on "dangerousness" says: [Managing Madness, pp. 58, 66-68]

Considerable attention has been given to the role of psychological tests in predicting dangerous behaviour, and there is a wide range of opinion as to their value.

Thus, so far no structured or projective test scale has been derived which when used alone, will predict violence in the individual case in a satisfactory manner. Indeed, none has been developed which will adequately postdict let alone predict, violent behaviour. . . .

. . . .But we are on dangerous ground when deprivation of liberty occurs under such conditions.

. . . .The practice has been to markedly over-predict. In addition, the courts and mental health professionals involved have systematically ignored statutory requirements relating to dangerousness and mental illness. . . .

. . . .In balancing the interests of the State against the loss of liberty and rights of the individual, a prediction of dangerous behaviour must have a high level of probability, (a condition which currently does not exist) and the harm to be prevented should be considerable.

36. A law which handcuffs almost every under trial (who presumably, is innocent) is itself dangerous.

37. Before we conclude, we must confess that we have been influenced by the thought that some in authority are sometimes moved by the punitive passion for retribution through the process of parading under trial prisoners cruelly clad in hateful irons. We must also frankly state that our culture, constitutional and other, revolts against such an attitude because, truth to tell,

> "each tear that flows, when it could have been spared, is an accusation and he commits a crime who with brutal inadvertency crushes a poor earthworm. [Rosa Luxemburg] "

38. We clearly declare — and it shall be obeyed from the Inspector General of Police and Inspector General of Prisons to the escort constable and the jail warder — that the rule regarding a prisoner in transit between prison house and court house is freedom from handcuffs and the exception, under conditions of judicial supervision we have indicated earlier, will be restraints with irons, to be justified before or after. We mandate the judicial officer before whom the prisoner is produced to interrogate the prisoner, as a rule, whether he has been subjected to handcuffs or other "irons" treatment and, if he has been, the official concerned shall be asked to explain the action forthwith in the light of this judgment.

Pathak, J. (concurring): I have read the judgment of my learned Brother Krishna Iyer with considerable interest but I should like to set forth my own views shortly.

40. It is an axiom of the criminal law that a person alleged to have committed an offence is liable to arrest. In making an arrest, declares Section 46 of the Code of Criminal Procedure, "the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". If there is forcible resistance to the endeavour to arrest or an attempt to evade the arrest, the law allows the police officer or other person to use all means necessary to effect the arrest. Simultaneously, Section 49 provides that the person arrested must "not be subjected to more restraint than is necessary to prevent his escape". The two sections define the parameters of the power envisaged by the Code in the matter of arrest. And Section 46 (sic 49) in particular, foreshadows the central principle controlling the power to impose restraint on the person of a prisoner while in continued custody. Restraint may be imposed where it is reasonably apprehended

that the prisoner will attempt to escape, and it should not be more than is necessary to prevent him from escaping. Viewed in the light of the law laid down by this Court in Sunil Batra v. Delhi Admn., [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] that a person in custody is not wholly denuded of his fundamental rights, the limitations flowing from that principle acquire a profound significance. The power to restrain, and the degree of restraint to be employed are not for arbitrary exercise. An arbitrary exercise of that power infringes the fundamental rights of the person in custody. And a malicious use of that power can bring Section 220 of the Indian Penal Code into play. Too often is it forgotten that if a police officer is vested with the power to restrain a person or handcuffing him or otherwise there is a simultaneous restraint by the law on the police officer as to the exercise of that power.

41. Whether a person should be physically restrained and, if so, what should be the degree of restraint, is a matter which effects the person in custody so long as he remains in custody. Consistent with the fundamental rights of such person the restraint can be imposed, if at all, to a degree no greater than is necessary for preventing his escape. To prevent his escape is the object of imposing the restraint, and that object defines at once the bounds of that power. The principle is of significant relevance in the present case. The petitioner complains that he is unnecessarily handcuffed when escorted from the jail house to the court building, where he is being tried for criminal offences, and back from the court building to the jail house. He contends that there is no reason why he should be handcuffed. On behalf of the respondent it is pointed out by the Superintendent, Central Jail, Tihar, where the petitioner is detained, that the police authorities take charge of prisoners from the main gate of the jail for the purpose of escorting them to the court building and back, and that the jail authorities have no control during such custody over the manner in which the prisoners are treated. Section 9(2)(c) of the Prisoners Attendance in Courts Act, 1955 empowers the State Government to make rules providing for the escort of persons confined in a prison to and from courts in which their attendance is required and for their custody during the period of such attendance. The Punjab Police Rules, 1934 contain Rule 26.22, which classifies those cases in which handcuffs may be applied. The classification has been attempted somewhat broadly, but it seems to me that some of the clauses of Rule 26.22, particularly clauses (a) to (c), appear to presume that in every instance covered by any of those clauses the accused will attempt to escape. It is difficult to sustain the classification attempted by those clauses. The rule, I think, should be

that the authority responsible for the prisoners custody, should consider the case of each prisoner individually and decide whether the prisoner is a person who having regard to his circumstances, general conduct, behaviour and character will attempt to escape or disturb the peace by becoming violent. That is the basic criterion, and all provisions relating to the imposition of restraint must be guided by it. In the ultimate analysis it is that guiding principle which must determine in each individual case whether a restraint should be imposed and to what degree.

42. Rule 26.22 read with Rule 26.21-A of the Punjab Police Rules, 1934 draw a distinction between "better class" under trial prisoners and "ordinary" under trial prisoners as a basis for determining who should be handcuffed and who should not be. As I have observed, the appropriate principle for a classification should be defined by the need to prevent the prisoner escaping from custody or becoming violent. The social status of a person, his education and habit of life associated with a superior mode of living seem to me to be intended to protect his dignity of person. But that dignity is a dignity which belongs to all, rich and poor, of high social status and low, literate and illiterate. It is the basic assumption that all individuals are entitled to enjoy that dignity that determines the rule that ordinarily no restraint should be imposed except in those cases where there is a reasonable fear of the prisoner attempting to escape or attempting violence. It is abhorrent to envisage a prisoner being handcuffed merely because it is assumed that he does not belong to "a better class" that he does not possess the basic dignity pertaining to every individual. Then there is need to guard against a misuse of the power from other motives. It is grossly objectionable that the power given by the law to impose a restraint, either by applying handcuffs or otherwise, should be seen as an opportunity for exposing the accused to public ridicule and humiliation. Nor is the power intended to be used vindictively or by way of punishment. Standing Order 44 and the Instructions on Handcuffs of November 1977, reproduced by my learned Brother, evidence the growing concern at a higher level of the administration over the indiscriminate manner in which handcuffs are being used. To my mind, even those provisions operate somewhat in excess of the object to be subserved by the imposition of handcuffs, having regard to the central principle that only he should be handcuffed who can be reasonably apprehended to attempt an escape or become violent.

43. Now, whether handcuffs or other restraint should be imposed on a prisoner is primarily a matter for the decision of the authority responsible

for his custody. It is a judgment to be exercised with reference to each individual case. It is for that authority to exercise its discretion, and I am not willing to accept that the primary decision should be that of any other. The matter is one where the circumstances may change from one moment to another, and inevitably in some cases it may fall to the decision of the escorting authority midway to decide on imposing a restraint on the prisoner. I do not think that any prior decision of an external authority can be reasonably imposed on the exercise of that power. But I do agree that there is room for imposing a supervisory regime over the exercise of that power. One sector of supervisory jurisdiction could appropriately lie with the court trying the accused, and it would be desirable for the custodial authority to inform that court of the circumstances in which, and the justification for imposing a restraint on the body of the accused. It should be for the court concerned to work out the modalities of the procedure requisite for the purpose of enforcing such control.

44. In the present case it seems sufficient in my judgment, that the question whether the petitioner should be handcuffed should be left to be dealt with, in the light of the observations made herein, by the Magistrate concerned, before whom the petitioner is brought for trial in the cases instituted against him. The petition is disposed of accordingly."

IN THE SUPREME COURT OF INDIA

Kishore Singh Ravinder Dev & Ors. v. State of Rajasthan

(1981) 1 SCC 503

R.S. Pathak & V.R. Krishna Iyer, JJ.

In this case, the petitioners sent a telegram to a Supreme Court complaining of insufferable, illegal solitary confinement punctuated by periods of iron fetters. The Court directed that the prisoners be released from solitary confinement and freed from fetters.

Iyer, J.: "6. This Court has frowned upon handcuffs save in the "rarest of rare" cases where security will be seriously jeopardized unless iron restraint is necessarily clamped on the prisoner. We are heartened to know that there are States where escorting is done with civility and humanity. For instance, para 443 of the Kerala Police Manual, 1970, Vol. II, reads:

> "443. (1) The use of handcuffs or ropes causes humiliation to the person subjected to the restraint, and is contrary to the modern policy regarding the treatment of offenders. Therefore, handcuffing and/or binding shall be restricted to cases where a person in custody is of a desperate character, or where there are reasons to believe that he will use violence or attempt to escape or where there are other similar reasons necessitating such a step."

We mention this here since policemen who beat those in their custody may with easy conscience handcuff and footcuff their charges, a course contrary to Article 21.

7. The harrowing facts, in substantial measure emerge even from the statement of the case by the State. The petitioners have admittedly been kept in separate solitary rooms for long periods from 8 months to 11 months — spells long enough to be regarded as barbarous if Sunil Batra (I) case [Under Article 32 of the Constitution] is to prevail. Admittedly, cross-bar fetters were put on Kishore Singh for several days and on Surjeet Singh for 30 days — counsel for the petitioner has rightly

submitted that flimsy grounds like "loitering in the prison", behaving insolently and in an "uncivilised" manner tearing off his history ticket, were the foundation for the torturesome treatment of solitary confinement and cross-bar fetters. We have read the affidavit of the Superintendent and feel utterly unsatisfied, that the mandate in Sunil Batra (7) [Under Article 32 of the Constitution] has been obeyed. This case and the uncivilised orders of cellular solitude and traumatic fetters compels us to repeat what we stated earlier in Sunil Batra (II) [Sunil Batra (II) v. Delhi Administration, (1980) 3 SCC 488, 494: 1980 SCC (Cri) 777] : [SCC p. 494,: SCC (Cri) p. 783, para 4] :

> "The essence of the matter is that in our era of human rights consciousness the habeas writ has functional plurality and the constitutional regard for human decency and dignity is tested by this capability." We ideologically accept the words of Will Durant: [Will Durant's article : What Life Has Taught Me, published in Bhavan's Journal, Vol. XXIV, No. 18, quoted in (1978) 4 SCC 494 at 514, para 42]
>
> 'It is time for all good men to come to the aid of their party, whose name is civilization.'

Likewise, we endorse, as part of our constitutional thought, what the British Governments White Paper [Ibid], titled People in Prison, stated with telling effect:

> 'A society that believes in the worth of individual beings can have the quality of its belief judged at least in part by the quality of its prison and probation services and of the resources made available to them.' "

8. We do not accept the Superintendent's version that he had given a hearing to the prisoners before punishing them. It is a self-defensive pretence and perhaps the only veracious alibis available to him are that the vintage Prison Rules [Rule 1 (F) Part 16 and Rule 79 of the Rajasthan Prisons Rules, 1951] support the administrative absolutism of the prison boss and more to the point as counsel Shri Sharma candidly stated. The Superintendent was "innocent" of the benign prescriptions in Sunil Batra (II) decision [John Brown: quoted by Bruce Catton, Life, September 12, 1955]. Indeed, Shri Sharma, convincingly persuaded

us to take a lenient view of the delinquency of the Superintendent by emphasising that he had taken the Prison Superintendent through the effective exercise of reading and explaining the Batra (I) [Under Article 32 of the Constitution] & (II) [John Brown : quoted by Bruce Catton, Life, September 12, 1955] rulings and assuring us that no more of solitary confinement disguised as "keeping in separate cell" and imposition of fetters will take place, save in the rarest of rare cases and with strict adherence to the procedural safeguards contained in the decisions of this Court relating to the punishment of prisoners. We accept the bona fide of the prison official but emphasise that violation of Article 21 as interpreted by this Court in its recent decisions, if repeated, will be visited with more serious consequences. Even so, we will refer to the scripture relied on as absolvent of the sin complained of and reiterate tersely the mandatory prescriptions and prescriptions implicit in Article 21 and elucidated by case-law.

9. Rules 79 and 1(f) of Part XVI of the Rajasthan Prisons Rules, may be extracted here:

> "79. Special precautions for security. — The Superintendent shall use his discretion in ordering such special precautions as may be necessary to be taken for the security of any important prisoner, whether he has received any warning from the Magistrate or not, as the Superintendent is the sole judge of what measures are necessary for the safe custody of the prisoners; he shall be held responsible for seeing that precautions taken are reasonably sufficient for the purpose.
>
> 1. (f) Cells may be used for the confinement of convicted criminal prisoners who are in the opinion of the Superintendent, likely to exercise a bad influence over other prisoners, if kept in their association."

These Rules were framed under Section 46 of the Prisons Act which also may be read at this stage:

> "46. The Superintendent may examine any person touching any such offence, and determine thereupon and punish such offence by....

> (6) imposition of handcuffs of such pattern and weight, in such manner and for such period, as may be prescribed by rules made by the Governor-General-in-Council;
>
> (7) imposition of fetters of such pattern and weight in such manner and for such period, as may be prescribed by the rules made by Governor-General-in-Council;
>
> (8) separate confinement for any period not exceeding three months;
>
> Explanation.—Separate confinement means such confinement with or without labour as secludes a prisoner from communication with, but not from sight of other prisoners, and allows, him not less than one hour's exercise per diem and to have his meals in association with one or more other prisoners;
>
> * * *
>
> (9) Cellular confinement means such confinement with or without labour as entirely secludes a prisoner from communication with, but not from sight of other prisoners."

10. We cannot agree that either the Section or the Rules can be read in the absolutist expansionism the prison authorities would like us to read. That would virtually mean that prisoners are not persons to be dealt with at the mercy of the prison echelons. This country has no totalitarian territory even within the walled world we call prison. Articles 14, 19 and 21 operate within the prisons in the manner explained in Sunil Batra (I) [Under Article 32 of the Constitution], by a Constitution Bench of this Court. It is significant that the two opinions given separately in that judgment agree in spirit and substance, in reasoning and conclusions. Batra in that case was stated to be in a separate confinement and not solitary cell. An identical plea has been put forward here too. For the reasons given in Sunil Batra (I) case [Under Article 32 of the Constitution] we must overrule the extenuatory submission that a separate cell is different from solitary confinement. The petitioners will, therefore, be entitled to move within the confines of the prison like others undergoing rigorous imprisonment. If special restrictions

of a punitive or harsh character have to be imposed for convincing security reasons, it is necessary to comply with natural justice as indicated in Sunil Batra (J) case [Under Article 32 of the Constitution]. Moreover, there must be an appeal not from Caeser to Caeser, but from a prison authority to a judicial organ when such treatment is meted out.

11. Sobraj in the same case [Sunil Batra (I) [Under Article 32 of the Constitution]] was kept in fetters and reasons more persuasive than in the present case were put forward in defence. This Court, however, directed "such fetters shall forthwith be removed". Of course, we do not place any absolute ban but insist that in extreme cases of compelling necessity for security of other prisoners or against escape can such fettering be resorted to. Human dignity is a dear value of our Constitution not to be bartered away for mere apprehensions entertained by jail officials. The latter decision of this Court in Sunil Batra (27) [John Brown: quoted by Bruce Catton, Life, September 12, 1955] clothes with flesh and blood the principles laid down in Sunil Batra (7) [Under Article 32 of the Constitution]. In Rakesh Kaushik [Rakesh Kaushik v. B.L. Vig, 1980 Supp SCC 183, 192: 1980 SCC (Cri) 834, 843] the position has advanced further and concrete directions have been issued which we extract here because the law laid down by this Court applies not to one State or the other but to all national institutions in the country: [SCC p. 192: SCC (Cri) p. 843, para 22]

> "(2) He will further enquire, with specific reference to the charges of personal assault and compulsion for collaboration in canteen swindle and other vices made by the prisoner against the Superintendent and the Deputy Superintendent.
>
> (3) He will go into the question of the directives issued in the concluding portion of Sunil Batra case [John Brown: quoted by Bruce Catton, Life, September 12, 1955] with a view to ascertain whether these directions have been substantially complied with and to the extent there is shortfall or default whether there is any reasonable explanation therefor.
>
> (4) Being a visitor of the jail, it is part of his visitatorial functions for the Sessions Judge to acquaint himself with the condition of tension, vice and violence and prisoners grievances...."

We hold that the jail authorities in Rajasthan will comply with the principles so laid down. We read down Section 46 and Rules 1(F) and 79 of the Rajasthan Prisons Rules and sustain them in this limited fashion.

12. We direct the respondents to act accordingly. Further, we remind that the Sessions Judges in the State of Rajasthan to remember the rulings of this Court in Sunil Batra (I) [Under Article 32 of the Constitution] & (II) [John Brown: quoted by Bruce Catton, Life, September 12, 1955] and Rakesh Kaushik [Ibid] and act in such manner that judicial authority over sentences and the conditions of their incarceration are not eroded by judicial inaction.

13. We find that the old rules and circulars and instructions issued under the Prisons Act are read incongruously with the Constitution especially Article 21 and interpretation put upon it by this Court. We, therefore, direct the State Government of Rajasthan — and indeed, all the other State Governments in the country — to convert the rulings of this Court bearing on Prison Administration into rules and instructions forthwith so that violation of the prisoners' freedoms can be avoided and habeas corpus litigation may not proliferate. After all, human rights are as much cherished by the State as by the citizen."

IN THE SUPREME COURT OF INDIA

Aeltemesh Rein, Advocate, Supreme Court of India v. Union of India

(1988) 4 SCC 54

E.S. Venkataramiah & M.M. Dutt, JJ.

Attention of the Court was drawn to the fact that the Union government and the Delhi Administration had not issued necessary instructions to the police authorities regarding handcuffing. The Court directed that a notice ought to be issued to the Union of India to frame rules or guidelines regarding handcuffing, conforming to earlier judgments of the Supreme Court.

Venkataramiah, J. : "1. On the basis of the allegations made in the above writ petition at the time of the preliminary hearing, the court felt that notice should be issued to the Union of India regarding two matters and accordingly the court made an order that the Union Government shall show cause

(i) why it should not be directed to implement faithfully the decision of this Court in Prem Shankar Shukla v. Delhi Administration [(1980) 3 SCC 526 : (1980) 3 SCR 855 : 1980 SCC (Cri) 815 : 1980 Cri LJ 930] as regards the handcuffing of the accused arrested under the provisions of the criminal law; and

(ii) why it should not be directed to consider the question of issuing a notification bringing Section 30 of the Advocates Act, 1961 (hereinafter referred to as "the Act") into force since already more than 25 years had elapsed from the date of the passing of the Act.

2. The first question referred to above arose on account of the allegations relating to the alleged handcuffing of an advocate practising in Delhi contrary to law while he was being taken to the Court of the Metropolitan Magistrate at Delhi after he had been arrested on the charge of a criminal offence. It is urged that the Union Government and the Delhi Administration had not issued necessary instructions to the police authorities with regard to the

circumstances in which an accused, arrested in a criminal case, could be handcuffed or fettered in accordance with the judgment of this Court in Prem Shankar Shukla v. Delhi Administration [(1980) 3 SCC 526: (1980) 3 SCR 855: 1980 SCC (Cri) 815 : 1980 Cri LJ 930] . The learned Attorney-General of India very fairly conceded that it was for the Union of India to issue necessary instructions in this behalf to all the State Governments and the Governments of Union Territories. We accordingly direct the Union of India to frame rules or guidelines as regards the circumstances in which handcuffing of the accused should be resorted to in conformity with the judgment of this Court referred to above and to circulate them amongst all the State Governments and the Governments of Union Territories. This part of the order shall be complied with within three months."

IN THE SUPREME COURT OF INDIA

Sunil Gupta & Ors. v State of Madhya Pradesh & Ors.

(1990) 3 SCC 119

K. Jayachandra Reddy & S. Ratnavel Pandian, JJ.

Petitioners claimed that while they were protesting, they were arrested abused, beaten, handcuffed, and paraded through the streets on the way to the Court. The Court discussed whether these acts amounted to torture and degrading and inhuman treatment; and if so, the remedies available.

Pandian, J.: "11. …However, the complaint of handcuffing is not denied and that action of the escort police is attempted to be justified mainly in the following grounds:

(1) After pronouncement of the judgment in Criminal Case No. 248/88 arising out of Crime No. 52/88 registered under Sections 186 and 447 IPC, the petitioners 1 to 3 on their conviction got agitated, turned violent and shouted slogans outside and inside the court and in such turbulent circumstances, the escort party felt that it was necessary to handcuff the petitioners.

(2) Paragraph 465(1) of Part III dealing with escorting of arrested and convicted persons (including political persons) falling under Chapter VII of Madhya Pradesh Police Regulations captioned 'Protection and Escort' empowers the escort police to handcuff the arrested or convicted persons if the escort police feels the necessity.

(3) It has been reported by the Jail Superintendent that in several cases the under-trial prisoners have run away from police custody while being taken from jail to court or vice versa.

…

14. The only remaining complaint to be considered is in regard to the handcuffing.

We have already mentioned in the preceding part of the judgment the reasons given by the respondents in justification of the conduct of the escort party in putting menacles on the petitioners 1 and 2. With regard to the reasons assigned by the police, Sunil Gupta in his additional affidavit has stated thus:

> "This fact is incorrect, firstly neither myself nor Raj Narain did shout any slogan in the court though I was handcuffed in the court itself but the handcuffing was not done with the consent of the Magistrate nor it was done under his direction. Raj Narain was taken to jail on April 21, 1989 and was brought in the court on April 22, 1989 under handcuffs from the jail itself to court lock-up and then taken under handcuffs in the court itself in the presence of the Magistrate."

15. Coming to the regulation relied upon by the police, we would like to reproduce the relevant instructions of the Madhya Pradesh Police Regulation hereunder for proper understanding of the plea of justification.

"M.P. POLICE REGULATIONS

CHAPTER VII

Protection and Escort

Part III — Escorting of the arrested and convicted persons (including political persons)

465. When to use handcuffs

Handcuffing will be resorted to only when it is necessary. Its use will be regulated by following instructions.

Instructions regarding use of handcuffs

(1) When a prisoner is to be taken from court to jail or jail to court in the custody; the Magistrate or the Jail Superintendent should give instructions in writing as to whether the prisoner will be handcuffed or not and the escort commander will follow the instructions but when the instructions are for not to handcuff the prisoner and thereafter, due to some reasons if the escort

commander feels that it is necessary to handcuff the prisoner, he should do so in spite of the instructions to the contrary.

(2) ....

(3) The escort commander should ask and obtain orders in writing without fail, regarding handcuffing of prisoners, from the Magistrate or the Jail Superintendent before taking into custody the prisoner for escorting from the court or the jail. Strict action should be taken against any disobedience of this instruction."

16. Undeniably, the escort party neither got instructions nor obtained any orders in writing from the Magistrate or the Jail Superintendent regarding handcuffing of petitioners 1 to 3 as found under the above instructions (1) and (2). The escort commander has also not noted any reason for handcuffing the petitioners on April 22, 1989; on the other hand in the letter dated nil annexed to the counter of SHO, no mention of handcuffing is made at all.

17. Let us examine whether the plea of justification is supported by the materials placed before this Court. Nand Lal Sharma (Head Constable No. 66), who presumably headed the escort party has not stated in his affidavit that he got instructions in writing, either from the Magistrate or from the Jail Superintendent to bind the petitioners 1 to 3 in fetters.

18. Nowhere in his affidavit he swears that he handcuffed the petitioners 1 to 3; either under the orders or directions of the Magistrate. Even the counter-affidavit filed by Shivhare, SHO of Itarsi Police there is no averment that the Magistrate directed the escort party to handcuff the petitioners 1 and 2. For the first time, only in the report dated July 10, 1989, the relevant portion of which is extracted above, it is submitted by the Sub-Inspector, CID to the Superintendent of Police, Hoshangabad that the handcuffing was under the direction of the court.

19. However, in the copies of the daily diary of the date April 22, 1989, it is mentioned that the Head Constable Nand Lal Sharma and the constables of his escort party have been ordered to produce the accused in the court from the jail after handcuffing them and they were further ordered to take the chains besides handcuffs from the armoury. These entries are purported to have been made one at 10.05 a.m. and another at 5.15 p.m. There is specific entry in the said daily diary that the escort party had

produced the three accused before the court after handcuffing them. It seems that certain statements were also recorded from petitioners 1 and 2 on July 4, 1989 and July 5, 1989. One Jasbir has filed reply affidavit submitting that the petitioners 1 and 2 were handcuffed 'within the court room without there being any occasion for the same' and 'the Magistrate never endorsed or directed their handcuffing'. The petitioners have produced two photographs showing that the left hand of one person and the right hand of another person are bound in fetters with a leading chain. In one of the photographs, yet another person standing behind these two persons is also found handcuffed with a leading chain. A number of persons inclusive of some police officials are also found standing nearby indicating that these petitioners 1 to 3 have been publically handcuffed. This handcuffing of petitioners 1 to 3 with the leading chains might not relate to the admitted handcuffing of these petitioners on April 22, 1989 while they were being taken from the prison to the court and from the court to the prison because the close examination of these photographs reveal that the handcuffing of these three persons should have been on a thoroughfare. Though neither the enquiry report dated July 10, 1989 of the Sub-Inspector of CID nor the counter-affidavits filed by the SHO, Head Constable and Constables disclose either about the handcuffing of these three petitioners earlier to April 22, 1989 or about the handcuffing of these petitioners while being taken to court from the jail. We are very much distressed the way in which the respondents have come forward to explain their conduct of handcuffing of these three petitioners while being taken from the court to the jail but make no whisper about the handcuffing from jail to court.

20. This Court on several occasions has made weighty pronouncements decrying and severely condemning the conduct of the escort police in handcuffing the prisoners without any justification. In spite of it, it is very unfortunate that the courts have to repeat and re-repeat its disapproval of unjustifiable handcuffing. As is pointed out by Krishna Iyer, J. speaking for himself and Chinnappa Reddy, J. in Prem Shankar Shukla v. Delhi Administration [(1980) 3 SCC 526 : 1980 SCC (Cri) 815] , this kind of complaint cannot be dismissed as a daily sight to be pitied and buried but to be examined from fundamental viewpoint. In the same judgment, the following observation is made with regard to handcuffing: (SCC pp. 529-30, para 1 and p. 537, para 22)

"Those who are inured to handcuffs and bar fetters

> on others may ignore this grievance, but the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanize him and, therefore, to violate his very personhood, too often using the mask of 'dangerousness' and security."....
>
> "Handcuffing is prima facie inhuman and, therefore, unreasonable, is over-harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons', is to resort to zoological strategies repugnant to Article 21. Thus, we must critically examine the justification offered by the State for this mode of restraint. Surely, the competing claims of securing the prisoner from fleeing and protecting his personality from barbarity, have to be harmonised. To prevent the escape of an undertrial is in public interest, reasonable, just and cannot, by itself, be castigated. But to bind a man hand-and-foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the courts is to torture him, defile his dignity, vulgarise society and foul the soul of our constitutional culture. Where then do we draw the humane line and how far do the rules err in print and praxis?"

21. Chinnappa Reddy, J. in Bhim Singh, MLA v. State of J & K [(1985) 4 SCC 677 : 1976 SCC (Cri) 47] has expressed his view that police officers should have greatest regard for personal liberty of citizens in the following words : (SCC p. 685, para 2)

> "Police officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct."

22. See also Maneka Gandhi v. Union of India [(1978) 1 SCC 248: (1978) 2 SCR 621] , Sunil Batra v. Delhi Administration [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] and Sunil Batra(II) v. Delhi Administration [(1980) 3 SCC 488 : 1980 SCC (Cri) 777] .

23. Coming to the case on hand, we are satisfied that the petitioners are educated persons and selflessly devoting their service to the public cause. They are not the persons who have got tendency to escape from the jail custody. In fact, petitioners 1 and 2 even refused to come out on bail, but chose to continue in prison for a public cause. The offence for which they were tried and convicted under Section 186 of Indian Penal Code is only a bailable offence. Even assuming that they obstructed public servants in discharge of their public functions during the 'dharna' or raised any slogan inside or outside the court, that would not be sufficient cause to handcuff them. Further, there was no reason for handcuffing them while taking them to court from jail on April 22, 1989. One should not lose sight of the fact that when a person is remanded by a judicial order by a competent court, that person comes within the judicial custody of the court. Therefore, the taking of a person from a prison to the court or back from court to the prison by the escort party is only under the judicial orders of the court. Therefore, even if extreme circumstances necessitate the escort party to bind the prisoners in fetters, the escort party should record the reasons for doing so in writing and intimate the court so that the court considering the circumstances either approve or disapprove the action of the escort party and issue necessary directions. It is most painful to note that the petitioners 1 and 2 who staged a 'dharna' for public cause and voluntarily submitted themselves for arrest and who had no tendency to escape had been subjected to humiliation by being handcuffed which act of the escort party is against all norms of decency and which is in utter violation of the principle underlying Article 21 of the Constitution of India. So we strongly condemn this kind of conduct of the escort party arbitrarily and unreasonably humiliating the citizens of the country with obvious motive of pleasing 'someone'.

24. From the discussion made above, we have no compunction in arriving at a conclusion that in the present case, the escort party without any justification had handcuffed the petitioners on April 22, 1989 on both occasions i.e. when taking the petitioners 1 and 2 from the prison to the court and then from the court to the prison. Hence, we direct the Government of Madhya Pradesh to take appropriate action against the

erring escort party for having unjustly and unreasonably handcuffing the petitioners 1 and 2 on April 22, 1989 in accordance with law.

25. As has been pointed out supra, the copies of the photographs produced before this Court clearly reveal that three persons — evidently the petitioners 1 to 3 have been handcuffed with leading chains. We are not able to arrive at a correct conclusion as to when, where and under what circumstance this had happened. Therefore, we further direct the Government of Madhya Pradesh to initiate an enquiry in this matter and to take appropriate action against the erring officials.

26. Lastly, with regard to the prayer of claim for suitable and adequate compensation, we observe that it is open to the petitioners to take appropriate action against the erring officials in accordance with law, if they are so advised, and in that case, the court in which the claim is made can examine the claim not being influenced by any observation made in this judgment.

27. In the result, the writ petitions are disposed of subject to the observations made above."

IN THE SUPREME COURT OF INDIA

State of Maharashtra & Ors. v. Ravikant S. Patel

(1991) 2 SCC 373

S.R. Pandian & K. Jayachandra Reddy, JJ.

The police arrested the respondent on charges of murder. He was handcuffed, both his arms were tied by a rope, and he was taken by the police in a procession/parade from the police station through the main squares of the city, allegedly for the purpose of investigation. The respondent filed a writ petition seeking a censure of the police officer, as well as damages.

Reddy, J.:"3. It is submitted before us that the respondent had a long criminal record and that the murder of Ganesh Kolekar was as a result of enmity between the two gangs and the respondent belonged to one gang and the situation required that he should be taken after being handcuffed. The High Court elaborately dealt with this aspect and held that the explanation given by the Inspector of Police is wholly unacceptable. On behalf of the respondent, reliance is placed on some of the decisions of this Court on the aspect of handcuffing and violation of Article 21 of the Constitution of India. In Sunil Batra v. Delhi Administration [(1978) 4 SCC 494: 1979 SCC (Cri) 155] , a Constitution Bench of this Court held that: (SCC p. 568, para 213) "the convicts are not wholly denuded of their fundamental rights …. Prisoners are entitled to all constitutional rights unless their liberty has been constitutionally curtailed." In Prem Shankar Shukla v. Delhi Administration [(1980) 3 SCC 526 : 1980 SCC (Cri) 815] , this Court observed that: (SCC HN) "To be consistent with Articles 14 and 19 handcuffs must be the last refuge as there are other ways for ensuring security. No prisoner shall be handcuffed or fettered routinely or merely for the convenience of the custodian or escort." In Sunil Gupta v. State of M.P. [(1990) 3 SCC 119 : 1990 SCC (Cri) 440] , this Court again reiterated following the principles laid down in Sunil Batra case [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] and other cases held that handcuffing is an act against all norms of decency and amounts to violation of principle underlying Article 21. This Court also directed the State Government to take appropriate action against the

erring officials for having unjustly and unreasonably handcuffed the arrested persons.

4. Having gone through the entire record, we are unable to disagree with some of the findings of the High Court regarding the handcuffing and we do not propose to interfere with the order directing the payment of compensation. But we think that Shri Prakash Chavan, Inspector of Police, appellant 2 herein, cannot be made personally liable. He has acted only as an official and even assuming that he has exceeded his limits and thus erred in taking the undertrial prisoner handcuffed, still we do not think that he can be made personally liable. In Rudul Sah v. State of Bihar [(1983) 4 SCC 141: 1983 SCC (Cri) 798], this Court directed the State to pay compensation to the person illegally detained. The High Court also having noted this decision observed that the court can order payment of compensation either by the State or persons acting on behalf of the State. Having so observed, the High Court, however, held Shri Prakash Chavan, Inspector of Police personally liable and directed him to pay the compensation. We are of the view that in the instant case also a similar order as one passed in Rudul Sah case [(1983) 4 SCC 141: 1983 SCC (Cri) 798], will meet the ends of justice. Then the High Court has also directed that an entry should be made in his service record to the effect that he was guilty of violation of fundamental right of an undertrial prisoner. So far this direction is concerned, it is submitted that such an adverse entry cannot straightway be made without giving the Inspector of Police, appellant 2 herein, an opportunity of being heard. We find considerable force in this submission and accordingly we modify the order of the High Court as follows.

5. The compensation of Rs 10,000 as awarded by the High Court, shall be paid by the State of Maharashtra. The concerned authorities may, if they think it necessary, hold an enquiry and then decide whether any further action has to be taken against Shri Prakash Chavan, Inspector of Police. Subject to the above directions, this appeal is disposed of."

IN THE SUPREME COURT OF INDIA

Citizens for Democracy through its President v. State of Assam & Ors.

(1995) 3 SCC 743

Kuldip Singh & N.G. Venkatachala, JJ.

The Petitioner wrote a letter to the Supreme Court stating that he saw 7 TADA detenus put in one room and handcuffed to their bed at the Guwahati Medical College Hospital. The detenus were also tied to their bed with a long rope to contain their movement even though there was no material put forward by the government to draw an inference that the detenus were likely to break out of custody. The reasons given for keeping the detenus under fetters were that they allegedly were hardcore ULFA activists and earlier during the period 1991-94 as many as 51 detenus escaped from custody, including 13 alleged terrorists, seven of whom escaped from Guwahati Medical College Hospital. In its decision, the Court examined when a person can be placed in handcuffs and the procedure to be followed for the same.

Singh, J.:"9… This Court has categorically held that the relevant considerations for putting a prisoner in fetters are the character, antecedents and propensities of the prisoner. The peculiar and special characteristics of each individual prisoner have to be taken into consideration. The nature or length of sentence or the number of convictions or the gruesome character of the crime the prisoner is alleged to have committed are not by themselves relevant consideration. Krishna Iyer, J. in Sunil Batra case [(1978) 4 SCC 494: 1979 SCC (Cri) 155 : (1979) 1 SCR 392] observed as under: (SCC pp. 549-51, paras 153 and 159)

> "The defence of the State is that high-risk prisoners, even the undertrials, cannot be allowed to bid for escape, and where circumstances justify any result-oriented measure, including fetters is legally permissible ….
>
> A synthetic grasp of the claims of custodial security and

> prison humanity is essential to solve the dilemma posed by the Additional Solicitor General. If we are soft on security, escapes will escalate: so be stern, 'red in tooth and claw' is the submission. Security first and security last, is an argument with a familiar and fearful ring with Dwyerlist memories and recent happenings. To cry 'wolf' as a cover for official violence upon helpless prisoners is a cowardly act. Chaining all prisoners, amputating many, caging some, can all be fobbed off, if every undertrial or convict were painted as a potentially dangerous maniac. Assuming a few are likely to escape, would you shoot a hundred prisoners or whip everyone every day or fetter all suspects to prevent one jumping jail? These wild apprehensions have no value in our human order, if Articles 14, 19 and 21 are the prime actors in the constitutional play. We just cannot accede to arguments intended to stampede courts into vesting unlimited power in risky hands with no convincing mechanism for prompt, impartial check. A sober balance, a realistic system, with monitoring of abuses and reverence for human rights — that alone will fill the constitutional bill."

10. This Court in Shukla case [(1980) 3 SCC 526: 1980 SCC (Cri) 815: (1980) 3 SCR 855] categorically held that handcuffing is prima facie inhuman, unreasonable, arbitrary and as such repugnant to Article 21 of the Constitution of India. To prevent the escape of an undertrial is, no doubt, in public interest, but "to bind a man hand-and-foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the courts is to torture him, defile his dignity, vulgarise society and foul the soul of our constitutional culture".

…

13. It is not necessary to burden this judgment by quoting further paragraphs from the judgment of this Court in Shukla case [(1980) 3 SCC 526: 1980 SCC (Cri) 815: (1980) 3 SCR 855]. Suffice it to say that this Court has, clearly and firmly, laid down that the police and the jail authorities are under a public duty to prevent the escape of prisoners and provide them with safe custody but at the same time the rights of the prisoners guaranteed to them under Articles 14, 19 and 21 of the Constitution of India cannot be infracted. The authorities are justified in taking suitable measures, legally permissible, to safeguard the custody of the prisoners,

but the use of fetters purely at the whims or subjective discretion of the authorities is not permissible.

14. This Court in Batra case [(1978) 4 SCC 494: 1979 SCC (Cri) 155: (1979) 1 SCR 392] and Shukla case [(1980) 3 SCC 526 : 1980 SCC (Cri) 815 : (1980) 3 SCR 855] elaborately dealt with the extreme situation when the police and jail authorities can resort to handcuffing of the prisoners inside and outside the jail. It is a pity that the authorities have miserably failed to follow the law laid down by this Court in the matter of handcuffing of prisoners. The directions given by this Court are not being followed and are being treated as a pious declaration. We take judicial notice of the fact that the police and the jail authorities are even now using handcuffs and other fetters indiscriminately and without any justification. It has, therefore, become necessary to give binding directions and enforce the same meticulously.

15. We have elaborately narrated the facts of the present case. We are of the view that there is no basis whatsoever for drawing an inference that the seven detenus who were lodged inside the ward of a hospital were likely to escape from custody. The antecedents of the detenus are not known. There is nothing on the record to show that they are prone to violence. General averments that the detenus are hardcore activists of ULFA and that they are accused of terrorist and disruptive activities, murder, extortion, holding and smuggling of arms and ammunition are not sufficient to place them under fetters and ropes while lodged in a closed ward of the hospital as patients. Security guards were posted outside the ward. It is not disputed that while in jail the detenus were not handcuffed. They cannot be in a worst condition while in hospital under treatment as patients. In any case to safeguard any attempt to escape, extra armed guards can be deployed around the ward of the hospital where the detenus are lodged. The handcuffing and in addition tying with ropes of the patient-prisoners who are lodged in the hospital is, the least we can say, inhuman and in utter violation of the human rights guaranteed to an individual under the international law and the law of the land. We are, therefore, of the view that the action of the respondents was wholly unjustified and against law. We direct that the detenus — in case they are still in hospital — be relieved from the fetters and the ropes with immediate effect.

16. We declare, direct and lay down as a rule that handcuffs or other fetters shall not be forced on a prisoner — convicted or undertrial —

while lodged in a jail anywhere in the country or while transporting or in transit from one jail to another or from jail to court and back. The police and the jail authorities, on their own, shall have no authority to direct the handcuffing of any inmate of a jail in the country or during transport from one jail to another or from jail to court and back.

17. Where the police or the jail authorities have well-grounded basis for drawing a strong inference that a particular prisoner is likely to jump jail or break out of the custody, then the said prisoner be produced before the Magistrate concerned and a prayer for permission to handcuff the prisoner be made before the said Magistrate. Save in rare cases of concrete proof regarding proneness of the prisoner to violence, his tendency to escape, he being so dangerous/desperate and the finding that no other practical way of forbidding escape is available, the Magistrate may grant permission to handcuff the prisoner.

18. In all the cases where a person arrested by police, is produced before the Magistrate and remand — judicial or non-judicial — is given by the Magistrate the person concerned shall not be handcuffed unless special orders in that respect are obtained from the Magistrate at the time of the grant of the remand.

19. When the police arrests a person in execution of a warrant of arrest obtained from a Magistrate, the person so arrested shall not be handcuffed unless the police has also obtained orders from the Magistrate for the handcuffing of the person to be so arrested.

20. Where a person is arrested by the police without warrant the police officer concerned may if he is satisfied, on the basis of the guidelines given by us in para above, that it is necessary to handcuff such a person, he may do so till the time he is taken to the police station and thereafter his production before the Magistrate. Further use of fetters thereafter can only be under the orders of the Magistrate as already indicated by us.

21. We direct all ranks of police and the prison authorities to meticulously obey the above-mentioned directions. Any violation of any of the directions issued by us by any rank of police in the country or member of the jail establishment shall be summarily punishable under the Contempt of Courts Act apart from other penal consequences under law. The writ petition is allowed in the above terms. No costs."

IN THE SUPREME COURT OF INDIA

Gurdeep Singh @ Deep v. The State (Delhi Admin)

(2000) 1 SCC 498

K.T. Thomas & A.P. Misra, JJ.

The appellant claimed that his confessional statement cannot be considered voluntary under Section 15 of TADA as it was made under threat. To substantiate this claim, he stated that he was handcuffed at the time of recording his confession, and there was another policeman in the same room holding the chain of his handcuff. Armed guards were also present outside the room in which his confession was recorded. The issue in this case was whether such a confession can be considered voluntary under Section 15 of TADA.

Misra, J.:"23…We may at the outset record that it is also not in dispute that the appellant was handcuffed while the confessional statement was recorded and there was another policeman with the chain of his handcuffs at some distance in the room and there were armed guards outside the room, where the confessional statement was recorded. This leaves us to consider the question whether this set of situation could be construed to be such as to infer that the confessional statement recorded was not voluntary. In considering this we have to keep in mind the distinction between the TADA Act and the other criminal trial. While a confession recorded under the TADA Act before a police officer not below the rank of Superintendent of Police even under police custody is admissible but not under other criminal trials. Keeping an accused under police custody in what manner with what precautions is a matter for the police administration to decide. It is for them to decide what essential measures are to be taken in a given case for the purpose of security. What security, in which manner, are all in the realm of administrative exigencies and would depend on the class of accused, his antecedents and other information etc. The security is also necessary for the police personnel keeping him in custody or other personnel of the police administration including the public at large. Thus what measure has to be taken is for the police administration to decide and if they feel greater security is required in a case of trial under the TADA Act, it is for

them to decide accordingly. The Preamble of the TADA Act itself reveals that this Act makes special provisions for the prevention of and for coping with terrorists and disruptive activities. In fact the earlier TADA Act of 1985 was repealed to bring in the present Act to strengthen the prosecution to bring to book those involved under it without their filtering out, by bringing in more stringent measures under it. In this background, we do not find the handcuffing of the appellant or another policeman being present in the room with the chain of his handcuffs or armed guards present outside the room to be such as to constitute (sic conclude) that the appellant's confessional statement was not made voluntarily. It has to be kept in mind that Section 15 and Rule 15 of the TADA Act and the Rules have taken full precaution to see that confessional statement is only recorded when one makes it voluntarily. First, confession could only be recorded by a police officer of the rank of Superintendent of Police or above. Such police officer has to record in his own handwriting, he has to clearly tell such accused person that such confession made by him shall be used against him and if such police officer after questioning comes to the conclusion that it is not going to be voluntarily he shall not record the same. Keeping this in the background which is complied with in the present case and keeping the administrative exigencies under which an accused is kept under handcuffs with armed guards etc. which may be for the antecedent activities of the appellant as a terrorist, for the purpose of security, then this could in no way be constituted to be a threat or coercion to the accused for making his confessional statement. The policeman holding the chain of his handcuffs was only a constable and the person recording his confession was of the rank of Superintendent of Police. The Superintendent of Police conveyed confidence to the appellant and made it clear to the appellant as aforesaid. After all this, if the appellant was still ready and made his confessional statement, then merely the presence of a constable, a subordinate of the Superintendent of Police, who was holding the chain cannot be constituted to be such a threat which could induce him not to make any voluntary statement. Hence, we have no hesitation to hold that the presence of a constable in a room could not in fact or law be constituted to be such to hold that such confessional statement was not made voluntarily. Mere handcuffing and the presence of a policeman we fail to understand in what way could it be said to be a threat to the accused appellant. It is not the case that before making confessional statement any inducement, threat or promise by any other word or deed was made to him by any person which resulted in his making the said confessional statement. Firstly, we find a total absence of inducement, threat or promise in the present case as against the appellant and as we have said handcuffing, the presence

of a policeman holding the chain of the handcuffs or even keeping armed guards outside the room which being parts of the security measure by itself cannot penetrate into the realm as to make a confessional statement not to be voluntarily made.

24. For the aforesaid reasons and on the facts and circumstances of this case, we have no hesitation to hold that the confessional statement of the appellant is not only admissible but was voluntarily and truthfully made by him on which the prosecution could rely for his conviction. Such confessional statement does not require any further corroboration. Before reliance could be placed on such confessional statement, even though voluntarily made, it has to be seen by the court whether it is truthfully made or not. However, in the present case we are not called upon nor is it challenged that the confessional statement was not made truthfully. So for all these reasons we hold that the impugned judgment passed by the Designated Court was just and proper which does not require any interference by this Court. We confirm the conviction and sentence. The appeal is accordingly dismissed.

25. Before concluding, we would like to record our conscientious feeling for the consideration by the legislature, if it deem fit and proper. Punishment to an accused in criminal jurisprudence is not merely to punish the wrongdoer but also to strike a warning to those who are in the same sphere of crime or to those intending to join in such crime. This punishment is also to reform such wrongdoers not to commit such offence in future. The long procedure and the arduous journey of the prosecution to find the whole truth is achieved sometimes by turning on the accused as approvers. This is by giving incentive to an accused to speak the truth without fear of conviction. Now turning to the confessional statement, since it comes from the core of the heart through repentance, where such accused is even ready to undertake the consequential punishment under the law, it is this area which needs some encouragement to such an accused through some respite may be by reducing the period of punishment, such incentive would transform more such incoming accused to confess and speak the truth. This may help to transform an accused, to reach the truth and bring to an end successfully the prosecution of the case.

26. In view of the finding, as aforesaid, we uphold the judgment and order passed by the Designated Court No. III and uphold the conviction of the appellant under the aforesaid sections. The appeal is accordingly dismissed."

CHAPTER 3
BAIL AND REMAND

BAIL AND REMAND

Factors to be considered while granting bail

In **Gurcharan Singh & Others v. State (Delhi Administration)**,[1] the Supreme Court noted the factors that a court should consider while deciding on bail. These include: the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds. It further held that the considerations in granting bail are common both in the case of Section 437(1) and Section 439(1) CrPC Subsequently, in **Gudikanti Narasimhulu & Ors v. Public Prosecutor, High Court of Andhra Pradesh**,[2] the Court ruled on the manner in which bail discretion should be exercise by a court, especially in the context of Articles 14, 19 and 21 of the Constitution of India.

The question of whether the limitations to granting bail specified in Section 437(1), CrPC are applicable to Section 439, CrPC was dealt with in **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav & Another.**[3] The Supreme Court held that the conditions under Section 437(1)(i) CrPCare indeed applicable to granting of bail under Section 439 CrPC It also examined factors that are germane to the consideration of the bail applications, namely the nature of accusation and severity of punishment, reasonable apprehension of tampering with witnesses and *prima facie* satisfaction of the Court in relation to the charge. Further, the Court opined that if the bail has been rejected earlier, and a subsequent bail application is filed by the accused, then specific reasons needs to be cited to determine why the bail should be granted. The issue of application of the limitations specified in Section 437(1) to Section 439 was raised yet again in **Jayendra Saraswathi Swamigal v. State of Tamil Nadu.**[4] The Court

1 (1978) 1 SCC 118
2 (1978) 1 SCC 240
3 (2004) 7 SCC 528
4 (2005) 2 SCC 13

held that principles laid down in *Kalyan Chandra Sarkar* were done so in the context of the peculiar facts of that case. It held that there is no rule that a person who the court believes might be guilty of having committed an offence punishable with death or imprisonment for life, should not be granted bail under Section 439, CrPC. The Court, reiterating principles laid down in *Gurcharan Singh* and other cases, held that the factors to be considered while granting bail are the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. Subsequently, in **Vaman Narain Ghiya v. State of Rajasthan**,[5] the Supreme Court held that while granting bail detailed discussion of the evidence and elaborate documentation of the merits is to be avoided and only existence of prima facie case should be considered.

In **Rajesh Ranjan Yadav alias Pappu Yadav v. CBI through its Director**,[6] the Supreme Court held that long incarceration in and off itself does not form a reason for granting bail. The Court stated that while Article 21 is of great importance, a balance has to be struck between the right to individual liberty and the interest of the society. Factors such as the interest of the society also have to be considered while evaluating an application seeking bail.

Two important cases have arisen in the context of economic offences of a large scale. In **Sanjay Chandra v. Central Bureau of Investigation**,[7] the Court held that the object of the bail is neither punitive nor preventive. The Court held that although the economic offence committed was serious in nature, the same must be balanced with other factors such as the punishment that could be imposed after trial and conviction. It further ruled that the right to bail cannot be denied merely because the sentiments of the community run against the accused. However, in **Y.S. Jagan Mohan Reddy v. CBI**,[8] the Supreme Court held that economic offences are a class apart and hence, a different approach is required in dealing with applications for bail in such offences. The Court advocated keeping larger interests of the society in mind, while deciding on a bail application in economic offences.

5 (2009) 2 SCC 281
6 (2007) 1 SCC 70
7 (2012) 1 SCC 40
8 (2013) 7 SCC 439

The Supreme Court has also in multiple cases dealt with the anti-poor impact of bail laws and suggested steps to ensure against disparate impact of the law. In **Moti Ram v. State of M.P.**,[9] the Court discussed the enlargement of bail on one's own bond with or without sureties, as also not insisting on local sureties. In **Hussainara Khatoon (I) v. Home Secy., State of Bihar**,[10] the Court expressed its anguish at the incarceration of a huge number of undertrials, and directed them to be released. The Court also proposed alternative grounds to grant bail rather than the regular offence-related or finance-related grounds.

Default Bail – Section 167(2), CrPC

In **Uday Mohanlal Acharya v. State of Maharashtra**,[11] the Supreme Court was called upon to decide whether bail could be granted in a case where the chargesheet is filed after the period specified under Section 167(2), but before the decision of the Court on the issue of bail. The issue before the Court involved the interpretation of the term "availed of." A Constitution Bench of the Court in **Sanjay Dutt v. State**,[12] had held that the indefeasible right of the accused to be released on bail under Section 167(2) is defeated if the bail is *not availed of* before the filing of the charge sheet. The Court in *Acharya* interpreted "availed of" to mean even the filing of bail application and offering therein to furnish the bail in question. It ruled that is sufficient the standard per **Sanjay Dutt** would be satisfied in such a situation. However, subsequently in **Pragyna Singh Thakur v. State of Maharashtra**,[13] the Court held that the right to default bail is not an absolute or indefeasible right and if the chargesheet is filed before the application for bail is considered, then the said right would be lost and the application will be considered only on merits. Further, the Court also ruled that the relevant date from which the period of 90 or 60 days, as the case may be, is the date of first order of remand and not the date of arrest.

Bail in Special Criminal Statutes

Special criminal legislations such as the NDPS Act, TADA, MCOCA and others make various modifications to the general law relating to bail. Various cases have arisen in the context of these statutes. In **Supreme**

9 (1978) 4 SCC 47
10 (1980) 1 SCC 81
11 (2001) 5 SCC 453
12 (1994) 5 SCC 410
13 (2011) 10 SCC 445

Court Legal Aid Committee representing Undertrial prisoners v. Union of India,[14] the Court laid down guidelines relating to granting of bail in cases under the NDPS Act. It held that bail shall be granted if the accused has been in jail for a period which is not less than half the punishment under the Act, except in cases where the person is being prosecuted for an offence either under Section 31 or 31A of the Act. It also laid down general conditions that need to be followed while granting bail. Although the Court had stated that the guidelines were a one-time measure, owing to the long delay in trials in NDPS cases, the Court has followed these guidelines subsequently. For instance, in **Thana Singh v. Central Bureau of Narcotics**,[15] the Court granted bail to a person who had already been in custody for 12 years.

Another important case in the context of special laws is the decision of a Constitutional Bench of the Supreme Court in **Sanjay Dutt v. State**.[16] One of the issues discussed was with respect to default bail [see above] wherein the Court held that if the bail is not "availed of" before the chargesheet is filed, the right to be granted bail does not survive. The Court also ruled that a condition in the TADA Act, that the court while granting bail should have grounds to believe that the accused is not guilty of an offence under the Act, is not unreasonable.

The issue of "default bail" arose in the context of the MCOC Act in **State of Maharashtra v. Bharati Chandamal Varma**.[17] The Court held that 90 days shall be calculated from the date of remand and not from the date when the official sanction for investigation was given under the MCOC Act. The constitutionality of the Section 21 of the MCOC Act, which dealt with substantive bail was dealt with in **State of Maharashtra v. Bharat Shantilal Shah**.[18] Section 21(5) of the Act extended the scope beyond MCOCA to any other legislation and stated that bail shall not be granted if it is noticed by the court that the person was on bail in an offence under the Act, or under any other Act, on the date of the offence in question. The Supreme Court held that extending the scope of the legislation to other legislations violated Articles 14 and 21 of the Constitution of India, and excised the words "or under any other Act" from Section 21(5) of MCOCA.

14 (1994) 6 SCC 731
15 (2013) 2 SCC 603
16 (1994) 5 SCC 410
17 (2002) 2 SCC 121
18 (2008) 13 SCC 5

Anticipatory Bail

The Constitution Bench of the Supreme Court in **Gurbaksh Singh Sibbia v. State of Punjab**,[19] provided a detailed analysis of Section 438 of the CrPC, that deals with anticipatory bail. It discussed the history and objectives of the provision, and laid down guidelines with respect to the scope of anticipatory bail, and the manner in which discretion to grant/ reject anticipatory bail should be exercised. More recently, the Court in **Siddharam Satlingappa Mhetre v. State of Maharashtra**,[20] clarified various issues that had arisen because of various benches of the Court not adhering to the principles laid down in *Sibbia*. The Court reiterated *Sibbia* and added to the list of factors to be taken into consideration while granting anticipatory bail. In **Rashmi Rekha Thatoi v State of Orissa**,[21] the Court held that a condition mandating that the accused surrender before being released on anticipatory bail is not legally permissible. Further, in **Hema Mishra v. State of Uttar Pradesh**,[22] the Supreme Court held that a person can invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution for relief against pre-arrest, even when Section 438 CrPC authorising the Court to grant such a relief is specifically omitted and made inapplicable.

Cancellation of Bail

The landmark decision of the Supreme Court with respect to the power of cancellation of bail is **State (Delhi Administration) v. Sanjay Gandhi**.[23] The Court laid down factors that should be kept in mind when cancelling bail, and noted that it is an extraordinary power of the court, which should be exercised with circumspection. It also discussed issues relating to standard of proof and held that the prosecution needs to prove on preponderance of probabilities that the accused is abusing bail that has been granted to him/her. More recently, in **Prakash Kadam v. Ramprasad Vishwanath Gupta**,[24] the Supreme Court reiterated factors that need to be considered while exercising discretion to cancel bail.

19 (1980) 2 SCC 565
20 (2011) 1 SCC 694
21 (2012) 5 SCC 690
22 (2014) 4 SCC 453
23 (1978) 2 SCC 411
24 (2011) 6 SCC 189

On the question of cancellation of "default bail," the Supreme Court in **Aslam Babalal Desai v. State of Maharashtra**,[25] held that bail granted under Section 167 cannot be cancelled by the mere filing of a charge sheet. A bail granted under Section 167 is deemed to be granted under Section 437, 439 etc. and therefore the cancellation of bail under these provisions (Section 437(5), 439(2)) would be applicable for grant of bail. The issue of whether bail granted in a bailable offence may be cancelled was discussed by the Supreme Court in **Rasiklal v. Kisore**.[26] The Court held that a High Court may cancel such bail and order re-arrest using its inherent powers under Section 482 of the CrPC It also provided an illustrative list of circumstances that would be relevant in deciding on whether the person's bail should be cancelled. It also held that the failure to give notice to, and hear the complainant is not a ground to cancel bail.

Miscellaneous Issues

A Full Bench of the Allahabad High Court in **Smt. Amarawati v. State of Uttar Pradesh**,[27] held that a subordinate court should not be directed to hear and dispose a bail application on the same day. It held that as far as possible courts should attempt to do so, and state reasons for such inability if they are unable to decide the application on the same day. The Court held that a Sessions court may also grant interim bail pending its decision on the application for bail. In **Menino Lopes v. State of Goa**,[28] the Bombay High Court held that it is not necessary that if an application for bail is rejected by a single judge of the High Court, a subsequent bail application has to be heard and decided by him/her. **Kashmira Singh v. State of Punjab**,[29] the Supreme Court ruled against a practice that had developed in the High Courts and the Supreme Court not to grant bail to a person sentenced to imprisonment for life, unless his conviction or sentence were set aside. It held that the fact that special leave had been given to appeal was an indication that the Court believed that *prima facie* there were issues that need to be determined. Keeping the person in custody solely on the basis of the sentence awarded, the Court held, would be unfair.

25 (1992) 4 SCC 272
26 (2009) 4 SCC 446
27 2004 SCC Online All 1112
28 (1995) 1 Bom CR 334
29 (1977) 4 SCC 291

Remand

In **Central Bureau of Investigation, Special Investigation Cell – I, New Delhi v. Anupam J. Kulkarni,**[30] the Court held that an order of police remand cannot be made beyond the first fifteen days even under circumstances where the accused is unavailable to be remanded to police custody, for instance due to his being admitted in a hospital. The Court further clarified that the police cannot seek custody for another offence/s committed during the same transaction, by filing a later FIR and thus attempting to circumvent the fifteen day period. Remanding to police custody beyond the first fifteen days is only available if the offence/s arise out of a different transaction. In **Satyajit Ballubhai Desai v. State of Gujarat**,[31] the Supreme Court reiterated that remanding to police custody should be an exception and not a rule, and the police remand of an accused who has been enlarged on bail should not be granted for undisclosed and flimsy reasons.

In **Maulavi Hussein Haji Abraham Umarji v. State of Gujarat**,[32] the Supreme Court interpreting Section 49(2)(b) of POTA held an application for police custody under POTA can be made seeking the police custody of a person who has been remanded to judicial custody even after the initial period of 30 days of police custody. It held that there are sufficient safeguards available in the Act to prevent misuse of the provision by the police.

30 (1992) 3 SCC 141
31 (2014) 14 SCC 434
32 (2004) 6 SCC 672

IN THE SUPREME COURT OF INDIA

Kashmira Singh v. State of Punjab

(1977) 4 SCC 291

P.N. Bhagwati & A.C. Gupta, JJ.

The appellant was originally charged under Sections 323 and 302 of the IPC. The trial court convicted him under Section 323, but acquitted him of the charge under Section 302. On appeal by the State, the High Court set aside the appellant's acquittal under Section 302 of the IPC and sentenced him to life imprisonment. Special Leave to appeal to the Supreme Court was granted. His initial application for bail pending the hearing of the appeal was dismissed. The appellant preferred another bail application. In this case, the Court ruled on the validity and enforceability of a practise among High Courts and the Supreme Court wherein a person who had been sentenced to life imprisonment would not be released on bail so long as his conviction and sentence were not set aside.

Bhagwati, J.: "2. The appellant contends in this application that pending the hearing of the appeal he should be released on bail. Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years.

It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence.

3. … The very fact that this Court has granted to the appellant special leave to appeal against his conviction shows that, in the opinion of this Court, he has prima facie a good case to consider and in the circumstances it would be highly unjust to detain him in jail any longer during the hearing of the appeal."

IN THE SUPREME COURT OF INDIA

Gurcharan Singh & Ors. v. State (Delhi Administration)

(1978) 1 SCC 118

P.K. Goswami & V.D.Tulzapurkar, JJ.

The appellants in this case were allegedly a party to a criminal conspiracy to murder a man. Four of the appellants were granted bail by the order of the Sessions Judge which was set aside by the High Court under Section 439(2) CrPC. A Special Leave Petition was filed in the Supreme Court against the order of High Court. The Supreme Court examined the nature and scope of bail under Sections 437 and 439(1) & (2).

Goswami, J.: "13. … Under the new as well as the old Code an accused after being arrested is produced before the Court of a Magistrate. There is no provision in the Code whereby the accused is for the first time produced after initial arrest before the Court of Session or before the High Court. Section 437(1) CrPC, therefore, takes care of the situation arising out of an accused being arrested by the police and produced before a Magistrate. What has been the rule of production of accused person after arrest by the police under the old Code has been made explicitly clear in Section 437(1) of the new Code by excluding the High Court or the Court of Session.

14. From the above change of language it is difficult to reach a conclusion that the Sessions Judge or the High Court need not even bear in mind the guidelines which the Magistrate has necessarily to follow in considering bail of an accused. It is not possible to hold that the Sessions Judge or the High Court, certainly enjoying wide powers, will be oblivious of the considerations of the likelihood of the accused being guilty of an offence punishable with death or imprisonment for life. Since the Sessions Judge or the High Court will be approached by an accused only after refusal of bail by the Magistrate, it is not possible to hold that the mandate of the law of bail under Section 437 CrPC for the Magistrate will be ignored by the High Court or by the Sessions Judge.

…

18. Chapter XXXIII of the new Code contains provisions in respect of bail bonds. Section 436 CrPC, with which this Chapter opens makes an invariable rule for bail in case of bailable offences subject to the specified exception under sub-section (2) of that section. Section 437 CrPC provides as to when bail may be taken in case of non-bailable offences. Sub-section (1) of Section 437 CrPC makes a dichotomy in dealing with non-bailable offences. The first category relates to offences punishable with death or imprisonment for life and the rest are all other non-bailable offences. With regard to the first category, Section 437(1) CrPC imposes a bar to grant of bail by the Court or the officer-in-charge of a police station to a person accused of or suspected of the commission of an offence punishable with death or imprisonment for life, if there appear reasonable grounds for believing that he has been so guilty. Naturally, therefore, at the stage of investigation unless there are some materials to justify an officer or the Court to believe that there are no reasonable grounds for believing that the person accused of or suspected of the commission of such an offence has been guilty of the same, there is a ban imposed under Section 437(1) CrPC against granting of bail. On the other hand, if to either the officer-in-charge of the police station or to the Court there appear to be reasonable grounds to believe that the accused has been guilty of such an offence there will be no question of the Court or the officer granting bail to him. In all other non-bailable cases judicial discretion will always be exercised by the Court in favour of granting bail subject to sub-section (3) of Section 437 CrPC with regard to imposition of conditions, if necessary. Under sub-section (4) of Section 437 CrPC an officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) of that section is required to record in writing his or its reasons for so doing. That is to say, law requires that in non-bailable offences punishable with death or imprisonment for life, reasons have to be recorded for releasing a person on bail, clearly disclosing how discretion has been exercised in that behalf.

19. Section 437 CrPC deals, inter alia with two stages during the initial period of the investigation of a non-bailable offence. Even the officer-in-charge of the police station may, by recording his reasons in writing, release a person accused of or suspected of the commission of any non-bailable offence provided there are no reasonable grounds for believing that the accused has committed a non-bailable offence. Quick arrests by the police may be necessary when there are sufficient materials for the accusation or even for suspicion. When such an accused is produced before the Court, the Court has a discretion to grant bail in all non-bailable cases except those punishable with death or imprisonment for life if there appear to be reasons to believe that he has been guilty of such offences.

The Courts oversee the action of the police and exercise judicial discretion in granting bail always bearing in mind that the liberty of an individual is not unnecessarily and unduly abridged and at the same time the cause of justice does not suffer. After the Court releases a person on bail under sub-section (1) or sub-section (2) of Section 437 CrPC it may direct him to be arrested again when it considers necessary so to do. This will be also in exercise of its judicial discretion on valid grounds.

20. Under the first proviso to Section 167(2) no Magistrate shall authorise the detention of an accused in custody under that section for a total period exceeding 60 days on the expiry of which the accused shall be released on bail if he is prepared to furnish the same. This type of release under the proviso shall be deemed to be a release under the provisions of Chapter XXXIII relating to bail. This proviso is an innovation in the new Code and is intended to speed up investigation by the police so that a person does not have to languish unnecessarily in prison facing a trial. There is a similar provision under sub-section (6) of Section 437 CrPC which corresponds to Section 497(3-A) of the old Code. This provision is again intended to speed up trial without unnecessarily detaining a person as an undertrial prisoner, unless for reasons to be recorded in writing, the Magistrate otherwise directs. We may also notice in this connection sub-section (7) of Section 437 which provides that if at any time after the conclusion of a trial of any person accused of non-bailable offence and before the judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of such an offence, it shall release the accused, if he is in custody, on the execution of him of a bond without sureties for his appearance to hear the judgment. The principle underlying Section 437 is, therefore, towards granting of bail except in cases where there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life and also when there are other valid reasons to justify the refusal of bail.

21. Section 437 CrPC is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session. The language of Section 437(1) may be contrasted with Section 437(7) to which we have already made a reference. While under sub-section (1) of Section 437 CrPC the words are: "If there appear to be reasonable grounds for believing that he has been guilty", sub-section (7) says: "that there are reasonable grounds for believing that the accused is not guilty of such an offence". This difference in language occurs on account of the stage at which the two sub-sections operate. During the initial investigation of a case in order to confine a person in detention, there should only appear reasonable

grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Whereas after submission of charge-sheet or during trial for such an offence the Court has an opportunity to form somewhat clear opinion as to whether there are reasonable grounds for believing that the accused is not guilty of such an offence. At that stage the degree of certainty of opinion in that behalf is more after the trial is over and judgment is deferred than at a pre-trial stage even after the charge-sheet. There is a noticeable trend in the above provisions of law that even in case of such non-bailable offences a person need not be detained in custody for any period more than it is absolutely necessary, if there are no reasonable grounds for believing that he is guilty of such an offence. There will be, however, certain overriding considerations to which we shall refer hereafter. Whenever a person is arrested by the police for such an offence, there should be materials produced before the Court to come to a conclusion as to the nature of the case he is involved in or he is suspected of. If at that stage from the materials available there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, the Court has no other option than to commit him to custody. At that stage, the Court is concerned with the existence of the materials against the accused and not as to whether those materials are credible or not on the merits.

22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 CrPC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

23. By an amendment in 1955 in Section 497 CrPC of the old Code the words “or suspected of the commission of” were for the first time introduced. These words were continued in the new Code in Section 437(1) CrPC. It is difficult to conceive how if a police officer arrests a person on a reasonable suspicion of commission of an offence punishable

with death or imprisonment for life (Section 41 CrPC of the new Code) and forwards him to a Magistrate [Section 167(1) CrPC of the new Code] the Magistrate at that stage will have reasons to hold that there are no reasonable grounds for believing that he has not been guilty of such an offence. At that stage unless the Magistrate is able to act under the proviso to Section 437(1) CrPC bail appears to be out of the question. The only limited inquiry may then relate to the materials for the suspicion. The position will naturally change as investigation progresses and more facts and circumstances come to light.

24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), CrPC against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

IN THE SUPREME COURT OF INDIA

Gudikanti Narasimhulu & Ors. v. Public Prosecutor, High Court of Andhra Pradesh

(1978) 1 SCC 240

V.R. Krishna Iyer, J.

The petitioners' acquittal by the trial court was reversed by the High Court in appeal. They were were on bail during their trial, and the pendency of the appeal in the High Court. In its judgment, the Supreme Court discusses important issues relating to granting/ refusing bail. It lays down principles to be followed by courts in making their exercising discretion in bail cases.

Iyer, J.: "1. "Bail or jail?" — at the pre-trial or post-conviction stage — belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.

2. The doctrine of police power, constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public generally. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the Constitution.

3. What, then, is "judicial discretion" in this bail context? In the elegant words of Benjamin Cardozo [The Nature of the Judicial Process — Yale University Press (1921)] :

> "The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains."
>
> Even so it is useful to notice the tart terms of Lord Camden that [1 Bovu, Law Dict., Rawles' III Revision p. 885 — quoted in Judicial Discretion — National College of the State Judiciary, Rano, Nevada p. 14] "the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable...."

4. Some jurists have regarded the term "judicial discretion" as a misnomer. Nevertheless, the vesting of discretion is the unspoken but inescapable, silent command of our judicial system, and those who exercise it will remember that [*Attributed to Lord Mansfield, Tingley* v. *Dalby*, 14 NW 145] discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.

An appeal to a Judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law. [Judicial discretion, (ibid) p. 33]

5. Having grasped the core concept of judicial discretion and the constitutional perspective in which the Court must operate public policy by a restraint on liberty, we have to proceed to see what are the relevant criteria for grant or refusal of bail in the case of a person who has either

been convicted and has appealed or one whose conviction has been set aside but leave has been granted by this Court to appeal against the acquittal. What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said [*R.* v. *Rose*, (1898) 18 Cox CC 717 : 67 LJ QB 289 — Quoted in 'The Granting of Bail', Modern Law Rev., Vol. 81, Jan. 1968, pp. 40-48] :

> "I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial."

This theme was developed by Lord Russel of Kollowen, C.J., when he charged the grand jury at Salisbury Assizes, 1899: [(1898) 63 JP 193, Mod. Law Rev. p. 49 ibid.]

> "... it was the duty of Magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice."

In Archbold it is stated that [Mod. Law Rev. ibid. p. 53 — Archbold. Pleading Evidence and Practice in Criminal Cases, Thirty-Sixth Edn., London, 1966, para 203] :

> "The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial ....

The test should be applied by reference to the following considerations:

> (1) The nature of the accusation ....
>
> (2) The nature of the evidence in support of the accusation ....

> (3) The severity of the punishment which conviction will entail ....
>
> (4) Whether the sureties are independent, or indemnified by the accused person...."

Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr Bottomley. [The Granting of Bail, Principles and Practice, Mod. Law Rev. ibid. pp. 40 to 54]

6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle. J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. [Mod. Law Rev. p. 50 ibid., 1852 I E & B 1] Lord Campbell, C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows: [Mod. Law Rev. ibid., pp. 50-51]

> "I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial .... It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will

> generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted. ..."

7. It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being. [Patrick Devlin : The Criminal Prosecution in England, (London) 1960, p. 75 — Mod. Law Rev. ibid., p. 54]

9. Thus the legal principles and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record — particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant is therefore not an exercise in irrelevance.

10. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice — to the individual involved and society affected.

11. We must weight the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody.

And if public justice is to be promoted, mechanical detention should be demoted. …

12. A few other weighty factors deserve reference. All deprivation of liberty is validated by social defence and individual correction along anti-criminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harshness should be minimised. Restorative devices to redeem the man, even through community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned "free enterprise", should be provided against. No seeker of justice shall play confidence tricks on the Court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution."

IN THE SUPREME COURT OF INDIA

State (Delhi Admn.) v. Sanjay Gandhi

(1978) 2 SCC 411

Y.V. Chandrachud, C.J., S. Murtaza Fazal Ali & P.N. Singhal, JJ.

The respondent was an accused in a prosecution instituted by the Central Bureau of Investigation before the Chief Metropolitan Magistrate, Delhi. An application for the cancellation of his bail, filed by the Delhi Administration, had been dismissed by order of the High Court. The Administration approached the Supreme Court against the order of the High Court. In its judgment, the Supreme Court examined the difference between rejection of bail and cancellation of bail. It laid down principles in relation to cancellation of bail.

Chandrachud, C.J.:"13. Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. A brother, a sister or a parent who has seen the commission of crime, may resile in the Court from a statement recorded during the course of investigation. That happens instinctively, out of natural love and affection, not out of persuasion by the accused. The witness has a stake in the innocence of the accused and tries therefore to save him from the guilt. Likewise, an employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure or persuasion. In other words, the objective fact that witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused. Inconsistent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, by itself, can be

ascribed to the pressure of the prosecution. … It is therefore necessary for the prosecution to show some act or conduct on the part of the respondent from which a reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent.

14. Before we go to the facts of the case, it is necessary to consider what precisely is the nature of the burden which rests on the prosecution in an application for cancellation of bail. Is it necessary for the prosecution to prove by a mathematical certainty or even beyond a reasonable doubt that the witnesses have turned hostile because they are won over by the accused? We think not. The issue of cancellation of bail can only arise in criminal cases, but that does not mean that every incidental matter in a criminal case must be proved beyond a reasonable doubt like the guilt of the accused. Whether an accused is absconding and therefore his property can be attached under Section 83 of the Criminal Procedure Code, whether a search of person or premises was taken as required by the provisions of Section 100 of the Code, whether a confession is recorded in strict accordance with the requirements of Section 164 of the Code and whether a fact was discovered in consequence of information received from an accused as required by Section 27 of the Evidence Act are all matters which fall peculiarly within the ordinary sweep of criminal trials. But though the guilt of the accused in cases which involve the assessment of these facts has to be established beyond a reasonable doubt, these various facts are not required to be proved by the same rigorous standard. Indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence because, in cases where the statute raises a presumption of guilt as, for example, the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his defence by a balance of probabilities. He does not have to establish his case beyond a reasonable doubt. The same standard of proof as in a civil case applies to proof of incidental issues involved in a criminal trial like the cancellation of bail of an accused. The prosecution, therefore, can establish its case in an application for cancellation of bail by showing on a preponderance of probabilities that the accused has attempted to tamper or has tampered with its witnesses. Proving by the test of balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all that is necessary for the prosecution to do in order to succeed in an application for cancellation of bail.

…

24. Section 439(2) of the Code of Criminal Procedure confers jurisdiction on the High Court or Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. But the power, though of an extraordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the courts to be silent spectators to the subversion of the judicial process. We might as well wind up the courts and bolt their doors against all than permit a few to ensure that justice shall *not* be done.

25. The power to cancel bail was exercised by the Bombay High Court in *Madhukar Purshottam Mondkar* v. *Talab Haji Hussain* [AIR 1958 Bom 406 : 60 Bom LR 465] where the accused was charged with a bailable offence. The test adopted by that court was whether the material placed before the court was "such as to lead to the conclusion that there is a strong prima facie case that if the accused were to be allowed to be at large he would tamper with the prosecution witnesses and impede the course of justice". An appeal preferred by the accused against the judgment of the Bombay High Court was dismissed by this Court. In *Gurcharan Singh* v. *State* (*Delhi Administration*) [(1978) 1 SCC 118, 128-29 (Para 28) : 1978 SCC (Cri) 41, 52 (Para 28) : 1978 Cri LJ 129, 137] while confirming the order of the High Court cancelling the bail of the accused, this Court observed that the only question which the court had to consider at that stage was whether "there was prima facie case made out, as alleged, on the statements of the witnesses and on other materials", that "there was a likelihood of the appellants tampering with the prosecution witnesses". It is by the application of this test that we have come to the conclusion that the respondent's bail ought to be cancelled.

26. But avoidance of undue hardship or harassment is the quintessence of judicial process. Justice, at all times and in all situations, has to be tempered by mercy, even as against persons who attempt to tamper with its processes. …"

IN THE SUPREME COURT OF INDIA

Moti Ram v. State of M.P.

(1978) 4 SCC 47

D.A. Desai & V.R. Krishna Iyer, JJ.

The petitioner was a lowly paid mason who was granted bail on a surety of Rs.10,000. He was unable to procure the required sum or manage a surety of sufficient prosperity. The Magistrate refused to accept the suretyship of the petitioner's brother because he and his assets were in another district. The Supreme Court, in its judgment, deals with the issue of enlargement on bail with or without sureties.

Iyer, J.:"3. …From this factual matrix three legal issues arise (*1*) Can the Court, under the Code of Criminal Procedure, enlarge, on his own bond *without sureties*, a person undergoing incarceration for a non-bailable offence either as undertrial or as convict who has appealed or sought special leave? (*2*) If the Court decides to grant bail *with sureties*, what criteria should guide it in quantifying the amount of bail, and (*3*) Is it within the power of the Court to reject a surety because he or his estate is situate in a different district or State?

4. This formulation turns the focus on an aspect of liberty bearing on bail jurisprudence. The victims, when suretyship is insisted on or heavy sums are demanded by way of bail or local bailors alone are *persona grata*, may well be the weaker segments of society like the proletariat, the linguistic and other minorities and distant denizens from the far corners of our country with its vast diversity. In fact the grant of bail can be stultified or made impossibly inconvenient and expensive if the Court is powerless to dispense with surety or to receive an Indian bailor across the district borders as good or the sum is so excessive that to procure a wealthy surety may be both exasperating and expensive. The problem is plainly one of human rights, especially freedom *vis-a-vis* the lowly. …

5. … It is a sombre reflection that many little Indians are forced into long cellular servitude for little offences because trials never conclude and bailors are beyond their meagre means. The new awareness about human

rights imparts to what might appear to be a small concern relating to small men a deeper meaning. That is why we have decided to examine the question from a wider perspective bearing in mind prisoner's rights in an international setting and informing ourselves of the historical origins and contemporary trends in this branch of law. Social Justice is the signature tune of our Constitution and the little man in peril of losing his liberty is the consumer of Social Justice.

6. There is no definition of bail in the Code although offences are classified as bailable and non-bailable. The actual sections which deal with bail, as we will presently show, are of blurred semantics. We have to interdict judicial arbitrariness deprivatory of liberty and ensure 'fair procedure' which has a creative connotation after *Maneka Gandhi* [(1978) 1 SCC 248] .

…

14. The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.

…

16. Coming to studies made in India by knowledgeable Committees we find the same connotation of bail as including release on one's own bond being treated as implicit in the provisions of the Code of Criminal Procedure. The Gujarat Committee [Report of the Legal Aid Committee appointed by the Government of Gujarat, 1971 and headed by then Chief Justice of the State, Mr Justice P.N. Bhagwati, p. 185] from which we quote extensively, dealt with this matter in depth:

> "The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk

> of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D.C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases. Moreover, the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for a large majority of those who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount." (emphasis added)

17. The vice of the system is brought out in the Report:

> "The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. In one case the poor accused is fleeced of his moneys by touts and professional sureties and sometimes has even to incur debts to make payment to them for securing his release; in the other he is deprived of his liberty without trial and conviction and this leads to grave consequences, namely: (1) though presumed innocent he is subjected to the psychological and physical deprivations of jail life; (2) he loses his job, if he has one, and is deprived of an opportunity to work to support himself and his family with the result that burden of his detention falls heavily on the innocent members of the family, (3) he is prevented from contributing to the preparation of his defence; and (4) the public exchequer has to bear the cost of maintaining him in the jail. [Report of the Legal Aid Committee appointed by the Government

> of Gujarat, 1971 and headed by then Chief Justice of the State, Mr Justice P.N. Bhagwati, p. 185] "

...

19A. Again:

> "We should suggest that the Magistrate must always bear in mind thatmonetary bail is not a necessary element of the criminal process and even if risk of monetary loss is a deterrent against fleeing from justice, it is not only deterrent and there are other factors which are sufficient deterrents against flight. The Magistrate must abandon the antiquated concept under which pre-trial release could be ordered only against monetary bail. That concept is out-dated and experience has shown that it has done more harm than good. The new insight into the subject of pre-trial release which has now been developed in socially advanced countries and particularly the United States should now inform the decisions of the Magistrates in regard to pre-trial release. Every other feasible method of pre-trial release should be exhausted before resorting to monetary bail. The practice which is now being followed in the United States is that the accused should ordinarily be released on order to appear or on his own recognizance unless it is shown that there is substantial risk of non-appearance or there are circumstances justifying imposition of conditions on release... If a Magistrate is satisfied after making an enquiry into the condition and background of the accused that the accused has his roots in the community and is not likely to abscond, he can safely release the accused on order to appear or on his own recognizance [Report of the Legal Aid Committee appointed by the Government of Gujarat, 1971 and headed by then Chief Justice of the State, Mr Justice P.N. Bhagwati, p. 185]..." (emphasis added)

19. A latter Committee with Judges, lawyers, members of Parliament and other legal experts, came to the same conclusion and proceeded on the assumption that release on bail included release on the accused's own bond:

> *". . . We think that a liberal policy of conditional release without monetary sureties or financial security and release on one's own recognizance with punishment provided for violation will go a long way to reform the bail system and help the weaker and poorer sections of the community to get equal justice under law. Conditional release may take the form of entrusting the accused to the care of his relatives or releasing him on supervision. The court or the authority granting bail may have to use the discretion judiciously. When the accused is too poor to find sureties, there will be no point in insisting on his furnishing bail with sureties, as it will only compel him to be in custody with the consequent handicaps in making his defence. [Report of the Expert Committee on Legal Aid — Processual Justice to the People, May 1973] "*

20. [Thus] the legal literature, Indian and Anglo-American, on bail jurisprudence lends countenance to the contention that bail, loosely used, is comprehensive enough to cover release on one's own bond with or without sureties.

…

24. Primarily Chapter XXXIII is the nidus of the law of bail. Section 436 of the Code speaks of bail but the proviso makes a contradistinction between 'bail' and 'own bond without sureties'. Even here there is an ambiguity, because even the proviso comes in only if, as indicated in the substantive part, the accused in a bailable offence 'is prepared to give bail'. Here, 'bail' suggests 'with or without sureties'. And, 'bail bond' in Section 436(2) covers own bond. Section 437(2) blandly speaks of bail but speaks of release on bail of persons below 16 years of age, sick or infirm people and women. It cannot be that a small boy or sinking invalid or *pardanashin* should be refused release and suffer stress and distress in prison unless sureties are haled into a far-off court with obligation for frequent appearance: 'Bail' there suggests release, the accent being on undertaking to appear when directed, not on the production of sureties. But Section 437(2) distinguishes between bail and bond without sureties.

25. Section 445 suggests, especially read with the marginal note, that deposit of money will do duty for bond '*with or without sureties'.* Section

441(1) of the Code may appear to be a stumbling block in the way of the liberal interpretation of bail as covering own bond with and without sureties. Superficially viewed, it uses the words 'bail' and 'own bond' as antithetical, if the reading is literal. Incisively understood, Section 441(1) provides for both the bond of the accused and the undertaking of the surety being conditioned in the manner mentioned in the sub-section. To read 'bail' as including only cases of release *with* sureties will stultify the sub-section; for then, an accused released on his own bond without bail i.e. surety, cannot be conditioned to attend at the appointed place. Section 441(2) uses the word "bail" to include "own bond" loosely as meaning one or the other or both. Moreover, an accused in judicial custody, actual or potential, may be released by the court to further the ends of justice and nothing in Section 441(1) compels a contrary meaning.

26. Section 441(2) and (3) use the word 'bail' generically because the expression is intended to cover bond with or without sureties.

27. The slippery aspect is dispelled when we understand the import of Section 389(1) which reads:

> "389. (1) Pending any appeal by a convicted person the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond."

The Court of appeal may release a convict on his own bond without sureties. Surely, it cannot be that an under-trial is worse off than a convict or that the power of the court to release increases when the guilt is established. It is not the court's status but the applicant's guilt status that is germane. That a guilty man may claim *judicial liberation, pro tempore without sureties* while an undertrial cannot is a *reductio ad absurdem.*

28. Likewise, the Supreme Court's powers to enlarge a prisoner, as the wide words of Order 21 Rule 27 (Supreme Court Rules) show, contain no limitation based on sureties. Counsel for the State agree that this is so, which means that a murderer, concurrently found to be so, may theoretically be released on his own bond without sureties while a suspect, presumed to be innocent, cannot. Such a strange anomaly could not be, even though it is true that the Supreme Court exercises wider powers with greater circumspection.

...

30. If sureties are obligatory even for Juveniles, females and sickly accused while they can be dispensed with, after being found guilty, if during trial when the presence to instruct lawyers is more necessary, an accused must buy release *only* with sureties while at the appellate level, suretyship is expendable, there is unreasonable restriction on personal liberty with discrimination writ on the provisions. The hornet's nest of Part III need not be provoked if we read 'bail' to mean that it popularly does, and lexically and in American Jurisprudence is stated to mean viz. a generic expression used to describe judicial release from *custodia juris*. Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigents's rights, we hold that bail covers both — release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables.

…

31. Even so, poor men — Indians are, in monetary terms, indigents — young persons, infirm individuals and women are weak categories and courts should be liberal in releasing them on their own recognisances — put whatever reasonable conditions you may.

32. It shocks one's conscience to ask a mason like the petitioner to furnish sureties for Rs 10,000. The Magistrate must be given the benefit of doubt for not fully appreciating that our Constitution, enacted by 'We, the People of India', is meant for the butcher, the baker and the candlestick maker — shall we add, the bonded labour and pavement dweller.

…

33. … Judicial disruption of Indian unity is surest achieved by such provincial allergies. What law prescribes sureties from outside or non-regional language applications? What law prescribes the geographical discrimination implicit in asking for sureties from the court district? This tendency takes many forms, sometimes, geographic, sometimes linguistic, sometimes legalistic. Article 14 protects all Indians qua Indians within the territory of India. Article 350 sanctions representation to any authority, including a court, for redress of grievances in any language used in the Union of India. Equality before the law implies that even a *vakalat* or affirmation made in any State language according to the law in that State must be accepted everywhere in the territory of India save where

a valid legislation to the contrary exists. Otherwise, an *adivasi* will be unfree in Free India, and likewise many other minorities. This divagation has become necessary to still the judicial beginnings, and to inhibit the process of making Indians aliens in their own homeland. Swaraj is made of united stuff.

34. We mandate the Magistrate to release the petitioner on his own bond in a sum of Rs 1000.

An afterword

35. We leave it to Parliament to consider whether in our socialist republic, with social justice as its hallmark, monetary superstition, not other relevant considerations like family ties, roots in the community, membership of stable organisations, should prevail for bail bonds to ensure that the 'bailee' does not flee justice. The best guarantee of presence in court is the reach of the law, not the money tag. A parting thought. If the indigents are not to be betrayed by the law including bail law, re-writing of many processual laws is an urgent desideratum; and the judiciary will do well to remember that the geo-legal frontiers of the Central Codes cannot be disfigured by cartographic dissection in the name of language or province."

IN THE SUPREME COURT OF INDIA

Hussainara Khatoon (I) v. Home Secy., State of Bihar

(1980) 1 SCC 81

A.D. Koshal, P.N. Bhagwati & R.S. Pathak, JJ.

The petition pertained to a large number of persons who had been facing incarceration for years awaiting trial. In its judgment, the Supreme Court examined alternative grounds to grant bail, which otherwise usually tend to be offense related or finance related.

Bhagwati, J. (for himself and Koshal, J.): "1.This petition for a writ of habeas corpus discloses a shocking state of affairs in regard to administration of justice in the State of Bihar. An alarmingly large number of men and women, children including, are behind prison bars for years awaiting trial in courts of law. The offences with which some of them are charged are trivial, which, even if proved, would not warrant punishment for more than a few months, perhaps for a year or two, and yet these unfortunate forgotten specimens of humanity are in jail, deprieved of their freedom, for periods ranging from three to ten years without even as much as their trial having commenced. It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial. We are shouting from housetops about the protection and enforcement of human rights. We are talking passionately and eloquently about the maintenance and preservation of basic freedoms But, are we not denying human rights to these nameless persons who are laguishing in jails for years for offences which perhaps they might ultimately be found not to have committed? Are we not withholding basic freedoms from these neglected and helpless human beings who have been condemned to a life of imprisonment and degradation for years on end? Are expeditious trial and freedom from detention not part of human rights and basic freedoms? Many of these unfortunate men and women must not even be remembering when they entered the jail and for what offence. They have over the years ceased to be human beings: they are mere ticket numbers. It is high time that the public conscience is awakened and the Government as well as the judiciary begin to realise that in the dark cells of our prisons there are large numbers of

men and women who are waiting patiently, impatiently perhaps, but in vain, for justice — a commodity which is tragically beyond their reach and grasp. Law has become for them an instrument of injustice and they are helpless and despairing victims of the callousness of the legal and judicial system. The time has come when the legal and judicial system has to be revamped and restructured so that such injustices do not occur and disfigure the fair and otherwise luminous face of our nascent democracy.

2. Though we issued notice to the State of Bihar two weeks ago, it is unfortunate that on February 5, 1979 no one has appeared on behalf of the State and we must, therefore, at this stage proceed on the basis that the allegations contained in the issues of the Indian Express dated January 8 and 9, 1979 which are incorporated in the writ petition are correct. The information contained in these newspaper cuttings is most distressing and it is sufficient to stir the conscience and disturb the equanimity of any socially motivated lawyer or judge. Some of the undertrial prisoners whose names are given in the newspaper cuttings have been in jail for as many as 5, 7 or 9 years and a few of them, even more than 10 years, without their trial having begun. What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them. It is a travesty of justice that many poor accused, "little Indians, are forced into long cellular servitude for little offences" because the bail procedure is beyond their meagre means and trials don't commence and even if they do, they never conclude. There can be little doubt, after the dynamic interpretation placed by this Court on Article 1 in*Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248 : (1978) 2 SCR 621] that a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as "reasonable, just or fair" so as to be in conformity with the requirement of that article. It is necessary, therefore, that the law as enacted by the legislature and as administered by the courts must radically change its approach to pre-trial detention and ensure "reasonable, just and fair" procedure which has creative connotation after *Maneka Gandhi case*[(1978) 1 SCC 248 : (1978) 2 SCR 621] .

3. Now, one reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is our highly unsatisfactory bail system. It suffers from a property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re-enactment, continues to

adopt the same antiquated approach as the earlier Code enacted towards the end of the last century and where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the accused to pay a sum of money in case he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the accused fails to appear to answer the charge. This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the courts is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences, namely, (*1*) though presumed innocent, they are subjected to psychological and physical deprivations of jail life, (*2*) they are prevented from contributing to the preparation of their defence, and (*3*) they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result that the burden of their detention almost invariably falls heavily on the innocent members of the family. It is here that the poor find our legal and judicial system oppressive and heavily weighted against them and a feeling of frustration and despair occurs upon them as they find that they are helplessly in a position of inequality with the non-poor. The Legal Aid Committee appointed by the Government of Gujarat under the chairmanship of one of us, Mr Justice Bhagwati, emphasised this glaring inequality in the following words:

> *"The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is*

> *necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D.C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases. Moreover, the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail is fixed by the Magistrate is not high, for a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount."*

The Gujarat Committee also pointed out how the practice of fixing the amount of bail with reference to the nature of the charge without taking into account relevant factors, such as the individual financial circumstances of the accused and the probability of his fleeing before trial, is harsh and oppressive and discriminates against the poor:

> *"The discriminatory nature of the bail system becomes all the more acute by reason of the mechanical way in which it is customarily operated. It is no doubt true that theoretically the Magistrate has broad discretion in fixing the amount of bail but in practice it seems that the amount of bail depends almost always on the seriousness of the offence. It is fixed according to a schedule related to the nature of the charge. Little weight is given either to the probability that the accused will attempt to flee before his trial or to his individual financial circumstances, the very factors which seem most relevant if the purpose of bail is to*

> *assure the appearance of the accused at the trial. The result of ignoring these factors and fixing the amount of bail mechanically having regard only to the seriousness of the offence is to discriminate against the poor who are not in the same position as the rich as regards capacity to furnish bail. The courts by ignoring the differential capacity of the rich and the poor to furnish bail and treating them equally produce inequality between the rich and the poor: the rich who is charged with the same offence in the same circumstances is able to secure his release while the poor is unable to do so on account of his poverty. These are some of the major defects in the bail system as it is operated today."…The bail system, as it operates today, is a source of great hardship to the poor and if we really want to eliminate the evil effects of poverty and assure a fair and just treatment to the poor in the administration of justice, it is imperative that the bail system should be thoroughly reformed so that it should be possible for the poor, as easily as the rich, to obtain pre-trial release without jeopardising the interest of justice.*

4. It is high time that our Parliament realises that risk of monetary loss is not the only deterrent against fleeing from justice, but there are also other factors which act as equal deterrents against fleeing. Ours is a socialist republic with social justice as the signature tune of our Constitution and Parliament would do well to consider whether it would not be more consonant with the ethos of our Constitution that instead of risk of financial loss, other relevant considerations such as family ties, roots in the community, job security, membership of stable organisations etc., should be the determinative factors in grant of bail and the accused should in appropriate cases be released on his personal bond without monetary obligation. Of course, it may be necessary in such a case to provide by an amendment of the penal law that if the accused wilfully fails to appear in compliance with the promise contained in his personal bond, he shall be liable to penal action. But even under the law as it stands today the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new

insight into the subject of pre-trial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our courts in regard to pre-trial release. If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond. To determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the accused:

> "1. The length of his residence in the community,
>
> 2. his employment status, history and his financial condition,
>
> 3. his family ties and relationships,
>
> 4. his reputation, character and monetary condition,
>
> 5. his prior criminal record including any record of prior release on recognizance or on bail,
>
> 6. the identity of responsible members of the community who would vouch for his reliability,
>
> 7. the nature of the offence charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of non-appearance, and
>
> 8. any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear."

If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond. Of course, if facts are brought to the notice of the court which go to show that having regard to the condition and background of the accused, his previous record and the nature and circumstances of

the offence, there may be a substantial risk of his non-appearance at the trial, as for example, where the accused is a notorious bad character or a confirmed criminal or the offence is serious (these examples are only by way of illustration), the Court may not release the accused on his personal bond and may insist on bail with sureties. But in the majority of cases, considerations like family ties and relationship, roots in the community, employment status etc. may prevail with the Court in releasing the accused on his personal bond and particularly in cases where the offence is not grave and the accused is poor or belongs to a weaker section of the community, release on personal bond could, as far as possible, be preferred. But even while releasing the accused on personal bond it is necessary to caution the Court that the amount of the bond which it fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. Otherwise, it would be difficult for the accused to secure his release even by executing a personal bond. Moreover, when the accused is released on his personal bond, it would be very harsh and oppressive if he is required to satisfy the Court—and what we have said here in regard to the court must apply equally in relation to the police while granting bail—that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond. We have no doubt that if the system of bail, even under the existing law, is administered in the manner we have indicated in this judgment, it would go a long way towards relieving hardship of the poor and help them to secure pre-trial release from incarceration. It is for this reason we have directed the undertrial prisoners whose names are given in the two issues of the Indian Express should be released forthwith on their personal bond. We should have ordinarily said that personal bond to be executed by them should be with monetary obligation but we directed as an exceptional measure that there need be no monetary obligation in the personal bond because we found that all these persons have been in jail without trial for several years, and in some cases for offences for which the punishment would in all probability be less than the period of their detention and, moreover, the order we were making was merely an interim

order. The peculiar facts and circumstances of the case dictated such an unusual course."

…

Pathak, J. (concurring): " 8. In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. I think it is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee or hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account. [Section 440, CrPC].

…

11. While concluding, it seems desirable to draw attention to the absence of an explicit provision in the Code of Criminal Procedure enabling the release, in appropriate cases, of an undertrial prisoner on his bond without sureties and without any monetary obligation. There is urgent need for a clear provision. Undeniably, the thousands of undertrial prisoners lodged in Indian prisons today include many who are unable to secure their release before trial because of their inability to produce sufficient financial guarantee for their appearance. Where that is the only reason for their continued incarceration, there may be ground for complaining of invidious discrimination; The more so under a constitutional system which promises social equality and social justice to all of its citizens. The deprivation of liberty for the reason of financial poverty only is an incongruous element in a society aspiring to the achievement of these constitutional objectives. There are sufficient guarantees for appearance in the host of considerations to which reference has been made earlier and, it seems to me, our law-makers would take an important step in defence of individual liberty if appropriate provision was made in the statute for non-financial releases."

IN THE SUPREME COURT OF INDIA

Gurbaksh Singh Sibbia v. State of Punjab

(1980) 2 SCC 565

Y.V. Chandrachud, C.J., O. Chinappa Reddy, P.N. Bhagwati, R.S. Pathak & N.L. Untwalia, JJ.

There were grave allegations of political corruption against the appellant. The appellant filed an application for anticipatory bail under Section 438 of the CrPC in the High Court of Punjab and Haryana. The Single Judge referred the application to a Full Bench, which dismissed the same. In its judgment, the Supreme Court discusses the jurisprudence on anticipatory bail while emphasizing on the importance of personal liberty.

Chandrachud, C.J.: "1. These appeals by special leave involve a question of great public importance bearing, at once, on personal liberty and the investigational powers of the police. The society has a vital stake in both of these interests, though their relative importance at any given time depends upon the complexion and restraints of political conditions. Our task in these appeals is how best to balance these interests while determining the scope of Section 438 of the Code of Criminal Procedure, 1973 (Act 2 of 1974).

…

4. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present Section 438. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power. The need for extensive amendments to the Code of Criminal Procedure was felt for a long time and various suggestions were made in different quarters in order to make the Code more effective and comprehensive. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipatory bail". It observed in para 39.9 of its report (Volume I):

> *"The suggestion for directing the release of a person on bail prior to his arrest (commonly known*

> *as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.*
>
> *We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter."*

…

7. The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in its 41st Report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's LAW LEXICON, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an

order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under Section 438 is intended to confer conditional immunity from this 'touch' or confinement.

…

9. … It is argued that anticipatory bail is an extraordinary remedy and therefore, whenever it appears that the proposed accusations are prima facie plausible, the applicant should be left to the ordinary remedy of applying for bail under Section 437 or Section 439 of the Criminal Procedure Code, after he is arrested.

10. Shri V.M. Tarkunde, appearing on behalf of some of the appellants, while supporting the contentions of the other appellants, said that since the denial of bail amounts to deprivation of personal liberty, courts should lean against the imposition of unnecessary restrictions on the scope of Section 438, when no such restrictions are imposed by the legislature in the terms of that section. The learned Counsel added a new dimension to the argument by invoking Article 21 of the Constitution. He urged that Section 438 is a procedural provision which is concerned with the personal liberty of an individual who has not been convicted of the offence in respect of which he seeks bail and who must therefore be presumed to be innocent. The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.

11. The Full Bench of the Punjab and Haryana High Court rejected the appellants' applications for bail after summarising, what according to it is the true legal position, thus:

> "(1) The power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only;
>
> (2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.
>
> (3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.
>
> (4) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.
>
> (5) Where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under Section 438 should not be exercised.
>
> (6) The discretion under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.
>
> (7) The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised; and
>
> (8) Mere general allegations of mala fides in

> the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless."

It was urged before the Full Bench that the appellants were men of substance and position who were hardly likely to abscond and would be prepared willingly to face trial. … The possession of high status, according to the Full Bench, is not only an irrelevant consideration for granting anticipatory bail but is, if anything, an aggravating circumstance.

12. We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor General or the constraints which the Full Bench of the High Court has engrafted on the power conferred by Section 438. Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code: Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail. The whole of Section 437 is riddled and hedged in by restrictions on the power of certain courts to grant bail. … The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully: Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail

should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (*i*) to (*iv*) of sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail if generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

13. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (*i*) to (*iv*) of that sub-section.

The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. …

15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is

the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law.

16**.** A close look at some of the rules in the eight-point code formulated by the High Court will show how difficult it is to apply them in practice. The seventh proposition says:

> "The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised."

17. How can the court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail? And will it be correct to say that blatantness of the accusation will suffice for rejecting bail, if the applicant's conduct is painted in colours too lurid to be true? The eighth proposition rule framed by the High Court says:

> "Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless."

Does this rule mean, and that is the argument of the learned Additional Solicitor General, that anticipatory bail cannot be granted *unless* it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusations are mala fide? It is understandable that if mala fides are shown, anticipatory bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the accusation is shown to be mala fide. This, truly, is the risk involved in framing rules by judicial construction. Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides a safeguard against its abuse.

18. According to the sixth proposition framed by the High Court, the discretion under Section 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now, Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non-bailable offence". We see no warrant for reading into this provision the conditions subject to which bail can be granted under Section 437(1) of the Code. That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in Section 437(1) should govern the grant of relief under Section 438(1), nothing would have been easier for the legislature than to introduce into the latter section a similar provision. We have already pointed out the basic distinction between these two sections. Section 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre-conditions of its application is that the person, who applies for relief under it, must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this distinction bears with the grant or refusal of bail is that in cases falling under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in Section 437(1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the first information report. In the majority of cases falling under Section 438, that data will be lacking for forming the requisite belief. If at all the conditions mentioned in Section 437 are to be read into the provisions of Section 438, the transplantation shall have to be done without amputation. That is to say, on the reasoning of the High Court, Section 438(1) shall have to be read as containing the clause that the applicant "shall not" be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life". In this process one shall have overlooked that whereas, the power

under Section 438(1) can be exercised if the High Court or the Court of Session "thinks fit" to do so, Section 437(1) does not confer the power to grant bail in the same wide terms The expression "if it thinks fit", which occurs in Section 438(1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437(1). We see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

19. A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. It is true that the functions of the judiciary and the police are in a sense complementary and not overlapping. And, as observed by the Privy Council in *King-Emperor* v. *Khwaja Nazir Ahmed* [AIR 1945 PC 18 : (1943-44) 71 IA 203 : 46 Cri LJ 413] :

> "Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry .... The functions of the judiciary and the police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function,…"

But these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old Section 561-A of the Criminal Procedure

Code, to quash all proceedings taken by the police in pursuance of two first information reports made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the court cannot, in the exercise of its inherent powers, virtually direct that the police shall not investigate into the charges contained in the FIR. We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued under Section 438(1) are those recommended in sub-section (2)(*i*) and (*ii*) which require the applicant to cooperate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P.* v. *Deoman Upadhyaya* [AIR 1960 SC 1125 : (1961) 1 SCR 14, 26 : 1960 Cri LJ 1504] to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency.

20. It is unnecessary to consider the third proposition of the High Court in any great details because we have already indicated that there is no justification for reading into Section 438 the limitations mentioned in Section 437. The High Court says that such limitations are implicit in Section 438 but, with respect, no such implications arise or can be read into that section. The plenitude of the section must be given its full play.

21. The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This, virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

22. By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under Section 437 or Section 439. These sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations.

23. It remains only to consider the second proposition formulated by the High Court, which is the only one with which we are disposed to agree but we will say more about it a little later.

24. It will be appropriate at this stage to refer to a decision of this Court in *Balchand Jain* v. *State of Madhya Pradesh* [(1976) 4 SCC 572 : 1976 SCC (Cri) 689 : (1977) 2 SCR 52] on which the High Court has leaned heavily in

formulating its propositions. One of us, Bhagwati, J. who spoke for himself and A.C. Gupta, J. observed in that case that: (SCC pp. 576, para 2)

> "This power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty while on bail" that such power is to be exercised."

Fazal Ali, J. who delivered a separate judgment of concurrence also observed that: (SCC pp. 582-83, para 14)

> "An order for anticipatory bail is an extraordinary remedy available in special cases…"

and proceeded to say: (SCC p. 586, para 17)

> "As Section 438 immediately follows Section 437 which is the main provision for bail in respect of non-bailable offences, it is manifest that the conditions imposed by Section 437(1) are implicitly contained in Section 438 of the Code. Otherwise the result would be that a person who is accused of murder can get away under Section 438 by obtaining an order for anticipatory bail without the necessity of proving that there were reasonable grounds for believing that he was not guilty of offence punishable with death or imprisonment for life. Such a course would render the provisions of Section 437 nugatory and will give a free licence to the accused persons charged with non-bailable offences to get easy bail by approaching the court under Section 438 and bypassing Section 437 of the Code. This, we feel, could never have been the intention of the legislature. Section 438 does not contain unguided or uncanalised powers to pass an order for anticipatory bail, but such an order being of an exceptional type can only be passed if, apart from the conditions mentioned in Section 437, there is a special case made out for passing the order. The words "for a direction under this section" and "court may, if it thinks fit, direct" clearly show

> that the court has to be guided by a large number of considerations including those mentioned in Section 437 of the Code."
>
> While stating his conclusions Fazal Ali, J. reiterated in conclusion No. 3 (SCC p. 589, para 25) that "Section 438 of the Code is an extraordinary remedy and should be resorted to only in special cases".

25. We hold the decision in *Balchand Jain* [(1976) 4 SCC 572 : 1976 SCC (Cri) 689 : (1977) 2 SCR 52] in great respect but it is necessary to remember that the question as regards the interpretation of Section 438 did not at all arise in that case. Fazal Ali, J. has stated in para 3 of his judgment (SCC para 10) that "the only point" which arose for consideration before the court was whether the provisions of Section 438 relating to anticipatory bail stand overruled and repealed by virtue of Rule 184 of the Defence and Internal Security of India Rules, 1971 or whether both the provisions can, by the rule of harmonious interpretation, exist side by side. Bhagwati, J. has also stated in his judgment, after adverting to Section 438 that Rule 184 is what the court was concerned with in the appeal (SCC para 3). The observations made in *Balchand Jain* [(1976) 4 SCC 572 : 1976 SCC (Cri) 689 : (1977) 2 SCR 52] regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot therefore be treated as concluding the points which arise directly for our consideration. We agree, with respect, that the power conferred by Section 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that, it is not possible to agree with the observations made in *Balchand Jain* [(1976) 4 SCC 572 : 1976 SCC (Cri) 689 : (1977) 2 SCR 52] in an altogether different context on an altogether different point.

26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal

freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] , that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.

27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in *Nagendra* v. *King-Emperor* [AIR 1924 Cal 476, 479, 480 : 25 Cri LJ 732] that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the 'Meerut Conspiracy cases' observations are to be found regarding the right to bail which deserve a special mention. In *K.N. Joglekar* v. *Emperor* [AIR 1931 All 504 : 33 Cri LJ 94] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the court that there was no hard and fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In *Emperor* v. *Hutchinson* [AIR 1931 All 356, 358 : 32 Cri LJ 1271] it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he

were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.28. Coming nearer home, it was observed by Krishna Iyer, J., in *Gudikanti Narasimhulu* v. *Public Prosecutor* [(1978) 1 SCC 240 : 1978 SCC (Cri) 115] that: (SCC p. 242, para 1)

> "... the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. . . . After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right."

29. In *Gurcharan Singh* v. *State (Delhi Administration*) [(1978) 1 SCC 118 : 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the court, that: (SCC p. 129, para 29)

> "There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail."

…

31. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of

the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in *State* v. *Captain Jagjit Singh* [AIR 1962 SC 253 : (1962) 3 SCR 622 : (1962) 1 Cri LJ 216] , which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

…

33. We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.

34. This should be the end of the matter, but it is necessary to clarify a few points which have given rise to certain misgivings.

35. Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief", for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension

that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely

36. Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.

37. Thirdly, the filing of a first information report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

38. Fourthly, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.

39. Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of “anticipatory bail” to an accused who is under arrest involves a contradiction in terms, insofar as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

40.We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a ‘blanket order’ of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has “reason to believe” that he may be arrested. A belief can be said to be founded on reasonable grounds

only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

41. Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.

42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be

re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

43. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2) (*i*), (*ii*) and (*iii*). The court has, in addition, directed in most of those cases that (*a*) the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court under Section 438(1) of the Code."

IN THE SUPREME COURT OF INDIA

Central Bureau of Investigation, Special Investigation Cell–I, New Delhi v. Anupam J. Kulkarni

(1992) 3 SCC 141

A.M. Ahmadi & K. Jayachandra Reddy, JJ.

The accused was arrested by the police and placed in judicial custody. Although an application to transfer him to police custody was granted, the accused complained of chest pain and was taken to the hospital. He was brought back to judicial custody after 18 days and the police requested for police custody. The Supreme Court was asked to determine if an order of police custody can be made after the period of 15 days from first remand. The Court also examined the extension of police custody beyond 15 days in special scenarios.

Reddy, J.: "2. An important question that arises for consideration is whether a person arrested and produced before the nearest Magistrate as required under Section 167(1) Code of Criminal Procedure can still be remanded to police custody after the expiry of the initial period of 15 days. We propose to consider the issue elaborately as there is no judgment of this Court on this point…

…

4. Now coming to the object and scope of Section 167 it is well-settled that it is supplementary to Section 57. It is clear from Section 57 that the investigation should be completed in the first instance within 24 hours; if not the arrested person should be brought by the police before a Magistrate as provided under Section 167. The law does not authorise a police officer to detain an arrested person for more than 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate court. Sub-section (1) of Section 167 covers all this procedure and also lays down that the police officer while forwarding the accused to the nearest Magistrate should also transmit a copy of the entries in the diary relating to the case. The entries in the diary are meant to afford to the Magistrate the

necessary information upon which he can take the decision whether the accused should be detained in the custody further or not. It may be noted even at this stage the Magistrate can release him on bail if an application is made and if he is satisfied that there are no grounds to remand him to custody but if he is satisfied that further remand is necessary then he should act as provided under Section 167. It is at this stage sub-section (2) comes into operation which is very much relevant for our purpose. It lays down that the Magistrate to whom the accused person is thus forwarded 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 he thinks fit for a term not exceeding fifteen days in the whole. If such Magistrate has no jurisdiction to try the case or commit it for trial and if he considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. The section is clear in its terms. The Magistrate under this section can authorise the detention of the accused in such custody as he thinks fit but it should not exceed fifteen days in the whole. Therefore the custody initially should not exceed fifteen days in the whole. The custody can be police custody or judicial custody as the Magistrate thinks fit. The words "such custody" and "for a term not exceeding fifteen days in the whole" are very significant. It is also well-settled now that the period of fifteen days starts running as soon as the accused is produced before the Magistrate.

5. Now comes the proviso inserted by Act No. 45 of 1978 which is of vital importance in deciding the question before us. This proviso comes into operation where the Magistrate thinks fit that further detention beyond the period of fifteen days is necessary and it lays down that the Magistrate may authorise the detention of the accused person otherwise than in the custody of the police beyond the period of fifteen days. The words "otherwise than in the custody of the police beyond the period of fifteen days" are again very significant.

6. The learned Additional Solicitor-General appearing for the C.B.I. contended that a combined reading of Section 167(2) and the proviso therein would make it clear that if for any reason the police custody cannot be obtained during the period of first fifteen days yet a remand to the police custody even later is not precluded and what all that is required is that such police custody in the whole should not exceed fifteen days. According to him there could be cases where a remand to police custody would become absolutely necessary at a later stage even though such an accused is under judicial custody as per the orders of the Magistrate passed under

the proviso. The learned Additional Solicitor-General gave some instances like holding an identification parade or interrogation on the basis of the new material discovered during the investigation. He also submitted that some of the judgments of the High Courts particularly that of the Delhi High Court relied upon by the Chief Metropolitan Magistrate do not lay down the correct position of law in this regard. In*Gian Singh* v. *State (Delhi Administration)* [1981 Cri LJ 100 : (1981) 19 DLT 168 : (1981) 83 Punj LR (D) 85] a learned Single Judge of the High Court held that once the accused is remanded to judicial custody he cannot be sent back again to police custody in connection with or in continuation of the same investigation even though the first period of fifteen days has not exhausted. Again the same learned Judge, Justice M.L. Jain in *Trilochan Singh* v. *State (Delhi Administration)* [1981 Cri LJ 1773 : 1981 Rajdhani LR 635] took the same view. In *State (Delhi Administration)* v.*Dharam Pal* [1982 Cri LJ 1103 : (1982) 21 DLT 50 : 1982 Chand Cri C (Del) 114] a Division Bench of the Delhi High Court overruled the learned Single Judge's judgments in *Gian Singh case* [1981 Cri LJ 100 : (1981) 19 DLT 168 : (1981) 83 Punj LR (D) 85] and *Trilochan Singh case* [1981 Cri LJ 1773 : 1981 Rajdhani LR 635] . The Division Bench held that the words "from time to time" occurring in the section show that several orders can be passed under Section 167(2) and that the nature of the custody can be altered from judicial custody to police custody and vice-versa during the first period of fifteen days mentioned in Section 167(2) of the Code and that after fifteen days the accused could only be kept in judicial custody or any other custody as ordered by the Magistrate but not in the custody of the police. In arriving at this conclusion the Division Bench sought support on an earlier decision in *State* v. *Mehar Chand* [(1969) 5 DLT 179]. In that case the accused had been arrested for an offence of kidnapping and after the expiry of the first period of fifteen days the accused was in judicial custody under Section 344 CrPC (old Code). At that stage the police found on investigation that an offence of murder also was prima facie made out against the said accused. Then the question arose whether the said accused who was in judicial custody should be sent to the police custody on the basis of the discovery that there was an aggravated offence. The Magistrate refused to permit the accused to be put in police custody. The same was questioned before the High Court. Hardy, J. held that an accused who is in magisterial custody in one case can be allowed to be remanded to police custody in other case and on the same rule he can be remanded to police custody at a subsequent stage of investigation in the same case when the information discloses his complicity in more serious offences and that on principle, there is no difference at all between the two types of cases. The learned

Judge further stated as under: (DLT p. 182, para 12)

> "I see no insuperable difficulty in the way of the police arresting the accused for the second time for the offence for which he is now wanted by them. The accused being already in magisterial custody it is open to the learned Magistrate under Section 167(2) to take the accused out of jail or judicial custody and hand him over to the police for the maximum period of 15 days provided in that section. All that he is required to do is to satisfy himself that a good case is made out for detaining the accused in police custody in connection with investigation of the case. It may be that the offences for which the accused is now wanted by the police relate to the same case but these are altogether different offences and in a way therefore it is quite legitimate to say that it is a different case in which the complicity of the accused has been discovered and the police in order to complete their investigation of that case require that the accused should be associated with that investigation in some way."

The Division Bench in *Dharam Pal case* [1982 Cri LJ 1103 : (1982) 21 DLT 50 : 1982 Chand Cri C (Del) 114] referring to these observations of Hardy, J. observed that "We completely agree with Hardy, J. in coming to the conclusion that the Magistrate has to find out whether there is a good case for grant of police custody". A perusal of the later part of the judgment in *Dharam Pal case* [1982 Cri LJ 1103 : (1982) 21 DLT 50 : 1982 Chand Cri C (Del) 114] would show that the Division Bench referred to these observations in support of the view that the nature of the custody can be altered from judicial custody to police custody or vice-versa during the first period of fifteen days mentioned in Section 167(2) of the Code, but however firmly concluded that after fifteen days the accused could only be in judicial custody or any other custody as ordered by the Magistrate but not in police custody. Then there is one more decision of the Delhi High Court in *State (Delhi Administration)* v. *Ravinder Kumar Bhatnagar* [1982 Cri LJ 2366 : (1982) 84 Punj LR (D) 114 : (1982) 21 DLT 442] where a Single Judge after relying on the judgment of the Division Bench in*Dharam Pal case* [1982 Cri LJ 1103 : (1982) 21 DLT 50 : 1982 Chand Cri C (Del) 114] held that the language of Section 167(2) is plain and that

words "for a term not exceeding fifteen days in the whole" would clearly indicate that those fifteen days begin to run immediately after the accused is produced before the Magistrate in accordance with sub-section (1) and the police custody cannot be granted after the lapse of the "first fifteen days". In *State of Kerala* v. *Sadanadan* [1984 KLT 747] a Single Judge of the Kerala High Court held that the initial detention of the accused by the Magistrate can be only for fifteen days in the whole and it may be either police custody or judicial custody and during the period the Magistrate has jurisdiction to convert judicial custody to police custody and vice-versa and the maximum period under which the accused can be so detained is only fifteen days and that after the expiry of fifteen days the proviso comes into operation which expressly refers to police custody and enjoins that there shall be no police custody and judicial custody alone is possible when power is exercised under the proviso. The learned Single Judge stated that in the case before him the accused has already been in police custody for fifteen days and therefore he could not be remanded to police custody either under Section 167 or Section 309 CrPC.

7. The learned Additional Solicitor-General submitted that the observations made by Hardy, J. in *Mehar Chand case* [(1969) 5 DLT 179] would indicate that during the investigation of the same case in which the accused is arrested and is already in custody if more offences committed in the same case come to light there should be no bar to turn over the accused to police custody even after the first period of fifteen days and during the period of ninety days or sixty days in respect of the investigation of the cases mentioned in provisos (*a*)(*i*) and (*ii*) respectively. It may be noted firstly that the *Mehar Chand case* [(1969) 5 DLT 179] was decided in respect of a case arising under the old Code. If we examine the background in enacting the new Section 167(2) and the proviso (*a*) as well as Section 309 of the new Code it becomes clear that the legislature recognised that such custody namely police, judicial or any other custody like detaining the arrested person in Nari Sadans etc. should be in the whole for fifteen days and the further custody under the proviso to Section 167 or under Section 309 should only be judicial. In*Chaganti Satyanarayana* v. *State of A.P.* [(1986) 3 SCC 141 : 1986 SCC (Cri) 321] this Court examined the scope of Section 167(2) provisos (*a*)(*i*) and (*ii*) and held that the period of fifteen days, ninety days or sixty days prescribed therein are to be computed from the date of remand of the accused and not from the date of his arrest under Section 57 and that remand to police custody cannot be beyond the period of fifteen days and the further remand must be to judicial custody. … It was observed thus: (SCC pp. 148-49, para 16)

> "As sub-section (2) of Section 167 as well as proviso (1) of sub-section (2) of Section 309 relate to the powers of remand of a magistrate, though under different situations, the two provisions call for a harmonious reading insofar as the periods of remand are concerned. It would, therefore, follow that the words '15 days in the whole' occurring in sub-section (2) of Section 167 would be tantamount to a period of '15 days at a time' but subject to the condition that if the accused is to be remanded to police custody the remand should be for such period as is commensurate with the requirements of a case with provision for further extensions for restricted periods, if need be, but in no case should the total period of remand to police custody exceed 15 days. Where an accused is placed in police custody for the maximum period of 15 days allowed under law either pursuant to a single order of remand or to more than one order, when the remand is restricted on each occasion to a lesser number of days, further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. The legislature having provided for an accused being placed under police custody under orders of remand for effective investigation of cases has at the same time taken care to see that the interests of the accused are not jeopardised by his being placed under police custody beyond a total period of 15 days, under any circumstances, irrespective of the gravity of the offence or the serious nature of the case." (emphasis supplied)

These observations make it clear that if an accused is detained in police custody the maximum period during which he can be kept in such custody is only fifteen days either pursuant to a single order or more than one when such orders are for lesser number of days but on the whole such custody cannot be beyond fifteen days and the further remand to facilitate the investigation can only be by detention of the accused in judicial custody.

8. Having regard to the words "in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole" occurring in sub-section (2) of Section 167 now the question is whether it can be construed

that the police custody, if any, should be within this period of first fifteen days and not later or alternatively in a case if such remand had not been obtained or the number of days of police custody in the first fifteen days are less whether the police can ask subsequently for police custody for full period of fifteen days not availed earlier or for the remaining days during the rest of the periods of ninety days or sixty days covered by the proviso. The decisions mentioned above do not deal with this question precisely except the judgment of the Delhi High Court in *Dharam Pal case* [1982 Cri LJ 1103 : (1982) 21 DLT 50 : 1982 Chand Cri C (Del) 114] . Taking the plain language into consideration particularly the words "otherwise than in the custody of the police beyond the period of fifteen days" in the proviso it has to be held that the custody after the expiry of the first fifteen days can only be judicial custody during the rest of the periods of ninety days or sixty days and that police custody if found necessary can be ordered only during the first period of fifteen days. To this extent the view taken in *Dharam Pal case* [1982 Cri LJ 1103 : (1982) 21 DLT 50 : 1982 Chand Cri C (Del) 114] is correct.

9. At this juncture we want to make another aspect clear namely the computation of period of remand. The proviso to Section 167(2) clearly lays down that the total period of detention should not exceed ninety days in cases where the investigation relates to serious offences mentioned therein and sixty days in other cases and if by that time cognizance is not taken on the expiry of the said periods the accused shall be released on bail as mentioned therein. In *Chaganti Satyanarayana case* [(1986) 3 SCC 141 : 1986 SCC (Cri) 321] it was held that "It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run from the date of order of remand". Therefore the first period of detention should be computed from the date of order of remand. Section 167(2-A) which has been introduced for pragmatic reasons states that if an arrested person is produced before an Executive Magistrate for remand the said Magistrate may authorise the detention of the accused not exceeding seven days in aggregate. It further provides 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 Sections 167(2) and (2-A) 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. The detention thereafter could only be in judicial custody. Likewise the remand under Section 309 CrPC can be only to judicial custody in terms mentioned therein. This has been concluded by this Court and the language of the section also is clear. Section 309 comes into operation after taking cognizance and not during the period of investigation and the remand under this provision can only be to judicial custody and there cannot be any controversy about the same. (vide *Natabar Parida* v. *State of Orissa* [(1975) 2 SCC 220 : 1975 SCC (Cri) 484] .)

10. The learned Additional Solicitor-General however submitted that in some of the cases of grave crimes it would be impossible for the police to gather all the materials within first fifteen days and if some valuable information is disclosed at a later stage and if police custody is denied the investigation will be hampered and will result in failure of justice. There may be some force in this submission but the purpose of police custody and the approach of the legislature in placing limitations on this are obvious. The proviso to Section 167 is explicit on this aspect. The detention in police custody is generally disfavoured by law. The provisions of law lay down that such detention can be allowed only in special circumstances and that can be only by a remand granted by a Magistrate for reasons judicially scrutinised and for such limited purposes as the necessities of the case may require. The scheme of Section 167 is obvious and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers. Article 22(2) of the Constitution of India and Section 57 of CrPC give a mandate that every person who is arrested and detained in police custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of the arrest to the court of the Magistrate and no such person shall be detained in the custody beyond the said period without the authority of a Magistrate. These two provisions clearly manifest the intention of the law in this regard and therefore it is the Magistrate who has to judicially scrutinise circumstances and if satisfied can order the detention of the accused in police custody. Section 167(3) requires that the Magistrate

should give reasons for authorising the detention in the custody of the police. It can be thus seen that the whole scheme underlying the section is intended to limit the period of police custody. However, taking into account the difficulties which may arise in completion of the investigation of cases of serious nature the legislature added the proviso providing for further detention of the accused for a period of ninety days but in clear terms it is mentioned in the proviso that such detention could only be in the judicial custody. During this period the police are expected to complete the investigation even in serious cases. Likewise within the period of sixty days they are expected to complete the investigation in respect of other offences. The legislature however disfavoured even the prolonged judicial custody during investigation. That is why the proviso lays down that on the expiry of ninety days or sixty days the accused shall be released on bail if he is prepared to and does furnish bail. If as contended by the learned Additional Solicitor-General a further interrogation is necessary after the expiry of the period of first fifteen days there is no bar for interrogating the accused who is in judicial custody during the periods of 90 days or 60 days. We are therefore unable to accept this contention.

11. A question may then arise whether a person arrested in respect of an offence alleged to have been committed by him during an occurrence can be detained again in police custody in respect of another offence committed by him in the same case and which fact comes to light after the expiry of the period of first fifteen days of his arrest. The learned Additional Solicitor-General submitted that as a result of the investigation carried on and the evidence collected by the police the arrested accused may be found to be involved in more serious offences than the one for which he was originally arrested and that in such a case there is no reason as to why the accused who is in magisterial custody should not be turned over to police custody at a subsequent stage of investigation when the information discloses his complicity in more serious offences. We are unable to agree. In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the

arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody. The learned Additional Solicitor-General however strongly relied on some of the observations made by Hardy, J. in *Mehar Chand case* [(1969) 5 DLT 179] extracted above in support of his contention namely that an arrested accused who is in judicial custody can be turned over to police custody even after the expiry of first fifteen days at a subsequent stage of the investigation in the same case if the information discloses his complicity in more serious offences. We are unable to agree that the mere fact that some more offences alleged to have been committed by the arrested accused in the same case are discovered in the same case would by itself render it to be a different case. All these offences including the so-called serious offences discovered at a later stage arise out of the same transaction in connection with which the accused was arrested. Therefore there is a marked difference between the two situations. The occurrences constituting two different transactions give rise to two different cases and the exercise of power under Sections 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two different cases. Investigation in one specific case cannot be the same as in the other. Arrest and detention in custody in the context of Sections 167(1) and (2) of the Code has to be truly viewed with regard to the investigation of that specific case in which the accused person has been taken into custody. In *S. Harsimran Singh* v. *State of Punjab* [1984 Cri LJ 253 : ILR (1984) 2 P&H 139] a Division Bench of the Punjab and Haryana High Court considered the question whether the limit of police custody exceeding fifteen days as prescribed by Section 167(2) is applicable only to a single case or is attracted to a series of different cases requiring investigation against the same accused and held thus: (p. 257, para 10-A)

> "We see no inflexible bar against a person in custody with regard to the investigation of a particular offence being either re-arrested for the purpose of the investigation of an altogether different offence. To put it in other words, there is no insurmountable hurdle in the conversion of judicial custody into police custody by an order of the Magistrate under Section 167(2) of the Code for investigating another offence. Therefore, a re-

> arrest or second arrest in a different case is not necessarily beyond the ken of law."

This view of the Division Bench of the Punjab and Haryana High Court appears to be practicable and also conforms to Section 167. We may, however, like to make it explicit that such re-arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Section 167(2) to the effect that a fresh remand for police custody of a person already in judicial custody during investigation of a specific case cannot under any circumstances be issued, would seriously hamper the very investigation of the other case the importance of which needs no special emphasis. The procedural law is meant to further the ends of justice and not to frustrate the same. It is an accepted rule that an interpretation which furthers the ends of justice should be preferred. It is true that the police custody is not the be-all and end-all of the whole investigation but yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited police custody. The period of first fifteen days should naturally apply in respect of the investigation of that specific case for which the accused is held in custody. But such custody cannot further held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused.

12. As the points considered above have an important bearing in discharge of the day-to-day magisterial powers contemplated under Section 167(2), we think it appropriate to sum up briefly our conclusions as under:

13. Whenever any person is arrested under Section 57 CrPC he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial Magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the

same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody."

IN THE SUPREME COURT OF INDIA

Aslam Babalal Desai v. State of Maharashtra

(1992) 4 SCC 272

A.M. Ahamdi, C.J., M.M. Punchhi & K. Ramaswamy, JJ.

The appellant was arrested and an initial application for bail was rejected by the Sessions Judge. Since the chargesheet was not filed within 90 days, the appellant moved the Sessions Court seeking bail under the proviso to Section 167(2) CrPC. Bail was granted. After the charge sheet was submitted, the State of Maharashtra moved an application under Section 439(2) CrPC in the High Court for cancellation of bail arguing that the appellant was released on a technical ground under Section 167. The State argued that now that the chargesheet had been filed, the bail granted should be cancelled. The High Court cancelled the appellant's bail. The Supreme Court was asked to decide whether the cancellation of bail under Section 167 would attract different standards as opposed to the ones granted under Sections 437 and 439 of the CrPC?

Ahmadi, J.: "2. Can bail granted under the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (hereafter called 'the Code') for failure to complete the investigation within the period prescribed thereunder be cancelled on the mere presentation of the challan (charge-sheet) at any time thereafter? This is the question which we are called upon to answer…

…

7. We may…notice the case-law on the subject. In *Bashir* v. *State of Haryana* [(1977) 4 SCC 410 : 1977 SCC (Cri) 608 : (1978) 1 SCR 585] … [a]n application for cancellation of…bail of …three accused persons…was moved on the ground that they were released under Section 167(2) for failure to file the challans within the prescribed time and since the challans were filed, the court should cancel their bail. The Sessions Judge allowed the application and ordered cancellation of the bail on the ground that on the filing of the challans the court had jurisdiction to do so. The High Court dismissed the appeal. Thereupon this Court was moved by special leave

on the plea that once the bail is granted under Section 167(2) of the Code it cannot be cancelled on the mere filing of a challan but could be cancelled only under Section 437(5) of the Code. This Court after examining the relevant provisions to which we have adverted hereinabove concluded as under: (SCC pp. 413-14, para 6)

> "The power of the Court to cancel bail if it considers it necessary is preserved in cases where a person has been released on bail under Section 437(1) or (2) and these provisions are applicable to a person who has been released under Section 167(2). Under Section 437(2 when a person is released pending inquiry on the ground that there are not sufficient grounds to believe that he had committed a non-bailable offence may be committed to custody by court which released him on bail if it is satisfied that there are sufficient grounds for so doing after inquiry is completed. As the provisions of Section 437(1), (2) and (5) are applicable to a person who has been released under Section 167(2) the mere fact that subsequent to his release a challan has been filed is not sufficient to commit him to custody. In this case the bail was cancelled and the appellants were ordered to be arrested and committed to custody on the ground that subsequently a charge-sheet had been filed and that before the appellants were directed to be released under Section 167(2) their bail petitions were dismissed on merits by the Sessions Court and the High Court. The fact that before an order was passed under Section 167(2) the bail petitions of the accused were dismissed on merits is not relevant for the purpose of taking action under Section 437(5). Neither is it a valid ground that subsequent to release of the appellants a challan was filed by the police. The Court before directing the arrest of the accused and committing them to custody should consider it necessary to do so under Section 437(5). This may be done by the Court coming to the conclusion that after the challan had been filed there are sufficient grounds that the accused had committed a non-bailable offence and that it is necessary that he

> should be arrested and committed to custody. It may also order arrest and committal to custody on other grounds such as tampering of the evidence or that his being at large is not in the interests of justice. But it is necessary that the Court should proceed on the basis that he has been deemed to have been released under Sections 437(1) and (2)." (emphasis supplied)

It will thus be seen that once an accused person has been released on bail by the thrust of the proviso to Section 167(2), the mere fact that subsequent to his release a challan has been filed is not sufficient to cancel his bail. In such a situation his bail can be cancelled only if considerations germane to cancellation of bail under Section 437(5) or for that matter Section 439(2) exist. That is because the release of a person under Section 167(2) is equated to his release under Chapter XXXIII of the Code.

8. In *Raghubir Singh* v. *State of Bihar* [(1986) 4 SCC 481 : 1986 SCC (Cri) 511 : (1986) 3 SCR 802] a similar question came up for consideration...[O]ne of the grounds urged [before this Court] was that the High Court as well as the Special Judge were wrong in holding that the order of the Magistrate directing [the accused] to be released on bail under Section 167(2) had come to an end by the passage of time particularly after cognizance of the case was taken. Dealing with this contention this Court examined the scope of Section 167 read with Sections 437 and 439 of the Code and the ratio of the decision in *Bashir case* [(1977) 4 SCC 410 : 1977 SCC (Cri) 608 : (1978) 1 SCR 585] and proceeded to observe as under: (SCC p. 502, para 22)

> "The order for release on bail may however be cancelled under Section 437(5) or Section 439(2). Generally the grounds for cancellation of bail, broadly, are, interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or abuse of the liberty granted to him … Where bail has been granted under the proviso to Section 167(2) for the default of the prosecution in not completing the investigation in sixty days after the defect is cured by the filing of a charge-sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the

> accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect very strong grounds indeed."

Proceeding further while dealing with the facts on hand this Court observed: (SCC pp. 502-03, para 23)

> "The order for release on bail was not an order on merits but was what one may call an order-on-default, an order that could be rectified for special reasons after the defect was cured. The order was made long ago but for one reason or the other, the accused failed to take advantage of the order for several months. Probably for that reason, the prosecuting agency did not move in the matter and seems to have proceeded on the assumption that the order had lapsed with the filing of the charge-sheet. The question is should we now send the matter down to the High Court to give an opportunity to the prosecution to move that court for cancellation of bail? Having regard to the entirety of the circumstances, the long lapse of time since the original order for bail was made, the consequent change in circumstances and situation, and the directions that we have now given for the expeditious disposal of the case, we do not think that we will be justified in exercising our discretion to interfere under Article 136 of the Constitution in these matters at this stage."

It will thus be seen that this Court came to the conclusion that once an order for release on bail is made under the proviso to Section 167(2) it is not defeated by lapse of time and on the mere filing of the charge-sheet at a subsequent date. The order for release on bail can no doubt be cancelled for special reasons germane to cancellation of bail under Section 437(5) or Section 439(2). This Court then set out the grounds on which generally bail once granted could be cancelled and then proceeded to state that in the peculiar facts and circumstances of the case it would not be justified in interfering with the impugned order. Therefore, the final order which the Court made was in the backdrop of the special facts and circumstances of the case.

9. In *Rajnikant case* [(1989) 3 SCC 532 : 1989 SCC (Cri) 612],…the accused filed an application for bail under Section 167(2) of the Code on the ground that the charge-sheet had been filed after the expiry of the period of 90 days. The learned Magistrate…enlarged them on bail. The prosecution sought cancellation of the bail but the learned Magistrate did not accede to that request whereupon the High Court of Delhi was moved under Section 439(2) read with Section 482 of the Code. In that application the nature of offence committed, the part played by the accused, the gravity of the offence, etc., were set out. It was also mentioned that two of the accused persons had earlier absconded and as such the investigation could not be completed within the time prescribed by the proviso to Section 167(2) of the Code. The High Court following the dicta of *Raghubir Singh case* [(1986) 4 SCC 481 : 1986 SCC (Cri) 511 : (1986) 3 SCR 802] cancelled the bail. It was against this order that the accused approached this Court by special leave under Article 136 of the Constitution. Shetty, J. after considering the provisions of Section 167(2) read with Chapter XXXIII of the Code and in particular Sections 437(5) and 439(2) came to the following conclusion: (SCC p. 536, paras 13 and 14)

> "An order for release on bail under proviso (a) to Section 167(2) may appropriately be termed as an order-on-default. Indeed, it is a release on bail on the default of the prosecution in filing charge-sheet within the prescribed period. The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge-sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.
>
> The accused cannot, therefore, claim any special right to remain on bail. If the investigation reveals that the accused has committed a serious offence and charge-sheet is filed, the bail granted under proviso (a) to Section 167(2) could be cancelled."

10. On this line of reasoning the learned Judge upheld the order of the High Court and refused to interfere. It may here be mentioned that this Court's decision in *Bashir case* [(1977) 4 SCC 410 : 1977 SCC (Cri) 608 : (1978) 1 SCR 585] was not placed before the learned Judge.

11. On a conjoint reading of Sections 57 and 167 of the Code it is clear that the legislative object was to ensure speedy investigation after a person has been taken in custody. It expects that the investigation should be completed within 24 hours and if this is not possible within 15 days and failing that within the time stipulated in clause (*a*) of the proviso to Section 167(2) of the Code. The law expects that the investigation must be completed with dispatch and the role of the Magistrate is to oversee the course of investigation and to prevent abuse of the law by the investigating agency. As stated earlier, the legislative history shows that before the introduction of the proviso to Section 167(2) the maximum time allowed to the investigating agency was 15 days under sub-section (2) of Section 167 failing which the accused could be enlarged on bail. From experience this was found to be insufficient particularly in complex cases and hence the proviso was added to enable the Magistrate to detain the accused in custody for a period exceeding 15 days but not exceeding the outer limit fixed under the proviso (*a*) to that sub-section. We may here mention that the period prescribed by the proviso has been enlarged by State amendments and wherever there is such enlargement, the proviso will have to be read accordingly. The purpose and object of providing for the release of the accused under sub-section (2) of Section 167 on the failure of the investigating agency completing the investigation within the extended time allowed by the proviso was to instil a sense of urgency in the investigating agency to complete the investigation promptly and within the statutory time-frame. The deeming fiction of correlating the release on bail under sub-section (2) of Section 167 with Chapter XXXIII, i.e. Sections 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the order of release is by fiction of law an order passed under Section 437(1) or (2) or Section 439(1) it follows as a natural consequence that the said order can be cancelled under sub-section (5) of Section 437 or sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in *Raghubir Singh case*[(1986) 4 SCC 481 : 1986 SCC (Cri) 511 : (1986) 3 SCR 802] the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled where (*i*) the accused misuses his liberty by indulging in similar criminal activity, (*ii*) interferes with the course of investigation (*iii*) attempts

to tamper with evidence or witnesses, (*iv*) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (*v*) there is likelihood of his fleeing to another country, (*vii*) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (*vii*) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.

12. In *State (Delhi Admn.)* v. *Sanjay Gandhi* [(1978) 2 SCC 411 : 1978 SCC (Cri) 223] this Court observed rejection of bail when bail is applied for is one thing; cancellation of a bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail once granted. That is because cancellation of bail interferes with the liberty already secured by the accused either on the exercise of discretion by the court or by the thrust of law. This Court, therefore, observed that the power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. That does not mean that the power though extraordinary in character must not be exercised even if the ends of justice so demand.**13.** In *Bhagirathsinh* v. *State of Gujarat* [(1984) 1 SCC 284 : 1984 SCC (Cri) 63] this Court observed that very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail. Even where a prima facie case is established the approach of the Court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence. It is wrong to think that bail secured by virtue of the proviso (*a*) to Section 167 is an undeserved one. To so think is to doubt the legislative wisdom in prescribing the outer limit for filing the charge-sheet and to ignore the legislative history. As pointed out earlier the legislative history of Section 167 shows that by proviso (*a*) the detention period was enhanced to a maximum of 90 days from 15 days earlier allowed. When the Legislature made it obligatory that the accused shall be released on bail if the charge-sheet is not filed within the outer limit provided by proviso (*a*), it manifested concern for individual liberty notwithstanding the gravity of the allegation against the accused. It would not be permissible to interfere with the legislative mandate on imaginary apprehensions, e.g., an obliging investigation officer deliberately not filing the charge-sheet in time, as such misconduct can be dealt with departmentally. To permit the prosecution to have the bail cancelled on

the mere filing of the charge-sheet is to permit the police to trifle with individual liberty at its sweet will and set at naught the purpose and object of the legislative mandate. The paramount consideration must be to balance the need to safeguard individual liberty and to protect the interest of administration of justice so as to prevent its failure. In the present case the High Court cancelled the bail solely on the ground that the bail was granted on technical grounds and the investigation revealed that there was eyewitness account disclosing the commission of a serious offence of murder. In its view the ratio of *Rajnikant Jivanlal Patel case* [(1989) 3 SCC 532 : 1989 SCC (Cri) 612] applies to the case with full vigour. We find it difficult to agree.

14. We sum up as under:

> The provisions of the Code, in particular Sections 57 and 167, manifest the legislative anxiety that once a persons's liberty has been interfered with by the police arresting him without a court's order or a warrant, the investigation must be carried out with utmost urgency and completed within the maximum period allowed by the proviso (*a*) to Section 167(2) of the Code. It must be realised that the said proviso was introduced in the Code by way of enlargement of time for which the arrested accused could be kept in custody. Therefore, the prosecuting agency must realise that if it fails to show a sense of urgency in the investigation of the case and omits or defaults to file a charge-sheet within the time prescribed, the accused would be entitled to be released on bail and the order passed to that effect under Section 167(2) would be an order under Section 437(1) or (2) or Section 439(1) of the Code. Since Section 167 does not empower cancellation of the bail, the power to cancel the bail can only be traced to Section 437(5) or Section 439(2) of the Code. The bail can then be cancelled on considerations which are valid for cancellation of bail granted under Section 437(1) or (2) or Section 439(1) of the Code. The fact that the bail was earlier rejected or that it was secured by the thrust of proviso (*a*) to Section 167(2) of

> the Code then recedes in the background. Once the accused has been released on bail his liberty cannot be interfered with lightly i.e. on the ground that the prosecution has subsequently submitted a charge-sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sections 57 and 167(2) of the Code. We are, therefore, of the view that once an accused is released on bail under Section 167(2) he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals the commission of a non-bailable crime. The ratio of *Rajnikant case* [(1989) 3 SCC 532 : 1989 SCC (Cri) 612] to the extent it is inconsistent herewith does not, with respect, state the law correctly.

15. Even where two views are possible, this being a matter belonging to the field of criminal justice involving the liberty of an individual, the provision must be construed strictly in favour of individual liberty since even the law expects early completion of the investigation. The delay in completion of the investigation can be on pain of the accused being released on bail. The prosecution cannot be allowed to trifle with individual liberty if it does not take its task seriously and does not complete it within the time allowed by law. It would also result in avoidable difficulty to the accused if the latter is asked to secure a surety and a few days later be placed behind the bars at the sweet will of the prosecution on production of a charge-sheet. We are, therefore, of the view that unless there are strong grounds for cancellation of the bail, the bail once granted cannot be cancelled on mere production of the charge-sheet. The view we are taking is consistent with this Court's view in the case of *Bashir* [(1977) 4 SCC 410 : 1977 SCC (Cri) 608 : (1978) 1 SCR 585] and *Raghubir* [(1986) 4 SCC 481 : 1986 SCC (Cri) 511 : (1986) 3 SCR 802] but if any ambiguity has arisen on account of certain observations in *Rajnikant case* [(1989) 3 SCC 532 : 1989 SCC (Cri) 612] our endeavour is to clear the same and set the controversy at rest."

IN THE SUPREME COURT OF INDIA

Supreme Court Legal Aid Committee representing Undertrial Prisoners v. Union of India & Ors.

(1994) 6 SCC 731

A.M. Ahmadi & B.L. Hansaria, JJ.

The present writ was the outcome of the delay in the disposal of cases under the NDPS Act. Among other things, the writ highlighted the delay in the disposition of cases while the strictness in granting bail would violate the Act and right to speedy/fair trial under the Constitution. The Court framed guidelines for the issue of bail in NDPS offences.

A.M. Ahmadi, J.: "15. But the main reason which motivated the Supreme Court Legal Aid Society to file this petition under Article 32 of the Constitution was the delay in the disposal of cases under the Act involving foreigners. The reliefs claimed included a direction to treat further detention of foreigners, who were languishing in jails as undertrials under the Act for a period exceeding two years, as void or in any case they be released on bail and it was further submitted by counsel that their cases be given priority over others. When the petition came up for admission it was pointed out to counsel that such an invidious distinction between similarly situate undertrials who are citizens of this country and who are foreigners may not be permissible under the Constitution and even if priority is accorded to the cases of foreigners it may have the effect of foreigners being permitted to jump the queue and slide down cases of citizens even if their cases are old and pending since long. Counsel immediately realised that such a distinction if drawn would result in cases of Indian citizens being further delayed at the behest of foreigners, a procedure which may not be consistent with law. He, therefore, rightly sought permission to amend the cause-title and prayer clauses of the petition which was permitted. In substance the petitioner now prays that all undertrials who are in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should in any case be released on bail. It is indeed true and that is obvious from the plain language of Section 36(1) of the Act,

that the legislature contemplated the creation of Special Courts to speed up the trial of those prosecuted for the commission of any offence under the Act. It is equally true that similar is the objective of Section 309 of the Code. It is also true that this Court has emphasised in a series of decisions that Articles 14, 19 and 21 sustain and nourish each other and any law depriving a person of "personal liberty" must prescribe a procedure which is just, fair and reasonable, i.e., a procedure which promotes speedy trial. See *Hussainara Khatoon (IV)* v. *Home Secy., State of Bihar* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] , *Raghubir Singh* v. *State of Bihar*[(1986) 4 SCC 481 : 1986 SCC (Cri) 511] and *Kadra Pahadiya* v. *State of Bihar*[(1983) 2 SCC 104 : 1983 SCC (Cri) 361] to quote only a few. This is also the avowed objective of Section 36(1) of the Act. However, this laudable objective got frustrated when the State Government delayed the constitution of sufficient number of Special Courts in Greater Bombay; the process of constituting the first two Special Courts started with the issuance of notifications under Section 36(1) on 4-1-1991 and under Section 36(2) on 6-4-1991 almost two years from 29-5-1989 when Amendment Act 2 of 1989 became effective. Since the number of courts constituted to try offences under the Act were not sufficient and the appointments of Judges to man these courts were delayed, cases piled up and the provision in regard to enlargement on bail being strict the offenders have had to languish in jails for want of trials. As stated earlier Section 37 of the Act makes every offence punishable under the Act cognizable and non-bailable and provides that no person accused of an offence punishable for a term of five years or more shall be released on bail unless (*i*) the Public Prosecutor has had an opportunity to oppose bail and (*ii*) if opposed, the court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence and is not likely to indulge in similar activity. On account of the strict language of the said provision very few persons accused of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in *Kartar Singh*v. *State of Punjab* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] . Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in *A.R. Antulay* v. *R.S. Nayak* [(1992) 1 SCC 225 :

1992 SCC (Cri) 93] , release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned counsel for the State of Maharashtra that additional Special Courts have since been constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:

(*i*) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(*ii*) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (*i*) above

provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(*iii*) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(*iv*) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (*i*), (*ii*) and (*iii*) above shall be subject to the following general conditions:

(*i*) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(*ii*) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (*i*), once in a fortnight in the case of those covered under clause (*ii*) and once in a week in the case of those covered by clause (*iii*), unless leave of absence is obtained in advance from the Special Judge concerned;

(*iii*) the benefit of the direction in clauses (*ii*) and (*iii*) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(*iv*) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said

accused shall not leave the country and shall appear before the Special Court as and when required;

(*v*) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(*vi*) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(*vii*) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(*viii*) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.

16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order."

IN THE SUPREME COURT OF INDIA

Sanjay Dutt v. State through C.B.I, Bombay

(1994) 5 SCC 410

A.M. Ahmadi, J.S. Verma, P.B. Sawant, B.P. Jeevan Reddy & N.P. Singh, JJ.

The Constitution Bench of the Supreme Court was called upon to decide various questions of law relating to bail in the TADA Act 1987. Two questions that the Court had to decide on were (1) the scope of the right under Section 20(4) of the TADA Act for an accused to be released on bail on failure of the investigating agency to complete the investigation within the time frame prescribed in the Act, and (2) The scope of bail under Section 20(8) of the Act.

Verma, J.: "9. We may now quote for the sake of convenience the provisions of the TADA Act which are particularly material for our purpose:

…

[Section] 20. *Modified application of certain provisions of the Code*.— ….

***

(4) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that —

(*a*) the reference in sub-section (1) thereof to 'Judicial Magistrate' shall be construed as a reference to 'Judicial Magistrate or Executive Magistrate or Special Executive Magistrate';

(*b*) the references in sub-section (2) thereof to 'fifteen days', 'ninety days' and 'sixty days', wherever they occur, shall be construed as references to 'sixty days', 'one hundred and eighty days' and 'one hundred and eighty days', respectively; and

(*bb*) in sub-section (2), after the proviso, the following proviso shall be inserted, namely:—

Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period up to one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and

(c) sub-section (2-A) thereof shall be deemed to have been omitted.

***

(7) Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder.

(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless —

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.

...

43. Section 20 of the TADA Act prescribes the modified application of the Code of Criminal Procedure indicated therein. The effect of sub-section (4) of Section 20 is to apply Section 167 of the Code of Criminal Procedure in relation to a case involving an offence punishable under the TADA Act subject to the modifications indicated therein. One of the modifications made in Section 167 of the Code by Section 20(4) of the TADA Act is to require the investigation in any offence under the TADA Act to be completed within a period of 180 days with the further proviso that the Designated Court is empowered to extend that period up to one year if it is satisfied that it is not possible to complete the investigation within the said period of 180 days, on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of 180 days. This gives rise to the

right of the accused to be released on bail on expiry of the said period of 180 days or the extended period on default to complete the investigation within the time allowed.

44. In *Hitendra Vishnu Thakur* v. *State of Maharashtra* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087: JT (1994) 4 SC 255] the conclusion was summarised, as under : (SCC p. 635, para 30)

> "In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under Section 20(4) has to make an application to the court for grant of bail on grounds of the 'default' of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under clause (bb) but the charge-sheet is not filed within the extended period, the court shall have no option but to release the accused on bail, if he seeks it and is prepared to furnish

> the bail as directed by the court. Moreover, no extension under clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in clause (bb), which must be strictly construed."
>
> (emphasis in original)

45. In *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255], it was held that the Designated Court would have "no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bond as directed by the court"; and that a 'notice' to the accused is required to be given by the Designated Court before it grants any extension under the further proviso beyond the prescribed period of 180 days for completing the investigation. Shri Kapil Sibal, learned counsel for the petitioner contended that the requirement of the 'notice' contemplated by the decision in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] before granting the extension for completing the investigation is mere production of the accused before the court and not a written notice to the accused giving reasons for seeking the extension requiring the accused to show cause against it. Learned counsel submitted that mere production of the accused at that time when the prayer for extension of time is made by the Public Prosecutor and considered by the court, to enable such a decision being made in accordance with the requirements of Section 167 CrPC, is the only requirement of notice to be read in the decision of the Division Bench in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] . The grievance of the learned counsel was, that quite often the accused was not even produced before the court at the time of consideration by the court of the prayer of the Public Prosecutor for extension of the period.

46. On the other aspect, Shri Kapil Sibal conceded that the indefeasible right for grant of bail on expiry of the initial period of 180 days for completing the investigation or the extended period prescribed by Section 20(4)(*bb*) as held in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] is a right of the accused which is enforceable only up to the filing of the challan and does not survive for enforcement on the challan being filed in the court against him. Shri Sibal submitted that

the decision of the Division Bench in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] cannot be read to confer on the accused an indefeasible right to be released on bail under this provision once the challan has been filed if the accused continues in custody. He stated unequivocally that on filing of the challan, such a right which accrued prior to filing of the challan has no significance and the question of grant of bail to an accused in custody on filing of the challan has to be considered and decided only with reference to the provisions relating to grant of bail applicable after filing of the challan, since Section 167 CrPC has relevance only to the period of investigation.

47. Learned Additional Solicitor General, in reply, agreed entirely with the above submission of Shri Sibal and submitted that the principle enunciated by the Division Bench in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] must be so read. However, the grievance of the learned Additional Solicitor General is that the direction for grant of bail by the Division Bench in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] , on the facts of that case, is not in consonance with such reading of that decision and indicates that the indefeasible right of the accused to be released on bail on expiry of the time allowed for completing the investigation survives and is enforceable even after the challan has been filed, without reference to the merits of the case or the material produced in the court with the challan. He further submitted that it should be clarified that the direction to grant bail under this provision on this ground alone in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] after the challan had been filed was incorrect. Such a clarification, he urged, is necessary because the decision in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] is being construed by the Designated Courts to mean that the right of the accused to be released on bail in such a situation is indefeasible in the sense that it survives and remains enforceable, without reference to the facts of the case, even after the challan has been filed and the court has no jurisdiction to deny the bail to the accused at any time if there has been a default in completing the investigation within the time allowed. Bail is being claimed by every accused under the TADA Act for this reason alone in all such cases. This is the occasion for seeking a fresh decision of this question by a larger Bench.

48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(*bb*) is based on a correct reading of the principle indicated

in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(*bb*), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this 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 forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of *habeas corpus* on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan* v. *State of Punjab* [1952 SCR 395 : AIR 1952 SC 106 : 1952 Cri LJ 656] ; *Ram Narayan Singh* v. *State of Delhi* [1953 SCR 652 : AIR 1953 SC 277 : 1953 Cri LJ 1113] and *A.K. Gopalan* v. *Government of India* [(1966) 2 SCR 427 : AIR 1966 SC 816 : 1966 Cri LJ 602] .)

49. This is the nature and extent of the right of the accused to be released on bail under Section 20(4)(*bb*) of the TADA Act read with Section 167 CrPC in such a situation. We clarify the decision of the Division Bench in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087 : JT (1994) 4 SC 255] , accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribe to that view.

50. Shri Kapil Sibal, learned counsel for the petitioner submitted that the

meaning and scope of sub-section (8) of Section 20 of the TADA Act is indicated by the Constitution Bench in *Kartar Singh* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] as under : (SCC p. 707, para 349)

> "The conditions imposed under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed under clauses (i) and (ii) of sub-section (1) of Section 437 and clause (b) of sub-section (3) of that section. … Therefore, the condition that 'there are grounds for believing that he is not guilty of an offence,' which condition in different form is incorporated in other Acts such as clause (i) of Section 437(1) of the Code … cannot be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution."

51. In reply, the learned Additional Solicitor General submitted that the pronouncement of the Constitution Bench in *Kartar Singh* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] is clear and unambiguous and, therefore, there is no occasion for a fresh consideration of that matter.

52. The pronouncement of the Constitution Bench as extracted above is clear and does not require any further elucidation by us, besides it being binding on us.

53. As a result of the above discussion, our answers to the … questions of law referred for our decision are as under:

…

> (2)(a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the CrPC and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to Clause (bb) of Sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in Hitendra Vishnu Thakur. The requirement of such notice to the accused before granting the extension for completing the

investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the CrPC in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this 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 forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the CrPC. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

IN THE HIGH COURT OF BOMBAY

Menino Lopes v. State of Goa

(1995) 1 Bom CR 334

A.M. Bhattacharjee, C.J. & V.P. Tipnis, J.

The accused's bail application was rejected by a Single Judge of the Goa Bench of the Bombay High Court with an observation that the accused shall remain in custody "till final disposal of trial." A subsequent bail application was filed before another Single Judge of the Goa Bench who referred the matter to a Division Bench. The Court in this case dealt with the statutory right of an accused to move a bail application at a subsequent stage after the first bail application has been rejected. It also discussed the issue of placing a subsequent application of bail before the same judge who had disposed off the earlier application for bail.

Bhattacharjee, C.J.: "1.This application for bail has come up before us from the Goa Bench under somewhat unusual circumstances. An earlier application for bail was filed before a learned Single Judge of that Bench who rejected the same. Such rejection, by itself, may not be unusual; but the rejection was made with some extraordinarily unusual observations. The learned Judge, while rejecting the application of bail … observed that "the Petitioner is *bound, to remain in custody till the final disposal of the trial*". We are afraid, and this we say with respect, that the learned Judge went too far and in purporting to deprive and divest the accused-Applicant of all his rights to move for bail afresh at any subsequent stage of the trial, the learned Judge acted in a manner which is difficult to appreciate. We cannot forget that the right of the accused to move for bail, whether at the pre-trial, trial or post-trial stage, concerns his right to personal liberty under Article 21 of the Constitution and now that the said Article has been endowed with majestic magnitude, amplitude and plentitude in and since the decision of the Supreme Court in *Maneka Gandhi*, consideration of an application for bail has become all the more a matter of most anxious advertence and any improper handling thereof as a matter of easy insouciance or otherwise would offend the provisions of Article 21. Such an observation to the effect that the accused-Applicant "is

bound to remain in custody till the final disposal of the trial" is also squarely against the provisions of section 437 of the Code of Criminal Procedure. The provisions of sub-section (2) and of sub-section (6) of section 437 make it irresistibly clear that even though an application for bail has been rejected at an earlier stage, the accused may be released on bail at any time thereafter. Even the first proviso to sub-section (1) of section 437 shows that a person who has become very much sick or infirm at a later stage may be released on bail, notwithstanding that his earlier application has been rejected. All that a Judge can say while rejecting an application for bail is that on the materials then on record, the accused has not been able to make out a case for the grant of bail *at that stage*; but the Judge cannot, however grave or serious the accusation or the circumstance may be, forfeit the statutory right of the accused to move for bail at a subsequent stage to secure his release and thus to protect or enforce his right to personal liberty. We are, therefore, clearly of the view that the learned Judge who disposed of the first application was clearly wrong in making such observations.

2. The present application for bail … has been filed before another learned Single Judge who, having obviously felt embarrassed by the aforesaid fiat of the learned Judge who dealt with the earlier application, thought that since both he and the former Judge are Courts of co-equal jurisdiction, the matter should be referred for disposal by a two-Judge Bench. The learned Judge, however, while referring the matter as aforesaid, has granted the accused ad interim bail, obviously subject to the final order by this Bench. A question has, however, arisen as to whether the second Judge who has entertained this second application for bail could do so since the earlier one was dealt with and disposed of by another Judge of that very Bench and whether the second application was to be placed before that Judge only who dealt with and disposed of the first application.3. An impression has gained ground as a result of the decisions of the Supreme Court in *Shahzad Hasan Khan*, (1987) 2 SCC 684 : AIR 1987 SC 1613, and in *Buddhikota Subha Rao*, 1989 Supp (2) SCC 605 : AIR 1989 SC 2292, that a subsequent application for bail should invariably be placed before the same learned Judge of the High Court, if available, who has heard and disposed of the earlier application. It is true that in *Shahzad Hasan Khan* (supra) it has been observed by the two-Judge Bench that "if successive bail applications on the same subject are permitted to be disposed of by different Judges, there would be conflicting orders and the litigant would be *pestering every Judge* till he gets an order to his liking resulting in the *credibility of the Court* and the *confidence* of the other

side being put in issue and there would be wastage of Court's time" and that "judicial discipline requires that such matter must be placed before the same Judge, if he is available, for orders". In *Buddhikota Subha Rao* (supra), another two-Judge Bench of the Supreme Court observed, after referring with approval to *Shahzad Hasan Khan*(supra), that "in such a situation the proper course … is to direct that the matter be placed before the same learned Judge who disposed of the earlier application" and that "such a practice or convention would prevent the abuse of the process of Court inasmuch as it will prevent an impression being created that a litigant is *avoiding* or *selecting* a Court to secure an order to his liking". With respect, we have not been able to fully appreciate the import of these observations, even though we know that we are bound by the observations of the Supreme Court even if we fail to appreciate or understand the same.

…

4. It will be trite to say that the power and jurisdiction of a Judge to take cognizance of and to hear any case or classes of cases and to adjudicate and exercise any judicial power in respect of them is derived only and solely from the determination made by the Chief Justice in exercise of his constitutional, statutory and inherent powers and from no other source and no case which is not covered by such determination can be entertained, dealt with or decided by any Judge or Judges sitting singly or in Division Courts till such determination by the Chief Justice remains operative. So long such determination would continue in operation, no Judge who sits singly can sit in a Division Bench nor can a Division Bench be split up and one or both of the Judges constituting such Bench can sit singly or constitute a Division Bench with another Judge and take up any other kind of judicial business. No citation should be necessary for such an obvious proposition, but yet, reference may be made to the decision of our former Chief Justice P.D. Desai, speaking for the Division Bench in the Calcutta High Court in *Sohan Lal Baid* v. *State of West Bengal*, AIR 1990 Cal 168. If a Judge or a Bench of Judges is hearing applications for bail, they can only do so because of the existing determination in its or their favour by the Chief Justice and if at a later period, some other Judge or Bench of Judges would be hearing such applications for bail, that would also be so only because of such determination being subsequently made by the Chief Justice. Since the Judges derive their jurisdiction solely by and under the determination of the Chief Justice, it is difficult to understand how an impression can at all grow that a litigant is *selecting* or *avoiding* a particular Judge or Bench to obtain an order to his liking as observed,

in *Buddhikota Subha Rao* (supra), at 2296. It is also difficult to understand, as observed in *Shahzad Hasan Khan*, supra, at 1615, as to how "a litigant would be pestering" *every Judge* till he gets an order to his liking, for it is never in the hands of the litigants or their lawyers to confer on any Judge the jurisdiction to hear bail application or any other matter. It is also difficult to understand as to why the credibility of the Court and the confidence of the other side would be put in issue *simply and solely* on the ground that while an application for bail was rejected by an earlier Judge or an earlier Bench, the same has, at a later stage, been granted by a later Judge or a later Bench. As already indicated hereinabove, it would be apparent from the provisions of section 437 of the Code itself and also otherwise that the circumstances and materials on record may go on changing during the progress of the investigation, inquiry or trial and an order of bail in favour of the accused may be eminently justified at a later stage even though at an earlier stage when the same was moved before another Judge or Bench, no such justification could be made out.

…

6. We, therefore, do not think that it was not within the competence of the second learned Judge to hear and dispose of the present application for bail, even though the earlier application was heard and disposed of by another Judge. This position is indisputable and has not been disputed, even remotely, by the Supreme Court in any of the decisions mentioned hereinabove. All that the Supreme Court appears to have held in the facts and context of those cases is that *whenever and wherever possible*, an application for bail should be heard by the same learned Judge who has heard and disposed of the earlier applications, provided, however, as repeatedly pointed out by the Supreme Court, the same learned Judge "is available". We have our own doubts that whether in a busy High Court like ours, a learned Judge, who has ceased to have the requisite determination allotted to him earlier and is thereafter exercising a new determination, can always be made available without some amount of delay, particularly when this High Court is functioning with three more permanent Benches in Nagpur, Aurangabad and Goa. It is obvious that any such delay in disposing of bail matters must be avoided. If a learned Judge has ceased to have the earlier determination in exercise whereof he has disposed of an application for bail and is now exercising a new determination which does not include matters relating to bail, no new application for bail can obviously be placed or moved before him, unless the Judge having the present determination refers the application back to

the Chief Justice for special assignment thereof to the Judge who had the earlier determination. This also may, in a busy Court like ours, involve some amount of delay which may not always be appreciated in an application for bail where the accused is obviously endeavouring to protect or enforce his precise right to personal liberty. We, therefore, must not read the Supreme Court decision to have laid down any rigid or strait-jacket formula that an application for bail must *invariably* be placed before the Judge who has disposed of an earlier application, but only to have advised us to see that the later application is, if otherwise reasonably possible, be placed before the same learned Judge. But failure to do so, as already, indicated above, cannot attach any illegality or infirmity to the order passed by the later Judge who is now having the requisite determination. Therefore, while we appreciate the gesture on the part of the second learned Judge in this case to have the matter referred to this Bench, we have, for the reasons indicated above, no doubt that the said learned Judge could have also heard and disposed of the matter in his own way."

IN THE SUPREME COURT OF INDIA

Uday Mohanlal Acharya v. State of Maharashtra

(2001) 5 SCC 453

G.B. Pattnaik, U.C. Banerjee & B.N. Agrawal, JJ.

The accused filed an application for bail under Section 167(2), Cr. P.C. Since the chargesheet had not been filed within 60 days from the date of remand. The Magistrate rejected the application. The accused approached the High Court, where a single judge heard the case. He subsequently referred the matter to a Division Bench. In the interim, a charge-sheet was filed before the Trial judge. Therefore, the High Court rejected the application for bail since the charge sheet had been filed during the pendency of the appellant's bail application before it. The Apex Court was asked to decide on the question of whether the accused is entitled to bail in such circumstances.

Pattnaik, J. (speaking for the Majority):"3. Mr K.T.S. Tulsi, learned Senior Counsel appearing for the accused-appellant contended that the legislative mandate conferring right on the accused to be released on bail on the expiry of the period contemplated under the proviso to sub-section (2) of Section 167, if the accused is prepared to furnish bail, cannot be nullified by taking recourse to subterfuge and keeping the matter pending for passing of an order, allowing the prosecution to file a charge-sheet. According to Mr Tulsi, the expression "shall be released on bail" in the proviso to sub-section (2) of Section 167 not only confers indefeasible right on the accused but also casts duty/obligation on the Magistrate, since the Magistrate will not be entitled to remand the accused any further. In this view of the matter, if an accused files an application on the expiry of the period contemplated under the proviso to sub-section (2) of Section 167 and offers to furnish the bail on being ordered and by the date of filing of the application no charge-sheet had been filed by the prosecution then the accused has to be released on bail and the right conferred upon him under the aforesaid provision of the Code must be enforced and subsequent filing of the charge-sheet will not alter the position. Mr Tulsi further contended that in para 48 of the judgment in *Sanjay Dutt case* [(1994) 5 SCC 410 :

1994 SCC (Cri) 1433] when it has been indicated (at SCC p. 442)

> "the indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of"

It would obviously mean, if the application for being released on bail had not been made before the filing of challan. In other words, according to Mr Tulsi if an accused had not made any application for being released on bail, notwithstanding the fact, that the charge-sheet had not been filed within the stipulated period he will not be entitled to file the same after filing of the challan, but if the accused had filed the application for bail and was prepared to offer and furnish the bail, as required by the court, then subsequent filing of challan will not take away the accrued right of the accused merely because the Magistrate or any other court had not passed the order, or the accused had not been factually released. According to Mr Tulsi if the observation of this Court in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] is interpreted in the manner as it has been interpreted by the High Court in the impugned judgment then the prosecution can always frustrate the right of the accused accrued in his favour under the mandates of the statute by several dialectic tactics or even in contingency, like, absence of the Presiding Officer of the court or non-availability of the court to take up application of bail and passing orders thereon. Mr Tulsi contends that the passing of an order of bail under the proviso to sub-section (2) of Section 167 is merely a clerical act of the Magistrate or the court concerned in implementation of the legislative mandate, and at that stage, no adjudication is required to be made and in this view of the matter the provisions of the Code should be so construed so as not to frustrate the legislative mandate but it must be so construed which should be in aid of fulfilling the intention of the legislature. This being the position, Mr Tulsi contends that the impugned order is wholly erroneous and should be set aside.

4. Mr Janardhan, learned Additional Advocate General, appearing for the State of Maharashtra on the other hand contended that in several decisions of this Court including the Constitution Bench decision in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] it has been unequivocally held that the so-called indefeasible right accruing to the accused remains enforceable from the time of default till the filing of the challan and does not survive or remain enforceable on the challan being filed. According to Mr Janardhan, if an accused has not been released on bail and by the

time the court finally considers the application and passes an order and the accused furnishes the bail, the challan is filed then the right of being released stands extinguished since once a challan is filed the provisions of Section 167 will have no application and the custody of the accused thereafter is under the orders of the Magistrate where the case is pending. According to the learned counsel for the State, unless the provisions of Section 167 are so construed then the hard-core criminals will be allowed to be released on bail even if a challan is filed just the next day after the completion of the time provided under the Act and such an interpretation would not subserve the interest of the society at large. Mr Janardhan further contended that the dictum of the Constitution Bench in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] has been reaffirmed by a subsequent judgment of the Court in *Rustam case* [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] as well as by a three-Judge Bench judgment in*Mohd. Iqbal Madar Sheikh* v. *State of Maharashtra* [(1996) 1 SCC 722 : 1996 SCC (Cri) 202] and therefore the question no longer remains res integra and the High Court was fully justified in rejecting the application of the accused.

6. There cannot be any dispute that on expiry of the period indicated in the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure the accused has to be released on bail, if he is prepared to and does furnish the bail. Even though a Magistrate does not possess any jurisdiction to refuse the bail when no charge-sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order passed by the Magistrate. In other words, without an order of the Magistrate the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 cannot be given effect to and there lies the rub. The grievance of the accused is that for a variety of reasons the Magistrate or even the superior court would refuse to pass an order releasing the accused on bail, notwithstanding the preconditions required under the proviso are satisfied and then when the accused moves the High Court or the Supreme Court during the interregnum the police files a challan. It was also contended by Mr Tulsi that a Public Prosecutor may take adjournment from the court when the bail application was being moved and then would persuade the investigating agency to file a challan and then contend that the court would not be entitled to release the accused on bail under the proviso to sub-section (2) of Section 167, and in that situation not only the positive command of the legislature is flouted but also an unauthorised period of custody is being legalised and this would be an infraction of the constitutional provision within the meaning of Article 22. In *Hitendra*

Vishnu Thakur v. *State of Maharashtra* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] two learned Judges of this Court construed the provisions of Section 167 of the Code of Criminal Procedure Code read with sub-section (4) of Section 20 of TADA. After examining in detail the object behind the enactment of Section 167 of the Code of Criminal Procedure and the object of Parliament introducing the proviso to sub-section (2) of Section 167 prescribing the outer limit within which the investigation must be completed the Court expressed that the proviso to sub-section (2) of Section 167 read with Section 20(4)(*b*) of TADA creates an indefeasible right in an accused person on account of the default by the investigating agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail and such order is generally termed as an "order on default". The Court also held that an obligation is cast upon the court to inform the accused of his right of being released on bail and enable him to make an application in that behalf. It was also further held that the accused would be entitled to move an application for being admitted on bail and the Designated Court shall release him on bail if the accused seeks to be so released and furnishes the requisite bail. The Court declined to agree with the contention of the accused that the Magistrate must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail.

7. In *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] the Constitution Bench examined this question also along with some other questions and the Constitution Bench explained the meaning of the expression "indefeasible right" of the accused made in *Hitendra Vishnu Thakur*[(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] . It appears that the counsel for the accused in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] conceded before the Court that indefeasible right for grant of bail on expiry of the initial period of 180 days for completing the investigation or the extended period prescribed by Section 20(4)(*bb*), as held in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] is a right of the accused which is enforceable only up to the filing of the challan and does not survive for enforcement on the challan being filed in the court against him. In fact Mr Sibal, learned Senior Counsel appearing for the accused had submitted that the decision of the Division Bench in *Hitendra Vishnu Thakur* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] cannot be read to confer on the accused an indefeasible right to be released on bail under this provision once the challan has been filed if the accused continues in custody. The Constitution Bench in para 48 stated thus: (SCC p. 442)

"The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this 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 forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See Naranjan Singh Nathawan v. State of Punjab [AIR 1952 SC

106 : 1952 Cri LJ 656 : 1952 SCR 395] , Ram Narayan Singh v. State of Delhi [AIR 1953 SC 277 : 1953 Cri LJ 1113 : 1953 SCR 652] and A.K. Gopalan v. Govt. of India [AIR 1966 SC 816 : 1966 Cri LJ 602 : (1966) 2 SCR 427] .)"

8. The Court then answered in para 53 as under: (SCC p. 444)

"(2)(a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the Code of Criminal Procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to clause (bb) of sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in Hitendra Vishnu Thakur [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] . The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held inHitendra Vishnu Thakur [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed.

> If the accused applies for bail under this 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 forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage."

9. In *State through CBI* v. *Mohd. Ashraft Bhat* [(1996) 1 SCC 432 : 1996 SCC (Cri) 117] the Presiding Officer of the Designated Court granted bail to the accused on a finding that the prosecution had failed to submit the police report within the period prescribed. This Court set aside the order on a conclusion that on the date the Designated Court granted bail to the respondent-accused, the prosecution had already submitted the police report and, therefore, as held by the Constitution Bench in *Sanjay Dutt* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] the right of the accused stood extinguished.

10. In *Bipin Shantilal Panchal (Dr)* v. *State of Gujarat* [(1996) 1 SCC 718 : 1996 SCC (Cri) 200], a three-Judge Bench decision, this Court referred to the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure and held that though the aforesaid provisions would apply to an accused under the NDPS Act, but since the charge-sheet had already been filed and the accused is in custody on the basis of orders of remand passed under other provisions of the Code the so-called indefeasible right of the accused must be held to have been extinguished, as was held by the Constitution Bench in *Sanjay Dutt* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] . The Court observed thus: (SCC p. 720, para 4)

> "Therefore, if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact

> that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet, as pointed out in Aslam Babalal Desai v. State of Maharashtra [(1992) 4 SCC 272 : 1992 SCC (Cri) 870] ."

11. In this case, the accused had not made application for enforcement of his right accruing under the proviso to Section 167(2) of the Code, but raised the contention only in the Supreme Court. This Court, therefore, formulated the question thus — whether the accused who was entitled to be released on bail under the proviso to sub-section (2) of Section 167 of the Code, *not having made an application when such right had accrued*, can exercise that right at a later stage of the proceeding, and answered in the negative.

12. In yet another case, *Mohd. Iqbal Madar Sheikh* v. *State of Maharashtra* [(1996) 1 SCC 722 : 1996 SCC (Cri) 202] a three-Judge Bench considered again proviso (*a*) to sub-section (2) of Section 167 of the Code and it was held: (SCC pp. 728-29, para 10)

> "It need not be pointed out or impressed that in view of a series of judgments of this Court, this right cannot be defeated by any court, if the accused concerned is prepared and does furnish bail bonds to the satisfaction of the court concerned. Any accused released on bail under proviso (a) to Section 167(2) of the Code read with Section 20(4)(b) or Section 20(4)(bb), because of the default on the part of the investigating agency to conclude the investigation, within the period prescribed, in view of proviso (a) to Section 167(2) itself, shall be deemed to have been so released under the provisions of Chapter 33 of the Code. It cannot be held that an accused charged of any offence, including offences under TADA, if released on bail because of the default in completion of the investigation, then no sooner the charge-sheet is filed, the order granting bail to such accused is to be cancelled. The bail of

> such accused who has been released, because of the default on the part of the investigating officer to complete the investigation, can be cancelled, but not only on the ground that after the release, charge-sheet has been submitted against such accused for an offence under TADA. For cancelling the bail, the well-settled principles in respect of cancellation of bail have to be made out. In this connection, reference may be made to the case of Aslam Babalal Desai v. State of Maharashtra [(1992) 4 SCC 272 : 1992 SCC (Cri) 870] . The majority judgment has held that in view of deeming provision under proviso (a) to Section 167(2), the order granting bail shall be deemed to be one under Section 437(1) or sub-section (2) or Section 439(1) and that order can be cancelled, when a case for cancellation is made out under Sections 437(5) and 439(2) of the Code. But for that, the sole ground should not be that after the release of such accused the charge-sheet has been submitted. The same view was expressed by this Court in the case of Raghubir Singh v. State of Bihar [(1986) 4 SCC 481 : 1986 SCC (Cri) 511] ."

In that particular case even though the charge-sheet had not been submitted within the prescribed period and was submitted later and the Court observed that the accused had become entitled to be released on bail under proviso (*a*) to sub-section (2) of Section 167 of the Code, *but since no application for bail on the said ground had been made by the accused and the charge-sheet in the meantime, having been filed and cognizance having been taken, the said right cannot be exercised*. In para 12 of the said judgment, however, an observation has been made by this Court to the effect: (SCC p. 730)

> "If an accused charged with any kind of offence becomes entitled to be released on bail under proviso (a) to Section 167(2), that statutory right should not be defeated by keeping the applications pending till the charge-sheets are submitted so that the right which had accrued is extinguished and defeated."

The Court further came to the conclusion that the appellants-accused have forfeited their right to be released on bail under proviso (*a*) to Section 167(2) as they are in custody on the basis of orders for remand passed under other provisions of the Code.

13. In *State of M.P.* v. *Rustam* [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] this Court set aside the order of the High Court where the High Court had released the accused on bail, charge-sheet not having been filed within the period stipulated in Section 167(2) of the Code of Criminal Procedure, as by the time the High Court entertained the bail application, challan had already been filed, this Court had observed that the court is required to examine the availability of the right to compulsive bail on the date it is considering the question of bail and not barely on the date of presentation of the petition for bail. This Court came to the conclusion: (SCC p. 223, para 4)

> "On the dates when the High Court entertained the petition for bail and granted it to the accused-respondents, undeniably the challan stood filed in court, and then the right as such was not available."

A conspectus of the aforesaid decisions of this Court unequivocally indicates that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section (2) of Section 167 and right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail, necessarily, therefore, an order of the court has to be passed. It is also further clear that that indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of, as has been held by the Constitution Bench in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] . The crucial question that arises for consideration, therefore, is what is the true meaning of the expression "if already not availed of"? Does it mean that an accused files an application for bail and offers his willingness for being released on bail or does it mean that a bail order must be passed, the accused must furnish the bail and get him released on bail? In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail. To interpret the expression "availed of" to mean actually being released on bail after furnishing the necessary bail required would

cause great injustice to the accused and would defeat the very purpose of the proviso to Section 167(2) of the Criminal Procedure Code and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the Magistrate had no further jurisdiction to remand and such custody of the accused is without any valid order of remand. That apart, when an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period, there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not. If the expression "availed of" is interpreted to mean that the accused must factually be released on bail, then in a given case where the Magistrate illegally refuses to pass an order notwithstanding the maximum period stipulated in Section 167 had expired, and yet no challan had been filed then the accused could only move to the higher forum and while the matter remains pending in the higher forum for consideration, if the prosecution files a charge-sheet then also the so-called right accruing to the accused because of inaction on the part of the investigating agency would get frustrated. Since the legislature has given its mandate it would be the bounden duty of the court to enforce the same and it would not be in the interest of justice to negate the same by interpreting the expression "if not availed of" in a manner which is capable of being abused by the prosecution. A two-Judge Bench decision of this Court in *State of M.P.* v. *Rustam* [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] setting aside the order of grant of bail by the High Court on a conclusion that on the date of the order the prosecution had already submitted a police report and, therefore, the right stood extinguished, in our considered opinion, does not express the correct position in law of the expression "if already not availed of", used by the Constitution Bench in *Sanjay Dutt* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] . We would be failing in our duty if we do not notice the decisions mentioned by the Constitution Bench in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] which decisions according to the learned counsel, appearing for the State, clinch the issue. In *Makhan Singh Tarsikka* v. *State of Punjab* [AIR 1952 SC 27 : 1952 Cri LJ 321 : 1952 SCR 368] an order of detention had been assailed in a petition filed under Article 32, on the ground that the period of detention could not be indicated in the initial order itself, as under the provisions of the Preventive Detention Act, 1950, it is only when the Advisory Board reports that there is sufficient cause for detention, the appropriate Government may confirm the detention order and continue the detention of the detenu for such period, as it thinks fit. On a construction of the relevant provisions of the Preventive Detention Act,

as it stood then, this Court accepted the contention and came to hold that the fixing of the period of detention in the initial order was contrary to the scheme of the Act and could not be sustained. We fail to understand as to how this decision is of any assistance for arriving at a just conclusion on the issue, which we are faced with in the present case. The next decision is the case of *Ram Narayan Singh* v. *State of Delhi* [AIR 1953 SC 277 : 1953 Cri LJ 1113 : 1953 SCR 652] . In this case on a habeas corpus petition being filed under Article 32, the Court was examining the legality of the detention on the date the Court was considering the matter. From the facts of the case, it transpires that there was no material to establish that there was a valid order of remand of the accused. The Court, therefore, held that even if the earlier order of remand may be held to be a valid one, but the same having expired and no longer being in force and there being no valid order of remand, the detention was invalid. It is in this context, an observation has been made that in a question of habeas corpus, lawfulness or otherwise, custody of the person concerned will have to be examined with reference to the date of the return and not with reference to the institution of the proceedings. There cannot be any dispute with the aforesaid proposition, but in the case in hand, the consequences of default on the part of the investigating officer in not filing the charge-sheet within the prescribed period have been indicated in the provisions of the statute itself and the language is of mandatory character, namely the accused shall be released on bail. In view of the aforesaid language of the proviso to sub-section (2) of Section 167 and in view of the expression used in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] to the effect "if not availed of", the aforesaid decision will be of no assistance. The third decision referred to in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] is the case of *A.K. Gopalan* v. *Govt. of India* [AIR 1966 SC 816 : 1966 Cri LJ 602 : (1966) 2 SCR 427] . This was also a case for issuance of a writ of habeas corpus, filed under Article 32. In this case the Constitution Bench observed: (SCR p. 430 C-D)

> "It is well settled that in dealing with a petition for habeas corpus the court has to see whether the detention on the date on which the application is made to the court is legal, if nothing more has intervened between *the date of the application* and *the date of hearing*."

In that case, the detenu was detained by orders passed on 4-3-1965 and the earlier order of detention passed on 29-12-1964 was no longer in

force, when the detenu filed the application in the Supreme Court. The Court, therefore observed that it is not necessary to consider the validity of the detention order made on 29-12-1964 and the Court is only concerned with the validity of the order of detention dated 4-3-1965. The observations made by the Court and the principles enunciated referred to earlier would support our conclusion that the rights whether accrued or not to an accused, will have to be considered on the date he filed the application for bail and not with reference to any later point of time. In *Abdul Latif Abdul Wahab Sheikh* v. *B.K. Jha* [(1987) 2 SCC 22 : 1987 SCC (Cri) 244] where the final order of detention had been assailed, this Court had observed that in a habeas corpus proceeding it is not a sufficient answer to say that the procedural requirements of the Constitution and the statute have been complied with, before the date of hearing and, therefore, the detention should be upheld. The aforesaid observation had been made when there was no Advisory Board in existence to whom a reference could be made and whose report could be obtained, as required by the Constitution. Further the representation filed by the detenu had not been disposed of within the stipulated period, but an argument had been advanced that by the date of hearing of the petition the representation had been disposed of. This Court did not accept the plea of the State and interfered with the order of detention. In interpreting the expression "if not availed of" in the manner in which we have just interpreted we are conscious of the fact that accused persons in several serious cases would get themselves released on bail, but that is what the law permits, and that is what the legislature wanted and an indefeasible right to an accused flowing from any legislative provision ought not to be defeated by a court by giving a strained interpretation of the provisions of the Act. In the aforesaid premises, we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused. In our view, such interpretation would subserve the purpose and the object for which the provision in question was brought on to the statute-book. In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage

will not take away the right of the accused. Personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorise the detention of the accused in custody up to a maximum period as indicated in the proviso to sub-section (2) of Section 167, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and in conformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution. There is no provision in the Criminal Procedure Code authorising detention of an accused in custody after the expiry of the period indicated in proviso to sub-section (2) of Section 167 excepting the contingency indicated in Explanation I, namely, if the accused does not furnish the bail. It is in this sense it can be stated that if after expiry of the period, an application for being released on bail is filed, and the accused offers to furnish the bail and thereby avail of his indefeasible right and then an order of bail is passed on certain terms and conditions but the accused fails to furnish the bail, and at that point of time a challan is filed, then possibly it can be said that the right of the accused stood extinguished. But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and a challan is filed in interregnum. This is the only way how a balance can be struck between the so-called indefeasible right of the accused on failure on the part of the prosecution to file a challan within the specified period and the interest of the society, at large, in lawfully preventing an accused from being released on bail on account of inaction on the part of the prosecuting agency. On the aforesaid premises, we would record our conclusions as follows:

1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

2. Under the proviso to the aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days

where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/ court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. 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 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.

6. The expression "if not already availed of" used by this Court in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (*a*) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the

terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression "availed of" if the charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with the law laid down by this Court in the case of *Mohd. Iqbal* v. *State of Maharashtra* [(1996) 1 SCC 722 : 1996 SCC (Cri) 202] ."

IN THE SUPREME COURT OF INDIA

State of Maharashtra v. Bharati Chandmal Varma

(2002) 2 SCC 121

K.T. Thomas & S.N. Phukan, JJ.

A number of persons were arrested in connection with a racket of dealing in counterfeit currencies. As the chargesheet was not filed within 90 days from the date of first remand, the respondent applied for bail as per the proviso to Section 167(2), CrPC. While investigation was underway, charges under MCOCA were added to the IPC offences. The Magistrate rejected the application for bail. However, a single judge of the Bombay High Court granted bail to the respondent.This was the subject matter of challenge before the Supreme Court. The Court decided on the question of whether the period of 90 days is to be calculated from the date of first remand or from the date when the investigation under MCOCA began.

Thomas, J.: "2. A huge quantity of counterfeit notes of Rs 500 digit had been intercepted by the authorities and a case was registered by Thane Police, Maharashtra. A number of persons were arrested in connection with the said racket. We are now concerned only with the arrest of,…the respondent. After the arrest she was produced before the Metropolitan Magistrate who remanded her to custody. As a charge-sheet was not laid within 90 days thereof she applied for being released on bail as per the proviso to Section 167(2) of the Code of Criminal Procedure (for short "the Code"). Though the Metropolitan Magistrate disallowed her prayer, a Single Judge of the High Court of Bombay allowed her to be released on bail solely on the aforesaid ground. The said order of the High Court is now being challenged by the State of Maharashtra.

3. The main contention of the State is that the period of 90 days envisaged in Section 167(2) of the Code should be reckoned from the date when the police started investigation into the offences under the Maharashtra Control of Organised Crime Act, 1999 (its acronym is "MCOC").

4. For considering the aforesaid contention more details of the facts are

necessary. The respondent was arrested on 1-4-2001 for the offences under Sections 489-A, 489-B, 489-C, 120-B and 420 of the Indian Penal Code. She was produced before the Metropolitan Magistrate on 2-4-2001 and he remanded the respondent to police custody first and later to judicial custody. During the investigation the police discovered that organised crimes under the MCOC Act had also been committed and the respondent was one of the links connected with foreign collaborators in pumping such counterfeit currency notes into India. The investigating agency sought sanction of the authorities under the MCOC Act for conducting investigation under the said Act. Such sanction was granted on 21-4-2001 and thenceforth investigation was conducted into the offences under the MCOC Act also. Finally the charge-sheet was laid on 12-7-2001.

5. The respondent moved for bail principally on the ground that charge-sheet was not laid within 90 days. If the period of 90 days is to be reckoned from 2-4-2001 there is no doubt that the respondent is entitled to bail under the proviso to Section 167(2) of the Code…

6. If the position remained under the [proviso to Section 167(2)] the respondent has no difficulty to have the impugned order sustained because the appellant State cannot, by any stretch of imagination, show that charge-sheet was laid within 90 days from the date she was remanded to the custody at the first instance. But the endeavour of the State was to show that the said proviso can now be read only subject to the modifications made by the MCOC Act. Section 21 of the MCOC Act made modifications of the application of Section 167(2) of the Code. It is useful to extract Section 21 of that Act. It reads thus:

> "21. Modified application of certain provisions of the Code.—(1) Notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act, shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code and 'cognizable case' as defined in that clause shall be construed accordingly.
>
> (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in sub-section (2),—

(a) the references to 'fifteen days' and 'sixty days' wherever they occur, shall be construed as references to 'thirty days' and 'ninety days' respectively;

(b) after the proviso, the following proviso shall be inserted, namely—

'Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period up to one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days.'

(3) Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act.

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the court that he was on

bail in an offence under this Act, or under any other Act, on the date of the offence in question.

(6) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code or any other law for the time being in force on the granting of bail.

(7) The police officer seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody shall file a written statement explaining the reason for seeking such custody and also for the delay, if any, in seeking the police custody."

7. It is admitted by the learned Senior Counsel for the State of Maharashtra that the Public Prosecutor has not filed any report before the Special Court showing reasons for the detention of the respondent beyond 90 days from the date of the first remand order. Hence they are disabled from contending that the proviso to Section 21(2) of the MCOC Act would enable the investigating agency to have the pre-trial custody of the respondent extended beyond 90 days. In order to circumvent the said hurdle learned counsel adopted a twofold contention. First is that the period of 90 days can be reckoned from 21-4-2001 (the date when the investigation was allowed to be conducted for the offence under the MCOC Act). Second is that the provision regarding bail under the said Act is very stringent as quoted above and the High Court did not consider it from the said angle.

…

11. For the application of the proviso to Section 167(2) of the Code there is no necessity to consider when the investigation could legally have commenced. That proviso is intended only for keeping an arrested person under detention for the purpose of investigation and the legislature has provided a maximum period for such detention. On the expiry of the said period the further custody becomes unauthorized and hence it is mandated that the arrested person shall be released on bail if he is prepared to and does furnish bail. It may be a different position if the same accused was found to have been involved in some other offence disconnected from the offence for which he was arrested. In such an eventuality the officer investigating such second offence can exercise the power of arresting

him in connection with the second case. But if the investigation into the offence for which he was arrested initially had revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable."

12. We are, therefore, unable to agree with the contention of the learned counsel for the State of Maharashtra that a new period of 90 days would commence from the date when approval was accorded under Section 23 of the MCOC Act for initiating investigation for any offence under the said Act. In the present case, the accused would be entitled to bail, not on the merits of the case, but on account of the default of the investigating agency to complete the investigation within 90 days from the date of the first remand of the respondent."

IN THE SUPREME COURT OF INDIA

Maulavi Hussein Haji Abraham Umarji v. State of Gujarat

(2004) 6 SCC 672

S.N. Variava, Arijit Pasayat, JJ.

The accused was initially arrested for offences under the IPC in relation to the Godhra incident. However, offences under POTA were added later. The appellant was in police custody. An application for extending police custody was rejected. Thereupon, the case was transferred to the Special Court, where an application under Section 49(2)(b) of POTA was filed, seeking police custody of the accused. This application was allowed by the Special Judge, POTA. An appeal was filed before the Gujarat High Court, which dismissed it. The Supreme Court was asked to decide the scope and ambit of Section 49(2)(b) of POTA in relation to seeking police custody of an accused person.

Pasayat, J.: "5. Mr. Colin Gonsalves, learned Senior Counsel appearing for the appellant submitted that true import of Section 49(2) has not been kept in view by the Special Court and the High Court. The same is not intended to give unbridled power to the investigating agency to seek police custody. That would negate the statutory limit provided in Section 167 of the Code of Criminal Procedure, 1973 (in short "the Code"). For harmonising construction of the provisions it has to be held that Section 49(2)(*b*) has application only for the period of 30 days and not beyond it. If the construction put by the High Court is accepted, it would mean that for a period slightly less than 180 days the accused can be in police custody which can never be the legislative intent. Section 49(2)(*b*) is at the most a procedural provision intended to aid the operation of Section 167(2) of the Code and it cannot be given an extended meaning which would frustrate the legislative intent to restrict the period of police custody.

6. Great emphasis is laid on the expression "in police custody for a term not exceeding 15 days in the whole" in sub-section (2) of Section 167 and "otherwise than in the custody of the police, beyond the period of 15 days" in the first proviso of sub-section (2) of Section 167. It is submitted that

in Section 49(2)(*a*) the period of "15 days" in Section 167(2) of the Code has been substituted to be "30 days". Therefore, according to learned counsel for the appellant, Section 49(2)(*b*) can be resorted to only during the period of 30 days.

7. In response, learned counsel for the respondents submitted that if the interpretation suggested by learned counsel for the appellant is accepted it would make the second proviso to Section 49(2)(*b*) redundant in the sense that even if beyond the period of 30 days the custody of the accused is judicial custody yet the investigating officer will have no scope to seek for police custody beyond the 30-day period. The same can never be the legislative intent.

8. In order to appreciate the rival submissions...Section 49(2)(*b*) of POTA need[s] to be extracted…

Section 49(2) of POTA reads as follows:

> "49. (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—
>
> (a) the references to 'fifteen days', 'ninety days' and 'sixty days', wherever they occur, shall be construed as references to 'thirty days', 'ninety days' and 'ninety days', respectively; and
>
> (b) after the proviso, the following provisos shall be inserted, namely—
>
> 'Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period up to one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days:
>
> Provided also that if the police officer making the investigation under this Act, requests, for

> the purposes of investigation, for police custody from judicial custody of any person from judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.' "

9. If the argument of learned counsel for the appellant is accepted it would mean that what is specifically provided in Section 49(2)(*b*) would be controlled by Section 167(2) of the Code.

10. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins* v. *Treasurer of Surrey* [(1880) 5 QBD 170 : 42 LT 128] (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory* v. *Subhash Chandra Yograj Sinha* [AIR 1961 SC 1596] and *Calcutta Tramways Co. Ltd.* v. *Corpn. of Calcutta* [AIR 1965 SC 1728]) when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso" said Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Co.* [1897 AC 647 : 77 LT 284 (HL)] Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. [See *A.N. Sehgal* v. *Raje Ram Sheoran* [1992 Supp (1) SCC 304 : 1993 SCC (L&S) 675 : (1993) 24 ATC 559 : AIR 1991 SC 1406], *Tribhovandas Haribhai Tamboli* v. *Gujarat Revenue Tribunal* [(1991) 3 SCC 442 : AIR 1991 SC 1538] and *Kerala State Housing Board* v. *Ramapriya Hotels (P) Ltd.* [(1994) 5 SCC 672]

…

25. One thing which is specifically to be noted here is that the proviso inserted by Section 49(2)(*b*) of POTA is in relation to the proviso to Section

167(2) of the Code and not in respect of Section 167(2). Therefore, what is introduced by way of an exception by Section 49(2)(*b*) of POTA is in relation to the proviso to Section 167(2). That being the position, the interpretation suggested by learned counsel for the appellant cannot be accepted. It is to be noted that the acceptance of application for police custody when an accused is in judicial custody is not as a matter of course. Section 49(2)(*b*) provides inbuilt safeguards against its misuse by mandating filing of an affidavit by the investigating officer to justify the prayer and in an appropriate case, the reason for delayed motion. The Special Judge before whom such an application is made has to consider the prayer in its proper perspective and in accordance with law keeping in view the purpose for which POTA was enacted, the reasons and/or explanation offered and pass necessary order. Therefore, the apprehension of learned counsel for the appellant that there is likelihood of misuse of the provision is without substance. In any event, that cannot be a ground to give an extended meaning to the provision in the manner suggested by the learned counsel for the appellant."

IN THE SUPREME COURT OF INDIA

Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Another

(2004) 7 SCC 528

N. Santosh Hegde & B.P. Singh, JJ.

A complaint involving charges of conspiracy and murder was filed against the accused-respondent. The respondent made several applications for bail before the High Court. All of them were rejected save one, which was set aside in the Supreme Court. The respondent filed a subsequent application for bail, which was granted by the High Court. The judgment of the High Court was challenged in the instant appeal. The Appellant found fault with the grounds on the basis of which the High court granted bail to the respondent. The grounds included the extended period for which the respondent had been incarcerated and delay of the trial. The Supreme Court discusses the factors that are germane for a consideration of bail and decides on the applicability of limitations in Section 437(1)(i), CrPC to Section 439, CrPC. The Court also deals with the level of review which is required while granting bail.

Hegde, J.: "6. Mr R.F. Nariman, learned Senior Counsel appearing for the appellant contended that the crime committed by the appellant is so heinous and gruesome that that by itself should have been sufficient to reject the bail application of the first respondent. He pointed out from the record that the first respondent had filed an application for bail before the High Court which came to be rejected by the High Court as per its order dated 16-9-1999. An SLP filed against the said order of rejection of bail came to be dismissed by this Court on 7-10-1999. A second application for bail filed by him was also rejected by the High Court on 22-11-1999. An SLP filed against the said order was rejected by this Court on 4-2-2000 [*Rajesh Ranjan* v. *State of Bihar*, (2000) 9 SCC 222]. A third application filed by the first respondent for grant of bail before the High Court was rejected by the said Court on 3-5-2000 which order became final because no SLP was filed before this Court. A fourth application for grant of bail was made on 26-7-2000 which also came to be rejected, against which no SLP was filed before this Court. The fifth application filed by the first respondent for grant of bail before the High Court came to be allowed vide order dated 6-9-2000 but in an appeal filed against the grant of said

bail, this Court was pleased to allow the said appeal and cancel the bail granted to the respondent as per its order dated 25-7-2001 [*Union of India* v. *Rajesh Ranjan*, see cited order at (2004) 7 SCC 539] . Thereafter, the respondent filed a sixth application for grant of bail which was rejected by the High Court on 5-11-2001. Against the said rejection order, the respondent preferred an SLP to this Court which came to be rejected on 7-12-2001. The seventh application was filed by the respondent before the High Court for grant of bail which came to be dismissed on 13-3-2002 and an SLP filed against the said order came to be dismissed on 10-5-2002. The learned counsel submitted in this background that the eighth attempt by the respondent became successful and the High Court by its order dated 23-5-2003 granted bail to the first respondent which is the subject-matter of this appeal. The learned counsel then submitted that though this Court in the earlier order of cancellation of bail had specifically negatived the ground on which bail was granted by the High Court, still in this round, the High Court by the impugned order again granted bail on the very same grounds which the learned counsel submits amounts to ignoring the findings of this Court. He also pointed out from the judgment of this Court that while cancelling the bail this Court had decided certain questions of law which were binding on the High Court. Still the High Court regardless of the said findings of this Court proceeded to make the impugned order without even referring to the same. For example, he pointed out that this Court in the said order had held that there was non-application of mind by the High Court to the provision of Section 437(1)(*i*) CrPC which this Court had held is a sine qua non for granting bail. He also pointed out that this Court had also held in the said judgment that there is a prohibition in Section 437(1)(*i*) that the class of persons mentioned therein shall not be released on bail if there appears to be a reasonable ground for believing that such person is guilty of an offence punishable with death or imprisonment for life. He submitted that this Court had held that the said condition is also applicable to the courts entertaining a bail application under Section 439 of the Code. He argued, assuming that the said enunciation of law is erroneous, still because it is a finding given in the case of the first respondent himself, so far as his case is concerned, it is a binding precedent unless reversed by the Apex Court itself in a manner known to law. He submitted that the High Court has not followed the said mandate in the impugned order, therefore, on that ground also the impugned order is liable to be set aside. Shri Nariman further submitted that this Court in the said order dated 25-7-2001 [*Rajesh Ranjan* v. *State of Bihar*, (2000) 9 SCC 222] has held that the fact that an accused was in custody for a certain period of time by itself is not a ground to grant bail in matters where the accused is involved in heinous crimes. Learned counsel also pointed out that the first respondent has misused his liberty by interfering with the administration of justice.

7. Mr K.K. Sud, learned Additional Solicitor General appearing for CBI supporting the appellant, contended that the High Court has seriously erred in granting bail to the first respondent in spite of the fact that this Court by an earlier order had set aside the bail granted to him by the High Court on 6-9-2000. He contended that in the said order of this Court, dated 25-7-2001 [*Rajesh Ranjan* v. *State of Bihar*, (2000) 9 SCC 222] , this Court had specifically held that the grounds on which the High Court had granted bail viz.: (*a*) that the respondent was in custody for more than a year; and (*b*) that in an earlier order, the High Court while rejecting the bail application had reserved liberty to renew the bail application after framing of charge in the case, are by themselves insufficient for grant of bail. Learned Additional Solicitor General contended that in spite of the same the High Court again proceeded to grant bail practically on the very same ground without there being any change in the circumstances. Learned Additional Solicitor General also contended that liberty reserved in the order of this Court dated 25-7-2001 [*Rajesh Ranjan* v. *State of Bihar*, (2000) 9 SCC 222] that in the event of there being any fresh application for bail by the first respondent, the High Court is free to consider such application without being in any manner influenced by the observations made in the said order of this Court would not amount to giving a carte blanche to the High Court to grant bail to the first respondent merely for the asking of it, or by ignoring the findings given in the said order. He urged that there has been no change in circumstances nor has the High Court given any other or additional ground for grant of bail than what was given by the High Court in its order when it granted bail on 6-9-2000. Learned counsel also contended that after the High Court granted bail to the first respondent by the impugned order on 23-5-2003, the first respondent has been indulging in threatening witnesses. He pointed out from the records that after the respondent was granted bail on 23-5-2003 by the High Court a number of witnesses who were examined had turned hostile obviously because of the influence used and threats given to these witnesses. From the material on record, learned counsel pointed out that PWs 21 to 24, 26 and 27 are some such witnesses who had turned hostile. He also submitted that there is material on record to show that the surviving eyewitness Ramesh Oraon was also under such threat thus, the first respondent has misused the privilege of freedom granted to him by the High Court. He also contended that the first respondent is a very influential personality and with the political power and monetary clout which he wields freely to give threat to witnesses, the witnesses are not likely to come forward to give further evidence. Learned counsel also pointed out from the evidence that there is material on record to show the involvement of the first respondent in the conspiracy to kill the deceased.

8. Mr K.T.S. Tulsi, learned Senior Counsel appearing for the first

respondent contended that the observation of this Court in its judgment dated 25-7-2001 [*Rajesh Ranjan* v. *State of Bihar*, (2000) 9. SCC 222] that while granting bail under Section 439 of the Code the High Court is also bound by the conditions mentioned in Section 437(1)(*i*) of the Code is per incuriam being contrary to the wording of the section itself. He submitted that the observations of this Court in the said judgment that the conditions found in Section 437(1)(*i*) are sine qua non for granting bail under Section 439 is arrived at by this Court on a wrong reading of that section. He further submitted that the power of the Sessions Court and the High Court to grant bail under Section 439 is independent of the power of the Magistrate under Section 437 of the Code. Learned counsel also pointed out that Section 437 imposes a jurisdictional embargo on grant of bail by courts other than the courts mentioned in Section 439 of the Code in non-bailable offences, and such a restriction is deliberately omitted in Section 439 of the Code when it comes to the power of the High Court or the Court of Session to grant bail even in non-bailable offences. In this regard, he placed reliance on a judgment of the High Court of Madhya Pradesh delivered by Faizanuddin, J., as His Lordship then was, in *Badri Prasad Puran Badhai* v. *Bala Prasad Mool Chand Sahu* [1985 MPLJ 258].

…

10. Before we discuss the various arguments and the material relied upon by the parties for and against grant of bail, it is necessary to know the law in regard to grant of bail in non-bailable offences.

11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in

> support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] and Puran v. Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)

12. In regard to cases where earlier bail applications have been rejected there is a further onus on the court to consider the subsequent application for grant of bail by noticing the grounds on which earlier bail applications have been rejected and after such consideration if the court is of the opinion that bail has to be granted then the said court will have to give specific reasons why in spite of such earlier rejection the subsequent application for bail should be granted. (See *Ram Govind Upadhyay*[(2002) 3 SCC 598 : 2002 SCC (Cri) 688] .)

…

14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had earlier made seven applications for grant of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also. It is seen from the records that when the fifth application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745 of 2001 dated 25-7-2001 [*Rajesh Ranjan* v. *State of Bihar*, (2000) 9 SCC 222] . While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(*i*) of the Code. This Court also in specific terms held that the condition laid down under Section 437(1)(*i*) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant

on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail.

…

18. We agree that a conclusive finding in regard to the points urged by both the sides is not expected of the court considering a bail application. Still one should not forget, as observed by this Court in the case *Puran* v. *Rambilas* [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] : (SCC p. 344, para 8)

> "Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. … That did not mean that whilst granting bail some reasons for prima facie concluding why bail was being granted did not have to be indicated."

We respectfully agree with the above dictum of this Court. We also feel that such expression of prima facie reasons for granting bail is a requirement of law in cases where such orders on bail application are appealable, more so because of the fact that the appellate court has every right to know the basis for granting the bail. Therefore, we are not in agreement with the argument addressed by the learned counsel for the accused that the High Court was not expected even to indicate a prima facie finding on all points urged before it while granting bail…[T]he Court was duty-bound to apply its mind to the allegations put forth by the investigating agency and ought to have given at least a prima facie finding in regard to these allegations because they go to the very root of the right of the accused to seek bail. The non-consideration of these vital facts as to the allegations of threat or inducement made to the witnesses by the respondent during the period he was on bail has vitiated the conclusions arrived at by the High Court while granting bail to the respondent.

20. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. …"

IN THE HIGH COURT OF ALLAHABAD

Smt. Amarawati & Anr. v State of U.P.

2004 SCC OnLine All 1112

M. Katju, A.C.J., S.K. Singh, Sunil Ambwani, Imtiyaz Murtaza, K.K. Misra, Poonam Srivastava & Ravindra Singh, JJ.

A Full Bench was constituted to consider inter alia whether the High Court can direct subordinate courts to decide bail applications on the same day as they are filed. The Court examined a previous decision, which was the binding precedent on the issue and held that the discretion on when to hear the bail application should vest with the Magistrate or Sessions Judge, as the case may be.

Murtaza, J.: "2. In the case of Dr. Vinod Narain (Writ Petition No. 3643 of 1992) it was held: "For the reasons recorded separately this Full Bench unanimously holds that in exercise of power under Article 226 of the Constitution, while issuing direction and command to the Magistrate or the Court of Sessions as the case may be, to consider the bail application time schedule for concluding the bail proceedings cannot be fixed. …"

…

21. The second question referred to this Bench is whether the High Court can direct the subordinate Courts to decide the bail application on the same day it is filed.

…

25. A perusal of [Sections 437 and 439, CrPC] indicate[s] that whereas in section 437, CrPC there is no provision for any notice of the application for bail to the public prosecutor, in section 439, CrPC however it is specifically mentioned that before granting bail to a person notice of the application for bail to the public prosecutor is required, unless for reasons to be recorded in writing, the Court is of opinion that it is not practicable to give such notice.

26. In section 437, CrPC the provision for notice is not given because

there are specific provisions under the Code of Criminal Procedure which provide that all the relevant material relating to the case is produced or available before the Magistrate. Thus section 157, CrPC provides that an officer in charge of the police station shall forthwith send a report of the same to a Magistrate who is empowered to take cognizance of the offence. In section 167, CrPC it is provided that "whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57 and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate."

27. Section 173(5) provides that when the police report is in respect of a case to which section 170 applies the police officer must forward to the Magistrate the documents mentioned therein.

28. Section 437, CrPC applies to relatively minor offences where the punishment provided is not life sentence or death. In our opinion any application for bail under section 437, CrPC should ordinarily be decided by the Magistrate the same day, except in rare cases where reasons shall be recorded in writing for adjourning the hearing of the bail application. We think it necessary to lay down this guideline in respect of such applications under section 437 in view of (i) there being no provision for giving notice to the Public Prosecutor, as is required for applications under section 439(2) and Article 21 of the Constitution, which has been given a very wide interpretation in a series of decisions of the Supreme Court, referred to above.

…

33. It may be mentioned that a person's reputation and esteem in society is a valuable asset, just as in civil law it is an established principle that goodwill of a firm is an intangible asset. In practice, if a person applies for bail he has to surrender in Court, and normally the bail application is put up for hearing after a few days and in the meantime he has to go to jail. Even if he is subsequently granted bail or is acquitted his reputation is reparably tarnished in society.

34. We may now consider the provisions of section 439, CrPC … which

deal with the bail application before the High Court and Court of Sessions.

35. It may be noted that there is a very important difference between sections 437 and 439 inasmuch as there if no requirement of giving notice to the Public Prosecutor in section 437 but there is such a requirement in the proviso to section 439(1). Obviously this difference was made by Parliament in its wisdom because it was felt that the cases before the Court of Sessions are more serious as compared to the cases before the Magistrate which may be petty ones.

36. What is important to note is that the proviso to section 439(1) does not prescribe the period of the notice and leaves it to the discretion of the judge. This may be contrasted to section 407(5), CrPC …

37. The fact that in the same statute in one provision the period of the notice has been prescribed while in another provision it has not indicates that Parliament in its wisdom has left it to the discretion of the Court where such period has not been prescribed to regulate its proceedings and determine in its own discretion what reasonable period should there be between giving of the notice and hearing of the bail application under section 439.

…

39. In our opinion the learned Judge hearing the bail application, in his discretion, may in such a case give a very short time for the hearing after notice is given to the Public Prosecutor, and he may, in his discretion hear the bail application under section 439 on the same day when it is filed. After all, giving notice merely means giving copy of the bail application to the Public Prosecutor so that he may have an opportunity to be heard in reply and place the material facts before the Court. There may be cases where the learned Judge hearing the bail application under section 439 may, if he chooses, give a very short time to the Public Prosecutor after the bail application is filed and notice is given, and do the hearing the same day only after a short time of giving of the notice. The learned Judge can always get the record from the Court of the learned Magistrate where the entire papers are already available. Also sometimes it may not be practicable to give notice at all and for this purpose the hearing can be done after recording reasons for waiving the notice, as mentioned in the proviso of section 439(1). On the other hand, there may be cases where the learned Judge may feel that in view of the seriousness of the offence or other factors a longer time should be given to the Public Prosecutor

before hearing the bail application. In all such cases in our opinion the matter should be left to the discretion of the learned Judge hearing the bail application and a direction for deciding the bail on the same day should not ordinarily be given by this Court as that would be interfering in his discretion.

40. We again make it clear that the learned Sessions Judge in his discretion can hear and decide the bail application under section 439 on the same day of its filing provided notice is given to the Public Prosecutor, or he may not choose to do so. This is entirely a matter in the discretion of the learned Sessions Judge. There may also be cases where the learned Sessions Judge on the material available before him may decide to grant interim bail as he may feel that while he has sufficient material for giving interim bail he requires further material for grant of final bail. In such cases also he can in his discretion, grant interim bail and he can hear the bail application finally after a few days. All these are matters which should ordinarily be left to his discretion.

41. As regards power to grant interim bail we agree with the view of Hon'ble B.M. Lal, J. in Dr. Vinod Narain's case (supra) that such power is implicit in the power to grant bail, and we disagree with the view expressed by Hon'ble Palok Basu, J. in the aforesaid decision. The view we are taking would make the provisions for grant of bail in the CrPC in conformity with Article 21 of the Constitution, particularly since the provision for granting anticipatory bail has been deleted in U.P.

42. It may be mentioned that the Supreme Court in A.R. Antulay v. R.S. Nayak and Raj Deo Sharma v. State of Bihar, has held that the right of speedy justice is a fundamental right as envisaged under Article 21 of the Constitution. The interpretation we are giving above to the provisions in the CrPC are hence in conformity with Article 21 of the Constitution as interpreted by the Supreme Court.

46. In view of the above we answer the questions referred to the Full Bench as follows:

…

(2) The High Court should ordinarily not direct any subordinate Court to decide the bail application the same day, as that would be interfering with the judicial discretion of the

Court hearing the bail application. However, as stated above, when the bail application is under section 437, CrPC ordinarily the Magistrate should himself decide the bail application same day, and if he decided in a rare and exceptional case not to decide it on the same day he must record his reasons in writing. As regards the application under section 439, CrPC it is in the discretion of the learned Sessions Judge considering the facts and circumstances whether to decide the bail application the same day or not, and it is also in his discretion to grant interim bail the same day subject to the final decision on the bail application later.

(3) The decision in Dr. Vinod Narain v. State (supra) is incorrect and is substituted accordingly by this judgment."

IN THE SUPREME COURT OF INDIA

Jayendra Saraswathi Swamigal v. State of Tamil Nadu

(2005) 2 SCC 13

R.C. Lahoti, C.J., G.P. Mathur& P.P. Naolekar, JJ.

An appeal by special leave was preferred against an order of the Madras High Court by which the petition for bail filed by the petitioner under Section 439 CrPC was rejected. The Court considered the conditions for grant of bail in non-bailable offences and also considered the applicability of the limitations provided in Section 437(1)(i), CrPC to Section 439, CrPC.

Mathur, J.: "16. Shri Tulsi has … submitted that the prohibition contained in Section 437(1)(*i*) CrPC that the class of persons mentioned therein shall not be released on bail, if there appears to be a reasonable ground for believing that such person is guilty of an offence punishable with death or imprisonment for life, is also applicable to the courts entertaining a bail petition under Section 439 CrPC. In support of this submission, strong reliance has been placed on a recent decision of this Court in*Kalyan Chandra Sarkar* v. *Rajesh Ranjan* [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] . The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in *State* v. *Capt. Jagjit Singh* [(1962) 3 SCR 622 : AIR 1962 SC 253 : (1962) 1 Cri LJ 215] and *Gurcharan Singh* v. *State (Delhi Admn.)* [(1978) 1 SCC 118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179] and basically they are — the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. The case of *Kalyan Chandra Sarkar* [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] was decided on its own peculiar facts where the accused had made seven applications for bail before the High Court, all of which were rejected except the fifth one which order was also set aside

in appeal before this Court. The eighth bail application of the accused was granted by the High Court which order was the subject-matter of challenge before this Court. The observations made therein cannot have general application so as to apply in every case including the present one wherein the Court is hearing the matter for the first time.

17. For the reasons discussed above, we are of the opinion that prima facie a strong case has been made out for grant of bail to the petitioner. The appeal is accordingly allowed and the impugned order of the High Court is set aside. …"

IN THE SUPREME COURT OF INDIA

Rajesh Ranjan Yadav alias Pappu Yadav v. CBI through its Director

(2007) 1 SCC 70

S.B. Sinha & Markandey Katju, JJ.

An appeal under Article 136 of the Constitution was filed against the impugned judgment of the High Court by which the appellant's application for bail was dismissed. The appellant's bail application had been rejected earlier on several occasions by the High Court as well as by the Supreme Court. The last order of the Supreme Court inter alia instructed the Sessions Judge to expedite the trial. The Supreme Court, while dismissing the bail application, further ruled that if the trial was not completed within a period of six months from that order, it was left open to the appellant to renew the bail application. The trial was not completed at the end of the six months from the date of the order of the Supreme Court. Hence, the appellant approached the High Court seeking bail. The High Court rejected the application, instructing the trial court yet again to expedite the trial. It stated again that if the trial was not completed within another six months, the appellant could approach the court seeking bail. This order was challenged before the Supreme Court in the instant case. At the time of hearing of the appeal, all the prosecution witnesses had been examined and cross-examined, and only the defence witnesses remained to be examined. The appellant had been in jail for more than 6 years and hence contended that he should be released on bail. The Court dealt with the issue of whether a long period of incarceration would automatically qualify a person to be enlarged on bail.

Katju, J.: "5. Shri R.K. Jain, learned Senior Counsel appearing for the appellant stated that 60/70 defence witnesses are proposed to be examined and some more defence witnesses on behalf of the other accused are to be examined. Hence, he submitted that it would take a long time to examine these witnesses. He submitted that the appellant has been in jail for more than six years and hence he should be released on bail. Learned counsel also submitted that if ultimately the appellant is found innocent by the trial court, he would have undergone a long

period of incarceration in jail which would be violative of Article 21 of the Constitution.

…

7. Learned counsel for the appellant relied on the decision of this Court in *Babu Singh* v. *State of U.P.* [(1978) 1 SCC 579 : 1978 SCC (Cri) 133 : AIR 1978 SC 527] In para 8 of the said judgment it was observed as under: (SCC p. 582)

> "Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right."

8. Learned counsel for the appellant then relied on the decision of this Court in *Kashmira Singh* v. *State of Punjab* [(1977) 4 SCC 291 : 1977 SCC (Cri) 559] . In para 2 of the said decision it was observed as under: (SCC pp. 292-93)

> "It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: 'We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?' What confidence would such administration of justice inspire in the mind of the public? It may quite

> conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

…

10. In our opinion none of the aforesaid decisions can be said to have laid down any absolute and unconditional rule about when bail should be granted by the court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said that there is any absolute rule that because a long period of imprisonment has expired bail must necessarily be granted.

…

11. As observed by this Court in *State of U.P.* v. *Amarmani Tripathi* [(2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] vide paras 18-19: (SCC pp. 31-32)

> "18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and

standing of the accused [Emphasis in original.]; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with [Emphasis in original.]; and (viii) danger, of course, of justice being thwarted by grant of bail [Emphasis in original.] [see Prahlad Singh Bhati v.NCT, Delhi [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] and Gurcharan Singh v. State (Delhi Admn.) [(1978) 1 SCC 118: 1978 SCC (Cri) 41]]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] : (SCC pp. 535-36, para 11)

11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] and Puran v. Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)'

19. This Court also in specific terms held that: (SCC pp. 536-37, para 14)

"The condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to be enlarged on bail, nor the fact that the trial is not likely to be concluded, in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail." (emphasis supplied)

12. The above decisions have referred to the decision of this Court in the appellant's own case *Kalyan Chandra Sarkar* v. *Rajesh Ranjan* [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] in which it was clearly held that the mere fact that the accused has undergone a long period of incarceration by itself would not entitle him to be enlarged on bail.

…

14. Learned counsel for the appellant further relied on the decision of this Court in*Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra* [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057] . In para 35 of the said decision it was observed as under: (SCC p. 316)

> "35. Presumption of innocence is a human right. (See Narendra Singh v. State of M.P. [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893] , SCC para 31.) Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Sub-section (4) of Section 21 must be interpreted keeping in view the aforementioned salutary principles. Giving an opportunity to the Public Prosecutor to oppose an application for release of an accused appears to be reasonable restriction but clause (b) of sub-section (4) of Section 21 must be given a proper meaning."

15. Learned counsel for the appellant has repeatedly referred to Article 21 of the Constitution and on that basis has submitted that the appellant should be released on bail particularly, since he has already been imprisoned for more than six years.

16. We are of the opinion that while it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the court has also to take into consideration other facts and circumstances, such as the interest of the society."

IN THE SUPREME COURT OF INDIA

State of Maharashtra v. Bharat Shanti Lal Shah

(2008) 13 SCC 5

K.G. Balakrishnan, C.J., R.V. Raveendran & Mukundakam Sharma, JJ.

The respondents were arrested under the MCOCA Act, 1999 and cases were registered under the Act. Aggrieved by the same, they challenged the constitutionality of the Act in the Bombay High Court. The Bombay High Court upheld the constitutionality of some of the provisions, and struck down some others, including Section 21(5), which dealt with bail. Aggrieved by the High Court's judgment, the State of Maharashtra filed the present appeal.

Sharma, J.: "6. The High Court also struck down sub-section (5) of Section 21 of MCOCA holding that the same was violative of provisions of Article 14 of the Constitution of India. …

…

14. According to its Preamble, the said Act was enacted to make specific provisions for prevention and control of, and for coping with, criminal activity by organised crime syndicate or gang and for matters connected therewith or incidental thereto.

…

22.…Sub-section (1) of Section 21 of MCOCA lays down that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (for short "the Code") or in any other law, every offence punishable under MCOCA shall be deemed to be a cognizable offence within the meaning of clause (*c*) of Section 2 of the Code and "cognizable case" as defined in that clause would be construed accordingly. Sub-section (2) of Section 21 provides that Section 167 of the Code shall apply in relation to a case involving an offence punishable under the Act subject to certain modifications. Sub-section (5) of Section 21 provides that notwithstanding anything contained in the Code, the accused would not be granted bail if it is noticed by the

court that he was on bail in an offence under the Act, or under any other Act, on the date of the offence in question.

…

34.[W]e are required to answer the issues which are specifically raised before us, relating to the constitutional validity of Sections 13 to 16 as also Section 21(5) of MCOCA, on the ground of lack of legislative competence and also being violative of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision.

…

62. Having recorded our finding in the aforesaid manner, we now proceed to decide the issue as to whether a person accused of an offence under MCOCA should be denied bail if on the date of the offence he is on bail for an offence under MCOCA or any other Act. Section 21(5) of MCOCA reads as under:

> "21. (5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question."

63. As discussed above the object of MCOCA is to prevent the organised crime and, therefore, there could be reason to deny consideration of grant of bail if one has committed a similar offence once again after being released on bail but the same consideration cannot be extended to a person who commits an offence under some other Act, for commission of an offence under some other Act would not be in any case in consonance with the object of the Act which is enacted in order to prevent only organised crime.

64. We consider that a person who is on bail after being arrested for violation of law unconnected with MCOCA, should not be denied his right to seek bail if he is arrested under MCOCA, for it cannot be said that he is a habitual offender. The provision of denying his right to seek bail, if he was arrested earlier and was on bail for commission of an offence under any other Act, suffers from the vice of unreasonable classification by placing in the same class, offences which may have nothing in common with those under MCOCA, for the purpose of denying consideration of bail. The aforesaid expression and restriction on the right of seeking bail is not

even in consonance with the object sought to be achieved by the Act and, therefore, on the face of the provisions this is an excessive restriction.

65. The High Court found that the expression “or under any other Act” appearing in the section is arbitrary and discriminatory and accordingly struck down the said words from sub-section (5) of Section 21 as being violative of Articles 14 and 21 of the Constitution. We uphold the order of the High Court to the extent that the words “or under any other Act” should be struck down from sub-section (5) of Section 21.

66. … The decision of the High Court striking down the words “or under any other Act” from sub-section (5) of Section 21 of the Act is however upheld. …”

IN THE SUPREME COURT OF INDIA

Rasiklal v. Kisore S/o Khanchand Wadhwani

(2009) 4 SCC 446

R.V. Raveendran & J.M. Panchal, JJ.

The appellant was accused of committing offences punishable under Sections 499 and 500 of the Penal Code, 1860. The Judicial Magistrate had granted bail as the offences were bailable. While enlarging the appellant on bail the Magistrate imposed a condition on the appellant to appear before the court on each date of hearing, failing which he would be taken into custody. In a criminal revision petition filed in the High Court, a Single Judge cancelled the bail on the ground that the order granting bail was passed by the learned Judicial Magistrate, without hearing the original complainant and was, therefore, bad, for violation of principles of natural justice. Feeling aggrieved the appellant approached the Supreme Court. In its judgement the Court discusses the scope of Section 436 of CrPC.

Panchal, J.: "9. As is evident, the appellant is being tried for alleged commission of offences punishable under Sections 499 and 500 of the Penal Code. Admittedly, both the offences are bailable. The grant of bail to a person accused of a bailable offence is governed by the provisions of Section 436 of the Code of Criminal Procedure, 1973… There is no doubt that under Section 436 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on his executing a bond as provided in the section instead of taking bail from him.

10. The position of persons accused of non-bailable offence is entirely different. The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences

there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the court is as between taking a simple recognizance of the accused and demanding security with surety. The persons contemplated by Section 436 cannot be taken into custody unless they are unable or willing (*sic* unwilling) to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by the accused as of right and the officer or the court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him.

11. There is no express provision in the Code prohibiting the court from rearresting an accused released on bail under Section 436 of the Code. However, the settled judicial trend is that the High Court can cancel the bail bond while exercising inherent powers under Section 482 of the Code.

12. According to this Court a person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found to be prejudicial to a fair trial and this forfeiture can be made effective by invoking the inherent powers of the High Court under Section 482 of the Code. (See *Talab Haji Hussain* **v.** *Madhukar Purshottam Mondkar* **[AIR 1958 SC 376 : 1958 SCR 1226] reiterated by a Constitution Bench in***Ratilal Bhanji Mithani* **v.** *Collector of Customs* **[AIR 1967 SC 1639 : (1967) 3 SCR 926] .)**

13. It may be noticed that sub-section (2) of Section 436 of the 1973 Code empowers any court to refuse bail without prejudice to action under Section 446 where a person fails to comply with the conditions of bail bond giving effect to the view expressed by this Court in the abovementioned cases. However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused

(*1*) misuses his liberty by indulging in similar criminal activity,

(*2*) interferes with the course of investigation,

(*3*) attempts to tamper with evidence of witnesses,

(*4*) threatens witnesses or indulges in similar activities which would hamper smooth investigation,

(*5*) attempts to flee to another country,

(*6*) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency,

(*7*) attempts to place himself beyond the reach of his surety, etc.

These grounds are illustrative and not exhaustive.

14. However, a bail granted to a person accused of a bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.

15. The contention raised by the learned counsel for the respondent on the basis of decision of this Court in *Arun Kumar* v. *State of Bihar* [(2008) 3 SCC 203 : (2008) 1 SCC (Cri) 716 : JT (2008) 2 SC 584] that the complainant should have been heard by the Magistrate before granting bail to the appellant, cannot be accepted.

…

18. To say the least, the facts of the present case are quite different from those mentioned in the above-reported decision in *Arun Kumar* [(2008) 3 SCC 203 : (2008) 1 SCC (Cri) 716 : JT (2008) 2 SC 584] . Therefore the ratio laid down in the said decision cannot be applied to the facts of the instant case.

19. Even if notice had been issued to the respondent before granting bail to the appellant, the respondent could not have pointed out to the court that the appellant had allegedly committed non-bailable offences. As observed earlier, what has to be ascertained by the officer or the court is as to whether the person accused is alleged to have committed bailable offences and if the same is found to be in affirmative, the officer or the court has no other alternative but to release such person on bail if he is ready and willing to abide by reasonable conditions, which may be imposed on him. Having regard to the facts of the case this Court is of the firm opinion

that the bail granted to the appellant for alleged commission of bailable offence could not have been cancelled by the High Court on the ground that the complainant was not heard and, thus, principles of natural justice were violated.

20. Principles of natural justice is not a "mantra" to be applied in vacuum in all cases. The question as to what extent, the principles of natural justice are required to be complied with, will depend upon the facts of the case. They are not required to be complied with when it will lead to an empty formality (see *State Bank of Patiala* v. *S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] and *Karnataka SRTC* v. *S.G. Kotturappa* [(2005) 3 SCC 409 : 2005 SCC (L&S) 484] at SCC p. 420, para 24). The impugned order is, therefore, liable to be set aside."

IN THE SUPREME COURT OF INDIA

Vaman Narain Ghiya v. State of Rajasthan

(2009) 2 SCC 281

Dr. Arijit Pasayat & Dr. M.K. Sharma, JJ.

The appellant was accused of being involved in smuggling of antiques. His application for bail was rejected by the High Court. The appellant approached the Supreme Court challenging the order of High Court rejecting his bail application. The Supreme Court in this case discusses the factors to be considered while granting bail. It also discusses bail jurisprudence in general.

Pasayat, J.: "6. "Bail" remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb "bailer" which means to "give" or "to deliver", although another view is that its derivation is from the Latin term "baiulare", meaning "to bear a burden". Bail is a conditional liberty.*Stroud's Judicial Dictionary* (4th Edn., 1971) spells out certain other details. It states:

> "… when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance."

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See *A.K. Gopalan* v. *State of Madras* [AIR 1950 SC 27])

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt.

…

11. While considering an application for bail, detailed discussion of the evidence and elaborate documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have the impression that his case has been pre-judged. Existence of a prima facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required. (See*Niranjan Singh* v. *Prabhakar Rajaram Kharote* [(1980) 2 SCC 559 : 1980 SCC (Cri) 508 : AIR 1980 SC 785] .) Where the offence is of serious nature the question of grant of bail has to be decided keeping in view the nature and seriousness of the offence, character of the evidence and amongst others the larger interest of the public. (See *State of Maharashtra* v. *Anand Chintaman Dighe* [(1990) 1 SCC 397 : 1990 SCC (Cri) 142 : AIR 1990 SC 625] and *State* v. *Surendranath Mohanty*[(1990) 3 OCR 462] .)"

IN THE SUPREME COURT OF INDIA

Prakash Kadam v. Ramprasad Vishwanath Gupta and Anr

(2011) 6 SCC 189

Markandey Katju & Gyan Sudha Misra, JJ.

The appellants were policemen accused of a contract killing. They were charge-sheeted for offences punishable under Sections 302/34, 120-B, 364/34, IPC, 1860 and other minor offences. The Sessions Court granted bail to the appellants but that was cancelled by the High Court by the impugned judgment. In its judgement the Supreme Court in deciding whether the High Court was right in cancelling the bail granted by the Sessions Court, discusses considerations for cancellation of bail.

Katju, J.: "16. The Sessions Court granted bail to the appellants but that has been cancelled by the High Court by the impugned judgment.

17. It was contended by the learned counsel for the appellants before us, and it was also contended before the High Court, that the considerations for cancellation of bail are different from the consideration of grant of bail vide *Bhagirathsinh* v. *State of Gujarat* [(1984) 1 SCC 284: 1984 SCC (Cri) 63] , *Dolat Ram* v. *State of Haryana* [(1995) 1 SCC 349 : 1995 SCC (Cri) 237] and *Ramcharan* v. *State of M.P.* [(2004) 13 SCC 617 : (2006) 1 SCC (Cri) 511] However, we are of the opinion that that is not an absolute rule, and it will depend on the facts and circumstances of the case.

18. In considering whether to cancel the bail the court has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the above principle applies when the *same* court which granted bail is approached for cancelling the bail. It will not apply when the order granting bail is appealed against before an appellate/Revisional Court.

19. In our opinion, there is no absolute rule that once bail is granted to the

accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail.

20. This is a very serious case and cannot be treated like an ordinary case. The accused who are policemen are supposed to uphold the law, but the allegation against them is that they functioned as contract killers. Their version that Ramnarayan Gupta was shot in a police encounter has been found to be false during the investigation. It is true that we are not deciding the case finally as that will be done by the trial court where the case is pending, but we can certainly examine the material on record in deciding whether there is a prima facie case against the accused which disentitles them to bail.

…

25. In our opinion this is a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent i.e. Ramnarayan Gupta and the police officers and the staff acted as contract killers for them. If such police officers and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety. If the police officers and staff could kill a person at the behest of a third person, it cannot be ruled out that they may kill the important witnesses or their relatives or give threats to them at the time of trial of the case to save themselves. This aspect has been completely ignored by the learned Sessions Judge while granting bail to the accused persons.

26. In our opinion, the High Court was perfectly justified in cancelling the bail granted to the appellant-accused. The appellant accused are police personnel and it was their duty to uphold the law, but far from performing their duty, they appear to have operated as criminals. Thus, the protectors have become the predators. (see in this connection the judgment of this Court in *CBI* v. *Kishore Singh* [(2011) 6 SCC 369])."

IN THE SUPREME COURT OF INDIA

Pragyna Singh Thakur v. State of Maharashtra

(2011) 10 SCC 445

J.M. Panchal & H.L. Gokhale, JJ.

The appellant filed an application for bail before the Special Judge under Section 167(2) CrPC, Section 21(4) MCOCA and also under Section 439 CrPC on the ground that chargesheet was not filed within 90 days from the date of arrest. The date of arrest was also disputed, with the appellant claiming that she was arrested on 10.10.2008, whereas the Prosecution claimed that she was arrested on 23.10.2008. The Special Judge rejected her bail application, and so did the High Court on appeal. In this case, the Supreme Court discusses the relevant date from which the period of 90 days for filing of chargesheet under Section 167(2) CrPC should be counted. It also discusses the right to default bail under that section.

Panchal, J.: "1. This appeal, by grant of special leave, challenges the judgment dated 12-3-2010 rendered by the learned Single Judge of the High Court of Judicature of Bombay in *Pragyna Singh Thakur* v. *State of Maharashtra* [Criminal Application No. 3878 of 2009 decided on 12-3-2010 (Bom)] by which prayer made by the appellant to enlarge her on bail on the ground of violation of the mandate of Articles 22(1) and 22(2) of the Constitution of India and also on the ground of non-filing of charge-sheet within 90 days as contemplated by Section 167(2) of the Code of Criminal Procedure, is rejected.

…

13. According to the appellant she was under detention from 10-10-2008 and though the 90th day was to expire on 9-1-2009 the charge-sheet was filed on 20-1-2009. Therefore, the appellant filed an application for bail before the learned Special Judge under Section 167(2) CrPC and Section 21(4) of Mcoca and also under Section 439 CrPC. Subsequently, according to the appellant, the opening part of the application was amended to read as an application for grant of bail under Section 21(2)(*b*) of Mcoca. It is relevant to note that the above application was not an application for bail

on merits, but on the plea that charge-sheet was required to be filed within 90 days from the date of arrest and as no charge-sheet was filed within 90 days, she was entitled to bail under Section 21(2)(*b*) of Mcoca/Section 167(2) CrPC.

…

15. The main ground on which bail was sought was that charge-sheet was required to be filed within 90 days from the date of her arrest but it was filed beyond 90 days from the date of arrest which was on 10-10-2008. Most of the other grounds pleaded were challenging the correctness of the findings of the learned Special Judge. The application filed in the High Court was rejected by judgment dated 12-3-2010 [Criminal Application No. 3878 of 2009 decided on 12-3-2010 (Bom)] which has given rise to the present appeal.

…

25. The appellant was arrested on 23-10-2008 and was produced before the CJM, Nasik on 24-10-2008 on which date the appellant was remanded to police custody till 3-11-2008. On the said date, there was no complaint made to the learned CJM that the appellant was arrested on 10-10-2008 nor was there any complaint about the ill-treatment meted out to her by the officers of ATS, Mumbai. Also there was no challenge at any time to the order of remand dated 24-10-2008 on the ground that the appellant was not produced before the learned CJM within 24 hours of her arrest.

…

41. The findings recorded by the learned Special Judge as well as by the High Court that the appellant was not arrested on 10-10-2008 but was arrested on 23-10-2008 and was thereafter produced before the learned Chief Judicial Magistrate, Nasik are concurrent findings of facts. This Court does not find substance in the contention that the appellant was arrested on 10-10-2008 and therefore the findings recorded by the learned Special Judge and the High Court are liable to be interfered with in this appeal which arises by grant of special leave. It was agreed by the learned counsel for the appellant that if this Court comes to the conclusion that the appellant was arrested on 23-10-2008 then the charge-sheet was submitted within 90 days from the date of first order of the remand and therefore there would neither be breach of the provisions of Section 167(2) of the Criminal Procedure Code nor would there be breach of Articles 22(1) and 22(2) of the Constitution.

…

48. So far as the merits of the case are concerned, under the Criminal Procedure Code bail has to be only on consideration of merits, except default bail which is under Section 167(2). Section 21 of the MCOC Act is to the effect that unless the court is satisfied that the accused is not guilty of the offence alleged, bail shall not be granted, which is similar to Section 37 of the NDPS Act. Considerations for grant of bail at the stage of investigation and after the charge-sheet is filed are different …

…

51. Though this Court has come to the conclusion that the appellant has not been able to establish that she was arrested on 10-10-2008, even if it is assumed for the sake of argument that the appellant was arrested on 10-10-2008 as claimed by her and not on 23-10-2008 as stated by the prosecution, she is not entitled to grant of default bail because this Court finds that the charge-sheet was filed within 90 days from the date of first order of remand. In other words, the relevant date of counting 90 days for filing the charge-sheet is the date of first order of the remand and not the date of arrest. This proposition has been clearly stated in Chaganti Satyanarayana v. State of A.P. [(1986) 3 SCC 141 : 1986 SCC (Cri) 321]

52. If one looks at the said judgment one finds that the facts of the said case are set out in paras 4 and 5 of the judgment. In para 20 of the reported decision it has been clearly laid down as a proposition of law that 90 days will begin to run only from the date of the order of remand. This is also evident if one reads the last five lines of para 24 of the reported decision. *Chaganti Satyanarayana* [(1986) 3 SCC 141 : 1986 SCC (Cri) 321] has been subsequently followed in the following four decisions of this Court:

(1) CBI v. Anupam J. Kulkarni [(1992) 3 SCC 141 : 1992 SCC (Cri) 554] , para 13, placitum c where it has been authoritatively laid down that: (SCC p. 159)

"The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police."

(2) State v. Mohd. Ashraft Bhat [(1996) 1 SCC 432 : 1996 SCC (Cri) 117] , SCC para 5;

(3) State of Maharashtra v. Bharati Chandmal

Varma [(2002) 2 SCC 121 : 2002 SCC (Cri) 299], SCC para 12; and

(4) State of M.P. v. Rustam [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] , Supp SCC para 3.

53. Section 167(2) is one, dealing with the power of the learned Judicial Magistrate to remand an accused to custody. The 90 days' limitation is as such one relating to the power of the learned Magistrate. In other words the learned Magistrate cannot remand an accused to custody for a period of more than 90 days in total. Accordingly, 90 days would start running from the date of first remand. It is not in dispute in this case that the charge-sheet was filed within 90 days from the first order of remand. Therefore, the appellant is not entitled to default bail.

54. … The right under Section 167(2) CrPC to be released on bail on default if charge-sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge-sheet is filed and would not survive after the filing of the charge-sheet. In other words, even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge-sheet is filed, the said right to be released on bail would be lost. After the filing of the charge-sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from the Constitution Bench decision of this Court in *Sanjay Dutt (2)* v. *State* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] [paras 48 and 53(*2*)(*b*)]. The reasoning is to be found in paras 33 to 49.

55. This principle has been reiterated in the following decisions of this Court:

(1) State of M.P. v. Rustam [1995 Supp (3) SCC 221 : 1995 SCC (Cri) 830] , SCC para 4;

(2) Bipin Shantilal Panchal v. State of Gujarat [(1996) 1 SCC 718 : 1996 SCC (Cri) 200] , SCC para 4. It may be mentioned that this judgment was delivered by a three-Judge Bench of this Court;

(3) Dinesh Dalmia v. CBI [(2007) 8 SCC 770 : (2008) 1 SCC (Cri) 36] , SCC para 39; and

(4) Mustaq Ahmed Mohammed Isak v. State of Maharashtra [(2009) 7 SCC 480 : (2009) 3 SCC (Cri) 449] , SCC para 12.

56. In *Uday Mohanlal Acharya* v. *State of Maharashtra* [(2001) 5 SCC 453 : 2001 SCC (Cri) 760] a three-Judge Bench of this Court considered the meaning of the expression "if already not availed of" used by this Court in the decision rendered in*Sanjay Dutt* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] in para 48 and held that if an application for bail is filed before the charge-sheet is filed, the accused could be said to have availed of his right under Section 167(2) even though the court has not considered the said application and granted him bail under Section 167(2) CrPC. This is quite evident if one refers to para 13 of the reported decision as well as the conclusion of the Court at p. 747.

57. It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. This is quite evident from the principle laid down in *Union of India* v. *Thamisharasi* [(1995) 4 SCC 190 : 1995 SCC (Cri) 665], SCC para 10, placita *c-d*.

58. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge-sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge-sheet is filed, the said right to be released on bail, can be only on merits.

…

63. The decisions relied upon by the learned counsel for the appellant do not support the plea that in every case where there is violation of Article 22(2) of the Constitution, an accused has to be set at liberty and released on bail. Whereas, an accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police, such a right is not available after the Magistrate remands the accused to custody. Right under Article 22(2) is available only against illegal detention by the police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order."

IN THE SUPREME COURT OF INDIA

Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.

(2011) 1 SCC 694

Dr. Dalveer Bhandari & K.S.P. Radhakrishnan, JJ.

The appellant's application for anticipatory bail was rejected by the High Court. The Supreme Court in this case discusses the duration for which anticipatory bail should be granted, course of action to be followed by courts in granting such bail and procedure to be followed while cancelling it. It also examines manner in which courts should exercise their discretionary power in granting anticipatory bail.

Bhandari, J.: "1. This appeal involves issues of great public importance pertaining to the importance of individual's personal liberty and the society's interest. Society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails two conflicting interests, namely, on the one hand, the requirements of shielding society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand, absolute adherence to the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.

...

14. It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 in CrPC was to recognise the importance of personal liberty and freedom in a free and democratic country. When we carefully analyse this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court.

...

18. Mr [Shanti] Bhushan, [appearing for the appellant] contended that the personal liberty is the most important fundamental right guaranteed by the Constitution. He also submitted that it is the fundamental principle of criminal jurisprudence that every individual is presumed to be innocent till he or she is found guilty. He further submitted that on proper analysis of Section 438 CrPC the legislative wisdom becomes quite evident that the legislature wanted to preserve and protect personal liberty and give impetus to the age-old principle that every person is presumed to be innocent till he is found guilty by the court.

19. Mr Bhushan also submitted that an order of anticipatory bail does not in any way, directly or indirectly, take away from the police their power and right to fully investigate into charges made against the appellant. He further submitted that when the case is under investigation, the usual anxiety of the investigating agency is to ensure that the alleged accused should fully cooperate with them and should be available as and when they require him.

...

21. Mr Bhushan submitted that a plain reading of Section 438 CrPC clearly reveals that the legislature has not placed any fetters on the court. In other words, the legislature has not circumscribed the court's discretion in any manner while granting anticipatory bail, therefore, the court should not limit the order only for a specified period till the charge-sheet is filed and thereafter compel the accused to surrender and ask for regular bail under Section 439 CrPC, meaning thereby the legislature has not envisaged that the life of the anticipatory bail would only last till the charge-sheet is filed. Mr Bhushan submitted that when no embargo has been placed by the legislature then this Court in some of its orders was not justified in placing this embargo.

22. Mr Bhushan submitted that the discretion which has been granted by the legislature cannot and should not be curtailed by interpreting the provisions contrary to the legislative intention. The court's discretion in grant or refusal of the anticipatory bail cannot be diluted by interpreting the provisions against the legislative intention. He submitted that the life is never static and every situation has to be assessed and evaluated in the context of emerging concerns as and when it arises. It is difficult to visualise or anticipate all kinds of problems and situations which may arise in future.

Law has been settled by an authoritative pronouncement of the Supreme Court

23. The Constitution Bench of this Court in *Gurbaksh Singh Sibbia* **v.** *State of Punjab* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail. Section 438 CrPC is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest. The Constitution Bench's relevant observations are set out as under: (SCC p. 584, para 21)**

> "21. … A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail."

24. Mr Bhushan referred to the Constitution Bench judgment in *Sibbia case* **[(1980) 2 SCC 565: 1980 SCC (Cri) 465] to strengthen his argument that no such embargo has been placed by the said judgment of the Constitution Bench. He placed heavy reliance on SCC para 15 of** *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] which reads as under: (SCC p. 581)

> "15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a straitjacket.

> While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail 'if it thinks fit'. The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

...

26. Mr Bhushan submitted that the Court's orders in some cases that anticipatory bail is granted till the charge-sheet is filed and thereafter the accused has to surrender and seek bail application under Section 439 CrPC is neither envisaged by the provisions of the Act nor is in consonance with the law declared by the Constitution Bench in *Sibbia case* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] nor is it in conformity with the fundamental principles of criminal jurisprudence that an accused is considered to be innocent till he is found guilty nor in consonance with the provisions of the Constitution where the individual's liberty in a democratic society is considered sacrosanct.**

27. Mr Mahesh Jethmalani, learned Senior Counsel appearing for Respondent 2, submitted that looking to the facts and circumstances of this case, the High Court was justified in declining the anticipatory bail to the appellant. He submitted that the anticipatory bail ought to be granted

in the rarest of rare cases where the nature of offence is not very serious. He placed reliance on *Pokar Ram* **v.** *State of Rajasthan* [(1985) 2 SCC 597 : 1985 SCC (Cri) 297] and submitted that in murder cases custodial interrogation is of paramount importance particularly when no eyewitness account is available.

28. Mr Jethmalani fairly submitted that the practice of passing orders of anticipatory bail operative for a few days and directing the accused to surrender before the Magistrate and apply for regular bail are contrary to the law laid down in *Sibbia case*[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] . The decisions of this Court in *Salauddin Abdulsamad Shaikh* **v.** *State of Maharashtra* **[(1996) 1 SCC 667 : 1996 SCC (Cri) 198] ,** *K.L. Verma* **v.** *State* **[(1998) 9 SCC 348 : 1998 SCC (Cri) 1031] ,** *Adri Dharan Das* **v.***State of W.B.* **[(2005) 4 SCC 303 : 2005 SCC (Cri) 933] and** *Sunita Devi* **v.** *State of Bihar* **[(2005) 1 SCC 608 : 2005 SCC (Cri) 435] are in conflict with the above decision of the Constitution Bench in** *Sibbia case* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] . He submitted that all these orders which are contrary to the clear legislative intention of law laid down in** *Sibbia case* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] are per incuriam. He also submitted that in case the conflict between the two views is irreconcilable, the Court is bound to follow the judgment of the Constitution Bench over the subsequent decisions of Benches of lesser strength.**

…

85. It is a matter of common knowledge that a large number of undertrials are languishing in jail for a long time even for allegedly committing very minor offences. This is because Section 438 CrPC has not been allowed its full play. The Constitution Bench in *Sibbia case* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] clearly mentioned that Section 438 CrPC is extraordinary because it was incorporated in the Code of Criminal Procedure, 1973 and before that other provisions for grant of bail were Sections 437 and 439 CrPC. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some Courts of smaller strength have erroneously observed that Section 438 CrPC should be invoked only in exceptional or rare cases. Those orders are contrary to the law laid down by the judgment of the Constitution Bench in***Sibbia case* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] .**….

…

89. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the

basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

90. A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

Whether the powers under Section 438 CrPC are subject to limitation of Section 437 CrPC?

91. The question which arises for consideration is whether the powers under Section 438 CrPC are unguided or uncanalised or are subject to all the limitations of Section 437 CrPC? The Constitution Bench in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] has clearly observed that there is no justification for reading into Section 438 CrPC the limitations mentioned in Section 437 CrPC. The Court further observed that the plentitude of the section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 CrPC to a dead letter. The Court observed that: (SCC p. 584, para 21)

> "21. … We do not see why the provisions of Section 438 CrPC should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable."

92. As aptly observed in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] that: (SCC p. 584, para 21)

> "21. … A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with

> due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail."

93. The Constitution Bench in the same judgment also observed that a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

94. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.

95. The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply for a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in *Sibbia case* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] .96. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant on finding new material or circumstances at any point of time.**

…

97. The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely discretionary. The Constitution Bench in *Sibbia case* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] has clearly stated that grant and refusal is discretionary and it should depend on the** facts and circumstances of each case. The Constitution Bench in the said case has aptly observed that we must respect the wisdom of the legislature

entrusting this power to the superior courts, namely, the High Court and the Court of Session. The Constitution Bench observed as under: (SCC p. 589, para 33)

> "33. We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all 'the legislature in its wisdom' has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."

Grant of bail for limited period is contrary to the legislative intention and law declared by the Constitution Bench

98. The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the Public Prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case. The judgment in *Salauddin Abdulsamad Shaikh* [(1996) 1 SCC 667 : 1996 SCC (Cri) 198] is contrary to the legislative intent and the spirit of the very provisions of the anticipatory bail itself and has resulted in an artificial and unreasonable restriction on the scope of enactment contrary to the legislative intention.

99. The restriction on the provision of anticipatory bail under Section 438 CrPC limits the personal liberty of the accused granted under Article 21 of

the Constitution. The added observation is nowhere found in the enactment and bringing in restrictions which are not found in the enactment is again an unreasonable restriction. It would not stand the test of fairness and reasonableness which is implicit in Article 21 of the Constitution after the decision in *Maneka Gandhi case* [(1978) 1 SCC 248] ; in which the Court observed that: (*Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] , SCC p. 586, para 26)

> "26. … in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable."

100. Section 438 CrPC does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the court concerned would be fully justified in imposing conditions including the direction of joining the investigation.

101. The court does not use the expression "anticipatory bail" but it provides for issuance of direction for the release on bail by the High Court or the Court of Session in the event of arrest. According to the aforesaid judgment of *Salauddin case* **[(1996) 1 SCC 667 : 1996 SCC (Cri) 198] , the accused has to surrender before the trial court and only thereafter he/she can make prayer for grant of bail by the trial court. The trial court would release the accused only after he has surrendered.102.** In pursuance of the order of the Court of Session or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

…

103. The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating agency concerned may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and the life of anticipatory bail comes to an end. This may lead to disastrous and

unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. This finding of the said judgment (supra) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this Court in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] .

104. The validity of the restrictions imposed by the Apex Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail; this is contrary to the basic intention and spirit of Section 438 CrPC. It is also contrary to Article 21 of the Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period, amounts to deprivation of his personal liberty.

105. It is a settled legal position crystallised by the Constitution Bench of this Court in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the courts should not impose restrictions on the ambit and scope of Section 438 CrPC which are not envisaged by the legislature. The Court cannot rewrite the provision of the statute in the garb of interpreting it.

…

107. The Apex Court in *Salauddin case* [(1996) 1 SCC 667 : 1996 SCC (Cri) 198] held that anticipatory bail should be granted only for a limited period and on the expiry of that duration it should be left to the regular court to deal with the matter is not the correct view. The reason quoted in the said judgment is that anticipatory bail is granted at a stage when an investigation is incomplete and the court is not informed about the nature of evidence against the alleged offender. The said reason would not be right as the restriction is not seen in the enactment and bail orders by the High Court and the Sessions Court are granted under Sections 437 and 439 also at such stages and they are granted till the trial.

108. The views expressed by this Court in all the abovereferred judgments have to be reviewed and once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when

the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.

…

Relevant consideration for exercise of the power

111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case. As aptly observed in the Constitution Bench decision in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the High Court or the Court of Session has to exercise their jurisdiction under Section 438 CrPC by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(*i*) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(*ii*) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(*iii*) The possibility of the applicant to flee from justice;

(*iv*) The possibility of the accused's likelihood to repeat similar or other offences;

(*v*) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(*vi*) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(*vii*) The courts must evaluate the entire available material against the accused very carefully.

The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(*viii*) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(*ix*) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(*x*) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

113. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

114. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the Judge concerned, after consideration of the entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the Judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the Court of Session or the High Court is always available.

…

122. In our considered view, the Constitution Bench in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] has comprehensively dealt with almost all aspects of the concept of anticipatory bail under Section 438 CrPC. A number of judgments have been referred to by the learned counsel for the parties consisting of Benches of smaller strength where the Courts have observed that the anticipatory bail should be of limited duration only and ordinarily on expiry of that duration or standard duration, the court granting the anticipatory bail should leave it to the regular court to deal with the matter. This view is clearly contrary to the view taken by the Constitution Bench in *Sibbia case*[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] . In the preceding para, it is clearly spelt out that no limitation has been envisaged by the legislature under Section 438 CrPC. The Constitution Bench has aptly observed that "we see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court or the Court of Session but, for the purpose of limiting it".

123. In view of the clear declaration of law laid down by the Constitution Bench in*Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] , it would not be proper to limit the life of anticipatory bail. When the Court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of Section 438 CrPC would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] clearly observed that it is not necessary to rewrite Section 438 CrPC. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under Section 438 CrPC granting bail cannot be curtailed.

124. The ratio of the judgment of the Constitution Bench in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] perhaps was not brought to the notice of Their Lordships who had decided the cases of *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra* [(1996) 1 SCC 667 : 1996 SCC (Cri) 198], *K.L. Verma* v. *State* [(1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , *Adri Dharan Das* v. *State of W.B.* [(2005) 4 SCC 303 : 2005 SCC (Cri) 933] and *Sunita Devi* v. *State of Bihar* [(2005) 1 SCC 608 : 2005 SCC (Cri) 435].

125. In *Naresh Kumar Yadav* v. *Ravindra Kumar* [(2008) 1 SCC 632 : (2008) 1 SCC (Cri) 277] a two-Judge Bench of this Court observed: (SCC p. 632*d*)

> "the power exercisable under Section 438 CrPC is somewhat extraordinary in character and it [should be exercised] only in exceptional cases."

This approach is contrary to the legislative intention and the Constitution Bench's decision in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465].

126. We deem it appropriate to reiterate and assert that discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 CrPC should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

127. The judgments and orders mentioned in paras 124 and 125 are clearly contrary to the law declared by the Constitution Bench of this Court in *Sibbia case*[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] . These judgments and orders are also contrary to the legislative intention. The Court would not be justified in rewriting Section 438 CrPC.

…

140. In the instant case there is a direct judgment of the Constitution Bench of this Court in *Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] dealing with exactly the same issue regarding the ambit, scope and object of the concept of anticipatory bail enumerated under Section 438 CrPC. The controversy is no longer res integra. We are clearly bound to follow the said judgment of the Constitution Bench. The judicial discipline obliges us to follow the said judgment in letter and spirit."

IN THE SUPREME COURT OF INDIA

Rashmi Rekha Thatoi & Anr. v. State of Orissa & Ors.

(2012) 5 SCC 690

K.S.P. Radhakrishnan & Dipak Misra, JJ.

The Orissa High Court had granted anticipatory bail to five persons accused of committing offences punishable under Sections 341/294/506 and 302 read with Section 34 of the Penal Code, 1860. The sister of the deceased, and the complainant, an eyewitness, approached the Supreme Court seeking quashing of the orders on the ground that the High Court had extended the benefit of Section 438(1) of the Code in an illegal and impermissible manner. The issue before the Court was whether the order of the High Court was legally sustainable

Misra, J.: "14. On a perusal of … the orders [of the High Court] it is perceivable that the commonality in … the orders is that while the High Court had expressed its opinion that though it is not inclined to grant anticipatory bail to the petitioners yet it has directed on their surrender some of the accused petitioners would be enlarged on bail on such terms and conditions as may be deemed fit and proper by the Sub-Divisional Judicial Magistrate concerned and cases of certain accused persons on surrender shall be dealt with on their own merits.

…

17. The pivotal issue that emanates for consideration is: whether the orders passed by the High Court are legitimately acceptable and legally sustainable within the ambit and sweep of Section 438 of the Code?

…

19.[Section 438] in its denotative compass and connotative expanse enables one to apply and submit an application for bail where one anticipates his arrest in a non-bailable offence. Though the provision does not use the expression "anticipatory bail", yet the same has come in vogue by general usage and also has gained acceptation in the legal world.

20. The Constitution Bench in *Gurbaksh Singh Sibbia* v. *State of Punjab* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] has drawn a distinction between an order of ordinary bail and order of anticipatory bail by stating that the former is granted when the accused is in custody and, therefore, means release from the custody of the police, and the latter is granted in anticipation of arrest and hence, effective at the very moment of arrest. It has been held therein that an order of anticipatory bail constitutes, so to say, an insurance against police custody falling upon arrest for offences in respect of which the order is issued. Their Lordships clarifying the distinction have observed that: (SCC p. 575, para 7) …

21. The Constitution Bench partly accepted the verdict in *Balchand Jain* v. *State of M.P.* [(1976) 4 SCC 572 : 1976 SCC (Cri) 689 : AIR 1977 SC 366] by stating as follows: (*Gurbaksh Singh case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] , SCC p. 586, para 25)

> "25. … We agree, with respect, that the power conferred by Section 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection…."

22. Thereafter, the larger Bench in *Gurbaksh Singh case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465: AIR 1980 SC 1632] referred to the concept of liberty engrafted in Article 21 of the Constitution, situational and circumstantial differences from case to case and observed that in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. However, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond.

23. The Constitution Bench in *Gurbaksh Singh case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465: AIR 1980 SC 1632] also opined that the Court has to

take into consideration the combined effect of several other considerations which are too numerous to enumerate and the legislature has endowed the responsibility on the High Court and the Court of Session because of their experience.

24. The Constitution Bench proceeded to state the essential concept of exercise of jurisdiction under Section 438 of the Code on following terms:

> "119. Exercise of jurisdiction under Section 438 of Code of Criminal Procedure is extremely important judicial function of a Judge and must be entrusted to judicial officers with some experience and good track record. Both the individual and society have vital interest in orders passed by the courts in anticipatory bail applications." [Ed.: As observed in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694, p. 738, para 119 : (2011) 1 SCC (Cri) 514.]

25. In *Savitri Agarwal* v. *State of Maharashtra* [(2009) 8 SCC 325 : (2009) 3 SCC (Cri) 683] the Bench culled out the principles laid down in *Gurbaksh Singh* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] . Some principles which are necessary to be reproduced are as follows: (*Savitri Agarwal case* [(2009) 8 SCC 325 : (2009) 3 SCC (Cri) 683] , SCC pp. 333-34, para 24)

> "*24*. … (*ii*) Before power under sub-section (1) of Section 438 of the Code is exercised, the court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere 'fear' is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively. Specific events and facts must be disclosed by the applicant in order to enable the court to judge the reasonableness

> of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.
>
> ***
>
> (vii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.
>
> (viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government Advocate forthwith and the question of bail should be re-examined in the light of respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage."

26. At this juncture we may note with profit that there was some departure in certain decisions after the Constitution Bench decision. In *Salauddin Abdulsamad Shaikh* v.*State of Maharashtra* [(1996) 1 SCC 667 : 1996 SCC (Cri) 198 : AIR 1996 SC 1042] it was held that it was necessary that under certain circumstances anticipatory bail order should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on appreciation of material placed before it.

27. In *K.L. Verma* v. *State* [(1998) 9 SCC 348 : 1998 SCC (Cri) 1031] it was ruled that: (SCC p. 351, para 3)

> "3. … limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application."

It was further observed therein that till the bail application is disposed of one way or the other, the court may allow the accused to remain on anticipatory bail.

28. In *Nirmal Jeet Kaur* v. *State of M.P.* [(2004) 7 SCC 558 : 2004 SCC (Cri) 1989] , the decision in *K.L. Verma case* [(1998) 9 SCC 348 : 1998 SCC (Cri) 1031] was clarified by stating that the benefit of anticipatory bail may be extended few days thereafter to enable the accused persons to move the High Court if they so desire.

29. In *Adri Dharan Das* v. *State of W.B.* [(2005) 4 SCC 303 : 2005 SCC (Cri) 933] a two-Judge Bench while accepting for grant of bail for limited duration has held that: (SCC p. 313, para 19)

> "*19*. … arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code."

30. After analysing the ratio in *Salauddin Abdulsamad Shaikh* [(1996) 1 SCC 667 : 1996 SCC (Cri) 198 : AIR 1996 SC 1042] , *K.L. Verma* [(1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , *Nirmal Jeet Kaur* [(2004) 7 SCC 558: 2004 SCC (Cri) 1989] , *Niranjan Singh* v. *Prabhakar Rajaram Kharote* [(1980) 2 SCC 559 : 1980 SCC (Cri) 508] the Bench opined thus: (*Adri Dharan Das case* [(2005) 4 SCC 303 : 2005 SCC (Cri) 933] , SCC p. 311, paras 14-15)

> "*14*. After analysing the crucial question as to when a person is in custody, within the meaning of Section 439 of the Code, it was held in *Nirmal Jeet Kaur case* [(2004) 7 SCC 558 : 2004 SCC (Cri) 1989] and *Sunita Devi case* [*Sunita Devi* v. *State of Bihar*, (2005) 1 SCC 608 : 2005 SCC (Cri) 435] that for making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in *Salauddin case* [(1996) 1 SCC 667: 1996 SCC (Cri) 198 : AIR 1996 SC 1042] the protection in terms of Section 438 is for a limited duration during which the regular court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.
>
> *15*. If the protective umbrella of Section 438 is extended beyond what was laid down in *Salauddin case* [(1996) 1 SCC 667 : 1996 SCC (Cri) 198 : AIR 1996 SC 1042] the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner."

31. In *Union of India* v. *Padam Narain Aggarwal* [(2008) 13 SCC 305 : (2009) 1 SCC (Cri) 1 : AIR 2009 SC 254] this Court while dealing with an order wherein the High Court had directed that the respondent therein shall appear before the Customs Authorities concerned in response to

the summons issued to them and in case the Custom Authorities found a non-bailable offence against the accused persons they shall not arrest without ten days' prior notice to them. The two-Judge Bench relied on the decisions in *Gurbaksh Singh Sibbia* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] , *Adri Dharan Das* [(2005) 4 SCC 303 : 2005 SCC (Cri) 933] and *State of Maharashtra* v. *Mohd. Rashid* [(2005) 7 SCC 56 : 2005 SCC (Cri) 1598] and eventually held thus: (*Padam Narain case* [(2008) 13 SCC 305 : (2009) 1 SCC (Cri) 1 : AIR 2009 SC 254] , SCC pp. 322-23, para 45)

> "*45*. In our judgment, on the facts and in the circumstances of the present case, neither of the above directions can be said to be legal, valid or in consonance with law. *Firstly*, the order passed by the High Court is a *blanket* one as held by the Constitution Bench of this Court in *Gurbaksh Singh* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] and seeks to grant protection to the respondents in respect of *any non-bailable offence*. *Secondly*, it illegally obstructs, interferes and curtails the authority of Customs Officers from exercising statutory power of arrest of a person said to have committed a non-bailable offence by imposing a condition of giving *ten days' prior notice*, a condition not warranted by law. The order passed by the High Court to the extent of directions issued to the Customs Authorities is, therefore, liable to be set aside and is hereby set aside." (emphasis in original)

32 [Ed.: Para 32 corrected vide Official Corrigendum No. F.3/ Ed.B.J./31/2012 dated 31-5-2012.]. Be it noted, the principle of grant of anticipatory bail for a limited duration in *Salauddin Abdulsamad Shaikh* [(1996) 1 SCC 667 : 1996 SCC (Cri) 198 : AIR 1996 SC 1042] , *K.L. Verma* [(1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , *Adri Dharan Das* [(2005) 4 SCC 303 : 2005 SCC (Cri) 933] and *Sunita Devi* v. *State of Bihar* [*Sunita Devi* v. *State of Bihar*, (2005) 1 SCC 608 : 2005 SCC (Cri) 435] was held to be contrary to the Constitution Bench decision in *Gurbaksh Singh Sibbia case* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] by a two-Judge Bench in *Siddharam Satlingappa Mhetre* v. *State of Maharashtra* [(2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] and

accordingly the said decisions were treated as per incuriam. It is worth noting though the Bench treated *Adri Dharan Das* [(2005) 4 SCC 303 : 2005 SCC (Cri) 933] to be per incuriam, as far as it pertained to the grant of anticipatory bail for limited duration, yet it has not held that the view expressed therein that the earlier decisions pertaining to the concept of deemed custody as laid down in *Salauddin Abdulsamad Shaikh* [(1996) 1 SCC 667 : 1996 SCC (Cri) 198 : AIR 1996 SC 1042] and similar line of cases was per incuriam. It is so as the controversy involved in *Siddharam Satlingappa Mhetre* [(2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] did not relate to the said arena.

33. We have referred to the aforesaid pronouncements to highlight how the Constitution Bench in *Gurbaksh Singh Sibbia* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] had analysed and explained the intrinsic underlying concepts under Section 438 of the Code, the nature of orders to be passed while conferring the said privilege, the conditions that are imposable and the discretions to be used by the courts. On a reading of the said authoritative pronouncement and the principles that have been culled out in *Savitri Agarwal* [(2009) 8 SCC 325 : (2009) 3 SCC (Cri) 683] there is remotely no indication that the Court of Session or the High Court can pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the learned Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms has expressed the view that it is not inclined to grant anticipatory bail to the petitioner-accused it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in *Gurbaksh Singh Sibbia* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : AIR 1980 SC 1632] and the principles culled out in *Savitri Agarwal* [(2009) 8 SCC 325 : (2009) 3 SCC (Cri) 683] . It is clear as crystal the court cannot issue a blanket order restraining arrest and it can only issue an interim order and the interim order must also conform to the requirement of the section and suitable conditions should be imposed.

34. In *Gurbaksh Singh Sibbia* [(1980) 2 SCC 565 : 1980 SCC (Cri) 465: AIR 1980 SC 1632] the Constitution Bench has clearly observed that exercise of jurisdiction under Section 438 of the Code is an extremely important judicial function of a Judge and both individual and society have vital interest in the orders passed by the court in anticipatory bail applications.

35. In this context it is profitable to refer to a three-Judge Bench decision in *Narendra K. Amin* v. *State of Gujarat* [(2008) 13 SCC 584 : (2009) 3 SCC (Cri) 813] . In the said case a learned Judge of the Gujarat High Court cancelled the bail granted to the appellant therein in exercise of power under Section 439(2) of the Code. It was contended before this Court that the High Court had completely erred by not properly appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench referred to the decision in *Puran* v. *Rambilas* [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] wherein it has been noted that the concept of setting aside an unjustified, illegal or perverse order is totally different from the cancelling of an order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation. The three-Judge Bench further observed that when irrelevant materials have been taken into consideration the same makes the order granting bail vulnerable. In essence, the three-Judge Bench has opined that if the order is perverse, the same can be set at naught by the superior court.

36. In the case at hand the direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law. It is contradictory in terms and law does not countenance paradoxes. It gains respectability and acceptability when its solemnity is maintained. Passing such kind of orders the interest of the collective at large and that of the individual victims is jeopardised. That apart, it curtails the power of the regular court dealing with the bail applications.

37. In this regard it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is a well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in *Bay Berry Apartments (P) Ltd.* v. *Shobha* [(2006) 13 SCC 737] and *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey* [(2006) 1 SCC 479 : 2006 SCC (L&S) 250] .

38. Judging on the foundation of aforesaid well-settled principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons…on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside."

IN THE SUPREME COURT OF INDIA

Sanjay Chandra v. Central Bureau of Investigation

(2012) 1 SCC 40

G.S. Singhvi & H.L. Dattu, JJ.

The appellant-accused was refused bail by the Special Judge, CBI, New Delhi and a Single Judge of the Delhi High Court. The Special Leave Petition is directed against the common judgment and order of the single judge. The allegations against the accused involved a criminal conspiracy to get a license for providing telecom services to an ineligible company. The Court discusses various issues relating to bail jurisprudence, especially in the context of the gravity and seriousness of the offence charged, as also delay in the legal process.

Dattu, J.: "5. Shri Ram Jethmalani, learned Senior Counsel appearing for appellant Sanjay Chandra, would urge that the impugned judgment has not appreciated the basic rule laid down by this Court that grant of bail is the rule and its denial is the exception. Shri Jethmalani submitted that if there is any apprehension of the accused of absconding from trial or tampering with the witnesses, then it is justified for the Court to deny bail.

…

12. Shri Ashok H. Desai, learned Senior Counsel appearing for appellants Hari Nair and Surendra Pipara, adopted the principal arguments of Shri Jethmalani. In addition, Shri Desai would submit that a citizen of this country, who is charged with a criminal offence, has the right to be enlarged on bail. Unless there is a clear necessity for deprivation of his liberty, a person should not be remanded to judicial custody. Shri Desai would submit that the Court should bear in mind that such custody is not punitive in nature, but preventive, and must be opted only when the charges are serious. Shri Desai would further submit that the power of the High Court and this Court is not limited by the operation of Section 437. He would further contend that Surendra Pipara deserves to be released on bail in view of his serious health conditions.

…

14. Shri Harin P. Raval, the learned Additional Solicitor General, in his reply, would submit that the offences that are being charged, are of the nature that the economic fabric of the country is brought at stake. Further, the learned ASG would state that the quantum of punishment could not be the only determinative factor for the magnitude of an offence. He would state that one of the relevant considerations for the grant of bail is the interest of the society at large as opposed to the personal liberty of the accused, and that the Court must not lose sight of the former. He would submit that in the changing circumstances and scenario, it was in the interest of the society for the Court to decline bail to the appellants.

…

18. In his reply, Shri Jethmalani would submit that as the presumption of innocence is the privilege of every accused, there is also a presumption that the appellants would not tamper with the witnesses if they are enlarged on bail, especially in the facts of the case, where the appellants have cooperated with the investigation. In recapitulating his submissions, the learned Senior Counsel contended that there are two principles for the grant of bail—firstly, if there is no prima facie case, and secondly, even if there is a prima facie case, if there is no reasonable apprehension of tampering with the witnesses or evidence or absconding from the trial, the accused are entitled to grant of bail pending trial. He would submit that since both the conditions are satisfied in this case, the appellants should be granted bail.

…

21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which,

he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

24. In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the constitutional rights but rather "recalibrating the scales of justice".

25. The provisions of CrPC confer discretionary jurisdiction on criminal courts to grant bail to the accused pending trial or in appeal against convictions; since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, is a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognised, then it may lead to chaotic situation and would jeopardise the personal liberty of an individual.

26. This Court, in *Kalyan Chandra Sarkar* v. *Rajesh Ranjan* [(2005) 2 SCC 42 : 2005 SCC (Cri) 489] observed that: (SCC p. 52, para 18)

> "18. … Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during

> the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorised by law. But even persons accused of non-bailable offences are entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such [accused] on bail, where fact situations require it to do so."

27. This Court, time and again, has stated that bail is the rule and committal to jail an exception. It has also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution.

…

39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds: the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the

accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

...

42. When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is: whether the same is possible in the present case.

43. There are seventeen accused persons. Statements of witnesses run to several hundred pages and the documents on which reliance is placed by the prosecution, are voluminous. The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that the accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet.

44. This Court, in *State of Kerala* v. *Raneef* [(2011) 1 SCC 784 : (2011) 1 SCC (Cri) 409] has stated: (SCC p. 789, para 15)

> "15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail. A doctor incarcerated

> for a long period may end up like Dr. Manette in Charles Dickens's novel A Tale of Two Cities, who forgot his profession and even his name in the Bastille."

45. In *Bihar Fodder Scam* (*Laloo Prasad case* [*Laloo Prasad* v. *State of Jharkhand*, (2002) 9 SCC 372]) this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period of more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pretrial prisoners would not serve any purpose.

46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

IN THE SUPREME COURT OF INDIA

Y.S. Jagan Mohan Reddy v. CBI

(2013) 7 SCC 439

P. Sathasivam & M.Y. Eqbal, JJ.

The CBI registered a case under Section 120-B read with Sections 420, 409 and 477A of the Penal Code, 1860 and Section 13(2) read with Sections 13(1)(c) and (d) of the PCA, 1988 against the appellant, Y.S. Jagan Mohan Reddy, Member of Parliament and 73 others. The appellant was arrested. His application for regular bail was dismissed by the Special Judge, and subsequently, by the High Court as well. The only question posed for consideration before the Supreme Court in this SLP was whether the appellant should be released on bail. The Court examines whether economic offences should be treated differently when deciding on bail.

Sathasivam, J.: "9.The appellant moved the High Court for enlarging him on bail...The High Court, taking note of serious nature of the offence and having regard to personal and financial clout of the appellant (A-1) and finding that it cannot be ruled out that witnesses can be influenced by him in case he is released on bail at this stage, by the impugned order dated 4-7-2012 [*Y.S. Jagan Mohan Reddy* v. *State of A.P.*, Criminal Petition No. 5211 of 2012, order dated 4-7-2012 (AP)], dismissed his bail application.

…

16. The learned Senior Counsel appearing for the appellant, by drawing our attention to various materials/details including the fact that the appellant is in custody nearly for a period of 1 year and many persons alleged to have been involved in those transactions are not in custody and no steps have been taken by CBI for their arrest, submitted that the appellant may be enlarged on bail after imposing appropriate conditions.

...

18. Mr Ashok Bhan, learned Senior Counsel for CBI, by pointing out the penultimate paragraph in the order dated 5-10-2012 [*Y.S. Jagan Mohan*

Reddy v. *CBI*, (2013) 7 SCC 450. For text of the order *see also* para 17, below.] i.e. "It will be, however, open to the petitioner to renew his prayer for bail before the trial court on completion of the investigation by CBI on the issues as indicated above and submission of the final charge-sheet", submitted that in view of the fact that the investigation is still continuing in respect of the transaction(s) with certain companies/persons, the present application for bail is not maintainable.

...

32. Though the learned Senior Counsel for the appellant submitted that in view of the non-compliance with Section 167 of the Code the appellant is entitled to statutory bail, in view of enormous materials placed in respect of distinct entities, various transactions, etc. and in the light of the permission granted by this Court … we are unable to accept the argument of the learned Senior Counsel for the appellant.

33. On going into all the details furnished by CBI in the form of status report and the counter-affidavit dated 6-5-2013 sworn by the Deputy Inspector General of Police and Chief Investigating Officer, Hyderabad, without expressing any opinion on the merits, we feel that at this stage, the release of the appellant (A-1) would hamper the investigation as it may influence the witnesses and tamper with the material evidence. Though it is pointed out by the learned Senior Counsel for the appellant that the appellant is in no way connected with the persons in power, we are of the view that the apprehension raised by CBI cannot be lightly ignored considering the claim that the appellant is the ultimate beneficiary and the prime conspirator in huge monetary transactions.

34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension

of the witnesses being tampered with, the larger interests of the public/ State and other similar considerations.

36. Taking note of all these facts and the huge magnitude of the case and also the request of CBI asking for further time for completion of the investigation in filing the charge-sheet(s), without expressing any opinion on the merits, we are of the opinion that the release of the appellant at this stage may hamper the investigation. However, we direct CBI to complete the investigation and file the charge-sheet(s) within a period of 4 months from today.… the appellant is free to renew his prayer for bail before the trial court and if any such petition is filed, the trial court is free to consider the prayer for bail independently on its own merits without being influenced by dismissal of the present appeal."

IN THE SUPREME COURT OF INDIA

Satyajit Ballubhai Desai & Others v. State of Gujarat

(2014) 14 SCC 434

G.S. Singhvi & Gyan Sudha Misra, JJ.

The appellants were granted bail by the High Court. However, six days thereafter, the investigating agency sought police remand of the appellants. The Magistrate granted police remand. This order of the Magistrate was upheld by the High Court. The Supreme Court discusses when an order for police remand should have been granted. It also examines the power of a Magistrate to grant police remand of an accused after he has been granted bail by the High Court.

Misra, J.: "1. The appellants herein have assailed the judgment and order of the High Court of Gujarat at Ahmedabad dated 29-9-2011 passed in *Satyajit Ballubhai Desai* v. *State of Gujarat* [*Satyajit Ballubhai Desai* v. *State of Gujarat*, Special Criminal Application No. 810 of 2011, decided on 29-9-2011 (Guj)] whereby the learned Single Judge was pleased to dismiss the applications and thus upheld the order passed by the learned Magistrate permitting police remand of the appellants herein for three days for their interrogation in Complaint Case No. 3 of 2004 registered in the Court of the Judicial Magistrate (First Class), Valod, Gujarat which had been referred to the police for investigation after which the said complaint was registered as Talod M. Case No. 1 of 2004.

2. Before we consider the justification and correctness of the impugned order permitting police remand of the appellants, the relevant factual details are required to be recorded which disclose that a lady named Surjaben, widow of Badharsinh alias Babarsinh Chauhan, aged approximately 80 years filed a criminal complaint before the Judicial Magistrate First Class (JMFC), Valod in Gujarat being Case No. 3 of 2004 against the appellants alleging inter alia that the husband of the complainant, namely, Badharsinh alias Babarsinh Ratnaji Chauhan had expired on 10-6-1967 and after his death and death of other brothers of the husband of the complainant,

name of the complainant got entered in the revenue record. However, when the complainant obtained a copy of the revenue record in respect of the aforesaid land, she came to know that one Satyajitbhai Ballubhai Desai forged and created a bogus power of attorney at the instance of the owner of the property in the name of one Jaydipbhai Ranchhodbhai Solanki who is a fictitious person and on the basis of the bogus and fabricated power of attorney, he got executed a registered sale deed on 2-8-2003 in favour of a third party without the knowledge of the complainant. The learned Magistrate sent the matter for investigation to the police which registered it as Talod M. Case No. 1 of 2004.

3. The complainant apart from filing the complaint against the appellants also instituted Regular Civil Suit No. 15 of 2004 in the Court of the learned Civil Judge (Junior Division), Valod against Appellant 1 herein for declaration, permanent injunction and cancellation of registered sale deed executed on 2-8-2003. However, on appearance of Appellant 1 in the civil suit, a compromise came to be arrived at between Appellant 1 Satyajit Ballubhai Desai and the complainant Surjaben wherein the parties agreed that the criminal complaint filed by the complainant will be withdrawn unconditionally. The learned Civil Judge accepted the said compromise and directed to draw a decree as per the terms of the compromise.

4. In view of the aforesaid compromise, the complainant as also Appellant 1 appeared before the learned Judicial Magistrate, First Class, Valod and prayed to withdraw the criminal complaint. In view of the request made by the parties, the Judicial Magistrate directed the Deputy Superintendent of Police, Vyara to return the complaint by 15-2-2005. However, a third person and a stranger to the dispute, namely, Randhirsing Deepsing Parmar, who according to the appellants had nothing to do with the dispute between the complainant and the appellants herein, felt aggrieved with the order dated 15-2-2005 passed by the JMFC and filed Special Criminal Application No. 918 of 2007 before the High Court of Gujarat challenging the order of the JMFC by which the order of investigation in the complaint case had been directed to be returned. The High Court, however, was pleased to allow [*Randhirsinh Dipsinh Parmar* v. *State of Gujarat*, Special Criminal Application No. 918 of 2007, order dated 30-11-2007 (Guj)] this application and directed for investigation of the complaint which had been lodged by Surjaben.

5. As a result of this order of the High Court dated 30-11-2007 [*Randhirsinh*

Dipsinh Parmar v. *State of Gujarat*, Special Criminal Application No. 918 of 2007, order dated 30-11-2007 (Guj)] , Criminal Complaint Case No. 3 of 2004/Talod M. Case 1 of 2004 got revived in spite of the fact that a compromise decree had been drawn before the civil court in regard to the property for which criminal complaint had been lodged and the complainant had withdrawn the complaint but was revived by the order of the High Court. The appellants, therefore, had to approach the High Court seeking anticipatory bail in the criminal complaint which was revived [*Randhirsinh Dipsinh Parmar* v. *State of Gujarat*, Special Criminal Application No. 918 of 2007, order dated 30-11-2007 (Guj)] and the same was rejected but subsequently the High Court by order dated 23-3-2011 [*Satyajit Ballubhai Desai*v. *State of Gujarat*, Criminal Misc. Application No. 3978 of 2011, order dated 23-3-2011 (Guj)] enlarged the appellants herein on regular bail. However, Dy. SP Vyara, only six days thereafter on 29-3-2011, filed an application before the Judicial Magistrate, First Class, Valod Court, Valod seeking police remand of the appellants for seven days in connection with M. Case No. 1 of 2004 based on the complaint of the complainant lady Surjaben which had been registered with Valod Police Station on the basis of the complaint lodged for offences under Sections 406, 420, 467, 468, 471, 504, 506(2) and 114 of the Penal Code, 1860 and had been withdrawn but was later revived as stated hereinbefore.

6. The prayer made by the Dy. SP in the application seeking police remand for three days was partly allowed by the Principal Civil Judge and Judicial Magistrate, First Class, Valod permitting police remand of the appellants for three days against which the appellants moved the High Court whereby a stay against the order of police remand was passed in favour of the appellants herein. However, when the matter was heard finally, the High Court upheld the order passed by the Magistrate permitting police remand of the appellants for a period of three days in view of the investigation which was conducted in regard to the case lodged by the complainant Surjaben, finally giving rise to a case before the police for investigation at the instance of a third party, namely, Randhirsing Deepsing Parmar who was a stranger to the dispute.

7. The appellants feeling aggrieved with the order passed by the High Court and the JMFC permitting police remand of the appellants for a period of three days has challenged this order in this appeal essentially on the ground that the order granting police remand of the appellants is not based on valid or justifiable reason on the part of the investigating agency and hence the same encroaches on the personal liberty of the appellants

as the appellants have never tried to scuttle the investigation justifying police remand. It was further submitted that the grant of police remand is an exception and not the rule and therefore the investigating agency was required to make a strong case for taking police custody of the appellants in order to undertake further investigation and only in that event police custody would be justified. The appellants having fully cooperated with the investigating authority and having appeared for questioning as and when required after the grant of bail, should not have been allowed to be sent for police remand on the pretext of conducting further investigation as prayed for by the investigating authority.

…

9. Having considered and deliberated over the issue involved herein in the light of the legal position and existing facts of the case, we find substance in the plea raised on behalf of the appellants that the grant of order for police remand should be an exception and not a rule and for that the investigating agency is required to make out a strong case and must satisfy the learned Magistrate that without the police custody it would be impossible for the police authorities to undertake further investigation and only in that event police custody would be justified as the authorities specially at the magisterial level would do well to remind themselves that detention in police custody is generally disfavoured by law. The provisions of law lay down that such detention/police remand can be allowed only in special circumstances granted by a Magistrate for reasons judicially scrutinised and for such limited purposes only as the necessities of the case may require. The scheme of Section 167 of the Criminal Procedure Code, 1973 is unambiguous in this regard and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers which at times may be at the instance of an interested party also. But it is also equally true that the police custody although is not the be-all and end-all of the whole investigation, yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and, has therefore, permitted limited police custody.

10. It may, therefore, be noted that Article 22(2) of the Constitution of India and Section 57 CrPC gives a mandate that every person who is arrested and detained in police custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person can be detained in the police custody

beyond the said period without the authority of a Magistrate. These two provisions clearly manifest the intention of the law in this regard and therefore it is the Magistrate who has to judicially scrutinise circumstances and if satisfied can order detention of the accused in police custody. The resultant position is that the initial period of custody of an arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of an order of remand passed by a Magistrate. In fact, the powers of remand given to a Magistrate become exercisable only after an accused is produced before him in terms of sub-section (1) of Section 167 CrPC.

11. The Judicial Magistrate thus in the first instance can authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner, namely, by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of first period of fifteen days further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction.

…

15. As already stated hereinbefore, the initial period of police custody of an arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of an order of remand passed by a Magistrate. In fact the powers of remand given to a Magistrate become exercisable only after an accused is produced before him in terms of sub-section (1) of Section 167. But there cannot be any detention in the police custody after the

expiry of first 15 days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at the later stage.

16. While examining the case of the appellants in the light of the aforesaid legal position, it is apparent from the provisions of CrPC that the order permitting police remand cannot be treated lightly or casually and strict adherence to the statutory provision is mandatory. …

17. However, even if the revival of the investigation was rightly or wrongly justified, the High Court as also the Magistrate lost sight of an important factor which is the order of the High Court granting bail to the appellants on 23-3-2011 which clearly had a bearing on the plea seeking police remand. When the appellants were enlarged on bail vide order dated 23-3-2011 [*Satyajit Ballubhai Desai* v. *State of Gujarat*, Criminal Misc. Application No. 3978 of 2011, order dated 23-3-2011 (Guj)] , it was incumbent upon the Magistrate to meticulously examine the facts and circumstance as to whether it was so grave which persuaded the police authorities only after six days to file an application seeking police remand of the appellants for seven days by filing an application on 29-3-2011 which was allowed by the Principal Civil Judge and Judicial Magistrate, First Class, Valod by order dated 31-3-2011 as apparently the same is beyond comprehension since no reason had been assigned. It is thus obvious that an extremely casual approach has been adopted by the Judicial Magistrate permitting such police remand overlooking the legal position and yet the High Court has also confirmed it overlooking and ignoring two very important aspects—first one being that the complainant although had withdrawn the complaint, the investigation was revived at the instance of a third party, namely, Shri Parmar who was wholly unconnected with the case and secondly, that the appellants although had been enlarged on bail by the High Court in the case for which investigation had been revived, yet police remand was sought only six days after the grant of bail. In spite of these glaring inconsistencies writ large on the matter, the Judicial Magistrate allowed the request of the investigating authorities seeking police remand of the appellants without judicially scrutinising and disclosing a single circumstance as to why it was so essential to seek police remand of the appellants for seven days in the interest of investigation which could not proceed until they were taken into police custody although they had already been enlarged on bail.

18. When the appellant-accused in the instant matter had already been

enlarged on bail by the High Court, it was all the more essential and judicial duty of the Judicial Magistrate to ensure and ascertain as to why the appellant was required to be taken into police custody/police remand for conducting further investigation specially when revival of the investigation was done not even at the instance of the complainant but by a third person, namely, Shri Parmar whose locus standi for revival of the investigation is itself not clear. We find sufficient force in the submission advanced on behalf of the appellants that the plea for grant of police remand should be an exception and not the rule and the investigating agency ought to advance strong reasons seeking police remand for further investigation specially in a matter where the alleged accused had been enlarged on bail and the dispute had practically come to an end when the complainant had arrived at a compromise with the accused persons and subsequently withdrew the complaint…

19. The fact remains that the learned Magistrate as also the High Court appear to have adopted a casual or a mechanical approach permitting police remand of the appellants without scrutinising the reasons, ignoring the fact that the appellants had already been enlarged on bail by the High Court and the dispute with the complainant Surjaben who had lodged the complaint had already been settled. Thus, the existing facts and circumstance prima facie were clearly not so grave or extraordinary justifying police remand which could have been overlooked by the High Court even though it was for three days only as it was bound to have ramifications not only affecting the liberty of the person who was already granted bail but also the Magistrate nullifying the order of the High Court granting bail, even if it was for a period of three days only.

20. In fact, when the accused had been enlarged on bail by the High Court, it was all the more essential initially for the police authorities and thereafter by the Magistrate to disclose and assign convincing reasons why investigation could not proceed further without seeking police remand of the accused and in case police remand was sought on any ground of interference with the investigation in any manner alleging influencing the witnesses or tampering with the evidence in any manner, straightaway it could have been a case for cancellation of bail of the accused and the Magistrate could have directed the police authorities to approach the High Court seeking cancellation or any other appropriate direction.

21. What is sought to be emphasised is that the disclosure of reasons by the Magistrate allowing police remand especially in a matter when

the accused has been enlarged on bail by the High Court is all the more essential and cannot be permitted in the absence of a valid and sufficiently weighty reason seeking such custody, as it clearly affects the liberty of an individual who has been enlarged on bail by the court of competent jurisdiction.

22. In fact, the correct course for the investigating authorities seeking police remand of an accused who had been granted bail by the High Court, should have been to approach the High Court as power of the Magistrate to grant police remand after the accused has been granted bail by the High Court, would cease to exist and any direction to that effect can be permitted by the High Court only in view of the fact that the High Court considered it just and appropriate to enlarge the accused on bail and the Magistrate cannot be permitted to override the order of bail even if it be for a brief period of few days. This in our view is the only appropriate course considering the strict legal provisions in the Code of Criminal Procedure wherein the legislature has earmarked 24 hours minus the period of transportation of the accused from police station to the Magistrate as the maximum period of police custody during the initial stage and not more than fifteen days by order of the Judicial Magistrate clearly is an indication that police custody cannot be permitted without adherence to strict judicial scrutiny from which it is obvious that it cannot be allowed without assigning clear and cogent reason for enhancement of the period of police remand and the same would all the more be essential when police remand is sought for an accused who has been enlarged on bail by the High Court. The inference is thus candid and clear that police remand of the accused—more so, who has been enlarged on bail cannot be granted for an undisclosed or a flimsy reason."

IN THE SUPREME COURT OF INDIA

Hema Mishra v. State of U.P. & Ors.

(2014) 4 SCC 453

K.S.P. Radhakrishnan & Arjan Kumar Sikri, JJ.

A complaint was registered alleging that the appellant had committed fraud and forgery in the matter of preparation of documents of government office regarding selection for the post of assistant teacher and, consequently, got appointed as the assistant teacher with payment of salary from the Government Exchequer. A FIR under Sections 419/420 IPC was registered in Police Station Zaidpur, District Barabanki. After coming to know about the registration of the crime, the applicant made representations to the SP and the IO to stay arrest proceedings in view of her willingness to cooperate in investigation and to appear before the investigating officer upon being called. On not receiving any reply, the appellant invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India seeking the issuance of a writ in nature of certiorari to quash the FIR, and issue a writ in nature of mandamus directing the SP and IO to defer the arrest of the petitioner until collection of credible evidence sufficient for filing the charge-sheet, by following the amended proviso to Section 41(1)(b) read with Section 41-A CrPC. The High Court dismissed the petitions. However, since the petitioner was a woman, the High Court ruled that if she surrendered and moved an application for bail, the same should be considered and decided by the courts below expeditiously. In this case, the Supreme Court deals with the application of section 438 of CrPC/Article 226 of the Constitution of India.

Radhakrishnan, J.: "8. Shri Gaurav Bhatia, learned Additional Advocate General, appearing for the State, submitted that the investigation was properly conducted and the crime was registered. Further, it was also pointed out that the President has also withheld the assent of the Code of Criminal Procedure (Uttar Pradesh Amendment) Bill, 2010, since the provisions of the Bill were found to be in contravention to Section 438 CrPC and hence the High Court rightly declined the stay sought for under Article 226 of the Constitution of India.

9. Shri Sidharth Luthra, Additional Solicitor General, who appeared on our

request, submitted that the High Court can in only the rarest of rare cases grant pre-arrest bail while exercising powers under Article 226 of the Constitution of India, since the provision for the grant of anticipatory bail under Section 438 CrPC was consciously omitted by the State Legislature. The legislative intention is, therefore, not to seek or provide pre-arrest bail when the FIR discloses a cognizable offence. Shri Luthra submitted that since there is a conscious withdrawal/deletion of Section 438 CrPC by the legislature from the Code of Criminal Procedure, by Section 9 of the Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, the relief which otherwise the appellant could not have obtained under the Code, is sought to be obtained indirectly by invoking the writ jurisdiction of the High Court, which is impermissible in law.

10. Shri Luthra also submitted that since the appellant has no legal right to move for anticipatory bail and that practice is not an integral part of Article 21 of the Constitution of India, the contention that the High Court has failed to examine the charges levelled against the appellant, was mala fide or violative of Articles 14 and 21 of the Constitution of India, does not arise. Shri Luthra also submitted that the High Court was not correct in granting further reliefs after having dismissed the writ petition and that, only in extraordinary cases, the High Court could exercise its jurisdiction under Article 226 of the Constitution of India and the case in hand does not fall in that category.

…

12. I am conscious of the fact that since the provisions similar to Section 438 CrPC being absent in the State of Uttar Pradesh, the High Court is burdened with a large number of writ petitions filed under Article 226 of the Constitution of India seeking pre-arrest bail. Section 438 was added to the Code of Criminal Procedure in the year 1973, in pursuance of the recommendation made by the 41st Law Commission, but in the State of Uttar Pradesh by Section 9, Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, Section 438 was specifically omitted, the legality of which came up for consideration before the Constitution Bench of this Court in *Kartar Singh* v. *State of Punjab* [*Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899] and the Court held that the deletion of the application of Section 438 in the State of Uttar Pradesh by Section 9 of the abovementioned Amendment Act does not offend either Article 14, Article 19 or Article 21 of the Constitution of India and the State Legislature is competent to delete that section, which is one of the matters enumerated in the Concurrent List, and such a deletion is valid under Article 254(2) of the Constitution of India.

13. I notice, therefore, as per the Constitution Bench, a claim for pre-arrest

protection is neither a statutory nor a right guaranteed under Article 14, Article 19 or Article 21 of the Constitution of India. All the same, in *Kartar Singh case* [*Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899] , this Court in sub-para (17) of para 368, has also stated as follows: (SCC p. 714, para 368)

> "368. (17) Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the 1987 Act, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters."

The High Court of Allahabad has also taken the same view in several judgments. Reference may be made to the judgments in *Satya Pal* v. *State of U.P.*[2000 Cri LJ 569 (All)] , *Ajeet Singh* v. *State of U.P.* [2007 Cri LJ 170 (All)] , *Lalji Yadav* v. *State of U.P.* [1998 Cri LJ 2366 (All)] , *Kamlesh Singh* v. *State of U.P.* [1997 Cri LJ 2705 (All)] and *Natho Mal* v. *State of U.P.* [1994 Cri LJ 1919 (All)]

14. We have, therefore, no concept of "anticipatory bail" as understood in Section 438 of the Code in the State of Uttar Pradesh.

15. In *Balchand Jain* v. *State of M.P.* [(1976) 4 SCC 572 : 1976 SCC (Cri) 689] this Court observed that "anticipatory bail" is a misnomer. Bail, by itself, cannot be claimed as a matter of right under the Code of Criminal Procedure, 1973, except for bailable offences (Section 436 CrPC, 1973). For non-bailable offences, conditions are prescribed under Sections 437 and 439 CrPC. The discretion to grant bail in non-bailable offences remains with the court and hence, it cannot be claimed as a matter of right, but the aggrieved party can only seek a remedy and it is on the discretion of the court to grant it or not.

…

17. This Court in *Lal Kamlendra Pratap Singh* **v.** *State of U.P.* **[(2009) 4 SCC 437 : (2009) 2 SCC (Cri) 330] , while affirming the judgment in** *Amarawati* **[***Amarawati* **v.** *State of U.P.*, 2005 Cri LJ 755 (All)], held as follows: (*Lal Kamlendra Pratap Singh case* **[(2009) 4 SCC 437 : (2009) 2 SCC (Cri) 330] , SCC pp. 438-39, paras 6-8)**

> "6. The learned counsel for the appellant apprehends that the appellant will be arrested as there is no

> provision for anticipatory bail in the State of U.P. He placed reliance on a decision of the Allahabad High Court in Amarawati v. State of U.P. [Amarawati v. State of U.P., 2005 Cri LJ 755 (All)] in which a seven-Judge Full Bench of the Allahabad High Court held that the court, if it deems fit in the facts and circumstances of the case, may grant interim bail pending final disposal of the bail application. The Full Bench also observed that arrest is not a must whenever an FIR of a cognizable offence is lodged. The Full Bench placed reliance on the decision of this Court in Joginder Kumar v. State of U.P. [Joginder Kumar v.State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri) 1172 : 1994 Cri LJ 1981]
>
> 7. We fully agree with the view of the High Court in Amarawati case [Amarawati v. State of U.P., 2005 Cri LJ 755 (All)] and we direct that the said decision be followed by all courts in U.P. in letter and spirit, particularly since the provision for anticipatory bail does not exist in U.P.
>
> 8. In appropriate cases interim bail should be granted pending disposal of the final bail application, since arrest and detention of a person can cause irreparable loss to a person's reputation, as held by this Court in Joginder Kumar case [Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri) 1172 : 1994 Cri LJ 1981] . Also, arrest is not a must in all cases of cognizable offences, and in deciding whether to arrest or not the police officer must be guided and act according to the principles laid down in Joginder Kumar case [Joginder Kumar v. State of U.P., (1994) 4 SCC 260 : 1994 SCC (Cri) 1172 : 1994 Cri LJ 1981] ."

...

21. I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pinpoint what are the appropriate cases, which have to be left to the wisdom of the Court

exercising powers under Article 226 of the Constitution of India.

22. I am also faced with the situation that on dismissal of the writ by the High Court under Article 226 of the Constitution of India, while examining the challenge for quashing the FIR or a charge-sheet, whether the High Court could grant further relief against arrest for a specific period or till the completion of the trial. This Court in *State of Orissa* v. *Madan Gopal Rungta* [AIR 1952 SC 12], while dealing with the scope of Article 226 of the Constitution, held as follows: (AIR p. 14, para 6)

> "*6*. … Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of Section 80 of the Civil Procedure Code, and … that is not within the scope of Article 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of the opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Article 226 of the Constitution. … the language of Article 226 does not permit such an action."

The language of Article 226 does not permit such an action and once the Court finds no merits in the challenge, the writ petition will have to be dismissed and the question of granting further relief after dismissal of the writ, does not arise. Consequently, once a writ is dismissed, all the interim reliefs granted would also go.

…

Sikri, J. (*concurring*) : "24. I have carefully gone through the judgment authored by my esteemed Brother Radhakrishnan, J. I entirely agree with the conclusions arrived at by my learned Brother in the said judgment. At the same time, I would also like to make some observations pertaining to the powers of the High Court under Article 226 of the Constitution of India to grant relief against pre-arrest (commonly called as anticipatory bail), even when Section 438 CrPC authorising the Court to grant such a relief is specifically omitted and made inapplicable insofar as the State of Uttar Pradesh is concerned. I would like to start with reproducing the following observations in the opinion of my Brother, on this aspect which are contained in para 21 of the judgment. It reads as under:

> "I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pinpoint what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India."

25. Another aspect which is highlighted in the judgment rendered by Radhakrishnan, J. is that many times in the writ petition filed under Article 226 of the Constitution of India seeking quashing of the FIR or the charge-sheet, the petitioners pray for interim relief against arrest. While entertaining the writ petition the High Court invariably grants such an interim relief. It is rightly pointed out that once the writ petition claiming main relief for quashing of FIR or the charge-sheet itself is dismissed, the question of granting further relief after dismissal of the writ petition, does not arise. It is so explained in para 22 of the judgment of my learned Brother.

26. I would like to remark that in the absence of any provisions like Section 438 CrPC applicable in the State of Uttar Pradesh, there is a tendency on the part of the accused persons, against whom FIR is lodged and/or charge-sheet is filed in the Court, to file a writ petition for quashing of those proceedings so that they are able to get protection against the arrest in the interregnum which is the primary motive for filing such petitions. It is for this reason that invariably after the lodging of the FIR, a writ petition under Article 226 is filed with the main prayer to quash those proceedings and to

claim interim relief against pre-arrest in the meantime or till the completion of the trial. However, the considerations which have to weigh with the High Court to decide as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against the arrest. Since the grounds on which such an FIR or charge-sheet can be quashed are limited, once the writ petition challenging the validity of the FIR or charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out.

27. It is for this reason, we are of the opinion that in appropriate cases the High Court is empowered to entertain the petition under Article 226 of the Constitution of India where the main relief itself is against arrest. Obviously, when provisions of Section 438 CrPC are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such accused persons would not be entitled to claim such a relief under Article 226 of the Constitution. It cannot be converted into a second window for the relief which is consciously denied statutorily making it a case of casus omissus. At the same time, as rightly observed in para 21 extracted above, the High Court cannot be completely denuded of its powers under Article 226 of the Constitution, to grant such a relief in appropriate and deserving cases; albeit this power is to be exercised with extreme caution and sparingly in those cases where arrest of a person would lead to total miscarriage of justice. There may be cases where pre-arrest may be entirely unwarranted and lead to disastrous consequences. Whenever the High Court is convinced of such a situation, it would be appropriate to grant the relief against pre-arrest in such cases. What would be those cases will have to be left to the wisdom of the High Court. What is emphasised is that the High Court is not bereft of its powers to grant this relief under Article 226 of the Constitution.

28. A Bench of this Court, headed by the then Chief Justice Y.V. Chandrachud, laid down first principles of granting anticipatory bail in *Gurbaksh Singh Sibbia* **v.** *State of Punjab* **[(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : 1980 Cri LJ 1125] , re-emphasising that liberty…**

> "12. … A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent." (SCC p. 580, para 12)

…

30. It is pertinent to explain that there may be imminent need to grant protection against pre-arrest. The object of this provision is to relieve a person from being disgraced by trumped up charges so that liberty of the subject is not put in jeopardy on frivolous grounds at the instance of the unscrupulous or irresponsible persons who may be in charge of the prosecution. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail.

31. The purposes for which the provisions of anticipatory bail are made are quite obvious. One of the purposes of the arrest is that the accused should be available to the investigating machinery for further investigation and questioning whenever he is required. Another purpose is that the trial should not be jeopardised and for this purpose the restrictions on the movements of the accused are necessary. The genuineness of the alleged need for police custody has to be examined and it must be balanced against the duty of courts to uphold the dignity of every man and to vigilantly guard the right to liberty without jeopardising the State objective of maintenance of law and order.

…

33. It was also held in[*Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899] that the High Courts under Article 226 had the right to entertain writ petitions for quashing of FIR and granting of interim protection from arrest. This position, in the context of contours of Article 226, is stated as follows in the same judgment: (*Kartar Singh case* [*Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899] , SCC pp. 746-47, para 427)

> "427. From this scenario, the question emerges whether the High Court under Article 226 would be right in entertaining proceedings to quash the charge-sheet or to grant bail to a person accused of an offence under the Act or other offences committed during the course of the same transaction exclusively triable by the designated court. Nothing is more conspicuous than the failure of law to evolve a consistent jurisdictional doctrine or even elementary principles, if it is subject to conflicting or inconceivable or inconsistent result which lead to uncertainty, incongruity and disbelief in the efficacy of law. The jurisdiction and power of the High Court under Article 226 of the Constitution is undoubtedly constituent power and the High Court has untrammelled powers and jurisdiction to issue

> any writ or order or direction to any person or authority within its territorial jurisdiction for enforcement of any of the fundamental rights or for any other purpose. The legislature has no power to divest the Court of the constituent power engrafted under Article 226. A superior court is deemed to have general jurisdiction and the law presumes that the court has acted within its jurisdiction. This presumption is denied to the inferior courts. The judgment of a superior court unreservedly is conclusive as to all relevant matters thereby decided, while the judgment of the inferior court involving a question of jurisdiction is not final. The superior court, therefore, has jurisdiction to determine its own jurisdiction, may be rightly or wrongly. Therefore, the court in an appropriate proceeding may erroneously exercise jurisdiction. It does not constitute want of jurisdiction, but it impinges upon its propriety in the exercise of the jurisdiction. Want of jurisdiction can be established solely by a superior court and that in practice no decision can be impeached collaterally by an inferior court. However, acts done by a superior court are always deemed valid wherever they are relied upon. The exclusion thereof from the rule of validity is indispensable in its finality. The superior courts, therefore, are the final arbiters of the validity of the acts done not only by other inferior courts or authorities, but also their own decisions. Though they are immune from collateral attack, but to avoid confusion the superior court's decisions lay down the rules of validity; are not governed by those rules. The valid decision is not only conclusive, it may affect, but it is also conclusive in proceedings where it is sought to be collaterally impeached. However, the term conclusiveness may acquire other specific meanings. It may mean that the finding upon which the decision is founded—as distinct or it is the operative part—or has to be conclusive or these findings bind only parties on litigated disputes or that the organ which has made the decision is itself precluded from revoking, rescinding or otherwise altering it."

34. It would be pertinent to mention here that in light of the abovementioned statements and cases, the High Court would not be incorrect or acting out of jurisdiction if it exercises its power under Article 226 to issue an

appropriate writ or direction or order in exceptional cases at the behest of a person accused of an offence triable under the Act or offence jointly triable with the offences under the Act.

35. It is pertinent to mention that though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well-established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision.

36. Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a device to advance justice and not to frustrate it. The powers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by the authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Article 226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Article 226 is not to be exercised liberally so as to convert it into Section 438 CrPC proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as back door entry via Article 226. On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Article 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified."

CHAPTER 4
LEGAL AID

LEGAL AID

One of the earliest cases where the right to legal aid was recognized by the Supreme Court was **M.H. Hoskot v. State of Maharashtra**.[1] The Supreme Court in *Hoskot* recognized the right of an indigent prisoner to free legal aid. It placed an obligation on the State to provide such free legal aid to prisoners, stating that failure to do so would violate Article 21 of the Constitution of India. In the context of the case, the Court noted how the right extends to filing of appeals against conviction, and supplying of free copies of the judgments.

Legal Aid at the Pre-Trial Stage

The Supreme Court in **Nandini Satpathy v. P.L. Dani**,[2] recognized the importance of providing access to counsel during interrogation. It placed an obligation on the police to inform the arrestee of this right. The presence of counsel during interrogation was considered as a preventive measure against police excesses, including torture. In **Hussainara Khatoon (IV) v. Home Secretary, State of Bihar**,[3] the Court noted how the poor languish in jail for extended periods of time pending trial. In many cases, such extended pre-trial detention is only because the poor do not have legal assistance. It was in this context that the Court reminded the State of its obligation under Article 39A of the Constitution to provide free legal aid. Further, it directed Magistrates to ensure that the guidelines given by the Supreme Court regarding legal aid at the time of remand, are followed. However, most of these guidelines were not followed, which the Court noted with anguish in **Khatri(II) v. State of Bihar**.[4] It reiterated its decision in *Khatoon (IV)* stating that failure to provide counsel violates the right to a fair trial guaranteed under Article 21 of the Constitution. It noted that the right to free legal aid extends to the stage of remand, and placed the responsibility on Magistrates to ensure that the accused person has a lawyer, and if he/she does not, to provide one at the expense of the State. The question of whether the accused needs to make an applicationseeking

1 (1978) 3 SCC 544
2 (1978) 2 SCC 424
3 (1980) 1 SCC 98
4 (1981) 1 SCC 627

free legal aid arose in **Suk Das v. State of Arunachal Pradesh**.[5] The Court reiterated its dictum in Khatri(II) stating that it is the obligation of the Magistrate/Judge to ensure that free legal aid is provided to the accused, without seeking or waiting for a formal application from him/her.

The right to legal aid at the pre-trial stage was yet again recognized in **State (N.C.T. of Delhi) v. Navjot Sandhu**,[6] where the Supreme Court held that a confession of the accused recorded without him being provided legal assistance is inadmissible. However, it is pertinent to note that the case was under POTA, which had a specific provision in that respect. Subsequently, in **Mohd. Ajmal Amir Kasab v. State of Maharashtra**,[7] the same issue arose once again, when it was argued that since legal assistance was not provided to the accused when his confession was recorded by a Magistrate, it should be held to be inadmissible. An argument was also made that the right to counsel only begins at the trial stage. The Supreme Court in *Kasab* reiterated its earlier decisions to state that the right to counsel and to free legal aid commences at the state of first production before the Magistrate and remand. It however viewed the role of the lawyer at the pre-trial stage in a very limited fashion, stating that the lawyer's role is only to oppose remand, file applications for bail etc., and not to "scare the accused" by telling him/her of the consequences of confessing to the crime. Further, it held that absence of a lawyer during trial would vitiate the trial, but absence during the pre-trial stage would not vitiate the trial. It could lead to disciplinary action being initiated against the Magistrate for not providing counsel to the accused.

Effective Legal Assistance

In **Kishore Chand v. State of Himachal Pradesh**,[8] the Supreme Court was seized of a matter which involved the effectiveness of a defence counsel in a capital case. The Court observed that providing an experienced defence counsel to an indigent accused is a facet of Articles 14, 19 and 21 of the Constitution. It further noted that providing an inexperienced counsel could lead to an "unequal defence" of the case.[9] The issue of effective

5 (1986) 2 SCC 401
6 (2005) 11 SCC 600
7 (2012) 9 SCC 1
8 (1991) 1 SCC 286
9 The Allahabad High Court in Ram Awadh v. State of U.P., 1999 Cri.L.J. 4083 (All), held that the responsibility of the state to provide counsel means to provide a counsel who is effective. Failure to cross examine important witnesses was considered to be a sign of ineffectiveness of the counsel

counsel arose again in **State (N.C.T. of Delhi) v. Navjot Sandhu**,[10] where the Court held that the right to legal assistance cannot be extended to such an extent. Further, on facts, the Court held that the accused had been provided effective legal assistance.

The Bombay High Court faced a curious situation in **Ramchandra Nivrutti Mulak v. State of Maharashtra**,[11] where a defence lawyer sought to withdraw from the trial – permission for which was denied by the Sessions Court. Consequently, he absented himself from the rest of the trial. The Court however continued with the trial and even convicted the accused. The High Court held that the fact that the accused went unrepresented was a violation of his right to counsel and the right to a fair trial. It consequently set aside the conviction, reminding subordinate courts that the obligation was on the judge to ensure that free legal aid was provided to the accused. A similar situation arose in **Mohd. Husain @ Julfikar Ali v. The State (Govt. of NCT of Delhi)**.[12] In this case, the defence counsel disappeared in the early part of the trial, leading to nearly all witnesses for the prosecution not being cross-examined. The Sessions Court continued with the trial, convicted the accused and sentenced him to death. The Supreme Court noted how this was aninstance where the right to fair trial of the accused had been violated. The case was remanded to the trial court for a retrial.[13] More recently, in **Ashok Debbarmav. State of Tripura**,[14] an argument was made that ineffective assistance of counsel led to the death sentence being imposed on the accused. The Supreme Court ruled that the test would be whether there is a reasonable probability that, absent the errors, the court independently reweighing the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence.Interestingly, in the recent case of *Surendra Koli v. State of UP*,[15] where the convicted person filed a review petition against his conviction and sentence by the Supreme Court on the ground that he had lacked effective legal representation during trial, the Supreme Court rejected the petitioner's contention citing delay in raising the ground of ineffective assistance of counsel. It however observed that judges should assign experienced lawyers who have expertise in handling Sessions trials, especially in cases where legal aid is sought.[16]

10 (2005) 11 SCC 600
11 Cr.App. No. 487/2008
12 (2012) 2 SCC 584
13 (2012) 9 SCC 408
14 (2014) 4 SCC 747
15 Surendra Koli v. State of UP, Review Petition (Crl.) No. 395 of 2014 dated October 28, 2014
16 Surendra Koli v. State of UP, Review Petition (Crl.) No. 395 of 2014 dated October 28, 2014

IN THE SUPREME COURT OF INDIA

Nandini Satpathy v. P. L. Dani

(1978) 2 SCC 424

V. R. Krishna Iyer, Jaswant Singh & V. D. Tulzapulkar, JJ.

The appellant was prosecuted for an offence under Section 179, IPC for refusing to truthfully answer questions during interrogation in a case relating to corruption charges against her. She challenged the prosecution on the ground that she had a right against self-incrimination under Article 20(3) of the Constitution, which would be violated if she were compelled, under sanction of law, to answer questions. In deciding the case, the Supreme Court discussed, inter alia, the importance of the right to counsel during the stage of interrogation.

Iyer, J.:"62. Right at the beginning we must notice Article 22(1) of the Constitution, which reads:

> "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice.

63. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. The *Miranda* decision has insisted that if an accused person asks for lawyer's assistance, at

the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Overreaching Article 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that the police must secure the services of a lawyer. That will lead to "police-station-lawyer" system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.

64. Not that a lawyer's presence is a panacea for all problems of involuntary self-crimination, for he cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot harangue the police but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.

65. We realize that the presence of a lawyer is asking for the moon in many cases until a public defender system becomes ubiquitous. The police need not wait more than for a reasonable while for an advocate's arrival. But they must invariably warn — and record that fact — about the right to silence against self-incrimination; and where the accused is literate take his written acknowledgment."

IN THE SUPREME COURT OF INDIA

M.H. Hoskot v. State of Maharashtra

(1978) 3 SCC 544

D.A. Desai, O. Chinnappa Reddy & V.R. Krishna Iyer, JJ.

The petitioner in this case was convicted for making fabricated degrees. The Supreme Court, in this judgment, discussed and delineated the right to free legal aid, as guaranteed by Articles 21 and 39A of the Constitution.

Iyer, J.:"4. The High Court's judgment was pronounced in November 1973 but the special leave petition has been made well over four years later. This hiatus may appear horrendous, all the more so because the petitioner has undergone his full term of imprisonment during this lengthy interregnum. The explanation offered by him for condonation of the delay, if true, discloses a disturbing episode of prison injustice. To start with the petitioner complained that the High Court granted a copy of the judgment of 1973 only in 1978, a further probe disclosed that a free copy had been sent promptly by the High Court, meant for the applicant, to the Superintendent, Yaravada Central Prison, Pune. The petitioner denies having been served that copy and there is nothing on record which bears his signature in token of receipt of the High Court's judgment. The Prison Superintendent, on the other hand, would have us believe that a clerk of his office did deliver it to the prisoner but took it back for the purpose of enclosing it with a mercy petition to the Governor for remission of sentence. This exonerative story may be imaginary or true, but there is no writing to which the petitioner is a party to validate this plea. The fact remains that prisoners are situationally at the mercy of the prison "brass" but their right to appeal, which is part of the constitutional process to resist illegal deprivation of liberty, is in peril, if district jail officials' *ipse dixit* that copies have been served is to pass muster without a title of prisoner's acknowledgement. What is more, there is no statutory provision for free legal services to a prisoner, absent which a right of appeal for the legal illiterates is nugatory and, therefore, a negation of that fair legal procedure which is implicit in Article 21 of the Constitution, as made explicit by this Court in *Maneka Gandhi* [(1978) 1 SCC 248].

…

10. Freedom is what freedom does, and here we go straight to Article 21 of the Constitution, where the guarantee of personal liberty is phrased with superb amplitude:

> "Article 21. Protection of life and personal liberty.— No person shall be deprived of his life or personal liberty except according to procedure established by law."
>
> "Procedure established by law" are words of deep meaning for all lovers of liberty and judicial sentinels. Amplified, activist fashion "procedure" means "fair and reasonable procedure" which comports with civilised norms like natural justice rooted firm in community consciousness — not primitive processual barbarity nor legislated normative mockery. In a landmark case, *Maneka Gandhi* [(1978) 1 SCC 248, 277 at 281 and 284] Bhagwati, J. (on this point the court was unanimous) explained: (paras 4, 5, 7 & 8)
>
> "Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable? Article 21 occurs in Part III of the Constitution which confers certain fundamental rights.
>
> Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney-General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law.
>
> The principle of reasonableness which legally, as

> well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.
>
> Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show-cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21."

One of us in this separate opinion there observed [Krishna Iyer, J., 337, 338] :

> "'Procedure established by law', with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with 'do or die' patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional illusion. Processual justice is writ patently on Article 21.
>
> Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus understood, 'procedure' must rule out anything arbitrary, freakish or bizarre. A valuable

> constitutional right can be canalised only by civilised processes.... What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality of fairness in the process is emphasised by the strong word 'established' which means 'settled firmly' not wantonly or whimsically. If it is rooted in the legal consciousness of the community it becomes 'established' procedure. And 'law' leaves little doubt that it is normae regarded as just since law is the means and justice is the end.
>
> Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as bad politics.
>
> To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece."

11. One component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with long loss of liberty, is basic to civilized jurisprudence. It is integral to *fair* procedure, natural justice and normative universality save in special cases like the original tribunal being a high bench sitting on a collegiate basis. In short, a first appeal from the Sessions Court to the High Court, as provided in the Criminal Procedure Code, manifests this value upheld in Article 21.

12. What follows from this appellate imperative? Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies it is unfair and, ergo, unconstitutional. (In a sense even Article 19 may join hands with Article 21, as the *Maneka Gandhi* reasoning discloses). Pertinent to the point before us are two requirements: (*i*) service of a copy of the judgment to the prisoner in time to file an appeal and (*ii*) provision

of free legal services to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service. Both these are State responsibilities under Article 21. Where the procedural law provides for further appeals what we have said regarding first appeals will similarly apply.

13. In the present case there is something dubious about the delivery of the copy of the judgment by the Jailor to the prisoner. A simple proof of such delivery is the latter's written acknowledgment. Any jailor who, by indifference or vendetta, withholds the copy thwarts the court process and violates Article 21, and may pave the way for holding the further imprisonment illegal. We hope that Jail Manuals will be updated to include the mandate, if there be any omission, and deviant jail officials punished. And courts, when prison sentence is imposed, will make available a copy of the judgment if he is straight marched into the prison. All the obligations we have specificated are necessarily implied in the right of appeal conferred by the Code read with the commitment to procedural fairness in Article 21. Section 363 of the Criminal Procedure Code is an activist expression of this import of Article 21 and is inviolable. We say no more because we have condoned the delay in the present case although it is pathetic that for want of a copy of judgment the leave is sought after the sentence has been served out.

14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said: [Justice and Reform, Earl Johnson, Jr. p. 11]

> "What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?"

15. Gideon's trumpet has been heard across the Atlantic. Black, J. there observed: [Processual Justice to the People, (May 1973) p. 69 (*Gideon* v. *Wainwright* 372 US 335 at p. 344 : 9 L Ed 2d 799 at p. 805)]

> "Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hires lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

16. The philosophy of legal aid as an inalienable element of fair procedure is evident from Mr Justice Brennan's [Legal Aid and Legal Education, p. 94] well known words:

> "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things

> down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."

17. More recently, the U.S. Supreme Court, in *Raymond Hamlin* has extended this processual facet of Poverty Jurisprudence. Douglas, J. there explicated: [*Jon Richard Argersinger* v. *Raymond Hamlin*, 407 US 25 : 35 L Ed 2d 530 at 535-36 and 554]

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. *If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect*.
>
> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our state and national constitutions and laws have laid *great emphasis on procedural*

> *and substantive safeguards designed to assure fair trials* before impartial tribunals in which every defendant stands equal before the law. *This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him*. (372 US 335 at p. 344 (1963). 9 L Ed 2d 799 at p. 805, 93 ALR 2d 733.)
>
> Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.
>
> * * *
>
> *The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed* .... The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case."
>
> (emphasis added)

18. The American Bar Association has upheld the fundamental premise that counsel should be provided in the criminal proceedings for offences *punishable by loss of liberty*, except those types of offences for which such punishment is not likely to be imposed. Thus in America, strengthened by the *Powell, Gideon* and *Hamlin cases*, counsel for the accused in the more serious class of cases which threaten a person with imprisonment is regarded as an essential component of the administration of criminal justice and as part of procedural fair-play. This is so without regard to the sixth amendment because lawyer participation is ordinarily an assurance that deprivation of liberty will not be in violation of procedure established by law. In short, it is the warp and woof of fair procedure in a sophisticated, legalistic system plus lay illiterate indigents aplenty. The Indian socio-legal milieu makes free legal service, at trial and higher levels, an imperative processual piece of criminal justice where deprivation of life or personal liberty hangs in the judicial balance.

19. The widespread insistence on free legal assistance, where liberty is in jeopardy, is obvious from the Universal Declaration of Human Rights:

> "8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law."

Article 14(3) of the International Covenant on Civil and Political Rights guarantees to everyone:

> "[T]he right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it."

Many high-level Indian Committees and Commissions have emphasised the free legal service desideratum as integral to processual fair play for prisoners. For example, one such committee has stated [Processual Justice to the People, May 1973, p. 34]

> "93. Prisoners, men and women, regardless of means, are a peculiarly handicapped class. The morbid cell which confines them walls them off from the world outside. Legal remedies, civil and criminal, are often beyond their physical and even financial reach unless legal aid is available within the prison as is provided in some States in India and in other countries. Without legal aid, petitions of appeal, applications for commutation or parole, bail motions and claims for administrative benefits would be well-nigh impossible. There is a case for systematised and extensive assistance through legal aid lawyers to our prison population."

…

21. It needs no argument to drive home this point, now that Article 39-A, a fundamental constitutional directive, states:

> "39-A. *Equal justice and free legal aid*.—The State shall secure that the operation of the legal system

> promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes *or in any other way*, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." (emphasis added)

22. This article is an interpretative tool for Article 21.

23. Partial statutory implementation of the mandate is found in Section 304, Criminal Procedure Code; and in other situations courts cannot be inert in the face of Articles 21 and 39-A.

24. We may follow up the import of *Maneka Gandhi* and crystallise the conclusion. *Maneka Gandhi case* has laid down that personal liberty cannot be cut out or cut down without *fair* legal procedure. Enough has been set out to establish that a prisoner, deprived of his freedom by court sentence but entitled to appeal against such verdict, can claim, as part of his protection under Article 21 and as implied in his statutory right to appeal, the necessary concomitant of right to counsel to prepare and argue his appeal.

25. If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Article 142, read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual "for doing complete justice". This is a necessary incident of the right of appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State's duty and not Government's charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. Surely, the profession has a public commitment to the people but mere philanthropy of its members yields short mileage in the long run. Their services, especially when they are on behalf of the State must be paid for. Naturally, the State concerned must pay a reasonable sum that the court may fix when assigning counsel to the prisoner. Of course, the court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases

but only where public justice suffers otherwise. That discretion resides in the court.

26. In the present petition, the party, though preferred legal aid by the court, preferred to argue himself. Even so we uphold the right to counsel not in the permissive sense of Article 22(1) and its wider amplitude but in the peremptory sense of Article 21 confined to prison situations.

27. While dismissing the special leave petition we declare the legal position to put it beyond doubt:

1. Courts shall forthwith furnish a free transcript of the judgment when sentencing a person to prison term;

2. In the event of any such copy being sent to the jail authorities for delivery to the prisoner, by the appellate, revisional or other court, the official concerned shall, with quick despatch, get it delivered to the sentence and obtain written acknowledgement thereof from him;

3. Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the Jail Administration;

4. Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer.

5. The State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix;

6. These benign prescriptions operate by force of Article 21 (strengthened by Article 19(1)(d) read with sub-article (5) from the lowest to the highest court where deprivation of life and personal liberty is in substantial peril."

IN THE SUPREME COURT OF INDIA

Hussainara Khatoon (IV) v. Home Secretary, State of Bihar

(1980) 1 SCC 98

P. N. Bhagwati & D.A. Desai, JJ.

The writ petitioner sought various directions from the Court regarding the violation of rights of undertrial prisoners in the state of Bihar. The Supreme Court, in its judgment, discussed the importance and constitutional imperative of free legal aid for indigent persons.

Bhagwati, J.:"6. … [T]here are several undertrial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that undertrial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the undertrial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the undertrial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre-trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them. It is now well settled, as a result of the decision of this Court in *Maneka Gandhi* v. *Union of India* [(1978) 1 SCC 248] that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be "reasonable, fair and just". Now, a procedure

which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. This Court pointed out in *M.H. Hoskot* v. *State of Maharashtra* [(1978) 3 SCC 544, 553]:

> "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law".

Free legal services to the poor and the needy is an essential element of any "reasonable, fair and just" procedure. It is not necessary to quote authoritative pronouncements by Judges and Jurists in support of the view that without the service of a lawyer an accused person would be denied "reasonable, fair and just" procedure. Black, J., observed in *Gideon* v. *Wainwright* [372 US 335 : 9 L Ed 2d at 799] :

> "Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences.

> That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

The philosophy of free legal service as an essential element of fair procedure is also to be found in the passage from the judgment of Douglas, J. in *Jon Richard Argersinger* v.*Raymond Hamlin* [417 US 25 : 25 L Ed 2d 530 at 535-36] :

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.

> Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.
>
> The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed .... The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case."
>
> (emphasis added)

7. We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:

> "39-A. Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." (emphasis added)

This article also emphasises that free legal service is an unalienable element of "reasonable, fair and just" procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of "reasonable, fair and just", procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. We would, therefore, direct that on the next remand dates, when the undertrial prisoners, charged with bailable offences, are produced before

the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such undertrial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our judgment dated February 12, 1979. The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today.

…

9. We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding—always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services. We may remind the Government of the famous words of Mr Justice Brennan:

> "Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.:"

and also recall what was said by Leeman Abbot years ago in relation to affluent America:

> "If ever a time shall come when in this city only the rich can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the fire-brand of revolution will be lighted and put into the hands of men and they will almost be justified in the revolution which will follow."

> We would strongly recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodied in Article 39A."

IN THE SUPREME COURT OF INDIA

Khatri (II) v. State of Bihar

(1981) 1 SCC 627

P. N. Bhagwati & A.P. Sen, JJ.

In a writ petition relating to the Bhagalpur Blinding case, the Supreme Court noticed various procedural violations in relation to the right to free legal aid, and passed directions in this regard.

Bhagwati, J.: "5. … It is clear from the particulars supplied by the State from the records of the various Judicial Magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the Judicial Magistrate nor at the time when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the Judicial Magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the Judicial Magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in *Hussainara Khatoon (IV) case* [*Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar*, (1979) 3 SCR 532 : (1980) 1 SCC 98 : 1980 SCC (Cri) 40] . This Court has pointed out in*Hussainara Khatoon (IV) case* [Under Article 32 of the Constitution] which was decided as far back as March 9, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the

circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of the highest court in the land by many of the States despite the constitutional declaration in Article 141 that the law declared by this Court shall be binding throughout the territory of India. Mr K.G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to an indigent accused but he suggested that the State might find it difficult to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in *Rhem* v. *Malcolm* [377 F Supp 995] "the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty" and to quote the words of Justice Blackmum in *Jackson* v. *Bishop* [404 F Supp 2d 571] "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations". Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the Magistrate as also when he is remanded from time to time.

6. But even this right to free legal services would be illusory for an indigent

accused unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicable situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State."

IN THE SUPREME COURT OF INDIA

Suk Das v. Union Territory of Arunachal Pradesh

(1986) 2 SCC 401

P. N. Bhagwati, C.J., D. P. Madon & G.L. Oza, JJ.

In his trial for an offence under Section 506 read with Section 34, IPC, the appellant was unrepresented by a lawyer since he could not afford one. In his appeal he argued that since he was not provided free legal aid, the trial was vitiated and the conviction should be set aside. In deciding the appeal, the Supreme Court delineated the scope of the right to free legal aid.

Bhagwati, C.J.: "1. This appeal by special leave raises a question of considerable importance relating to the administration of criminal justice in the country. The question is whether an accused who on account of his poverty is unable to afford legal representation for himself in a trial involving possibility of imprisonment imperilling his personal liberty, is entitled to free legal aid at State cost and whether it is obligatory on him to make an application for free legal assistance or the Magistrate or the Sessions Judge trying him is bound to inform him that he is entitled to free legal aid and inquire from him whether he wishes to have a lawyer provided to him at State cost: if he is not so informed and in consequence he does not apply for free legal assistance and as a result he is not represented by any lawyer in the trial and is convicted, is the conviction vitiated and liable to be set aside? This question is extremely important because we have almost 50 per cent population which is living below the poverty line and around 70 per cent is illiterate and large sections of people just do not know that if they are unable to afford legal representation in a criminal trial, they are entitled to free legal assistance provided to them at State cost.

…

4. The appellant thereupon preferred an appeal before the Gauhati High Court. There were several contentions urged in support of the appeal but it is not necessary to refer to them, since there is one contention which in our opinion goes to the root of the matter and has invalidating effect on the conviction and sentence recorded against the appellant. That contention is that the appellant was not provided free legal aid for his defence and the trial was therefore vitiated. This selfsame contention was also advanced before the High Court in the appeal preferred by the appellant but the

High Court took the view that, though it was undoubtedly the right of the appellant to be provided free legal assistance, the appellant did not make any request to the learned Additional Deputy Commissioner praying for legal aid and since no application for legal aid was made by him, "it could not be said in the facts and circumstances of the case that failure to provide legal assistance vitiated the trial". The High Court in the circumstances confirmed the conviction of the appellant but in view of the fact that he was already in jail for a period of nearly 8 months, the High Court held that the ends of justice would be met if the sentence on the appellant was reduced to that already undergone by him. The appellant was accordingly ordered to be set at liberty forthwith but since the order of conviction passed against him was sustained by the High Court, he preferred the present appeal with special leave obtained from this Court.

5. It is now well established as a result of the decision of this Court in *Hussainara Khatoon case* [*Hussainara Khatoon (IV)* v. *Home Secretary*, (1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369 : (1979) 3 SCR 532 : 1979 Cri LJ 1045] that: (SCC p. 105, para 7)

> "The right to free legal service is ... clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer."

This Court pointed out that it is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal service available to him. The same view was taken by a Bench of this Court earlier in *M.H. Hoskot* v. *State of Maharashtra* [(1978) 3 SCC 544 : 1978 SCC (Cri) 468] . It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. Of course, it must be recognised that there may be cases involving offences, such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may

require that free legal service may not be provided by the State. There can in the circumstances be no doubt that the appellant was entitled to free legal assistance at State cost when he was placed in peril of his personal liberty by reason of being accused of an offence which if proved would clearly entail imprisonment for a term of two years.

6. But the question is whether this fundamental right could lawfully be denied to the appellant if he did not apply for free legal aid. Is the exercise of this fundamental right conditioned upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him? Now it is common knowledge that about 70 per cent of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis-oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant: they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognised as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would in these circumstances make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. This is the reason why in *Khatri* (*II*) v. *State of Bihar* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] , we ruled that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. We deplored that in that case where the accused were blinded prisoners the Judicial Magistrates failed to discharge their obligation and contented themselves by merely observing that no legal representation had been asked for by the blinded

prisoners and hence none was provided. We accordingly directed "the Magistrates and Sessions Judges in the country to inform every accused who appear before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State" unless he is not willing to take advantage of the free legal services provided by the State. We also gave a general direction to every State in the country "to make provision for grant of free legal service to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situations," the only qualification being that the offence charged against an accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. It is quite possible that since the trial was held before the learned Additional Deputy Commissioner prior to the declaration of the law by this Court in *Khatri* (*II*) v. *State of Bihar* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] the learned Additional Deputy Commissioner did not inform the appellant that if he was not in a position to engage a lawyer on account of lack of material resources, he was entitled to free legal assistance at State cost nor asked him whether he would like to have free legal aid. But it is surprising that despite this declaration of the law in *Khatri* (*II*) v. *State of Bihar* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] on December 19, 1980 when the decision was rendered in that case, the High Court persisted in taking the view that since the appellant did not make an application for free legal assistance, no unconstitutionality was involved in not providing him legal representation at State cost. It is obvious that in the present case the learned Additional Deputy Commissioner did not inform the appellant that he was entitled to free legal assistance nor did he inquire from the appellant whether he wanted a lawyer to be provided to him at State cost. The result was that the appellant remained unrepresented by a lawyer and the trial ultimately resulted in his conviction. This was clearly a violation of the fundamental right of the appellant under Article 21 and the trial must accordingly be held to be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the appellant must be set aside."

IN THE SUPREME COURT OF INDIA

Kishore Chand v. State of Himachal Pradesh

(1991) 1 SCC 286

P.B. Sawant & K. Ramaswamy, JJ.

The appellant was convicted by the trial court and the High Court. The Supreme Court, in deciding the appeal, discussed whether assigning a young and inexperienced defense counsel against an experienced prosecutor would be violative of Articles 14, 19 and 21 of the Constitution.

Ramaswamy, J.:**"**12. Before parting with the case, it is necessary to state that from the facts and circumstances of this case it would appear that the investigating officer has taken the appellant, a peon, the driver and the cleaner for a ride and trampled upon their fundamental personal liberty and lugged them in the capital offence punishable under Section 302, IPC by freely fabricating evidence against the innocent. Undoubtedly, heinous crimes are committed under great secrecy and that investigation of a crime is a difficult and tedious task. At the same time the liberty of a citizen is a precious one guaranteed by Article 3 of Universal Declaration of Human Rights and also Article 21 of the Constitution of India and its deprivation shall be only in accordance with law. The accused has the fundamental right to defend himself under Article 10 of Universal Declaration of Human Rights. The right to defence includes right to effective and meaningful defence at the trial. The poor accused cannot defend effectively and adequately. Assigning an experienced defence counsel to an indigent accused is a facet of fair procedure and an inbuilt right to liberty and life envisaged under Articles 14, 19 and 21 of the Constitution. Weaker the person accused of an offence, greater the caution and higher the responsibility of the law enforcement agencies.\

...

13. Though Article 39-A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practising in the court concerned, volunteer to defend such indigent accused as a part of their professional duty. If these remedial steps are taken and an honest and objective investigation is done, it will enhance a sense of confidence of the public in the investigating agency.**"**

IN THE HIGH COURT OF ALLAHABAD

Ram Awadh v. State of U.P.

1999 Cri L.J. 4083 [All]

G. P. Mathur & K.D. Shahi, JJ.

The appellant was convicted for murdering his wife. The trial court record indicated that the appellant had not engaged a counsel for his defence. In its decision, the Supreme Court discussed the duty of the court to appoint a competent defence counsel for the accused.

Mathur, J.: "12. The record shows that the appellant had not engaged any counsel for his defence. The learned Sessions Judge appointed Sri Chandra Mohan Advocate as amicus curiae on 24-8-1990 to defend the appellant and fixed 12-9-1990 for recording evidence. … In spite of sufficient opportunity, the counsel for the appellant made no effort to cross-examine the prosecution witnesses on any material point which as defence lawyer is expected and supposed to do in a murder case.

13. Article 22(1) of the Constitution of India guarantees a fundamental right that no persons shall be denied the right to consult and to be defended by a legal practitioner of his choice. Article 39-A which is in part IV of the Constitution dealing with directive principles of State policy lays down that the State shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Section 304, CrPC provide that where, in a trial before the Court of Session, the accused is not represented by a pleader and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State. These provisions show that not only the accused has a fundamental right to be defended by a counsel of his choice but it is also an obligation of the State to appoint a counsel for the defence of an accused who does not have sufficient means to engage a counsel for himself.

14. The requirement of providing counsel to an accused at the State expense is not an empty formality which may be not by merely appointing a counsel whatever his calibre may be. When the law enjoins appointing

a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law. An accused facing charge of murder may be sentenced to death or imprisonment for life and consequently his case should be handled by a competent person and not by a novice or one who has no professional expertise. A duty is cast upon the Judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasise that a Judge is not a prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-examination may at times result in miscarriage of justice and the Court has to guard against such an eventuality.

15. Need to appoint competent persons to defend an accused who has not been able to engage a counsel, has been emphasised in several decisions of Supreme Court. In *Ranchod M. Wasawa* v. *State of Gujarat*, (1974) 3 SCC 581 : AIR 1974 SC 1143 : (1974 Cri LJ 799) it was observed as follows : (Para 1 of AIR):

> "……Even so, we are disturbed, having a look at the proceedings in this case, that the Sessions Judge do not view with sufficient seriousness the need to appoint State Counsel for undefended accused in grave cases. Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar. Sufficient time and compete papers should also be made available, so that the advocate chosen may serve the cause of justice with all the ability at his command……"

16. In *M.S. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544 : AIR 1978 SC 1548 : (1978 Cri LJ 1678), was held as follows at page 1557 (of AIR):

> "……Where the prisoner is disabled from engaging lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court

> shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer."

17. The above principle was reiterated in *Hussainara Khatoon* v. *Home Secretary State of Bihar*, (1980) 1 SCC 98 : AIR 1979 SC 1369 : (1979 Cri LJ 1045) *Khatri* v. *State of Bihar*, (1981) 1 SCC 627 : AIR 1981 SC 928 : (1981 Cri LJ 470), and *Sukh Das* v. *Union Territory*, (1986) 2 SCC 401 : AIR 1986 SC 991 : (1986 All LJ 774).

18. The principle that a competent lawyer should be engaged at the State expense to defend such accused who are unable to engage lawyer on account of their property was recognised in our country even before the advice of the Constitution or Code of Criminal Procedure 1973 had come into force. In *Darpaon Potdrain* v. *Emperor*, 1938 (39) Cri LJ 384 and then in *Dikson Mali* v. *Emperor*, AIR 1942 Patna 90 : (1943 Cri LJ 36), the Court gave a rule of caution in the following words at page 93 (of AIR):

> "……We desire to make some remarks about the defence of prisoners who are too poor to instruct lawyers on their own account. To see whose duty it is to select lawyers to defend at the expenses of the Crown should not treat the selection as a matter of patronage for the benefit of the lawyer so appointed. The selection should be made from among young men of marked ability. We have frequently observed that the persons actually appointed, do their work very badly and conspicuous opportunities for cross examination and obvious arguments are entirely ignored……"

19. In the case in hand, there cannot be even a slightest doubt that the lawyer who was appointed amicus curiae to defend the appellant did not at all discharge the duty which was cast upon him. It can hardly be said that the appellant was defended by a lawyer. In *Second Hussainara case*, (1980) 1 SCC 108 : AIR 1979 SC 1377 : (1979 Cri LJ 1052) it was observed that if free legal services are not provided to an accused who is unable to engage a lawyer on account of is poverty, the trial itself may run the risk of being vitiated as contravening Art. 21 and every State Government should try to avoid such possible eventually. Since we are of the opinion that the

appellant did not get a fair trial as the lawyer appointed to defend him was only in name sake and he did not do his duty at all, the trial of the appellant has been vitiated the appellant has, therefore, to be tried again in accordance with law.

20. In the result, the appeal is allowed and the conviction of the appellant and the sentence imposed upon him by the judgment and order dated 22-4-1991 are set aside. The appellant shall be tried again in accordance with law. The learned Sessions Judge is directed to appoint a competent lawyer at Sate expense to defend the appellant in the trial.

21. Office is directed to send back the entire record of the case to the learned Sessions Judge, Basti. It will be open for the learned Sessions Judge to assign the case to some other Addl. Sessions Judge in his Sessions Division. Before parting with the case, we would like to observe that the learned Sessions Judges should take great care in appointing only competent lawyers as amicus curiae. (To one should be appointed merely to provide him with some monetary benefit. It is true that senior and busy lawyers are not willing to act as amicus curiae on account of poor remuneration. Nevertheless an effort should be made to appoint capable persons. This should not be considered as grant of charity to those who on account of their incompetence have not been able to make any mark in the profession."

IN THE SUPREME COURT OF INDIA

State (N.C.T. Of Delhi) v. Navjot Sandhu @ Afsan Guru

(2005) 11 SCC 600

P. Venkatarama Reddi & P.P. Naolekar, JJ.

The appellant was tried for his involvement in a terrorist attack on the Indian Parliament. He was not informed of his right to counsel on being arrested, and he claimed that he was not provided effective representation during trial. The trial court sentenced the appellant to death, which the High Court confirmed. The Supreme Court, in this appeal, discussed the right to effective counsel, as well as the impact of lack of legal representation upon arrest, on the confessional statement of the appellant.

Reddi, J.: "158. … We have another set of procedural safeguards laid down in Section 52 of POTA which are modelled on the guidelines envisaged by *D.K. Basu* [*D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92] . Section 52 runs as under:

> "52. (1) Where a police officer arrests a person, he shall prepare a custody memo of the person arrested.
>
> (2) The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station.
>
> (3) Whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested.
>
> (4) The person arrested shall be permitted to meet

> the legal practitioner representing him during the course of interrogation of the accused person:
>
> Provided that nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogation."

Sub-sections (2) and (4) as well as sub-section (3) stem from the guarantees enshrined in Articles 21 and 22(1) of the Constitution. Article 22(1) enjoins that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. They are also meant to effectuate the commandment of Article 20(3) that no person accused of any offence shall be compelled to be a witness against himself.

…

160. In [*Nandini Satpahthy v. P. L. Dani*], we find lucid exposition of the width and content of Article 22(1). Krishna Iyer, J. observed: (*Nandini Satpathy case* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] SCC p. 455, para 62)

> "The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice."

Article 22(1) was viewed to be complementary to Article 20(3). It was observed: (SCC p. 456, para 63)

> "We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined."

It was pointed out (SCC p. 455, para 63) that the lawyer's presence, in the context of Article 20(3), "is an assurance of awareness and observance of

the right to silence". It was then clarified: (SCC p. 456, para 63)

> "We do not lay down that the police must secure the services of a lawyer. … But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied",

....without being exposed to the charge of securing involuntary self-incrimination. It was also clarified that the police need not wait more than for a reasonable while for an advocate's arrival. But they must invariably warn, and record that fact about the right to silence. It was aptly and graphically said: (SCC p. 458, para 70) "Article 20(3) is not a paper tiger but a provision to police the police and to silence coerced crimination." Based on the observations in *Nandini Satpathy case* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] it is possible to agree that the constitutional guarantee under Article 22(1) only implies that the suspect in the police custody shall not be denied the right to meet and consult his lawyer even at the stage of interrogation. In other words, if he wishes to have the presence of the lawyer, he shall not be denied that opportunity. Perhaps, *Nandini Satpathy* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] does not go so far as *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] in establishing access to a lawyer at the interrogation stage. But, Section 52(2) of POTA makes up this deficiency. It goes a step further and casts an imperative on the police officer to inform the person arrested of his right to consult a legal practitioner, soon after he is brought to the police station. Thus, the police officer is bound to apprise the arrested person of his right to consult the lawyer. To that extent, Section 52(2) affords an additional safeguard to the person in custody. Section 52(2) is founded on the *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] rule.

161. A discussion on the *raison d'etre* and the desirability of the provision enacted in Section 52(1) read with Section 52(4) can best be understood by referring to the seminal case of *Miranda* v. *Arizona* [384 US 436 : 16 L Ed 2d 694 (1966)] which is an oft-quoted decision. The privilege against self-incrimination was expressly protected by the Vth Amendment of the US Constitution. It provides, as Article 20(3) of the Indian Constitution provides, that no person…"shall be compelled in any criminal case to be a witness against himself". Such privilege lies at the heart of the concept of a fair procedure and such norm is now recognised to be an international standard. The Vth Amendment also guarantees a right akin to Article

21 of our Constitution by enjoining that no person shall be deprived of life, liberty or property without due process of law. Another notable safeguard to the accused is to be found in the VIth Amendment which inter alia provides that in a criminal prosecution, the accused shall have the assistance of the counsel for his defence. The safeguard is substantially similar to Article 22(1) of the Indian Constitution. It is in the context of exposition of these constitutional provisions that the US Supreme Court handed down the significant ruling in *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] . The core principles underscored in *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] have withstood the judicial scrutiny in the subsequent rulings, though the straitjacketed warning procedures and the effect of technical non-compliance with *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] procedures evoked critical comments and set a process of debate. *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] is often referred to as "the marriage of the Vth and VIth Amendments" and it is seen as the natural outgrowth of the Vth Amendment guarantees, spread over a century or more. Prior to the *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] ruling, confessions were only required to meet the "*voluntariness*" test. In the post *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] era, police have to prove that they read the specific *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] warnings and obtained an "intelligent waiver". The purpose of *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] it is said, is to neutralise the distinct psychological disadvantage that suspects are under when dealing with the police. The proposition laid down in the majority opinion in *Miranda case* [384 US 436 : 16 L Ed 2d 694 (1966)] was that: (US p. 444)

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

To ensure that the exercise of the right will be scrupulously honoured, the Court laid down the following measures: (US p. 479)

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney,

> and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

162. On the content of the right to consult a counsel not merely at the stage of trial, but also at the interrogation stage, Chief Justice Warren observed thus: (US p. 473)

> "In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent — the person most often subjected to interrogation — the knowledge that he too has a right to have counsel present."

At the same time it was clarified: (US p. 474)

> "This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation."

It was aptly pointed out (US p. 448) that "the modern practice of 'in-custody interrogation' is psychologically rather than physically oriented".

163. Now the question remains as to what is the effect of non-compliance of the obligations cast on the police officer by sub-sections (2) to (4) of Section 52. This question becomes relevant as we find the non-observance of the requirements of sub-section (2) read with sub-section (4) as well as sub-section (3) or one of them in the instant cases. Does it have a bearing on the voluntariness and admissibility of the confession recorded under Section 32(1)? Should these safeguards envisaged in Section 52(1) be telescoped into Section 32? These are the questions which arise.

164. … To hold that the violation of each one of the safeguards envisaged by Section 52 would lead to automatic invalidation of the confession would not be in consonance with the inherent nature and scheme of the respective provisions. However, we would like to make it clear that the denial of the safeguards under sub-sections (2) to (4) of Section 52 will be one of the relevant factors that would weigh with the court to act upon or discard the confession. To this extent they play a role vis-à-vis the confessions recorded under Section 32, but they are not as clinching as the provisions contained in sub-sections (2) to (5) of Section 32.

Case of Mohd. Afzal (A-1)

Legal assistance

165. The first point raised by Mr Sushil Kumar, appearing for the accused Afzal, was that he was denied proper legal aid, thereby depriving him of effective defence in the course of trial. In sum and substance, the contention is that the counsel appointed by the court as "amicus curiae" to take care of his defence was thrust on him against his will and the first amicus appointed made concessions with regard to the admission of certain documents and framing of charges without his knowledge. It is further submitted that the counsel who conducted the trial did not diligently cross-examine the witnesses. It is, therefore, contended that his valuable right of legal aid flowing from Articles 21 and 22 is violated. We find no substance in this contention. The learned trial Judge did his best to afford effective legal aid to the accused Afzal when he declined to engage a counsel on his own. We are unable to hold that the learned counsel who defended the accused at the trial was either inexperienced or ineffective or otherwise handled the case in a casual manner. The criticism against

the counsel seems to be an afterthought raised at the appellate stage. It was rightly negatived by the High Court.

166. Coming to the specific details, in the first instance, when Afzal along with the other accused was produced before the Special Judge, he was offered the assistance of a counsel. One Mr Attar Alam was appointed. However, the said advocate was not willing to act as amicus. On 14.5.2002, the charge-sheet was filed in the court. On 17-5-2002, the trial Judge appointed Ms Seema Gulati who agreed to defend Afzal. She filed vakalatnama along with her junior Mr Neeraj Bansal on the same day on behalf of the accused Afzal. On 3-6-2002, the arguments on the charges were heard. Afzal was represented by Ms Seema Gulati. The counsel conceded that there was prima facie material to frame charges. The court framed charges against all the accused on 4-6-2002 and the accused pleaded not guilty. True, the appellant was without counsel till 17.5.2002 but the fact remains that till then, no proceedings except extending the remand and furnishing of documents took place in the court. The next date which deserves mention is 5-6-2002. On that date, all the counsel appearing for the accused agreed that post-mortem reports, MLCs, documents related to recovery of guns and explosive substances at the spot should be considered as undisputed evidence without formal proof which resulted in dropping of considerable number of witnesses for the prosecution. The learned Senior Counsel for the appellant by referring to the application filed by Ms Seema Gulati on 1-7-2002 seeking her discharge from the case, highlights the fact that she took no instructions from Afzal or discussed the case with him and therefore no concession should have been made by her. The contention has no force. Assuming the counsel's statement that she took no instructions from the accused is correct, even then there is nothing wrong in the conduct of the advocate in agreeing for admission of formal documents without formal proof or in agreeing for the framing of charges. The counsel had exercised her discretion reasonably. The accused-appellant did not object to this course adopted by the amicus throughout the trial. No doubt, some of the documents admitted contained particulars of identification of the deceased terrorists by the appellant Afzal, but, the factum of identification was independently proved by the prosecution witnesses and opportunity of cross-examination was available to the accused. In the circumstances, we cannot say that there was a reasonable possibility of prejudice on account of admission of the said documents without formal proof.

167. Coming to the next phase of development, on 1-7-2002, Ms Seema

Gulati filed an application praying for her discharge from the case citing a curious reason that she had been engaged by another accused Gilani to appear on his behalf. An order was passed on 2-7-2002 releasing her from the case. Mr Neeraj Bansal who filed the vakalatnama along with Ms Seema Gulati was then nominated as amicus to defend Afzal and the brief was handed over to him. No objection was raised by Afzal on that occasion. Inspection of record by the counsel was allowed on 3-7-2002 and on subsequent occasions. On 8-7-2002, the accused Afzal filed a petition stating therein that he was not satisfied with the counsel appointed by the Court and that he needed the services of a Senior Advocate. He named four advocates in the petition and requested the Court to appoint one of them. On 12th July, the trial Judge recorded that the counsel named by the accused were not willing to take up the case. Mr Neeraj Bansal was therefore continued especially in view of the fact that he had experience in dealing with TADA cases. Afzal was also given the opportunity to cross-examine the prosecution witnesses in addition to the amicus. In fact, he did avail of that opportunity now and then. On several occasions, there was common cross-examination on behalf of all the accused. No indicia of apparent prejudice is discernible from the manner in which the case was defended. Though the objection that he was not satisfied with his counsel was reiterated on 12-7-2002 after PW 15 was cross-examined, we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to the cross-examination of one or two witnesses. The very decision relied upon by the learned counsel for the appellant, namely, *Strickland* v. *Washington* [466 US 668 (1984)] makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein:

> "Judicial scrutiny of the counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess the counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining the counsel's defence after it has proved unsuccessful, to conclude that a particular act of omission of the counsel was unreasonable. Cf. Engle v. Isaac [456

> US 107 (1982)] (US at pp. 133-134). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance;…."

168. The learned Senior Counsel for the State Mr Gopal Subramanium has furnished a table indicating the cross-examination of material prosecution witnesses by the counsel Mr Neeraj Bansal as Annexure 16 to the written submissions. Taking an overall view of the assistance given by the court and the performance of the counsel, it cannot be said that the accused was denied the facility of effective defence.

…

180. …It is an undisputed fact that the appellants were not apprised of the right to consult a legal practitioner either at the time they were initially arrested or after POTA was brought into the picture. We may recall that the POTA offences were added on 19th December and as a consequence thereof, investigation was taken up by PW 80 an Assistant Commissioner of Police, who is competent to investigate the POTA offences. But, he failed to inform the persons under arrest of their right to consult a legal practitioner, nor did he afford any facility to them to contact the legal practitioner. The opportunity of meeting a legal practitioner during the course of interrogation within closed doors of the police station will not arise unless a person in custody is informed of his right and a reasonable facility of establishing contact with a lawyer is offered to him. If the person in custody is not in a position to get the services of a legal practitioner by himself, such person is very well entitled to seek free legal aid either by applying to the court through the police or the Legal Services Authority concerned, which is a statutory body. Not that the police should, in such an event, postpone investigation indefinitely till his request is processed, but what is expected of the police officer is to promptly take note of such request and initiate immediate steps to place it before the Magistrate or the Legal Services Authority so that at least at some stage of interrogation, the person in custody would be able to establish contact with a legal

practitioner. But, in the instant case, the idea of apprising the persons arrested of their rights under sub-section (2) and entertaining a lawyer within the precincts of the police station did not at all figure in the mind of the investigating officer. The reason for this refrain or crucial omission could well be perceived by the argument of the learned Senior Counsel for the State that the compliance with the requirements of Section 52(2) of POTA did not arise for the simple reason that at the time of arrest, POTA was not applied. But this argument ignores the fact that as soon as POTA was added and the investigation commenced thereunder, the police officer was under a legal obligation to go through all the procedural safeguards to the extent they could be observed or implemented at that stage. The non-invocation of POTA in the first instance cannot become a lever to deny the safeguards envisaged by Section 52 when such safeguards could still be extended to the arrested person. The expression "the person arrested" does not exclude person initially arrested for offences other than POTA and continued under arrest when POTA was invoked. The "person arrested" includes the person whose arrest continues for the investigation of offences under POTA as well. It is not possible to give a truncated interpretation to the expression "person arrested" especially when such interpretation has the effect of denying an arrested person the wholesome safeguards laid down in Section 52.

181. The importance of the provision to afford the assistance of the counsel even at the stage of custodial interrogation need not be gainsaid. The requirement is in keeping with the *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] ruling and the philosophy underlying Articles 21, 20(3) and 22(1). This right cannot be allowed to be circumvented by subtle ingenuities or innovative police strategies. The access to a lawyer at the stage of interrogation serves as a sort of counterweight to the intimidating atmosphere that surrounds the detenu and gives him certain amount of guidance as to his rights and the obligations of the police. The lawyer's presence could pave the way, to some extent, to ease himself of the mental tension and trauma. In the felicitous words of Finlay, C.J. of Ireland in *People* v. *Healy* [(1990) 2 IR 73] :

> "The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such a person is aware of his rights and has the independent advice which would be appropriate in order to

> permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators."

182. Parliament advisedly introduced a *Miranda* [384 US 436 : 16 L Ed 2d 694 (1966)] ordained safeguard which was substantially reiterated in *Nandini Satpathy* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] by expressly enacting in sub-sections (2) and (4) of Section 52 the obligation to inform the arrestee of his right to consult a lawyer and to permit him to meet the lawyer. The avowed object of such prescription was to introduce an element of fair and humane approach to the prisoner in an otherwise stringent law with drastic consequences to the accused. These provisions are not to be treated as empty formalities. It cannot be said that the violation of these obligations under sub-sections (2) and (4) have no relation and impact on the confession. It is too much to expect that a person in custody in connection with the POTA offences is supposed to know the fasciculus of the provisions of POTA regarding the confessions and the procedural safeguards available to him. The presumption should be otherwise. The lawyer's presence and advice, apart from providing psychological support to the arrestee, would help him understand the implications of making a confessional statement before the police officer and also enable him to become aware of other rights such as the right to remain in judicial custody after being produced before the Magistrate. The very fact that he will not be under the fetters of police custody after he is produced before the CJM pursuant to Section 32(4) would make him feel free to represent to the CJM about the police conduct or the treatment meted out to him. The haunting fear of again landing himself into police custody soon after appearance before the CJM, would be an inhibiting factor against speaking anything adverse to the police. That is the reason why the judicial custody provision has been introduced in sub-section (5) of Section 32. The same objective seems to be at the back of sub-section (3) of Section 164 CrPC, though the situation contemplated therein is somewhat different.

183. The breach of the obligation of another provision, namely, sub-section (3) of Section 52 which is modelled on *D.K. Basu* [*D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92] guidelines has compounded the difficulty in acting on the confession. Section 52(3)

enjoins that the information of arrest shall be immediately communicated by the police officer to a family member or in his absence, to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested. PW 80 the IO under POTA merely stated that "near relatives of the accused were informed about their arrest as I learnt from the record". He was not aware whether any record was prepared by the police officer arresting the accused as regards the information given to the relatives. It is the prosecution case that Afzal's relative by the name of Mohd. Ghulam Bohra of Baramula was informed through phone. No witness had spoken to this effect. A perusal of the arrest memo indicates that the name of Ghulam Bohra and his phone number are noted as against the column "relatives to be informed". Afzal's arrest memo seems to have been attested by Gilani's brother who according to the prosecution, was present at the police cell. But, that does not amount to compliance with sub-section (3) because he is neither family member nor relation, nor even known to be a close friend. We are pointing out this lapse for the reason that if the relations had been informed, there was every possibility of those persons arranging a meeting with the lawyer or otherwise seeking legal advice.

…

185. All these lapses and violations of procedural safeguards guaranteed in the statute itself impel us to hold that it is not safe to act on the alleged confessional statement of Afzal and place reliance on this item of evidence on which the prosecution places heavy reliance."

IN THE HIGH COURT OF BOMBAY

Ramchandra Nivrutti Mulak v. State of Maharashtra

Cr. Appeal No. 487 of 2008

F. I. Rebello & K. U. Chandiwal, JJ.

The appellant was convicted and sentenced for offences under Section 302, IPC and other offences. During his trial, his lawyer sought to withdraw his vakalatnama. The Sessions Court refused to allow the withdrawal. Thereafter, the lawyer did not appear for the rest of the trial. No arrangements were made by the court to ensure that the accused was represented by counsel. In his appeal before the High Court, the appellant argued that his right to fair trial had been violated because he had not received effective assistance of counsel. The Bombay High Court discussed the duties of the Court in relation to the right to fair trial, right to counsel and right to free legal aid.

Rebello, J.: "4. The question that we have been called upon to answer in this appeal can be framed as under:"If the lawyer appearing for the accused files application for withdrawal, which is rejected by the court, and the lawyer fails to turn up for trial, is a duty cast on the trial court to ask the accused to make alternative arrangement for appearance by lawyer or appoint a lawyer for the accused under legal aid scheme?"

5. It is now settled law that free legal assistance at state cost is a fundamental right of the person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right pre-supposes the requirement of a reasonable, fair and just procedure prescribed under Article 21 of the Constitution of India. See M. H. Hoskot Vs. State of Maharashtra, AIR 1978 SC 1548.It is also well established that the right to free legal services is essential ingredient of reasonable, fair and just procedure for the person accused of offence and is implicit in the guarantee under Article 21. See Hussainara Khatoon's case,AIR 1979 SC 1369. …

…

7. We may now refer to the facts of the present case. Before the Sessions

Court, the accused had produced vakalatnama of Mr. R.N. Parchit, Advocate on 23.5.2003. Advocate Parchit did not remain present thereafter and charge against the accused was framed on 20.11.2003. Roznama for that day as recorded shows that Advocate did not remain present. On 7.1.2004 Advocate Mishra filed vakalatnama. The said Advocate on 5.2.2004 filed an adjournment application. Similarly on 7.9.2004, filed an application for adjournment on the ground of "No instructions". On 1.11.2004, the advocate was absent and he filed no instruction pursis. The same was not accepted by the learned court. The trial however, proceeded without the appellant being assisted by advocate or the court informing the appellant that he could avail of the services of the lawyer under free legal aid scheme.

8. This is, therefore, not a case where the appellant was unrepresented. It is a case where the lawyer applied to be discharged and the learned Judge refused to discharge him and the lawyer inspite of that order did not remain present. The learned Judge proceeded with the trial on the basis that the accused was represented by a lawyer even though that lawyer after his application was rejected choose not to appear. The logic of the learned Judge seems to be that as the lawyer was not allowed to withdraw, the accused continued to be represented. It is perhaps this approach, which resulted in the learned Judge not asking the appellant as to whether he desires to avail the services of free legal aid.

In our opinion, the case where the accused is unrepresented, and a case where accused is represented, and the lawyer seeks to withdraw his appearance by filing pursis and does not attend trial stand on an equal footing. The learned Judge by rejecting the application for withdrawal, at the highest could have taken steps against the concerned lawyer on failure to remain present. The Court did not pose to itself the question whether in such a case the trial could be proceeded with, and if proceeded with, it would satisfy the mandate of Article 21. Courts cannot play lip service to the right under Article 21. Courts in such a case must play an active role to ensure a fair trial. In the instant case it was clearly an infraction of the appellant's right to a fair trial guaranteed under Article 21 of the Constitution of India. This is not a case where the appellants engaged a Lawyer and the Lawyer choose not to appear on that day or dates. We are not examining the effect of such a situation in the present case. In the instant case, the lawyer filed an application for withdrawal. We, therefore, are only considering a class of cases where appearance is filed on behalf of an accused but before commencement of the trial, the lawyer seeks to withdraw and his application for withdrawal is rejected by the learned Court and the lawyer does not take part in the trial. The right under Article

21 was not satisfied by rejecting the application for withdrawal filed by the lawyer. Such rejection was an empty formality as the lawyer did not put in his appearance and the trial proceeded and concluded without his appearance. Article 21 is not merely to be read from a textbook, it must breathe life in a Court.

9. The mandate of Article 21 therefore, is not dependent [*sic]* on whether a Vakalatnama is filed or not. Though when a Vakalatnama is filed and the lawyer appears the mandate of Article 21 is satisfied. Once a lawyer applies to withdraw and chooses not to appear, there is burden cast on the courts to inform the accused either to engage another lawyer or to inform him that he is entitled to free legal aid if he so desires. It is only in the event that the accused does not seek to engage the services of the Lawyer after being informed and declines assistance under free legal aid scheme, can the trial proceed. The trial, therefore in the instant case ought not to have proceeded with in the absence of the accused being informed of his right to be represented by lawyer. In our opinion, therefore, on the facts of this case, the trial was in contravention of the appellant's right to fair trial as enshrined under Article 21 of the Constitution of India. The conviction and sentence of the appellant for the offences for which he has been charged, convicted and sentenced will have to be set aside.

10. We may only mention that the State no doubt has made provisions for free legal aid. By merely fixing some fees, the State has not discharged its burden of providing free legal aid. The fees as framed must be reasonable so as to enable competent lawyers to be empaneled. Empaneling advocates who are not conversant with criminal procedure and or of Evidence Act or Indian Penal Code would be defeating the very object behind Section 304, considering the ratio of the judgments of the Supreme Court, which have held that right to free legal assistance is aright guaranteed under Article 21 of the Constitution of India. From the records also we find that the fees were last revised on 1.10.1997. Ten years have elapsed since the fees were revised. In so far as the person who has been tried for the offence punishable with death or imprisonment of seven years or more, under rule 6 of Rules regarding legal aid to unrepresented accused persons the learned Judge when the accused seeks free legal aid, is bound to appoint a Senior Advocate with a junior Advocate from the Panel. Under Rule 10, Senior Advocate is not to be paid fees but to work as amicus curiae. The junior advocate has to be paid fees in terms which are notified. When the Supreme Court directed that free legal aid should be provided to accused, it did not mean that the Senior Lawyers would always work as amicus curiae. This cannot be described as legal aid at State expenses. We have come across cases, where the senior counsel of this court have agreed

to appear as amicus curiae in some cases. Similarly, other lawyers in the Sessions Court. Considering the number of matters of unrepresented accused and panel of lawyers prepared that senior lawyers should be called upon to work as amicus curiae in several matters is not acceptable. The object behind providing free legal services in such matters would be defeated. Most of the time, the rule itself is not being followed. It would therefore, be appropriate for the State Government to reconsider the rules for grant of legal aid and also to fix proper remuneration for the advocates under the legal aid scheme. This court on its administrative side has also to reconsider the rules made under Section 304 of the Code of Criminal Procedure.

11. For the aforesaid reasons we set aside the conviction and sentence imposed on the appellant. We remand the matter to the trial court for de novo trial after the stage of framing of the charge. We make it clear that all proceedings after 12.11.2003 are treated as null and void. We further make it clear that the witnesses will be examined afresh. The trial to commence on the writ being served on the court and the court appointing a lawyer under the legal aid scheme for the appellant. On the lawyer being appointed, the trial to commence within four weeks and to be completed within four weeks thereafter. We further make it clear that the lawyer to be appointed considering the gravity of the charge should be one who has conducted trials for the offence punishable under Section 302 of Indian Penal Code."

IN THE SUPREME COURT OF INDIA

Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi

(2012) 2 SCC 584

H.L. Dattu & C.K. Prasad, JJ.

The appellant, an illiterate foreign national, was unable to engage a counsel to defend himself. He was accused of being involved in a bomb blast, and was sentenced to death, without having the assistance of counsel for a large part of the trial. The death penalty was confirmed by the High Court. The Supreme Court, in its judgment, examined whether the appellant was given a fair and impartial trial and whether his right to counsel was denied.

Dattu, J.: "4. At this stage itself, it is relevant to notice that the appellant had pleaded, both before the trial court and the High Court, that he was not given a fair and impartial trial and he was denied the right of a counsel. The High Court has noticed this contention and has answered against the appellant. In the words of the High Court:

> "45. Faced with this situation Mr Luthra came out with an argument that this case, in fact, needs to be remanded back to the trial court for a fresh trial because the trial court record would reveal that the accused did not have a fair trial inasmuch as on most of the hearings when material witnesses were examined he was unrepresented and the trial court did not bother to provide him legal aid at State expense and by not doing that the trial court, in fact, failed to discharge its pious duty of ensuring that the accused was defended properly and effectively at all stages of the trial either by his private counsel or in the absence of private counsel by an experienced and responsible amicus curiae.
> …
>
> 46. There can be no dispute about the legal

> proposition put forward by the learned counsel for the appellant that it is the duty of the court to see and ensure that an accused in a criminal trial is represented with diligence by a defence counsel and in case an accused during the trial remains unrepresented because of poverty, etc., it becomes the duty of the court to provide him legal aid at State expense. We find from the judgment of the trial court that this point was raised on behalf of the accused during the trial also by the amicus curiae provided to the accused when his private counsel stopped appearing for him. …
>
> 47. We have ourselves also perused the trial court record and we are convinced that it is not a case where it can be said that the accused did not have a fair trial or that he had been denied legal aid. We are in full agreement with the above quoted views of the learned Additional Sessions Judge on this objection of the accused and we refuse to accept the plea of the appellant that this case should be remanded back for a retrial."

…

6. In this Court, the judgments are assailed, apart from the merits, that the appellant is denied due process of law and the conduct of the trial is contrary to the procedure prescribed under the provisions of CrPC and, in particular, that he was not given a fair and impartial trial and was denied the right of a counsel. Since the aforesaid issue is of vital importance, I have thought it fit to answer that issue before I discuss the merits of the appeal. Therefore, firstly, I will consider the issue; whether the appellant was given a fair and impartial trial and, whether he was denied the right of a counsel. To answer this issue, it may not be necessary to discuss the facts of the case or the circumstances surrounding the prosecution case except so far they reflect upon the aforesaid issue.

…

11. The appellant was initially assisted by a learned counsel employed by the learned Sessions Judge. However, in the midway, the learned counsel disappeared from the scene, that is, before the conclusion of the trial. It

is apparent from the records that he was not asked whether he is able to employ counsel or wished to have the counsel appointed. When the parties were ready for the trial, no one appeared for the accused. The court did not appoint any counsel to defend the accused. Of course, if he had a defence counsel, I do not see the necessity of the court appointing anybody as a counsel. If he did not have a counsel, it is the mandatory duty of the court to appoint a counsel to represent him.

12. The record reveals that the evidence of 56 witnesses, out of the 65 witnesses examined by the prosecution in support of the indictment, including the eyewitnesses and the investigating officer, were recorded by the trial court without providing a counsel to the appellant. The record also reveals that none of the 56 witnesses were cross-examined by the appellant-accused. It is only thereafter, the wisdom appears to have dawned on the trial court to appoint a learned counsel on 4-12-2003 to defend the appellant. The evidence of the prosecution witnesses from 57 to 65 was recorded in the presence of the freshly appointed learned counsel, who thought it fit not to cross-examine any of those witnesses. Before the conclusion of the trial, she had filed an application to cross-examine only one prosecution witness and that prayer in the application had been granted by the trial court and the learned counsel had performed the formality of cross-examining this witness. I do not wish to comment on the performance of the learned counsel, since I am of the view that "less said the better". In this casual manner, the trial, in a capital punishment case, was concluded by the trial court.

13. It will, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant-accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates, as I have already noticed, that the appointment of the learned counsel and her appearance during the last stages of the trial was rather pro forma than active. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and unbiased.

14. The purpose of cross-examination of a witness has been succinctly

explained by the Constitution Bench of this Court in *Kartar Singh* v. *State of Punjab* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] : (SCC p. 686, para 278)

> "278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:
>
> (1) to destroy or weaken the evidentiary value of the witness of his adversary;
>
> (2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;
>
> (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;
>
> and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."

15. The aforesaid view is reiterated by this Court in *Jayendra Vishnu Thakur* v. *State of Maharashtra* [(2009) 7 SCC 104 : (2010) 2 SCC (Cri) 500] wherein it is observed: (SCC p. 117, para 24)

> "24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable

> right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion."

16. In my view, every person, therefore, has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of the charge in a criminal case.

…

23. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. The Criminal Procedure Code provides that in all criminal prosecutions, the accused has a right to have the assistance of a counsel and the Criminal Procedure Code also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the court, having these cases in charge, to see that he is denied no necessary incident of a fair trial.

24. In the present case, not only was the accused denied the assistance of a counsel during the trial but such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law. The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial

proceedings, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304 CrPC.

25. After carefully going through the entire records of the trial court, I am convinced that the appellant-accused was not provided the assistance of a counsel in a substantial and meaningful sense. To hold and decide otherwise, would be simply to ignore actualities and also would be to ignore the fundamental postulates, already adverted to.

26. The learned counsel for the respondent State, Shri Attri contends that since no prejudice is caused to the accused in not providing a defence counsel, this Court need not take exception to the trial concluded by the learned Sessions Judge and the conviction and sentence passed against the accused. I find it difficult to accept the argument of the learned Senior Counsel. The Criminal Procedure Code ensures that an accused gets a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a learned counsel is a principal part of the right to fair trial. If these minimum safeguards are not provided to an accused; that itself is "prejudice" to an accused.

…

28. In view of the above discussion, I cannot sustain the judgments impugned and they must be reversed and the matter is to be remanded to the trial court with a specific direction that the trial court would assist the accused by employing a State counsel before the commencement of the trial till its conclusion, if the accused is unable to employ a counsel of his own choice. Since I am remanding the matter for fresh disposal, I clarify that I have not expressed any opinion regarding the merits of the case."

…

Prasad, J. (substantially concurring): "42. While holding the appellant guilty the trial court has not only relied upon the evidence of the witnesses who

have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of the witness is fit to be rejected. The appellant in the present case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him. Poverty also came in his way to engage a counsel of his choice.

43. Having said so, it needs consideration as to whether assistance of the counsel would be necessary for fair trial. It needs no emphasis that conviction and sentence can be inflicted only on culmination of the trial which is fair and just. I have no manner of doubt that in our adversary system of criminal justice, any person facing trial can be assured a fair trial only when the counsel is provided to him. Its roots are many and find places in manifold ways. It is internationally recognised by covenants and the Universal Declaration of Human Rights, constitutionally guaranteed and statutorily protected.

44. Article 14 of the International Covenant on Civil and Political Rights, 1966 guarantees to the citizens of nations signatory to that covenant various rights in the determination of any criminal charge and confers on them the minimum guarantees. Articles 14(2) and (3) of the said covenant read as under:

"**14.*****

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(*a*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*b*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*c*) To be tried without undue delay;

> (*d*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"

Article 14(3)(*d*) entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it.

45. It is accepted in the civilised world without exception that the poor and ignorant man is equal to a strong and mighty opponent before the law. But it is of no value for a poor and ignorant man if there is none to inform him what the law is. In the absence of such information that courts are open to him on the same terms as to all other persons the guarantee of equality is illusory. The aforesaid International Covenant on Civil and Political Rights guarantees to the indigent citizens of the member countries the right to be defended and right to have legal assistance without payment.

46. Not only this, the Universal Declaration of Human Rights, 1948 ensures due process and Article 10 thereof provides that:

> "10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

47. Article 11 of the Universal Declaration of Human Rights, 1948 guarantees everyone charged with a penal offence all the guarantees necessary for the defence, the same reads as under:

> "11.(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

> (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

48. These salutary features forming part of the international covenants and the Universal Declaration of Human Rights, 1948 are deep rooted in our constitutional scheme. Article 21 of the Constitution of India commands in emphatic terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and Article 22(1) thereof confers on the person charged to be defended by a legal practitioner of his choice. Article 39-A of the Constitution of India casts a duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities.

49. Besides the international covenants and declarations and the constitutional guarantees referred to above, Section 303 of the Code of Criminal Procedure gives right to any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 of the Code of Criminal Procedure contemplates legal aid to the accused facing charge in a case triable by the Court of Session at State expense and the same reads as follows:

> "304. Legal aid to accused at State expense in certain cases.—
>
> (1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State.
>
> (2) The High Court may, with the previous approval of the State Government, make rules providing for—
>
> (a) the mode of selecting pleaders for defence under sub-section (1);

(b) the facilities to be allowed to such pleaders by the courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts in the State as they apply in relation to trials before Courts of Session."

50. From a plain reading of the aforesaid provision it is evident that in a trial before the Court of Session if the accused is not represented by a pleader and has not sufficient means, the court shall assign a pleader for his defence at the expense of the State. The entitlement to free legal aid is not dependent on the accused making an application to that effect, in fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same.

51. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22(1) of the Constitution has further been fortified by the introduction of the directive principles of State policy embodied in Article 39-A of the Constitution by the Forty-second Amendment Act of 1976 and enactment of sub-section (1) of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by international covenants and human rights declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include the right to be heard through counsel.

52. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time loses

his equilibrium in face of the charge. A guiding hand of the counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it for the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence."

Note: Since the judges disagreed on whether the case should be remanded for a de novo trial, the matter was referred to a three judge bench, which decided to remand the matter back for a fresh trial, but stipulated a time period for completion of the trial. See **Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 9 SCC 408*.***

IN THE SUPREME COURT OF INDIA

Mohd. Ajmal Amir Kasab v. State of Maharashtra

(2012) 9 SCC 1

Aftab Alam & C.K. Prasad, JJ.

In this appeal from a decision convicting the appellant for various terrorist acts the Supreme Court examined whether there exists a constitutional obligation to provide free legal services to an indigent accused not just at the stage of trial, but also when he is first produced before a Magistrate and when he is remanded into custody.

Alam, J.: "440. We have not the slightest doubt that the right to silence and the right to the presence of an attorney granted by the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] decision to an accused as a measure of protection against self-incrimination have no application under the Indian system of law. Interestingly, an indication to this effect is to be found in the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] judgment itself. Having set down the principle, extracted above, that Court proceeded in the next part (Part IV) of the judgment to repel the arguments advanced against its view and to find support for its view in other jurisdictions. Part IV of the judgment begins as under: (L Ed p. 726)

> "A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court."

441. Rejecting the argument, the Court pointed out that very firm protections against self-incrimination were available to the accused in several other jurisdictions, in which connection it also made a reference to Indian laws. The Court observed: (*Miranda case* [(1966) 16 L Ed 2d 694 : 384 US 436] , L Ed pp. 730-32)

> "The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. … In India, confessions made to police not in the presence of a Magistrate have been excluded by rule of evidence since 1872, at a time when it operated under British law."

442. The Court then noticed Sections 25 and 26 of the Indian Evidence Act and then referred to the decision of the Indian Supreme Court in *Sarwan Singh* v. *State of Punjab*[AIR 1957 SC 637 : 1957 Cri LJ 1014] in the following words: (*Miranda case* [(1966) 16 L Ed 2d 694 : 384 US 436] , L Ed p. 732)

> "… To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a Magistrate, suggesting: '[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession.' (*Sarwan Singh case* [AIR 1957 SC 637 : 1957 Cri LJ 1014] , AIR p. 644, para 10)"

443. The US Supreme Court, thus, clearly acknowledged and pointed out that the measures to protect the accused against self-incrimination evolved by it under the *Miranda* rules were already part of the Indian statutory scheme.

444. Moreover, a bare reference to the provisions of CrPC would show that those provisions are designed to afford complete protection to the accused against self-incrimination. Section 161(2) CrPC disallows incriminating answers to police interrogations. Section 162(1) makes any statements, in any form, made to police officers inadmissible excepting those that may lead to discovery of any fact (*vide* Section 27 of the Evidence Act) and that may constitute a dying declaration (*vide* Section 32 of the Evidence Act). Coupled with these provisions of CrPC is Section 25 of the Evidence Act that makes any confession by an accused made to a police officer completely inadmissible. Section 163 CrPC prohibits the use of any inducement, threat or promise by a police officer. And then comes Section 164 CrPC, dealing with the recording of confessions and statements made before a Magistrate. Sub-section (1) of Section 164 provides for recording any confession or statement in the course of an investigation, or at any time before the commencement of the inquiry or trial; sub-section (2) mandates the Magistrate to administer the pre-confession caution to the accused and also requires him to be satisfied, as a judicial authority, about the confession being made voluntarily; sub-section (3) provides one of the most important protections to the accused by stipulating that in case the accused produced before the Magistrate declines to make the confession, the Magistrate shall not authorise his detention in police custody; sub-section (4) incorporates the post-confession safeguard and requires the Magistrate to make a memorandum at the foot of the confession regarding the caution administered to the accused and a certificate to the effect that

the confession as recorded is a full and true account of the statement made. Section 164 CrPC is to be read along with Section 26 of the Evidence Act, which provides that:

> "26. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

445. It is thus clear to us that the protection to the accused against any self-incrimination guaranteed by the Constitution is very strongly built into the Indian statutory framework and we see absolutely no reason to draw any help from the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] principles for providing protection against self-incrimination to the accused.

446. Here it will be instructive to see how the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] decision has been viewed by this Court; in what ways it has been referred to in this Court's decisions and where this Court has declined to follow the *Miranda* rules.

447. Significant notice of the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] decision was first taken by a three-Judge Bench of this Court in *Nandini Satpathy* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] . The appellant in that case, a former Chief Minister of Orissa, was summoned to the police station in connection with a case registered against her under Sections 5(1) and (2) of the Prevention of Corruption Act, 1947, and Sections 161/165, 120-B and 109 of the Penal Code, and was interrogated with reference to a long string of questions given to her in writing. On her refusal to answer, a complaint was filed against her under Section 179 of the Penal Code and the Magistrate took cognizance of the offence. She challenged the validity of the proceedings before the High Court. The High Court dismissed the petition following which the Chief Minister came to this Court in appeal against the order passed by the High Court. It was in that context that this Court made a glowing reference to the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] decision; however, in the end, this Court refrained from entirely transplanting the *Miranda* rules into the Indian criminal process and, with regard to the Indian realities, "suggested" certain guidelines that may be enumerated as under: (*Nandini Satpathy case* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] , SCC pp. 426-27)

> "(a) Under Article 22(1), the right to consult an advocate of his choice shall not be denied to any person who is arrested. Articles 20(3)

and 22(1) may be telescoped by making it prudent for the police to permit the advocate of the accused to be present at the time he is examined. Overreaching Article 20(3) and Section 161(2) will be obviated by this requirement. But it is not as if the police must secure the services of a lawyer, for, that will lead to 'police station-lawyer' system with all its attendant vices. If however an accused expresses the wish to have his lawyer by his side at the time of examination, this facility shall not be denied, because, by denying the facility, the police will be exposed to the serious reproof that they are trying to secure in secrecy and by coercing the will an involuntary self-incrimination. It is not as if a lawyer's presence is a panacea for all problems of self-incrimination, because, he cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried and to caution his client where incrimination is attempted and to insist on questions and answers being noted where objections are not otherwise fully appreciated. The lawyer cannot harangue the police, but may help his client and complain on his behalf. The police also need not wait for more than a reasonable time for the advocate's arrival.

(b) Where a lawyer of his choice is not available, after the examination of the accused, the police officer must take him to a Magistrate, a doctor or other willing and responsible non-partisan official or non-official and allow a secluded audience where he may unburden himself beyond the view of the police and tell whether he has suffered duress, in which case he should be transferred to judicial or other custody where the police cannot reach him. The collocutor communicate the relevant conversation to the nearest Magistrate."

448. In later decisions, *Nandini Satpathy* [(1978) 2 SCC 424 : 1978 SCC

(Cri) 236] guidelines and the *Miranda* rule are referred to, approved and followed in an ancillary way when this Court moved to protect or expand the rights of the accused against investigation by lawless means, but we are not aware of any decision in which the Court might have followed the core of the *Nandini Satpathy* guidelines or the *Miranda* rule.

449. In *Poolpandi* [(1992) 3 SCC 259 : 1992 SCC (Cri) 620] , the appellants before this Court, who were called for interrogation in course of investigation under the provisions of the Customs Act, 1962, and the Foreign Exchange Regulation Act, 1973, claimed the right of presence of their lawyer during interrogation, relying strongly on *Nandini Satpathy* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] . The question before the Court was thus directly whether a person summoned for interrogation is entitled to the presence of his lawyer during questioning. But a three-Judge Bench of this Court rejected the appeal, tersely observing in para 4 of the judgment as under: (*Poolpandi case* [(1992) 3 SCC 259 : 1992 SCC (Cri) 620] , SCC p. 261)

> "4. Both Mr Salve and Mr Lalit strongly relied on the observations in Nandini Satpathy v. P.L. Dani [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] . We are afraid, in view of two judgments of the Constitution Bench of this Court in Ramesh Chandra Mehta v. State of W.B. [AIR 1970 SC 940 : 1970 Cri LJ 863] and Illiasv. Collector of Customs [AIR 1970 SC 1065 : 1970 Cri LJ 998] the stand of the appellant cannot be accepted. The learned counsel urged that since Nandini Satpathy case [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] was decided later, the observations therein must be given effect to by this Court now. There is no force in this argument."

450. More recently in *Directorate of Revenue Intelligence* [(2011) 12 SCC 362: (2012) 1 SCC (Cri) 573] , (to which one of us, Aftab Alam, J. is a party) the question before the Court was, once again, whether a person summoned for interrogation by the officers of the Directorate of Revenue Intelligence in a case under the Narcotic Drugs and Psychotropic Substances Act, 1985, had the right of the presence of his lawyer at the time of interrogation. The Court, after discussing the decision in *Nandini Satpathy* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] and relying upon the decision in *Poolpandi* [(1992) 3 SCC 259: 1992 SCC (Cri) 620] , rejected the claim; but, in light of the decision in *D.K. Basu* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] and with regard to the special facts and circumstances of the case, directed that the interrogation of the respondent may be held within sight of his advocate or any person duly authorised by him, with the

condition that the advocate or person authorised by the respondent might watch the proceedings from a distance or from beyond a glass partition but he would not be within hearing distance, and the respondent would not be allowed to have consultations with him in the course of the interrogation.

451. But, as has been said earlier, *Nandini Satpathy* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] and *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] may also be found referred quite positively, though in a more general way, in several decisions of this Court. In *D.K. Basu* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] , this Court, while dealing with the menace of custodial violence, including torture and death in the police lock-up, condemned the use of violence and third-degree methods of interrogation of the accused, and described custodial death as one of the worst crimes against the society. In para 22 of its judgment, the Court observed: (*D.K. Basu case* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] , SCC p. 429)

> "22. … Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. … The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law."

452. In that connection, the Court examined international conventions and declarations on the subject and visited other jurisdictions, besides relying upon earlier decisions of this Court, and laid down a set of guidelines to be strictly followed in all cases of arrest or detention as *preventive measures*. While dealing with the question of striking a balance between the fundamental rights of the suspect-accused and the necessity of a thorough investigation in serious cases that may threaten the very fabric of society, such as acts of terrorism and communal riots, etc. this Court, in para 32 of the judgment, referred to the opening lines of Part IV of the judgment in *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] : (*D.K. Basu case* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] , SCC p. 434)

> "32. … 'A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. (See e.g. Chambers v. Florida [84 L Ed 716 : 60 S Ct 472: 309 US 227 (1940)], US at pp. 240-41: L Ed at p. 724.) The whole

> thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of the Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.' (Miranda case [(1966) 16 L Ed 2d 694 : 384 US 436] , L Ed pp. 726-27)"

453. *Navjot Sandhu* [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] is a case under the Prevention of Terrorism Act, 2002 (in short "POTA"). The law of POTA is a major departure from the ordinary mainstream criminal law of the country. Under Section 32 of the Prevention of Terrorism Act, 2002, contrary to the provisions of CrPC and the Evidence Act, as noted above in detail, a confession made by an accused before a police officer, not lower in rank than a Superintendent of Police, is admissible in evidence though subject, of course, to the safeguards stipulated in sub-sections (2) to (5) of Section 32 and Section 52 that lay down the requirements to be complied with at the time of the arrest of a person. Insisting on a strict compliance with those safeguards, the Court in *Navjot Sandhu* [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] pointed out that those safeguards and protections provided to the accused were directly relatable to Articles 21 and 22(1) of the Constitution and incorporated the guidelines spelled out by this Court in *Kartar Singh* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] and *D.K. Basu* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] . In that regard, the Court also referred in para 55 of the judgment to the decision in *Nandini Satpathy* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] , and in para 63 to the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] decision, observing as follows: (*Navjot Sandhu case* [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715], SCC p. 678)

> "63. In the United States, according to the decisions of the Supreme Court viz. Miranda v. Arizona [(1966) 16 L Ed 2d 694 : 384 US 436]; Escobedo v. Illinois [12 L Ed 2d 977 : 378 US 478 (1964)] the prosecution cannot make use of the statements stemming from custodial interrogation unless it demonstrates the use of procedural safeguards to secure the right against self-incrimination and these safeguards include a right to counsel during such interrogation and warnings to the suspect/ accused of his right to counsel and to remain silent. In Miranda case [(1966) 16 L Ed 2d 694 : 384 US 436] (decided in 1966), it was held that the

> right to have counsel present at the interrogation was indispensable to the protection of the Fifth Amendment privilege against self-incrimination and to ensure that the right to choose between silence and speech remains unfettered throughout the interrogation process. However, this rule is subject to the conscious waiver of right after the individual was warned of his right."

454. As we see *Navjot Sandhu* [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , it is difficult to sustain Mr Ramachandran's submission made on that basis. *To say that the safeguards built into Section 32 of POTA have their source in Articles 20(3)*, *21 and 22(1) is one thing, but to say that the right to be represented by a lawyer and the right against self-incrimination would remain incomplete and unsatisfied unless those rights are read out to the accused and further to contend that the omission to read out those rights to the accused would result in vitiating the trial and the conviction of the accused in that trial is something entirely different. As we shall see presently, the obligation to provide legal aid to the accused as soon as he is brought before the Magistrate is very much part of our criminal law procedure, but for reasons very different from the Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] *rule, aimed at protecting the accused against self-incrimination. And to say that any failure to provide legal aid to the accused at the beginning, or before his confession is recorded under Section 164 CrPC, would inevitably render the trial illegal is stretching the point to unacceptable extremes*.

455. What seems to be overlooked in Mr Ramachandran's submission is that the law of POTA is a major departure from the common criminal law process in this country. One can almost call POTA and a few other Acts of its ilk as exceptions to the general rule. Now, in the severe framework of POTA, certain constitutional safeguards are built into Section 32, and to some extent in Section 52 of the Act. But the mainstream criminal law procedure in India, which is governed by CrPC and the Evidence Act, 1872 has a fundamentally different and far more liberal framework, in which the rights of the individual are protected, in a better and more effective manner, in different ways. It is, therefore, wrong to argue that what is said in context of POTA should also apply to the mainstream criminal law procedure.

456. We are also not impressed by Mr Ramachandran's submission that providing a lawyer at the stage of trial would provide only incomplete protection to the accused because, in case the accused had already made a confession under Section 164 CrPC, the lawyer would be faced with a *fait accompli* and would be defending the accused with his hands tied.

457. The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defence lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of investigation. The test to judge the constitutional and legal acceptability of a confession recorded under Section 164 CrPC is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally.

458. … We accept that the right against self-incrimination under Article 20(3) does not exclude any voluntary statements made in exercise of *free will* and volition. We also accept that the right against self-incrimination under Article 20(3) is fully incorporated in the provisions of CrPC (Sections 161, 162, 163 and 164) and the Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance with these statutory provisions is also equal compliance with the constitutional guarantees.

459. … Mr Subramanium contends that Article 22(1) merely allows an arrested person to consult a legal practitioner of his choice and the right to be defended by a legal practitioner crystallises only at the stage of commencement of the trial in terms of Section 304 CrPC. We feel that such a view is quite incorrect and insupportable for two reasons. First, such a view is based on an unreasonably restricted construction of the constitutional and statutory provisions; and second, it overlooks the socio-economic realities of the country.

460. Article 22(1) was part of the Constitution as it came into force on 26-1-1950. The Criminal Procedure Code, 1973 (2 of 1974), that substituted the earlier Code of 1898, came into force on 1-4-1974. The Criminal Procedure Code, as correctly explained by Mr Subramanium in his submissions, incorporated the constitutional provisions regarding the protection of the accused against self-accusation. The Criminal Procedure Code also had a provision in Section 304 regarding access to a lawyer, to which Mr Subramanium alluded in support of his submission that the right to be defended by a legal practitioner would crystallise only on the commencement of the trial.

461. But the Constitution and the body of laws are not frozen in time. They comprise an organic structure developing and growing like a living organism. We cannot put it better than in the vibrant words of Justice Vivian Bose, who, dealing with the incipient Constitution in *State of*

W.B. v. *Anwar Ali Sarkar* [AIR 1952 SC 75 : 1952 Cri LJ 510] made the following observations: (AIR p. 103, para 85)

> "85. I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hidebound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case Judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact: Do these 'laws' which have been called in question offend a still greater law before which even they must bow?" (emphasis supplied)

462. In the more than four decades that have passed since, true to the exhortation of Justice Bose, the law, in order to serve the evolving needs of the Indian people, has made massive progress through constitutional amendments, legislative action and, not least, through the pronouncements by this Court. Article 39-A came to be inserted in the Constitution by the Constitution (Forty-second Amendment) Act, 1976 with effect from 3.1.1977 as part of the "Directive Principles of the State Policy". The Article reads as under:

> "39-A. Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

463. In furtherance to the ideal of Article 39-A, Parliament enacted the Legal Services Authorities Act, 1987, that came into force from 9-11-1995.

The Statement of Objects and Reasons of the Act, insofar as relevant for the present, reads as under:

> "Article 39-A of the Constitution provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."
>
> (emphasis added)

464. Sections 12 and 13 in Chapter IV of the Act deal with entitlement to legal services, and provide for legal services under the Act to a very large class of people, including members of the Scheduled Castes and the Scheduled Tribes, women and children and persons in receipt of annual income less than rupees nine thousand (Rs 9000) if the case is before a court other than the Supreme Court, and less than rupees twelve thousand (Rs 12,000) if the case is before the Supreme Court. As regards income, an affidavit made by the person concerned would be regarded as sufficient to make him eligible for entitlement to legal services under the Act. In the past seventeen (17) years since the Act came into force, the programme of legal aid had assumed the proportions of a national movement.

465. All this development clearly indicates the direction in which the law relating to access to lawyers/legal aid has developed and continues to develop. It is now rather late in the day to contend that Article 22(1) is merely an enabling provision and that the right to be defended by a legal practitioner comes into force only on the commencement of trial as provided under Section 304 CrPC.

466. …Mr Subramanium is quite right and we are one with him in holding that the provisions of CrPC and the Evidence Act fully incorporate the constitutional guarantees, and that the statutory framework for the criminal process in India affords the fullest protection to personal liberty and dignity of an individual. We find no flaws in the provisions in the statute books, but the devil lurks in the faithful application and enforcement of those provisions. It is common knowledge, of which we take judicial notice, that there is a great hiatus between what the law stipulates and the realities on the ground in the enforcement of the law. The abuses of the provisions of CrPC are perhaps the most subversive of the right to life and personal liberty, the most precious right under the Constitution, and the human rights of an individual. Access to a lawyer is, therefore, imperative to

ensure compliance with statutory provisions, which are of high standards in themselves and which, if duly complied with, will leave no room for any violation of constitutional provisions or human rights abuses.

467. In any case, we find that the issue stands settled long ago and is no longer open to a debate. More than three decades ago, in *Hussainara Khatoon (4)* v. *State of Bihar* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] , this Court referring to Article 39-A, then newly added to the Constitution, said that the article emphasised that free legal aid was an unalienable element of a "reasonable, fair and just" procedure, for without it a person suffering from economic or other disabilities would be deprived from securing justice. In para 7 of the judgment the Court observed and directed as under: (SCC p. 105)

> "7. … The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just', procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. *This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer*. We would, therefore, direct that on the next remand dates, when the undertrial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such undertrial prisoners and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad outlines set out by us in our judgment dated 12-2-1979 [*Hussainara Khatoon (1)* v. *State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23] . The State Government will report to the High Court of Patna its compliance with this direction within a period of six weeks from today." (emphasis supplied)

468. Two years later, in *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] relating to the infamous case of blinding of prisoners in Bihar, this Court reiterated that the right to free legal aid is an essential ingredient of due process, which is implicit in the guarantee of Article 21 of the Constitution. In para 5 of the judgment, the Court said: (SCC p. 631)

> "*5*. … This Court has pointed out in *Hussainara Khatoon (4) case* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] which was decided as far back as 9-3-1979 that the *right*to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer."
>
> (emphasis supplied)

469. Then, brushing aside the plea of financial constraint in providing legal aid to an indigent, the Court went on to say: [*Khatri (2) case* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] , SCC pp. 631-32, para 5]

> "*5*. … Moreover, *this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first*

> *produced before the Magistrate as also when he is remanded from time to time*." (emphasis supplied)

470. In para 6 of the judgment, this Court further said: [*Khatri (2) case* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] , SCC p. 632, para 6]

> "*6. But even this right to free legal services would be illusory for an indigent accused unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. … We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State*. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State." (emphasis added)

471. The resounding words of the Court in *Khatri (2)*[(1981) 1 SCC 627: 1981 SCC (Cri) 228] are equally, if not more, relevant today than when they were first pronounced. In *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] the Court also alluded to the reasons for the urgent need of the accused to access a lawyer, these being the indigence and illiteracy of the vast majority of Indians accused of crimes.

472. As noted in *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] as far back as in 1981, a person arrested needs a lawyer at the stage of his first production before the Magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the charge-sheet is submitted and the Magistrate applies his mind to the charge-sheet with a view to determine the future course of proceedings. He would need a lawyer at the stage of framing of charges against him and he would, of course, need a lawyer to defend him in trial.

473. To deal with one terrorist, we cannot take away the right given to the

indigent and underprivileged people of this country by this Court thirty-one (31) years ago.

474. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a Magistrate. We, accordingly, hold that it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings.

475. It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the charge-sheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice.

476. At this stage the question arises, what would be the legal consequence of failure to provide legal aid to an indigent who is not in a position, on account of indigence or any other similar reasons, to engage a lawyer of his own choice?

477. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see *Suk Das* v. *UT of Arunachal Pradesh* [(1986) 2 SCC 401 : 1986 SCC (Cri) 166]).

478. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent Magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case."

IN THE SUPREME COURT OF INDIA

Ashok Debbarma alias Achak Debbarma v. State of Tripura

(2014) 4 SCC 747

K.S.P. Radhakrishnan & Vikramjit Sen, JJ.

The appellant was convicted for an attack on a minority community which led to the death of 15 persons. He was sentenced to death. In this appeal, the appellant contended that ineffective legal assistance by the defense counsel at trial caused prejudice to the accused and violated the right to fair trial. The Supreme Court discussed whether ineffective assistance of counsel can be a mitigating circumstance favouring the accused in the rarest of rare analysis for imposition of the death sentence.

Radhakrishnan, J.:"35. Can the counsel's ineffectiveness in conducting a criminal trial for the defence, if established, be a mitigating circumstance favouring the accused, especially to escape from the award of death sentence. The counsel for the appellant, without causing any aspersion to the defence counsel appeared for the accused, but to only save the accused from the gallows, pointed out that the records would indicate that the accused was not meted out with effective legal assistance. The learned counsel submitted that the defence counsel failed to cross-examine PW 1 and few other witnesses. Further, it was pointed out that the counsel also should not have cross-examined PW 17, since he was not put to chief-examination. The learned counsel submitted that the appellant, a tribal, coming from very poor circumstances, could not have engaged a competent defence lawyer to conduct a case on his behalf. Placing reliance on the judgment of the US Supreme Court in *Strickland* v. *Washington* [*Strickland* v. *Washington*, 80 L Ed 2d 674 : 466 US 668 (1984)], the learned counsel pointed out that, under Article 21 of our Constitution, it is a legal right of the accused to have a fair trial, which the accused was deprived of.

36. Right to get proper and competent assistance is the facet of fair trial. This Court in *M.H. Hoskot* v. *State of Maharashtra* [(1978) 3 SCC 544: 1978 SCC (Cri) 468] , *State of Haryana* v. *Darshana Devi* [(1979) 2 SCC 236], *Hussainara Khatoon (4)* v. *State of Bihar* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] and *Ranjan Dwivedi* v.*Union of India* [(1983) 3 SCC 307 : 1983 SCC (Cri) 581] , pointed out that if the accused is unable to

engage a counsel, owing to poverty or similar circumstances, trial would be vitiated unless the State offers free legal aid for his defence to engage a counsel, to whose engagement, the accused does not object. It is a constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution. Section 304 CrPC provides for legal assistance to the accused on State expenditure. Apart from the statutory provisions contained in Article 22(1) and Section 304 CrPC, in *Hussainara Khatoon (4) case* [(1980) 1 SCC 98 : 1980 SCC (Cri) 40] , this Court has held that: (SCC p. 105, para 7)

> "7. … This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation. …"

37. The question raised, in this case, is with regard to ineffective legal assistance which, according to the counsel, caused prejudice to the accused and, hence, the same may be treated as a mitigating circumstance while awarding sentence. A few circumstances pointed out to show ineffective legal assistance are as follows:

(*1*) Failure to cross-examine PW 1, the injured first informant which, according to the counsel, is a strong circumstance of "ineffective legal assistance".

(*2*) The omission to point out the decision of this Court in *Dalbir Singh* [*State of Punjab* v. *Dalbir Singh*, (2012) 3 SCC 346 : (2012) 2 SCC (Cri) 143] , wherein this Court held that Section 27(3) of the Arms Act was unconstitutional, was a serious omission of "ineffective legal advice", at the trial stage, even though the High Court has found the appellant not guilty under Section 27 of the Arms Act, 1959.

(*3*) Ventured to cross-examine PW 17, who was not put to chief examination.

38. Right to get proper legal assistance plays a crucial role in adversarial system, since access to counsel's skill and knowledge is necessary to accord the accused an ample opportunity to meet the case of the prosecution. In *Strickland case* [*Strickland* v. *Washington*, 80 L Ed 2d 674 : 466 US 668 (1984)] , the US Court held that a convicted defendant alleging ineffective assistance of counsel must show not only that counsel was

not functioning as the counsel guaranteed by the Sixth Amendment so as to provide reasonable effective assistance, but also that counsel's errors were so serious as to deprive the defendant of a fair trial. The Court held that the defiant convict should also show that because of a reasonable probability, but for counsel's unprofessional errors, the results would have been different. The Court also held as follows: (L Ed p. 682)

> "… Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case."

39. The court, in determining whether prejudice resulted from a criminal defence counsel's ineffectiveness, must consider the totality of the evidence. When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is whether there is a reasonable probability that, absent the errors, the court independently reweighing the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence.

40. When we apply the above test to the facts of this case, we are not prepared to say that the accused was not given proper legal assistance by the counsel (*sic*as counsel had) appeared before the trial court as well as before the High Court. …"

CHAPTER 5
INTERROGATION

INTERROGATION

The Right Against Self Incrimination

Article 20(3) of the Constitution of India guarantees the right against self-incrimination to a person "accused of an offence." The right is particularly important in the context of interrogation, since the person being/sought to be interrogated may refuse to answer any questions that may incriminate him/her. Various issues relating to Article 20(3) and Section 161(2), CrPC were dealt with by the Supreme Court in **Nandini Satpathy v. P.L. Dani**.[1] The Supreme Court held that the right against self-incrimination is not confined only to the trial, but to the investigative stage as well. Further, "being a witness" would not only connote being witness in court, but also would cover giving of information or evidence that has a tendency to incriminate the person giving such information/evidence. The Court further held that the phrase "compelled testimony" has to be read as evidence procured not merely by physical threats or violence, but also by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like. Noting the importance of legal assistance at the time of interrogation, the Court recognized the right of a person to seek legal assistance during interrogation. It cast a responsibility on the police to inform the person being interrogated of this right.[2]

In **Directorate of Enforcement v. Deepak Mahajan**,[3] the Supreme Court discussed the difference between "person accused of an offence," "accused person"and "accused." It summarized the Court's jurisprudence on Article 20(3) in this context, noting that a formal accusation (including filing of an FIR) brings a person within the purview of "person accused of an offence," and thus, to the protection under Article 20(3).

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1 (1978) 2 SCC 424

2 The issue of legal aid is discussed in more detail in the cover note on "Legal Aid" and cases in the compilation under that head

3 (1994) 3 SCC 440

Finally, in **Selvi v. State of Karnataka**,[4] the Supreme Court undertook a detailed analysis of Article 20(3). It discussed the rationale of the right against self-incrimination, *iner alia* noting the unreliable nature of compelled statements. It also importantly held, citing the decision of the eleven judge bench of the Court in *Kathi Kalu Oghad v. State of Bombay*,[5] that a discovery/recovery made under Section 27 of the IEA, based on a confessional statement taken by violating Article 20(3), will also be *ultra vires* the Constitution, and hence, inadmissible.

Safeguards During Custodial Interrogation

In its landmark decision, **D.K. Basu v. State of West Bengal**,[6] the Supreme Court laid down detailed guidelines relating to arrest, and steps to be taken by an arresting officer. These steps were to serve as preventive steps against torture.[7]

4 (2010) 7 SCC 263
5 AIR 1961 SC 1808
6 (1997) 1 SCC 416
7 The discussion on torture in the D.K. Basu judgment is discussed under the head of "Torture" in the compilation

IN THE SUPREME COURT OF INDIA

Nandini Satpathy v. P.L. Dani

(1978) 2 SCC 424

V.R. Krishna Iyer, Jaswant Singh & V.D. Tulzapurkar, JJ.

Ms. Nandini Satpathy was directed to appear at a police station examination in connection with a case registered against her under the PCA. During the course of investigation she was interrogated with reference to a long string of questions, given to her in writing. Ms. Satpathy approached the Supreme Court, arguing that the right against self-incrimination, guaranteed by Article 20(3) of the Constitution of India would be violated if she we were compelled to answer the questions posed to her. In this landmark judgment, the Supreme Court deals with the interpretation of Article 20(3) of the Constitution, and Section 161(2) of the CrPC.

Iyer, J.: "10. The points in controversy may flexibly be formulated thus:

(*1*) Is a person *likely* to be accused of crimes i.e. a suspect accused, entitled to the sanctuary of silence as one "accused of any offence"? Is it sufficient that he is a potential — of course, not distant — candidate for accusation by the police?

(*2*) Does the bar against self-incrimination operate not merely with reference to a particular accusation in regard to which the police investigator interrogates, or does it extend also to other pending or potential accusations outside the specific investigation which has led to the questioning? That is to say, can an accused person, who is being questioned by a police officer in a certain case, refuse to answer questions plainly non-criminatory so far as that case is concerned but probably exposes him to the perils of inculpation in other cases *in posse* or *in esse* elsewhere?

(*3*) Does the constitutional shield of silence swing into action only in court or can it barricade the "accused" against incriminating interrogation at the stages of police investigation?

(*4*) What is the ambit of the cryptic expression "compelled to be a witness against himself" occurring in Article 20(3) of the Constitution? Does "compulsion" involve physical or like pressure or duress of an unlawful texture or does it cover also the crypto-compulsion or psychic coercion, given a tense situation or officer in authority interrogating an accused person, armed with power to insist on an answer?

(*5*) Does being "a witness against oneself" include testimonial *tendency* to incriminate or probative probability of guilt flowing from the answer?

(*6*) What are the parameters of Section 161(2) of the Criminal Procedure Code? Does tendency to expose a person to a criminal charge embrace answers which have an inculpatory impact in other criminal cases actually or about to be investigated or tried?

(*7*) Does "any person" in Section 161 of the Criminal Procedure Code include an accused person or only a witness?

(*8*) When does an answer self-incriminate or tend to expose one to a charge? What distinguishing features mark off nocent and innocent, permissible and impermissible interrogations and answers? Is the setting relevant or should the answer, in vacuo, bear a guilty badge on its bosom?

...

Setting the perspective of Article 20(3) and Section 161(2)

21. Back to the constitutional quintessence invigorating the ban on self-incrimination. The area covered by Article 20(3) and Section 161(2) is substantially the same. So much so, we are inclined to the view, terminological expansion apart, the Section 161(2) of the CrPC is a parliamentary gloss on the constitutional clause. …There are only two primary queries involved in this clause that seals the lips into permissible silence: (*i*) Is the person called upon to testify "accused of any offence"? (*ii*) Is he being compelled to be witness *against* himself? A constitutional provision receives its full semantic range and so it follows that a wider connotation must be imparted to the expressions "accused of any offence" and "to be witness against himself". The learned Advocate-General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already

registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression "expose himself to a criminal charge". Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges. In Article 20(3), the expression "accused of any offence" must mean formally accused *in praesenti* not *in futuro* — not even imminently as decisions now stand. The expression "to be witness against himself" means more than the court process. Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3). This is precisely what Section 161(2) means. That sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are co-terminous in the protective area. While the Code may be changed, the Constitution is more enduring. Therefore, we have to base our conclusion not merely upon Section 161(2) but on the more fundamental protection, although equal in ambit, contained in Article 20(3).

22. In a way this position brings us nearer to the *Miranda* mantle of exclusion which extends the right against self-incrimination, to police examination and custodial interrogation and takes in suspects as much as regular accused persons. Under the Indian Evidence Act, the *Miranda* exclusionary rule that custodial interrogations are inherently coercive finds expression (Section 26), although the Indian provision confines it to confession which is a narrower concept than self-crimination.

23. …Our constitutional perspective has…to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice.

24. Whether we consider the Talmudic law or the Magna Carta, the Fifth Amendment, the provisions of other constitutions or Article 20(3), the driving force behind the refusal to permit forced self-crimination is the system of

torture by investigators and courts from medieval times to modern days. Law is a response to life and the English rule of the accused's privilege of silence may easily be traced as a sharp reaction to the Court of Star Chamber when self-incrimination was not regarded as wrongful. Indeed, then the central feature of the criminal proceedings, as Holdsworth has noted, was the examination of the accused.

25. The horror and terror that then prevailed did, as a reaction, give rise to the reverential principle of immunity from interrogation for the accused. Sir James Stephen has observed:

> "For at least a century and a half the (English) Courts have acted upon the supposition that to question a prisoner is illegal.... This opinion arose from a peculiar and accidental state of things which has long since passed away and our modern law is in fact derived from somewhat questionable source though it may no doubt be defended." [Sir James Stephen (1857)]."

26. Two important considerations must be placed at the forefront before sizing up the importance and impregnability of the anti-self-incrimination guarantee. The first is that we cannot afford to write off the fear of police torture leading to forced self-incrimination as a thing of the past. Recent Indian history does not permit it, contemporary world history does not condone it…

…

29. The first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof. Of course, the means must be as good as the ends and the dignity of the individual and the freedom of the human person cannot be sacrificed by resort to improper means, however worthy the ends. Therefore, "third degree" has to be outlawed and indeed has been. We have to draw up clear lines between the whirlpool and the rock where the safety of society and the worth of the human person may co-exist in peace.

30. We now move down to the role of the Latin maxim "*nemo teneturseipsumtenetur*" which, literally translated means, a man cannot represent himself as guilty. This rule prevailed in the Rabbinic courts and found a place in the Talmud (no one can incriminate himself). Later

came the Star Chamber history and Anglo-American revulsion. Imperial Britain transplanted part of it into India in the CrPC Our Constitution was inspired by the high-minded inhibition against self-incrimination from Anglo-American sources. Thus we have a broad review of the origins and bearings of the fundamental right to silence and the procedural embargo on testimonial compulsion. The American cases need not detain us, although *Miranda* v. *Arizona* being the lodestar on the subject, may be referred to for grasping the basics of the Fifth Amendment bearing on oral incrimination by accused persons.

31. We have said sufficient to drive home the anxious point that this cherished principle which prescribes compulsory self-accusation, should not be dangerously over-broad nor illusorily whittled down. And it must openly work in practice and not be a talismanic symbol. The *Miranda* ruling clothed the Fifth Amendment with flesh and blood and so must we, if Article 20(3) is not to prove a promise of unreality. Aware that the questions raised go to the root of criminal jurisprudence we seek light from *Miranda* for interpretation, not innovation, for principles in their settings, not borrowings for our conditions…Chief Justice Warren mentioned the setting of the case and of the times such as official overbearing, "third degree", sustained and protracted questioning incommunicado, rooms cut off from the outside world — methods which nourished but were becoming exceptions. "But", noted the Chief Justice, "they are sufficiently widespread to be the object of concern". The *Miranda* court quoted from the conclusion of the Wickersham Commission Report made nearly half a century ago, and continued — words which ring a bell in Indian bosoms and so we think it relevant to our consideration and read it…The texts thus stress that the major qualities an interrogator should possess are patience and perseverance…The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt…A thorough and intimate sketch is made of the versatility of the arts of torture developed officially in American country calculated to break, by physical or psychological crafts, the morale of the suspect and make him cough up confessional answers. Police sops and syrups of many types are prescribed to wheedle unwitting words of guilt from tough or gentle subjects. The end product is involuntary incrimination, subtly secured, not crudely traditional. Our police processes are less "scholarly" and sophisticated, but?

32.33. Another moral from the *Miranda* reasoning is the burning relevance of erecting protective fenders and to make their observance a police obligation so that the angelic Article [20(3)] may face up to satanic

situations…We feel that by successful interpretation Judge-centred law must catalyze community-centred legality.

34. There is one touch of nature which makes the judicial world kin — the love of justice-in-action and concern for human values. So, regardless of historical origins and political borrowings, the framers of our Constitution have cognised certain pessimistic poignancies and mellow life meanings and obligated Judges to maintain a "fair state-individual balance" and to broaden the fundamental right to fulfil its purpose, lest frequent martyrdoms reduce the article to a mock formula. Even silent approaches, furtive moves, slight deviations and subtle ingenuities may erode the article's validity unless the law outlaws illegitimate and unconstitutional procedures before they find their first firm footing. The silent cause of the final fall of the tall tower is the first stone obliquely and obliviously removed from the base. And Article 20(3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness. The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy. The police reflect the State, the State society. The Indian legal situation has led to judicial concern over the *State* v. *Individual balance*. After tracing the English and American developments in the law against self-incrimination, Jagannadadas, J., in *M.P. Sharma case* [*M.P. Sharma* v. *Satish Chandra, D.M., Delhi*, AIR 1954 SC 300 : 1954 SCR 1077, 1085, 1086 : 1954 Cri LJ 865] observed:

> "Since the time when the principle of protection against self-incrimination became established in English law and in other systems of law which have followed it, there has been considerable debate as to the utility thereof and serious doubts were held in some quarters that this principle has a tendency to defeat justice. In support of the principle it is claimed that the protection of accused against self-incrimination promotes active investigation from external sources to find out the truth and proof of alleged or suspected crime instead of extortion of confessions on unverified suspicion.... On the other hand, the opinion has been strongly held in

> some quarters that this rule has an undesirable effect on social interests and that in the detection of crime, the State is confronted with overwhelming difficulties as a result of this privilege. It is said this has become a hiding place of crime and has outlived its usefulness and that the rights of accused persons are amply protected without this privilege and that no innocent person is in need of it....
>
> In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to. prevent its circumvention...."

Issues answered; "*Any person*" *in Section 161 CrPC*

35. We will now answer the questions suggested at the beginning and advert to the decisions of our Court which set the tone and temper of the "silence" clause and bind us willy-nilly. We have earlier explained why we regard Section 161(2) as a sort of parliamentary commentary on Article 20(3). So, the first point to decide is whether the police have power under Sections 160 and 161 of the CrPC to question a person who, then was or, in the future may incarnate as, an accused person. The Privy Council and this Court have held that the scope of Section 161 does include actual accused and suspects and we deferentially agree without repeating the detailed reasons urged before us by counsel.

36. The Privy Council, in *Pakala Narayana Swami case* [*Pakala Narayana Swami* v. *Emperor*, AIR 1939 PC 47, 51 : 66 IA 66, 78] …reached the conclusion that "any person" in Section 161 CrPC, would include persons then or ultimately accused. The view was approved in *Mahabir Mandal case* [*Mahabir Mandal* v. *State of Bihar*, (1972) 1 SCC 748] . We hold that "any person supposed to be acquainted with the facts and circumstances of the case" includes an accused person who fills that role because the police *suppose* him to have committed the crime and must, therefore,

be familiar with the facts. The supposition may later prove a fiction but that does not repel the section. Nor does the marginal note "examination of *witnesses* by police" clinch the matter. A marginal note clears ambiguity but does not control meaning. Moreover, the suppositions accused figures functionally as a witness. "To be a witness", from a functional angle, is to impart knowledge in respect of a relevant fact, and that is precisely the purpose of questioning the accused under Section 161 CrPC. The dichotomy between "witnesses" and "accused" used as terms of art, does not hold good here. The amendment, by Act 15 of 1941, of Section 162(2) of the CrPC is a legislative acceptance of the *Pakala Narayana Swami* reasoning and guards against a possible repercussion of that ruling. The appellant squarely fell within the interrogational ring. To hold otherwise is to hold up investigative exercise, since questioning suspects is desirable for detection of crime and even protection of the accused. Extreme positions may boomerang in law as in politics. Moreover, as the *Miranda* decision states (pp. 725, 726):

> "*It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is*, *of course*, *admissible in evidence*. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." (emphasis added)

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, e.g. *Chambers* v. *Florida* [309 US 227, 240-41 (1960) : 84 L Ed 716, 724] . The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted

with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr Justice Brandeis once observed:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the Government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justified the means... would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States* [277 US 438, 485 (1928): 72 L Ed 944, 959], (dissenting opinion)."

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law".

Article 20(*3*) *"Accused of an offence"*

37. It is idle to-day to ply the query whether a person formally brought into the police diary as an accused person is eligible for the prophylactic benefits of Article 20(3). He is, and the learned Advocate-General fairly stated, remembering the American cases and the rule of liberal construction, that suspects, not yet formally charged but embryonically are accused on record, also may swim into the harbour of Article 20(3). We note this position but do not have to pronounce upon it because certain observations in *Oghad case* [*State of Bombay* v. *KathiKaluOghad*, (1962) 3 SCR 10] conclude the issue. And in *Bansilal case* [*Raja Narayanlal Bansilal* v. *Maneck Phiroz Mistry*, (1961) 1 SCR 417, 438] this Court observed:

> "Similarly, for invoking the constitutional right against testimonial compulsion guaranteed

under Article 20(3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution. Here again the nature of the accusation and its probable sequel or consequence are regarded as important.

Thus we go back to the question which we have already posed: was the appellant accused of any offence at the time when the impugned notices were served on him? In answering this question in the light of the tests to which we have just referred it will be necessary to determine the scope and nature of the enquiry which the inspector undertakes under Section 240; for, unless it is shown that an accusation of a crime can be made in such an enquiry, the appellant's plea under Article 20(3) cannot succeed. Section 240 shows that the enquiry which the inspector undertakes is in substance an enquiry into the affairs of the company concerned.... If, after receiving the report, the Central Government is satisfied that any person is guilty of an offence for which he is criminally liable, it may, after taking legal advice, institute criminal proceedings against the offending person under Section 242(1); but the fact that a prosecution may ultimately be launched against the alleged offender will not retrospectively change the complexion or character of the proceedings held by the inspector when he makes the investigation. Have irregularities been committed in managing the affairs of the company; if yes, what is the nature of the irregularities? Do they amount to the commission of an offence punishable under the criminal law? If they do, who is liable for the said offence? These and such other questions fall within the purview of the inspector's investigation. The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company

> to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise, against any specified individual; there may be a general allegation that the affairs are irregularly, improperly or illegally managed; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as in investigation which starts with an accusation contemplated in Article 20(3) of the Constitution. In this connection it is necessary to remember that the relevant sections of the Act appear in Part VI which generally deals with management and administration of the companies."

38. …Further observations in *Bansilal case* make it out that in an enquiry undertaken by an inspector to investigate into the affairs of a company, the statement of a person not yet an accused, is not hit by Article 20(3). Such a general enquiry has no specific accusation before it and, therefore, no specific accused whose guilt is to be investigated. Therefore, Article 20(3) stands excluded.

39. In *R.C. Mehta* [*Romesh Chandra Mehta* v. *State of West Bengal*, AIR 1970 SC 940 : (1969) 2 SCR 461 : 1970 Cri LJ 863] also the Court observed: (SCR p. 472)

> "Normally a person stands in the character of an accused when a first information report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence. Where a Customs Officer arrests a person and

> informs that person of the grounds of his arrest, [which he is bound to do under Article 22(1) of the Constitution] for the purpose of holding an enquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate."

…

41. It is plausible to argue that, where realism prevails over formalism and probability over possibility, the enquiries under criminal statutes with quasi-criminal investigations are of an accusatory nature and are, sure to end in prosecution, if the offence is grave and the evidence gathered good. And to deny the protection of a constitutional shield designed to defend a suspect because the enquiry is preliminary and may possibly not reach the court is to erode the substance while paying hollow homage to the holy verbalism of the article. We are not directly concerned with this facet of Article 20(3); nor are we free to go against the settled view of this Court. There it is.

At what stage of the justice process does Article 20(*3*) *operate?*

42. Another fatuous opposition to the application of the constitutional inhibition may be noted and negatived. Does the ban in Article 20(3) operate *only* when the evidence previously procured from the accused is sought to be introduced into the case at the trial by the Court? This submission, if approved, may sap the juice and retain the rind of Article 20(3) doing interpretative violence to the humanist justice of the proscription.

43. The text of the clause contains no such clue, its intendment is stultified by such a judicial "amendment" and an expansive construction has the merit of natural meaning, self-fulfilment of the "silence zone" and the advancement of human rights. We overrule the plea for narrowing down the play of the sub-article to the forensic phase of trial. It works where the mischief is, in the womb i.e. the police process…The constitutional shield must be as broad as the contemplated danger. The Court in *M.P. Sharma case* took this extended view (SCR p. 1088):

> "Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the courtroom. The phrase used in Article 20(3) is 'to be a witness' and not to 'appear as a witness': It follows that the protection afforded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the courtroom but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.
>
> Considered in this light, the guarantee under Article 20(3) would be available in the present cases to these petitioners against whom a first information report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them."

44. …If the police can interrogate to the point of self-accusation, the subsequent exclusion of that evidence at the trial hardly helps because the harm has been already done. The police will prove through other evidence what they have procured through forced confession. So it is that the foresight of the framers has pre-empted self-incrimination at the incipient stages by not expressly restricting it to the trial stage in court. True, compelled testimony previously obtained is excluded. But the preventive blow falls also on pre-court testimonial compulsion. The condition, as the decisions now go, is that the person compelled must be an accused. Both precedent procurement and subsequent exhibition of self-criminating

testimony are obviated by intelligent constitutional anticipation.

(*i*) *What is an incriminatory statement?*

(*ii*) *What is compelled testimony?*

45. Two vital, yet knotty, problems demand solution at this stage. What is "being witness against oneself"? Or, in the annotational language of Section 161(2), when are answers tainted with the tendency to expose an accused to a criminal charge? When can testimony be castigated as "compelled"? The answer to the first has been generally outlined by us earlier. Not all relevant answers are criminatory; not all criminatory answers are confessions. Tendency to expose to a criminal charge is wider than actual exposure to such charge. The spirit of the American rulings and the substance of this Court's observations justify this "wheels within wheels" conceptualization of self-accusatory statements. The orbit of relevancy is large. Every fact which has a nexus to any part of a case is relevant, but such nexus with the case does not make it noxious to the accused. Relevance may co-exist with innocence and constitutional censure is attracted only when inference of nocence exists. And an incriminatory inference is not enough for a confession. Only if, without more, the answer establishes guilt, does it amount to a confession. An illustration will explicate our proposition.

46. Let us hypothesize a homicidal episode in which A dies and B is suspected of murder; the scene of the crime being 'C'. In such a case a bunch of questions may be relevant and yet be innocent. Any one who describes the scene as well-wooded or dark or near a stream may be giving relevant evidence of the landscape. Likewise, the medical evidence of the wounds on the deceased and the police evidence of the spots where blood pools were noticed are relevant but vis-a-vis B may have no incriminatory force. But an answer that B was seen at or near the scene, at or about the time of the occurrence or had blood on his clothes will be criminatory, is the hazard of inculpatory implication. In this sense, answers that would, in themselves, support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20(3) if elicited by pressure from the mouth of the accused. If the statement goes further to spell in terms that B killed A, it amounts to confession.

An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20(3) strikes at confessions and self-incriminations but leaves untouched other relevant facts.

48. Phipson, it is true, has this to say on self-incrimination: "The rule applies to questions not only as to direct criminal acts, but as to perfectly innocent matters, forming merely links in the chain of proof". We think this statement too widely drawn if applied to Indian Statutory and Constitutional Law Cross also has overstated the law, going by Indian provisions by including in the prohibition even those answers "*which might be used as a step towards obtaining evidence against him*". The policy behind the privilege, under our scheme, does not swing so wide as to sweep out of admissibility statements neither confessional per se nor guilty in tendency but merely relevant facts which, viewed in any setting, does not have a sinister import. To spread the net so wide is to make a mockery of the examination of the suspect, so necessitous in the search for truth. Over-breadth undermines, and we demur to such morbid exaggeration of a wholesome protection. Neither *Hoffman* nor *Malloy* nor *Maness* [42 L Ed 2d 574] drives us to this devaluation of the police process. And we are supported by meaningful hints from prior decisions. In *KathiKaluOghad case* [AIR 1961 SC 1808 : (1962) 3 SCR 10, 32 : (1961) 2 Cri LJ 856] , this Court authoritatively observed, on the bounds between constitutional proscription and testimonial permission: (p. 32)

> "In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself."
>
> (emphasis added)

Again, the Court indicated that Article 20(3) could be invoked only against statements which "had a *material bearing on the criminality* of the maker of the statement". "By itself" does not exclude the setting or other integral circumstances but means something in the fact disclosed a guilt element.

Blood on clothes, gold bars with notorious marks and presence on the scene or possession of the lethal weapon or corrupt currency have a tale to tell, beyond red fluid, precious metal, gazing at the stars or testing sharpness or value of the rupee. The setting of the case is an implied component of the statement.49. The problem that confronts us is amenable to reasonable solution. Relevancy is tendency to make a fact probable. Crimination is a tendency to make guilt probable. Confession is a potency to make crime conclusive. The taint of tendency, under Article 20(3) and Section 161(1), is more or less the same. It is not a remote, recondite, freak or fanciful inference but a reasonable, real, material or probable deduction. This governing test holds good, it is pragmatic, for you *feel* the effect, its guilty portent, fairly clearly.

50. We, however, underscore the importance of the specific setting of a given case for judging the tendency towards guilt. Equally emphatically, we stress the need for regard to the impact of the plurality of other investigations in the offing or prosecutions pending on the amplitude of the immunity. "To be witness against oneself" is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from "tendency to be exposed to *a* criminal charge". "A criminal charge" covers *any* criminal charge then under investigation or trial or which imminently threatens the accused.

51. The setting of the case or cases is also of the utmost significance in pronouncing on the guilty tendency of the question and answer. What in one milieu may be colourless, may, in another be criminal. "Have you fifty rupees in your pocket?" asks a police officer from a PWD engineer. He may have. It spells no hint of crime. But if, after setting a trap, if the same policeman, on getting the signal, moves in and challenges the engineer, "have you fifty rupees in your pocket?" The answer, if "yes", virtually proves the guilt. "Were you in a particular house at a particular time?" is an innocent question; but in the setting of a murder at that time in that house, where none else was present, an affirmative answer may be an affirmation of guilt. While subjectivism of the accused may exaggeratedly apprehend a guilty inference lingering behind every non-committal question, objectivism reasonably screens nocent from innocent answers. Therefore, making a fair margin for the accused's credible apprehension of implication from his own mouth, the court will view the interrogation objectively to hold it criminatory or otherwise, without surrendering to

the haunting subjectivism of the accused. The dynamics of constitutional "silence" cover many interacting factors and repercussions from "speech".

52. The next serious question debated before us is as to the connotation of "compulsion" under Article 20(3) and its reflection in Section 161(1). In *KathiKaluOghad case*, Sinha, C.J., explained: (SCR p. 35)

> "In order to bring the evidence within the inhibitions of clause (3) of Article 20 it must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement. 'Compulsion' in the context, must mean what in law is called 'duress'. In the Dictionary of English Law by Earl Jowitt, 'duress' is explained as follows:
>
> 'Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per minas). Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person.'
>
> The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police

> custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it."

This question of fact has to be carefully considered against the background of the circumstances disclosed in each case.

53. The policy of the law is that each individual, accused included, by virtue of his guaranteed dignity, has a right to a private enclave where he may lead a free life without overbearing investigatory invasion or even crypto-coercion. The protean forms gendarme duress assumes, the environmental pressures of police presence, compounded by incommunicado confinement and psychic exhaustion, torturesome interrogation and physical menaces and other ingenious, sophisticated procedures — the condition, mental, physical, cultural and social, of the accused, the length of the interrogation and the manner of its conduct and a variety of like circumstances, will go into the pathology of coerced para-confessional answers. The benefit of doubt, where reasonable doubt exists, must go in favour of the accused. The U.S. Supreme Court declared, and we agree with it, that

> "… our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognised. The meaning and vitality of the Constitution have developed against narrow and restrictive construction." [54 L Ed 793, 810]"

Making Article 20(3) effective in action

54. Impregnability of the constitutional fortress built around Article 20(3) is the careful concern of the Court and, for this purpose, concrete directives must be spelt out. To leave the situation fluid, after a general discussion and statement of broad conclusions, may not be proper where

glittering phrases pale into gloomy realities in the dark recesses where the law has to perform. *Law is what law does and not what law says*. This realisation obligates us to set down concrete guidelines to make the law a working companion of life. In this context we must certainly be aware of the burdens which law enforcement officials bear, often under trying circumstances and public ballyhoo and amidst escalating as well as novel crime proliferation. Our conclusions are, therefore, based upon an appreciation of the difficulties of the police and the necessities of the Constitution.

55. The functional role and practical sense of the law is of crucial moment. "An acre in Middlesex", said Macaulay, "is better than a principality in Utopia" [Introduction to "Law in America" by Bernard Schwartz] . This realism has great relevance when dealing with interrogation, incrimination, police station, the Constitution and the Code.

…

57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation — not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read "compelled testimony" as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes "compelled testimony", violative of Article 20(3).

58. A police officer is clearly a person in authority. Insistence on answering

is a form of pressure especially in the atmosphere of the police station unless certain safeguards erasing duress are adhered to. Frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure violating Article 20(3). Legal penalty may by itself not amount to duress but the manner of mentioning it to the victim of interrogation may introduce an element of tension and tone of command perilously hovering near compulsion.

59. We have explained elaborately and summed up, in substance, what is self-incrimination or tendency to expose oneself to a criminal charge. It is less than "relevant" and more than "confessional". Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference in the event of an answer being supplied, the tendency to incriminate springs into existence. We hold further that the accused person cannot be forced to answer questions merely because the answers thereto are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to guilt in some other accusation actual or imminent, even though the investigation under way is not with reference to that. We have already explained that in determining the incriminatory character of an answer the accused is entitled to consider — and the Court while adjudging will take note of — the setting, the totality of circumstances, the equation, personal and social, which have a bearing on making an answer substantially innocent but in effect guilty in import. However, fanciful claims, unreasonable apprehensions and vague possibilities cannot be the hiding ground for an accused person. He is bound to answer where there is no clear tendency to criminate.

…

62. Right at the beginning we must notice Article 22(1) of the Constitution, which reads:

> "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of

Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice.

63. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. The *Miranda* decision has insisted that if an accused person asks for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Overreaching Article 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that the police must secure the services of a lawyer. That will lead to "police-station-lawyer" system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.

64. Not that a lawyer's presence is a panacea for all problems of involuntary self-crimination, for he cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot harangue the police but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.

65. We realize that the presence of a lawyer is asking for the moon in many cases until a public defender system becomes ubiquitous. The police need not wait more than for a reasonable while for an advocate's arrival. But they must invariably warn — and record that fact — about the right to silence against self-incrimination; and where the accused is literate take his written acknowledgment.

66. "Third degree" is an easy temptation where the pressure to detect is heavy, the cerebration involved is hard and the resort to torture may yield

high dividends. Das Gupta, J. dissenting for the minority on the bench, drove home a point which deserves attention while on constitutional construction: (*KathiKaluOghad case*, SCR pp. 43-44)

> "It is sufficient to remember that long before our Constitution came to be framed the wisdom of the policy underlying these rules had been well recognised. Not that there was no view to the contrary; but for long it has been generally agreed among those who have devoted serious thought to these problems that few things could be more harmful to the detection of crime or conviction of the real culprit, few things more likely to hamper the disclosure of truth than to allow investigators or prosecutors to slide down the easy path of producing by compulsion, evidence, whether oral or documentary, from an accused person. It has been felt that the existence of such an easy way would tend to dissuade persons in charge of investigation or prosecution from conducting diligent search for reliable independent evidence and from sifting of available materials with the care necessary for ascertainment of truth. If it is permissible in law to obtain evidence from the accused person by compulsion, why tread the hard path of laborious investigation and prolonged examination of other men, materials and documents? It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law 'to sit comfortably in the shade rubbing red pepper into a poor devil's eyes rather than to go about in the sun hunting up evidence' [Stephen, History of Criminal Law, p. 442] . No less serious is the danger that some accused persons at least, may be induced to furnish evidence against themselves which is totally false — out of sheer despair and an anxiety to avoid an unpleasant present. Of all these dangers the Constitution-makers were clearly well aware and it was to avoid them that Article 20(3) was put in the Constitution."

67. The symbiotic need to preserve the immunity without stifling legitimate investigation persuades us to indicate that after an examination of the accused, where lawyer of his choice is not available, the police official must take him to a Magistrate, doctor or other willing and responsible non-partisan official or non-official and allow a secluded audience where he may unburden himself beyond the view of the police and tell whether he has suffered duress, which should be followed by judicial or some other custody for him where the police cannot reach him. That collocator may briefly record the relevant conversation and communicate it — not to the police — but to the nearest Magistrate. Pilot projects on this pattern may yield experience to guide the practical processes of implementing Article 20(3). We do not mandate but strongly suggest.

68. The statement of the accused, if voluntary, is admissible, indeed, invaluable. To erase involuntariness we must erect safeguards which will not "kill the goose". To ensure this free will by in-built structural changes is the desideratum. Short-run remedies apart, long-run recipes must be innovated whereby fists are replaced by wits, ignorance by awareness, "third degree" by civilised tools and technology. The factotum policeman who does everything from a guard of honour to traffic patrol to subtle detection is an obsolescent survival. Special training, special legal courses, technological and other detective updating, are important. An aware policeman is the best social asset towards crimelessness. The consciousness of the official as much as of the community is the healing hope for a crime-ridden society. Judge-centred remedies don't work in the absence of community-centred rights. All these add up to separation of investigatory personnel from the general mass and in-service specialisation of many hues on a scientific basis. This should be done vertically and horizontally. More importantly, the policeman must be released from addiction to coercion and be sensitized to constitutional values."

IN THE SUPREME COURT OF INDIA

Directorate of Enforcement v. Deepak Mahajan

(1994) 3 SCC 440

S. Ratnavel Pandian & K. Jayachandra Reddy, JJ.

The appellant was arrested under Section 35(1) of the FERA, 1973 and was taken before the Magistrate under Section 35(2) of the Foreign Exchange Regulation Act. In this case, the Court examined the difference between the term 'accused' under the Customs Act and the Foreign Exchange Regulation Act, and 'person who is accused of an offence' under Article 20(3) of the Constitution. In this context, the Court discusses its precedents in the context of Article 20(3).

Pandian, J.: "66. Section 35 of FERA and Section 104 of the Customs Act which confer power on the prescribed officer to effect the arrest deploy only the word 'person' and not 'accused' or 'accused person' or 'accused of any offence'. In fact, the word 'accused' appears only in the penal provisions of the special Acts, namely sub-section (4) of Section 56 of FERA and sub-section (3) of Section 135 of the Customs Act while explaining as to what would be the special and adequate reasons for awarding the sentence of imprisonment for a sub-minimum period, though sub-sections (1) to (3) of Section 56 of FERA and sub-sections (1) and (2) of Section 135 of Customs Act use the expression 'person' who becomes punishable on conviction under the penal provisions by the court trying the offence.

67. In this context, a relevant doubtful question arises for deliberation whether the expressions 'person', 'accused' or 'accused person' found in Section 167 of the Code and "person accused of any offence" used in Article 20(3) of the Constitution and Sections 25 and 27 of the Evidence Act denote one and the same meaning. Though it is not absolutely essential to exhaustively examine the connotation of these two expressions and render our considered and reasoned opinion, yet it has become necessary to fonder over to the limited question as to whether the expression 'accused' and 'accused person' appearing in Section 167(1) and (2) denote "a person accused of any offence" at the stage of authorising detention on production of an arrestee before a Magistrate.

…

74. Let us now approach this aspect of the matter from different angle with reference to the provisions of Article 20(3) of the Constitution as well as to Sections 24 to 27 of the Evidence Act.

75. The prohibitive sweep of Article 20(3) which imposes the ban on self-accusation reads, "No person accused of any offence shall be compelled to be a witness against himself."

76. In explaining the intendment of Article 20(3), relating to search and seizure of documents under Sections 94 and 96 of the old Code, an eight-Judge Bench of this Court in *M.P. Sharma* v. *Satish Chandra, District Magistrate, Delhi* [1954 SCR 1077 : AIR 1954 SC 300 : 1954 Cri LJ 865] held that one of the components for invoking sub-clause (3) of Article 20 should be that it is a right pertaining to a person 'accused of an offence.'

77. Having regard to the facts therein, it has been held: (SCR pp. 1086-87)

> "The cases with which we are concerned have been presented to us on the footing that the persons against whom the search warrants were issued, were all of them persons against whom the First Information Report was lodged and who were included in the category of accused therein and that therefore they are persons "accused of an offence" within the meaning of Article 20(3) and also that the documents for whose search the warrants were issued, being required for investigation into the alleged offences, such searches were for incriminating material."

78. Thereafter, a Constitution Bench of this Court in *Raja Narayanlal Bansilal* v.*Maneck Phiroz Mistry* [(1961) 1 SCR 417, 438 : AIR 1961 SC 29 : (1960) 30 Comp Cas 644] while dealing with the import of Article 20(3) with reference to certain provisions of the Indian Companies Act made the following observation, relying on the decision in *M.P. Sharma* [1954 SCR 1077 : AIR 1954 SC 300 : 1954 Cri LJ 865] : (SCR p. 438)

> "Similarly, for invoking the constitutional right against testimonial compulsion guaranteed under Article 20(3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution. Here again the nature of the accusation and its probable sequel or

consequence are regarded as important."

In the above two judgments, both the Benches have not discussed the distinction between the expression 'accused person' and 'person accused of any offence'.

79. Subsequently, an eleven-Judge Bench of this Court in State of Bombay v. Kathi Kalu Oghad [(1962) 3 SCR 10 : AIR 1961 SC 1808 : (1961) 2 Cri LJ 856] went into the question and by majority concluded that an accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more.

80. What is that 'anything more' required has been explained in the following words : (SCR p. 37)

> "(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case-law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.
>
> (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused any time after the statement has been made."

See also *Nandini Satpathy* v. *P.L. Dani* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] .

81. The essence of the above decisions is that to bring a person within the meaning of 'accused of any offence', that person must assimilate the character of an 'accused person' in the sense that he must be accused of any offence.

82. We think it is not necessary to interpret the expression, "person accused of any offence" as appearing in Article 20(3) any more but suffice to note that the same expression is found in Sections 25 and 27 of the Evidence Act.

83. It is apposite to note that clauses (1) to (3) of Article 22 which speak

of a 'person arrested' use only the word 'person'. Article 22(2) states that "every person who is arrested and detained in custody…". A similar expression is used in Section 167(1) of the code reading, "Whenever any person is arrested and detained in custody, …" Thus while referring to a person arrested and detained neither Article 22 nor Section 167 employs the expression "accused of any offence".

84. Coming to the provisions of the Evidence Act, Section 24 uses the expression 'accused person' whereas in Sections 25 and 27, the identical expression "person accused of any offence" is used. But in Section 26 neither of these two expressions is used but "any person". It was only while in examining the admissibility or otherwise of a statement of an 'accused person' or "a person accused of any offence", this Court in a series of judgments has dealt with the connotation of these two expressions but not otherwise.

85. Justice J.C. Shah who was member of the Bench in Raja Narayanlal Bansilal [(1961) 1 SCR 417, 438] speaking for the majority of a Constitution Bench in State of U.P. v. Deoman Upadhyaya [(1961) 1 SCR 14] has observed as follows: (SCR p. 21)

> "The ban which is partial under Section 24 and complete under Section 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, 'accused person' in Section 24 and the expression 'a person accused of any offence' have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding."

86. The judgment in Deoman case [(1961) 1 SCR 14] is referred to State of Bombay v. KathiKaluOghad [(1962) 3 SCR 10] but that Bench has not expressed any view as to whether the expression 'accused person' and the expression "person accused of any offence" have the same connotation. But in none of these judgments, Section 167 has come up for interpretation.

87. In Ramesh Chandra Mehta v. State of W.B. [(1969) 2 SCR 461] a Constitution Bench of this Court while examining the admissibility of a statement recorded under Section 171-A of the Sea Customs Act of 1878

(which Act is now repealed) corresponding to Section 108 of the Customs Act of 1962 has held that a person arrested by a Customs Officer is not a person accused of an offence within the meaning of Article 20(3) of the Constitution or within the meaning of Section 25 of the Evidence Act.

88. In Veera Ibrahim v. State of Maharashtra [(1976) 2 SCC 302] a Division Bench of this Court following the dictum laid down in Ramesh Chandra Mehta [(1969) 2 SCR 461] observed that in order to claim the benefit of the guarantee against testimonial compulsion embodied in clause (3) of Article 20 it must be shown, firstly that the person who made the statement was "accused of any offence"; secondly that he made the statement under compulsion. It has been further held that when the statement of a person is recorded by the Customs Officer under Section 108, he is not a person "accused of an offence under the Customs Act" and that an accusation which would stamp a person with the character of an accused of any offence is levelled only when the complaint is filed against that person by the Customs Officer complaining of the commission of any offence under the provisions of the Customs Act.

89. In a recent decision, this Court in Poolpandi v. Superintendent, Central Excise [(1992) 3 SCC 259] has reiterated the same view and held that a person being interrogated during investigation under Customs Act or FERA is not a person accused of any offence within the meaning of Article 20(3) of the Constitution.

90. In this connection, reference may be made to a decision in *Ramanlal Bhogilal Shah* v. *D.K. Guha* [(1973) 1 SCC 696 : 1973 SCC (Cri) 583] which has distinguished *Ramesh Chandra Mehta* [AIR 1970 SC 940: (1969) 2 SCR 461 : 1970 Cri LJ 863] and held on the facts of that case that the person served with summons under the FERA, was an accused within the meaning of Article 20(3) of the Constitution of India. The decision in *Ramanlal Bhogilal* [(1973) 1 SCC 696 : 1973 SCC (Cri) 583] has taken a different view to that of *Ramesh Chandra Mehta* [AIR 1970 SC 940 : (1969) 2 SCR 461 : 1970 Cri LJ 863] which view was examined in *Poolpandi* [(1992) 3 SCC 259 : 1992 SCC (Cri) 620] and was distinguished on the ground that a first information report in *Ramanlal Bhogilal Shah* [(1973) 1 SCC 696 : 1973 SCC (Cri) 583] has been lodged earlier and consequently it was settled that the person was accused of an offence within the meaning of Article 20(3)."

IN THE SUPREME COURT OF INDIA

D.K. Basu v. State of West Bengal

(1997) 1 SCC 416

Kuldip Singh & Dr. A.S. Anand, JJ.

The Executive Chairman, Legal Aid Services, West Bengal, wrote a letter to the Chief Justice of India drawing his attention to certain news items published in newspapers regarding deaths in police lock-ups and custody. In its decision, the Supreme Court formulated detailed guidelines and safeguards which are available to the accused at the time of arrest, detention and interrogation.

Anand, J.: "9. The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

...

18. However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third-degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or

describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

...

24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometimes resulted in his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting in death, as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either policemen or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third-degree methods since they are in charge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal.

...

28. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of

third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

29. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third-degree methods during interrogation.

30. Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, RAW, Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well. *Death of Sawinder Singh Grover, Re* [1995 Supp (4) SCC 450 : 1994 SCC (Cri) 1464] , (to which Kuldip Singh, J. was a party) this Court took suomotu notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge an FIR and initiate criminal proceedings against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs 2 lakhs to the widow of the deceased by way of

ex gratia payment at the interim stage. Amendment of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

…

33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *saluspopuli suprema lex* (the safety of the people is the supreme law) and *salusrepublicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of *torture* for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated — indeed subjected to sustained and scientific interrogation — determined in accordance with the provisions of law. He cannot, however, be *tortured or subjected to third-degree methods* or *eliminated* with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

…

35. We, therefore, consider it appropriate to issue the following *requirements* to be followed in all cases of arrest or detention till legal provisions are made in that behalf as *preventive measures*:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The “Inspection Memo” must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

36. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

37. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

…

39. The *requirements* mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the *requirements* on All India Radio besides being shown on the National Network of Doordarshan any by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of

the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

Punitive Measures

…

41. Some punitive provisions are contained in the Indian Penal Code which seek to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Sections 330 and 331 provide for punishment of those who inflict injury or grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustrations (*a*) and (*b*) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions are, however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience."

IN THE SUPREME COURT OF INDIA

Selvi v. State of Karnataka

(2010) 7 SCC 263

K.G. Balakrishnan, R.V. Raveendran & J.M. Panchal

The case dealt with the involuntary administration of certain scientific techniques, such as narcoanalysis, polygraph examination and the BEAP test for the purpose of improving investigation efforts in criminal cases. The issue was whether statements made in the course of these tests violate Article 20(3) of the constitution.

Balakrishnan, J. "2. The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. Ordinarily, the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of the fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.

3. Objections have been raised in respect of instances where individuals who are the accused, suspects or witnesses in an investigation have been subjected to these tests without their consent. Such measures have been defended by citing the importance of extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidence through ordinary means.

4. In some of the impugned judgments, reliance has been placed on certain provisions of the Code of Criminal Procedure, 1973 and the Evidence Act, 1872 to refer back to the responsibilities placed on citizens to fully cooperate with the investigating agencies. It has also been urged that

administering these techniques does not cause any bodily harm and that the extracted information will be used only for strengthening investigation efforts and will not be admitted as evidence during the trial stage. The assertion is that improvements in fact finding during the investigation stage will consequently help to increase the rate of prosecution as well as the rate of acquittal. Yet another line of reasoning is that these scientific techniques are a softer alternative to the regrettable and allegedly widespread use of "third-degree methods" by investigators.

5. The involuntary administration of the impugned techniques prompts questions about the protective scope of the "right against self-incrimination" which finds place in Article 20(3) of our Constitution. In one of the impugned judgments, it has been held that the information extracted through methods such as "polygraph examination" and the "Brain Electrical Activation Profile (BEAP) test" cannot be equated with "testimonial compulsion" because the test subject is not required to give verbal answers, thereby falling outside the protective scope of Article 20(3). It was further ruled that the verbal revelations made during a narcoanalysis test do not attract the bar of Article 20(3) since the inculpatory or exculpatory nature of these revelations is not known at the time of conducting the test.

6. To address these questions among others, it is necessary to inquire into the historical origins and rationale behind the "right against self-incrimination". The principal questions are whether this right extends to the investigation stage and whether the test results are of a "testimonial" character, thereby attracting the protection of Article 20(3). Furthermore, we must examine whether relying on the test results or materials discovered with the help of the same creates a reasonable likelihood of incrimination for the test subject.

7. We must also deal with the arguments invoking the guarantee of "substantive due process" which is part and parcel of the idea of "personal liberty" protected by Article 21 of the Constitution. The first question in this regard is whether the provisions in the Code of Criminal Procedure, 1973 that provide for "medical examination" during the course of investigation can be read expansively to include the impugned techniques, even though the latter are not explicitly enumerated. To answer this question, it will be necessary to discuss the principles governing the interpretation of statutes in light of scientific advancements. Questions have also been raised with respect to the professional ethics of the medical personnel involved in the administration of these techniques. Furthermore, Article 21 has been

judicially expanded to include a "right against cruel, inhuman or degrading treatment", which requires us to determine whether the involuntary administration of the impugned techniques violates this right whose scope corresponds with evolving international human rights norms. We must also consider contentions that have invoked the test subject's "right to privacy", both in a physical and mental sense.

8. The scientific validity of the impugned techniques has been questioned and it is argued that their results are not entirely reliable. For instance, the narcoanalysis technique involves the intravenous administration of sodium pentothal, a drug which lowers inhibitions on the part of the subject and induces the person to talk freely. However, empirical studies suggest that the drug-induced revelations need not necessarily be true. Polygraph examination and the BEAP test are methods which serve the respective purposes of lie detection and gauging the subject's familiarity with information related to the crime. These techniques are essentially confirmatory in nature, wherein inferences are drawn from the physiological responses of the subject. However, the reliability of these methods has been repeatedly questioned in empirical studies. In the context of criminal cases, the reliability of scientific evidence bears a causal link with several dimensions of the right to a fair trial such as the requisite standard of proving guilt beyond reasonable doubt and the right of the accused to present a defence. We must be mindful of the fact that these requirements have long been recognised as components of "personal liberty" under Article 21 of the Constitution...

...

11. At this stage, it will be useful to frame the questions of law and outline the relevant sub-questions in the following manner:

I. Whether the involuntary administration of the impugned techniques violates the "right against self-incrimination" enumerated in Article 20(3) of the Constitution?

I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

I-B. Whether the results derived from the impugned techniques amount to "testimonial compulsion" thereby attracting the bar of Article 20(3)?

II. Whether the involuntary administration of the impugned

techniques is a reasonable restriction on "personal liberty" as understood in the context of Article 21 of the Constitution?

...

84. As per the Laboratory Procedure Manuals, the impugned tests are being conducted at the direction of the jurisdictional courts even without obtaining the consent of the intended test subjects. …

85. It is plausible that investigators could obtain statements from individuals by threatening them with the possibility of administering either of these tests. The person being interrogated could possibly make self-incriminating statements on account of apprehensions that these techniques will extract the truth. Such behaviour on the part of the investigators is more likely to occur when the person being interrogated is unaware of his/her legal rights or is intimidated for any other reason. It is a settled principle that a statement obtained through coercion, threat or inducement is involuntary and hence inadmissible as evidence during trial. However, it is not settled whether a statement made on account of the apprehension of being forcibly subjected to the impugned tests will be involuntary and hence inadmissible. This aspect merits consideration. It is also conceivable that an individual who has undergone either of these tests would be more likely to make self-incriminating statements when he/she is later confronted with the results. The answers to these questions rest on the permissibility of subjecting individuals to these tests without their consent.

I. Whether the involuntary administration of the impugned techniques violates the "right against self-incrimination" enumerated in Article 20(3) of the Constitution?

86. The investigators could seek reliance on the impugned tests to extract information from a person who is suspected or accused of having committed a crime. Alternatively, these tests could be conducted on witnesses to aid investigative efforts. As mentioned earlier, this could serve several objectives, namely, those of gathering clues which could lead to the discovery of relevant evidence, to assess the credibility of previous testimony or even to ascertain the mental state of an individual. With these uses in mind, we have to decide whether the compulsory administration of these tests violates the "right against self-incrimination" which finds place in Article 20(3) of the Constitution of India. Along with the "rule against double jeopardy" and the "rule against retrospective criminalisation"

enumerated in Article 20, it is one of the fundamental protections that controls interactions between individuals and the criminal justice system. Article 20(3) reads as follows:

> "20. (3) No person accused of any offence shall be compelled to be a witness against himself."

...

88. In the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights, since this approach was recognised in *Maneka Gandhi case* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248]. Hence, we must examine the "right against self-incrimination" in respect of its relationship with the multiple dimensions of "personal liberty" under Article 21, which include guarantees such as the "right to fair trial" and "substantive due process".

89. It must also be emphasised that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Fourty-fourth Amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended even during the operation of a Proclamation of Emergency. …

...

91**.** Not only does an accused person have the right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his/her silence.At the trial stage, Section 313(3) CrPC places a crucial limitation on the power of the court to put questions to the accused so that the latter may explain any circumstances appearing in the evidence against him. It lays down that the accused shall not render himself/herself liable to punishment by refusing to answer such questions, or by giving false answers to them. Further, proviso (*b*) to Section 315(1) CrPC mandates that even though an accused person can be a competent witness for the defence, his/her failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial. It is evident that Section 161(2) CrPC enables a person to choose silence in response to questioning by a police officer during the stage of investigation, and as per the scheme of Section 313(3) and proviso (*b*) to Section 315(1) of the Code, adverse inferences cannot be drawn on account of the accused person's silence during the trial stage.

…

Underlying rationale of the right against self-incrimination

102. As mentioned earlier "the right against self-incrimination" is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

103. The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, "the right against self-incrimination" is a vital safeguard against torture and other "third-degree methods" that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such "short cuts" will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the "right against self-incrimination" is a vital protection to ensure that the prosecution discharges the said onus.

…

110. It is argued that in aiming to create a fair State-individual balance in criminal cases, the task of the investigators and prosecutors is made unduly difficult by allowing the accused to remain silent. If the overall intent of the criminal justice system is to ensure public safety through expediency in investigations and prosecutions, it is urged that the privilege against self-incrimination protects the guilty at the cost of such utilitarian objectives. Another criticism is that adopting a broad view of this right does not deter improper practices during investigation and it instead encourages investigators to make false representations to courts about the voluntary or involuntary nature of custodial statements. It is reasoned that when investigators are under pressure to deliver results there is an inadvertent tendency to rely on methods involving coercion, threats, inducement or deception in spite of the legal prohibitions against them. Questions have also been raised about conceptual inconsistencies in the way that courts have expanded the scope of this right. One such objection is that if the legal system is obliged to respect the mental privacy of individuals, then why is there no prohibition against compelled testimony in civil cases which could expose parties to adverse consequences. Furthermore, questions have also been asked about the scope of the privilege being restricted to testimonial acts while excluding physical evidence which can be extracted through compulsion.

111. In response to John Wigmore's thesis about the separate foundations of the "rule against involuntary confessions", we must recognise the infusion of constitutional values into all branches of law, including procedural areas such as the law of evidence. While the abovementioned criticisms have been made in academic commentaries, we must defer to the judicial precedents that control the scope of Article 20(3)…

…

Applicability of Article 20(3) to the stage of investigation

113. The question of whether Article 20(3) should be narrowly construed as a trial right or a broad protection that extends to the stage of investigation has been conclusively answered by our courts. In M.P. Sharma v. Satish Chandra [AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] , it was held by Jagannadhadas, J. at SCR pp. 1087-88: (AIR p. 304, para 10)

> "10. Broadly stated the guarantee in Article 20(3) is against 'testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person

> standing his trial for an offence when called to the witness stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. … Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the courtroom.
>
> The phrase used in Article 20(3) is 'to be a witness' and not to 'appear as a witness': It follows that the protection afforded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the courtroom but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."

114. These observations were cited with approval by B.P. Sinha, C.J. in *State of Bombay* v. *KathiKaluOghad* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] , SCR at pp. 26-28…

115. The broader view of Article 20(3) was consolidated in *Nandini Satpathy* v.*P.L. Dani* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236]…

116. In upholding this broad view of Article 20(3), V.R. Krishna Iyer, J. relied heavily on the decision of the US Supreme Court in *Miranda* v. *Arizona* [16 L Ed 2d 694 : 384 US 436 (1965)]. The majority opinion (by Earl Warren, C.J.) laid down that custodial statements could not be used as evidence unless the police officers had administered warnings

about the accused's right to remain silent. The decision also recognised the right to consult a lawyer prior to and during the course of custodial interrogations. The practice promoted by this case is that it is only after a person has "knowingly and intelligently" waived of these rights after receiving a warning that the statements made thereafter can be admitted as evidence. The safeguards were prescribed in the following manner *ibid*. at US pp. 444-45: (L Ed pp. 706-07)

> "… the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

117. These safeguards were designed to mitigate the disadvantages faced by a suspect in a custodial environment. This was done in recognition of the fact that methods involving deception and psychological pressure were routinely used and often encouraged in police interrogations. Emphasis was placed on the ability of the person being questioned to fully comprehend and understand the content of the stipulated warning. It was held *ibid*. at US pp. 457-58: (*Miranda case* [16 L Ed 2d 694 : 384 US 436 (1965)] , L Ed pp. 713-14)

> "In these cases, we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect the precious Fifth Amendment right is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. … It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. (Professor Sutherland, Crime and Confession [79 Harvard Law Review 21, 37 (1965)] .) The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

118. The opinion also explained the significance of having a counsel present during a custodial interrogation. It was noted, *ibid*. at US pp. 469-70: (*Miranda case* [16 L Ed 2d 694 : 384 US 436 (1965)] , L Ed p. 721)

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have

> counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional'. (Brief for the National District Attorneys Association as amicus curiae, p. 14.) Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. (Cited from Escobedo v. Illinois [12 L Ed 2d 977 : 378 US 478 (1963)] , US at p. 485….) Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."

…

Who can invoke the protection of Article 20(3)?

122. [T]he "right against self-incrimination" protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated…

123. Even though Section 161(2) CrPC casts a wide protective net to protect the formally accused persons as well as suspects and witnesses during the investigative stage….

…

What constitutes "incrimination" for the purpose of Article 20(3)?

128. We can now examine the various circumstances that could "expose a person to criminal charges". The scenario under consideration is one where a person in custody is compelled to reveal information which aids the investigation efforts. The information so revealed can prove to be incriminatory in the following ways:

- The statements made in custody could be directly relied upon by the prosecution to strengthen their case. However, if it is shown that such statements were made under circumstances of compulsion, they will be excluded from the evidence.
- Another possibility is that of "derivative use" i.e. when information revealed during questioning leads to the discovery of independent materials, thereby furnishing a link in the chain of evidence gathered by the investigators.
- Yet another possibility is that of "transactional use" i.e. when the information revealed can prove to be helpful for the investigation and prosecution in cases other than the one being investigated.
- A common practice is that of extracting materials or information, which are then compared with materials that are already in the possession of the investigators. For instance, handwriting samples and specimen signatures are routinely obtained for the purpose of identification or corroboration.

…

132. [W]e must examine the permissibility of extracting statements which may furnish a link in the chain of evidence and hence create a risk of exposure to criminal charges. The crucial question is whether such derivative use of information extracted in a custodial environment is compatible with Article 20(3). It is a settled principle that statements made in custody are considered to be unreliable unless they have been subjected to cross-examination or judicial scrutiny. The scheme created by the Code of Criminal Procedure and the Evidence Act also mandates that confessions made before police officers are ordinarily not admissible as evidence and it is only the statements made in the presence of a Judicial Magistrate which can be given weightage. The doctrine of "excluding the fruit of a poisonous tree" has been incorporated in Sections 24, 25 and 26

of the Evidence Act, 1872 which read as follows:

> "24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
>
> 25. Confession to police officer not proved.—No confession made to a police officer, shall be proved as against a person accused of any offence.
>
> 26. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

133. We have already referred to the language of Section 161 CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the "theory of confirmation by subsequent facts" i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for a successful prosecution. This provision reads as follows:

> "27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

134. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of *Miranda* [16 L Ed 2d 694 : 384 US 436 (1965)] warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).

135. The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in *KathiKaluOghad* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] . It was observed in the majority opinion by Jagannadhadas, J., at SCR pp. 33-34: (AIR pp. 1815-16, para 13)

> "*13*. … The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. *It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion [has] been used in obtaining the information*."
>
> (emphasis supplied)

This position was made amply clear at SCR pp. 35-36: (AIR p. 1816, para 15)

> *"15. … Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised. In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it."*

136. The minority opinion also agreed with the majority's conclusion on this point since Das Gupta, J., held at SCR p. 47: (*KathiKaluOghad case* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] , AIR p. 1820, para 36)

> *"36. … Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It cannot be disputed that by giving such information the accused furnishes evidence and therefore is a 'witness' during the investigation. Unless however he is 'compelled' to give the information he cannot be said to be 'compelled' to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under Section 27. There will be other cases where the accused gives the information without any compulsion. Where the*

> *accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information without any compulsion."*

…

I-B. Whether the results derived from the impugned techniques amount to "testimonial compulsion" thereby attracting the bar of Article 20(3)?

145. The next issue is whether the results gathered from the impugned tests amount to "testimonial compulsion" thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes "testimonial compulsion" and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or "furnish a link in the chain of evidence" which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.

…

153. [T]he majority decision in *KathiKaluOghad* [(1962) 3 SCR 10] is the controlling precedent [on the issue of testimonial compulsion. Hence, it will be useful to restate the two main premises for understanding the scope of "testimonial compulsion". The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to "personal testimony" thereby coming within the prohibition contemplated by Article 20(3). In most cases, such "personal testimony" can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with

facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to incrimination by themselves or "furnish a link in the chain of evidence" needed to do so. We must emphasise that a situation where a testimonial response is used for comparison with facts already known to the investigators is inherently different from a situation where a testimonial response helps the investigators to subsequently discover fresh facts or materials that could be relevant to the ongoing investigation.

…

Examining the "compelling public interest"

255. The respondents have contended that even if the compulsory administration of the impugned techniques amounts to a seemingly disproportionate intrusion into personal liberty, their investigative use is justifiable since there is a compelling public interest in eliciting information that could help in preventing criminal activities in the future. Such utilitarian considerations hold some significance in light of the need to combat terrorist activities, insurgencies and organised crime. It has been argued that such exigencies justify some intrusions into civil liberties. The textual basis for these restraints could be grounds such as preserving the "sovereignty and integrity of India", "the security of the State" and "public order" among others. It was suggested that if investigators are allowed to rely on these tests, the results could help in uncovering plots, apprehending suspects and preventing armed attacks as well as the commission of offences. Reference was also made to the frequently discussed "ticking bomb" scenario. This hypothetical situation examines the choices available to investigators when they have reason to believe that the person whom they are interrogating is aware of the location of a bomb. The dilemma is whether it is justifiable to use torture or other improper means for eliciting information which could help in saving the lives of ordinary citizens. [The arguments for the use of "truth serums" in such situations have been examined in the following articles: Jason R. Odeshoo, "Truth or Dare?: Terrorism and Truth Serum in the Post-9/11 World" [57 Stanford Law Review 209-255 (October 2004)] ; Kenneth Lasson, "Torture, Truth Serum, and Ticking Bombs: Toward a Pragmatic Perspective on Coercive Interrogation" [39 Loyola University Chicago Law Journal 329-360 (Winter 2008)] .]

256. While these arguments merit consideration, it must be noted that ordinarily it is the task of the legislature to arrive at a pragmatic balance between the often competing interests of "personal liberty" and "public

safety". In our capacity as a constitutional court, we can only seek to preserve the balance between these competing interests as reflected in the text of the Constitution and its subsequent interpretation. There is absolutely no ambiguity on the status of principles such as the "right against self-incrimination" and the various dimensions of "personal liberty". We have already pointed out that the rights guaranteed in Articles 20 and 21 of the Constitution of India have been given a non-derogable status and they are available to citizens as well as foreigners. It is not within the competence of the judiciary to create exceptions and limitations on the availability of these rights.

…

258. [I]f we were to permit the forcible administration of these techniques, it could be the first step on a very slippery slope as far as the standards of police behaviour are concerned. In some of the impugned judgments, it has been suggested that the promotion of these techniques could reduce the regrettably high incidence of "third-degree methods" that are being used by policemen all over the country. This is a circular line of reasoning since one form of improper behaviour is sought to be replaced by another. What this will result in is that investigators will increasingly seek reliance on the impugned techniques rather than engaging in a thorough investigation. The widespread use of "third-degree" interrogation methods so as to speak is a separate problem and needs to be tackled through long-term solutions such as more emphasis on the protection of human rights during police training, providing adequate resources for investigators and stronger accountability measures when such abuses do take place.

259. [T]he claim that the use of these techniques will only be sought in cases involving heinous offences rings hollow since there will no principled basis for restricting their use once the investigators are given the discretion to do so. From the statistics presented before us as well as the charges filed against the parties in the impugned judgments, it is obvious that investigators have sought reliance on the impugned tests to expedite investigations, unmindful of the nature of offences involved. In this regard, we do not have the authority to permit the qualified use of these techniques by way of enumerating the offences which warrant their use. By itself, permitting such qualified use would amount to a law-making function which is clearly outside the judicial domain.

260. One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the Government.

As the guardians of these rights, we will be failing in our duty if we permit any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generations.

261. Sometimes there are apprehensions about Judges imposing their personal sensibilities through broadly worded terms such as "substantive due process", but in this case our inquiry has been based on a faithful understanding of principles entrenched in our Constitution. In this context it would be useful to refer to some observations made by the Supreme Court of Israel in *Public Committee Against Torture in Israel* v. *State of Israel* [(1999) 7 BHRC 31 : HC 5100/94 (1999) (SC of Israel)] , where it was held that the use of physical means (such as shaking the suspect, sleep deprivation and enforcing uncomfortable positions for prolonged periods) during interrogation of terrorism suspects was illegal. Among other questions raised in that case, it was also held that the "necessity" defence could be used only as a post-factum justification for past conduct and that it could not be the basis of a blanket pre-emptive permission for coercive interrogation practices in the future. Ruling against such methods, Aharon Barak, J. held at p. 26:

> *"… This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the 'rule of law' and recognition of an individual's liberty constitutes an important component in its understanding of security."*

CHAPTER 6
TORTURE

TORTURE

The Supreme Court has categorically stated that torture violates the right to life with dignity guaranteed under Article 21 of the Constitution and that any procedure that amounts to torture can never be just, fair or reasonable. In **Francis Coralie Mullin v. Administrator, Union Territory of Delhi & Ors.**,[1] the Court extensively dealt with the scope of right to life, and held that torture, and cruel and degrading treatment constitute an abject violation of this right. The Supreme Court echoed this view in **Mehmood Nayyar Azam v. State of Chattisgarh**,[2] where it held that torture includes mental and psychological harassment designed to cause fear in the minds of the prisoner. Mental torture results in the denigration of the humanity of a person, and is thus violative of Article 21.

Similarly, in **Selvi v. State of Karnataka**,[3] the Supreme Court observed that torture is not restricted to physical harassment, and includes forcible intrusion into a person's mental processes resulting in grave and long-lasting consequences. Consequently, it was held that compulsory involuntary administration of the Narcoanalysis, Polygraph examination and the Brain Electrical Activation Profile (BEAP) constitutes 'cruel, inhuman or degrading treatment', and is violative of Article 21.[4]

In various cases, the Court has struck down practices which violate the norm against torture. For example, in **Sunil Batra v. Delhi Administration**,[5] the Supreme Court held that in light of the prohibition on torture under the Constitution, a death row convict cannot be placed in solitary confinement until the person's death sentence and execution were beyond judicial scrutiny. Further, the Court held that ordinarily prisoners cannot be placed in bar fetters, and that this practice has to be limited to extraordinary circumstances, with the approval of the Chief Judicial Magistrate or the Sessions Judge.

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1 (1981) 1 SCC 608
2 (2012) 8 SCC 1
3 (2010) 7 SCC 263
4 See also State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808, where the Court adopted the same stance and held that information received from an accused under compulsion cannot be proved under Section 27, Evidence Act
5 (1978) 4 SCC 494

Similarly, in **Sunil Gupta v. State of M.P.**,[6] and **Prem Shankar Shukla v. Delhi Administration**,[7] the Supreme Court observed that in light of the prohibition against torture, handcuffing cannot be routinely or arbitrarily used. It may only be resorted to when there are no alternative reasonable measures to prevent escape. This view was affirmed in **Khedat Mazdoor Chetna Sangath v. State of Madhya Pradesh**.[8]

The Court has employed various remedies to curb, penalize and redress instances of custodial violence, which the Court has recognized as torture.

First, the Court has passed various orders and guidelines for creating institutional mechanisms and an institutional culture that prevent the commission of torture in custody. For example, in **Sheela Barse v. State of Maharashtra**,[9] the Supreme Court issued certain guidelines for providing protection to woman prisoners in police lock-ups and save them from possible torture or ill treatment. Similarly, in the locus classicus on this point, **D. K. Basu v. State of West Bengal**,[10] the Court issued extensive guidelines on procedures to be followed by the State to prevent and remedy instances of custodial violence. The D. K. Basu guidelines are binding on state authorities and violation of these guidelines is a ground for judicial intervention. For example, the High Court of Bombay in **Fattuji Dajiba Gedam v. Superintendent of Police, Akola & Ors**.,[11] ordered the State to pay compensation to the heirs of the deceased for violation of D.K. Basu Guidelines.

In recent times, the Court has also recommended the installation of CCTV cameras within possible sites of abuse such as police stations, in order to curb custodial violence. For example, the High Court of Bombay, in **Leonard Xavier Valdaris & Ors v. Officer-in-charge Wadala Railway Police Station, Mumbai & Ors**.,[12] directed the installation of CCTV cameras all police stations across Maharashtra. Similar suggestions were made by the High Court of Gujarat in **Prakash v. Commissioner**.[13] However, it is to be noted that there is an emerging discourse on surveillance and the possible dangers that the implementation of such measures could pose, not only in terms of violation of privacy but in terms of the possible

6 1990 SCC (3) 119
7 1980) 3 SCC 526
8 JT 1994 (6) SC 60
9 (1983) 2 SCC 96
10 (1997) 1 SCC 416
11 2001 SCC OnLineBom 772
12 WP/2110/2014
13 WPPIL/200/2012

non-recognition and redressal of custodial violence that does not take place within sight of the camera.

Second, recognizing the need to protect the interests of victims of custodial violence and their families, the Court has evolved a jurisprudence of constitutional torts for the payment of compensation for the commission of acts of torture. The classic case on this point is **Nilabati Behera v. State of Orissa & Ors**.,[14] where the Court held that award of compensation in proceedings for enforcement of fundamental right under Article 32 and 226 is a remedy available in public law. The Court also held that the defence of sovereign immunity does not apply to violations of fundamental rights, including the right against torture. This point was reiterated in **Solgabai Sunil Pawar v. State of Maharashtra**,[15] where the High Court of Bombay rejected the defense of 'sovereign immunity' for the State, and granted compensation for custodial death.

In **Sheela S. Yerpude v. Home Department, Mumbai**,[16] the Bombay High Court clarified that the recovery of stolen items from the body of the deceased and the pendency of criminal trial against the errant police officials should not have any bearing on the amount to be awarded as compensation.

In **Sube Singh v. State of Haryana**,[17] the Supreme Court examined the evolution of grant of compensation as a public law remedy for the violation of fundamental rights under Article 21, and defined the conditions under which compensation should be awarded as a public law remedy. It emphasized on the importance of making efforts to remove the causes of custodial violence to prevent such occurrences, while taking remedial steps towards securing compensation for victims of such violence.

Thirdly, the Court has imposed punitive sanctions on perpetrators of custodial violence.

The Supreme Court, in **Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble & Anr.**,[18] while confirming the order of acquittal against the accused police officers passed by the High Court, clarified that police authorities are entitled to initiate proceedings against the errant officials, notwithstanding the order of acquittal.

14 1993) 2 SCC 746
15 1998 Cri LJ 1505
16 2005 SCC OnLine Bom 1563
17 (2006) 3 SCC 178
18 (2003) 7 SCC 749

In **C.B.I. v Dharampal Singh**,[19] it was held that the bar on prosecuting police officers under Section 140 of the Delhi Police Act, 1978 only extends to an act done under the colour of duty or in exercise of such duty or authority. However, any act of custodial torture/ violence does not come within their duty, and consequently falls outside the sweep of Section 140.

In **S.P. Vaithianathan v. K. Shanmuganathan**,[20] the Supreme Court held that no limitation applies to filing a complaint on torture against a police officer.

In **Smt. Parvathamma v. Chief Secretary, Government**,[21] the Court held that in all cases of custodial deaths, whether it is by suicide or on account of atrocities committed by the police, the onus rests on the police to show that there has been no negligence on their part.

Further, the Court has held in **State of M.P. v. Shyamsunder Trivedi**,[22] that strict adherence to a standard of proof of beyond reasonable doubt is not possible in cases involving custodial violence owing to ground realities.

19 (2005) 123 DLT 592
20 (1994) 4 SCC 569
21 1995 SCC Online Kar 245
22 (1995) 4 SCC 262

IN THE SUPREME COURT OF INDIA

Sunil Batra v. Delhi Administration & Ors. And Charles Gurmukh Sobraj v. Delhi Administration & Ors.

(1978) 4 SCC 494

Y.V.Chandrachud, C.J, V.R.Krishna Iyer, S. Murtaza Fazal Ali, P.N. Shinghal & D.A.Desai, JJ.

The first petitioner filed a writ challenging the constitutionality of his solitary confinement. The second petitioner filed a separate writ challenging the imposition of bar fetters upon him. In its judgment, the Court examined the constitutional validity of Section 30(2) of the Prisons Act of 1984, which was used by the prison administration to justify the first petitioner's solitary confinement, and Section 56 of the Act, which was used by the prison administration to justify placing the second petitioner in bar fetters. Additionally, the Court analyzed whether the acts sanctioned by these provisions amount to custodial torture.

Iyer, J.: "4. …The jurisdictional reach and range of this Court's writ to hold prison caprice and cruelty in constitutional leash is incontestable, but teasing intrusion into administrative discretion is legal anathema, absent breaches of constitutional rights or prescribed procedures. Prisoners have enforceable liberties devalued may be but not demonetized; and under our basic scheme, Prison Power must bow before Judge Power if fundamental freedoms are in jeopardy. …

…

15. …In our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree, and, as sentinels on the *qui-vive*, courts will guard freedom behind bars, tempered, of course, by environmental realism but intolerant of torture by executive echelons. The policy of the law and the paramountcy of the Constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons.

…

20. …Where prison torture is the credible charge and human person the potential casualty, the benefit of scepticism justly belongs to the individual's physical-mental immunity, not to the hyper-sensitivity about safe custody.

…

27b. *Ex post facto* justification of *prison* cruelty as prevention of disorder and escape is often a dubious allegation. Another factor often forgotten, while justifying harsh treatment of prisoners, is the philosophy of rehabilitation. The basis is that the custodial staff can make a significant contribution by enforcing the rule of prison law and preparing convicts for a law-abiding life after their release—mainstreaming, as it is sometimes called.

…

29. The benign purpose behind deprivation of freedom of locomotion and expression is habilitation of the criminal into good behaviour, ensuring social defence on his release into the community. This rationale is subverted by torture-some treatment, antagonism and bitterness which spoil the correctional process. "Fair treatment... will enhance the chance of rehabilitation by reactions to arbitrariness"… All this adds up to the important proposition that it is a crime of punishment to further torture a person undergoing imprisonment, as the remedy aggravates the malady and thus ceases to be a reasonable justification for confiscation of personal freedom and is arbitrary because it is blind action not geared to the goal of social defense, which is one of the primary ends of imprisonment. It reverses the process by manufacturing worse animals when they are released into the mainstream of society. …

…

33. The relevance of the thought that accentuation of injury, beyond imprisonment, may be counter-productive of the therapeutic objective of the penal system will be clear when we test such inflictions on the touchstone of Article 19 and the 'reasonableness' of the action. In depth application of these seminal aspects may be considered after unfolding the fact-situations in the two cases. Suffice it to say that, so long as judges are invigilators and enforcers of constitutionality and performance auditors of legality, and convicts serve terms in that grim microcosm called prison by the mandate of the court, a continuing institutional responsibility vests in the system to monitor the incarceratory process and prevent security 'excesses'. Jailors are bound by the rule of law and cannot inflict supplementary sentences under disguises or defeat the primary purposes of imprisonment. Additional torture by forced cellular solitude or iron

immobilisation — that is the complaint here — stands the peril of being shot down as unreasonable, arbitrary and is perilously near unconstitutionality.

…

41. The specific questions before us are whether the quasi-solitudinous cellular custody of sorts imposed on Batra is implicit in his death sentence and otherwise valid and, the heavy irons forced on the person of Sobraj still standing his trial comport with our constitutional guarantees qualified and curtailed by the prison environs. Necessarily our perspective has to be humanistic-juristic, becoming the *Karuna* of our Constitution and the international consciousness on human rights.

…

44. The quasi-solitary confinement was challenged in the High Court, perhaps vaguely (not particularising the constitutional infirmities of Section 30 of the Prisons Act and the Punjab Jail Rules) but was given short shrift by the High Court. …

…

50. Essentiality, we have to decide whether, as a fact, Batra is being subjected to solitary confinement. We have further to explore whether Section 30 of the Act contemplates some sort of solitary confinement for condemned prisoners and, if it does, that legalizes current prison praxis. We have further to investigate whether such total seclusion, even if covered by Section 30(2) is the correct construction, having regard to the conspectus of the relevant provisions of the Penal Code and Criminal Procedure Code. Finally, we have to pronounce upon the vires of Section 30(2), if it does condemn the death sentences to dismal solitude.

…

52. True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after *Cooper* [*R.C. Cooper* v. *Union of India*, (1970) 1 SCC 248 : (1970) 3 SCR 531] and *Maneka Gandhi* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. *Is a person under death sentence or undertrial unilaterally dubbed dangerous liable to suffer*

extra torment too deep for tears? Emphatically, no. Not lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Article 19) become chimerical constitutional claptrap. Judges, even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanize and civilize the life-style within the *concerns*. The operation of Articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether. For example, public addresses by prisoners may be put down but talking to fellow prisoners cannot. Vows of silence or taboos on writing poetry or drawing cartoons are violative of Article 19. So also, locomotion may be limited by the needs of imprisonment but binding hand and foot, with hoops of steel, of every man or woman sentenced for a term is doing violence to Part III. So, Batra pleads that until decapitation he is human and so should neither be scotched in mind by draconian cellular insulation nor stripped of the basic fellowship which keeps the spirit flickering before being extinguished by the swinging rope.

…

62. …Is solitary confinement or similar stressful alternative, putting the prisoner beyond the zone of sight and speech and society and wrecking his psyche without decisive prophylactic or penological gains, too discriminatory to be valid under Article 14, too unreasonable to be intra vires Article 19 and too terrible to qualify for being human *law* under Article 21? If the penal law merely permits safe custody of a 'condemned' sentencee, so as to ensure his instant availability for execution with all the legal rituals on the appointed day, is not the hurtful severity of hermetic insulation during that tragic gap between the first judgment and the fall of the pall, under guise of a prison regulation, beyond prison power?

…

72. When handling the inner dynamics of human action, we must be informed of the basic factor of human psychology that "Nature abhors a vacuum; and man is a social animal". (Spinoza). In such an area we must expect Brandies briefs backed by opinions of specialists on prison tensions, of stressologists on the etiology of crime and of psychiatrists who have focussed attention on behaviour when fear of death oppresses their patients. A mere administrative officer's deposition about the behaviourl of men under contingent sentence of death cannot weigh with us; when the limited liberties of expression and locomotion of prisoners are sought to be unreasonably pared down or virtually wiped out by oppressive cell insulation. No medical or psychiatric opinion or record of jail events as pointers, are produced to prove, even prima facie, that this substantial negation of gregarious jail life is *reasonable*. Where total deprivation of

the truncated liberty of prisoner's locomotion is challenged, the validatory burden is on the State.

…

74-A. …[I]t becomes necessary to explain why a sensitized perspective repels judicial condemnation of solitary confinement of sorts. How is solitary confinement, experientially, juristically, and humanistically understood? At the close of this consideration, a legal definition of solitary confinement may be given to the extent necessary in this case.

…

87. The propositions of law canvassed in Batra's case turn on what is solitary confinement as a punishment and what is non-punitive custodial isolation of a prisoner awaiting execution. And secondly, if what is inflicted is, in effect, 'solitary', does Section 30(2) of the Act authorise it, and, if it does, is such a rigorous regimen constitutional. In one sense, these questions are pushed to the background, because Batra's submission is that he is not 'under sentence of death' within the scope of Section 30 until the Supreme Court has affirmed and Presidential mercy has dried up by a final 'nay'. Batra has been sentenced to death by the Sessions Court. The sentence has since been confirmed, but the appeals for Presidential commutation are ordinarily precedent to the hangman's lethal move, and remain to be gone through. His contention is that solitary confinement is a separate substantive punishment of maddening severity prescribed by Section 73 of the Indian Penal Code which can be imposed only by the Court; and so tormenting is this sentence that even the socially less sensitive Penal Code of 1860 has interposed, in its cruel tenderness, intervals, maxima and like softening features in both Sections 73 and 74. Such being the penal situation, it is argued that the incarceratory insulation inflicted by the Prison Superintendent on the petitioner is virtual solitary confinement unauthorised by the Penal Code and, therefore, illegal. Admittedly, no solitary confinement has been awarded to Batra. So, if he is de facto so confined, it is illegal. Nor does a sentence of death, under Section 53 IPC, carry with it a supplementary secret clause of solitary confinement. What warrant then exists for solitary confinement on Batra? None. The answer offered is that he is not under solitary confinement. He is under 'statutory confinement' under the authority of Section 30(2) of the Prisons Act read with Section 366 (2) CrPC, 1973. It will be a stultification of judicial power if, under guise of using Section 30(2) of the Prisons Act, the Superintendent inflicts what is substantially solitary confinement which is a species of punishment exclusively within the jurisdiction of the criminal court. We hold, without hesitation, that Sunil Batra shall not be

solitarily confined. Can he be segregated from view and voice and visits and commingling, by resort to Section 30(2) of the Prisons Act and reach the same result? To give the answer we must examine the essentials of solitary confinement to distinguish it from being 'confined in a cell apart from all other prisoners'.

88. If solitary confinement is a revolt against society's humane essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label, nor logomachy, but a working technique of justice. The Penal Code and the Criminal Procedure Code regard *punitive* solitude too harsh and the Legislature cannot be intended to permit *preventive* solitary confinement, released even from the restrictions of Sections 73 and 74 IPC, Section 29 of the Prisons Act and the restrictive Prison Rules. It would be extraordinary that a far worse solitary confinement, masked as safe custody, sans maximum, sans intermission, sans judicial oversight or natural justice, would be sanctioned. Commonsense quarrels with such nonsense.

89. For a fuller comprehension of the legal provisions and their construction we may have to quote the relevant sections and thereafter make a laboratory dissection thereof to get an understanding of the components which make up the legislative sanction for semi-solitary detention of Shri Batra. Section 30 of the Prisons Act rules:

> "30. …(2) *Every such prisoner*, shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under charge of a guard." …

90. The next attempt is to discern the meaning of confinement "in a cell apart from all other prisoners". …

91. Confinement inside a prison does not necessarily import cellular isolation. Segregation of one person all alone in a single cell is solitary confinement. That is a separate *punishment* which the Court alone can impose. It would be a subversion of this statutory provision (Sections 73 and 74 IPC) to impart a meaning to Section 30(2) of the Prisons Act whereby a disciplinary variant of solitary confinement can be clamped down on a prisoner, although no court has awarded such a punishment, by a mere construction, which clothes an executive officer, who happens to be the governor of the jail, with harsh judicial powers to be exercised by punitive restrictions and unaccountable to anyone, the power being discretionary and disciplinary.

92. Indeed, in a jail, cells are ordinarily occupied by more than one inmate and community life inside dormitories and cells is common. Therefore, "to be confined in a cell" does not compel us to the conclusion that the confinement should be in a solitary cell.

93. … Segregation into an isolated cell is not warranted by the word. All that it connotes is that in a cell where there is plurality of inmates, the death sentencee will have to be kept separated from the rest in the same cell but not too close to the others. And this separation can be effectively achieved because the condemned prisoner will be placed under the charge of a guard by day and by night. The guard will thus stand in between the several inmates and the condemned prisoner. Such a meaning preserves the disciplinary purpose and avoids punitive harshness. Viewed functionally, the separation is authorised, not obligated. That is to say, if discipline needs it the authority shall be entitled to and the prisoner shall be liable to separate keeping within the same cell as explained above. "Shall" means, in this disciplinary context, "shall be liable to". If the condemned prisoner is docile and needs the attention of fellow-prisoners nothing forbids the jailor from giving him that facility.

…

96. Solitary confinement has the severest sting and is awardable *only* by Court. …

…

101. This 'safe keeping' in jail custody is the limited jurisdiction of the jailor. The convict is *not* sentenced to imprisonment. He is *not* sentenced to solitary confinement. He is a guest in custody, in the safe keeping of the host-jailor until the terminal hour of terrestrial farewell whisks him away to the halter. This is trusteeship in the hands of the Superintendent, not imprisonment in the true sense. …The inference is inevitable that if the 'condemned' men were harmed by physical or mental torture the law would not tolerate the doing since injury and safety are obvious enemies. And once this qualitative distinction between imprisonment and safe keeping within the prison is grasped, the power of the jailor becomes benign. Batra, and others of his ilk, are entitled to every creature comfort and cultural facility that compassionate safe-keeping implies. Bed and pillow, opportunity to commerce with human kind, worship in shrines, if any, games, books, newspapers, writing material, meeting family members, and all the good things of life, so long as life lasts and prison facilities exist. To distort safe-keeping into a hidden opportunity to cage the ward and

to traumatize him is to betray the custody of the law. Safe custody does not mean deprivation, isolation, banishment from the Lenten banquet of prison life and infliction of travails as if guardianship were best fulfilled by making the ward suffer near-insanity. … Safe keeping means keeping his body and mind in fair condition. To torture his mind is unsafe keeping. Injury to his personality is not safe- keeping. So, Section 366 CrPC forbids any act which disrupts the man in his body and mind. To preserve his flesh and crush his spirit is not safe-keeping, whatever else it be.

102. Neither the Penal Code nor the Criminal Procedure Code lends validity to any action beyond the needs of safety; and any other deprivation, whatever the reason, has not the authority of law. Any executive action which spells infraction of the life and liberty of a human being kept in prison precincts, purely for safe custody, is a challenge to the basic notion of the rule of law — unreasonable, unequal, arbitrary and unjust. A death sentencee can no more be denuded of life's amenities than a civil debtor, fine defaulter, maintenance defaulter or contemner — indeed, a gross confusion accounts for this terrible maltreatment.

…

105. In my judgment Section 30(2) does not validate the State's treatment of Batra. To argue that it is not solitary confinement since visitors are allowed, doctors and officials come and a guard stands by, is not to take it out of the category.

106. Since arguments have been addressed, let us enquire what are the vital components of solitary confinement? Absent statutory definition, the indication we have is in the Explanation to para 510 of the Jail Manual:

> *"Solitary confinement means such confinement with or without labour as entirely secludes the prisoner both from sight of, and communication with, other prisoners."*

107. The hard core of such confinement is (*a*) seclusion of the prisoner, (*b*) from sight of *other prisoners*, and (*c*) *from* communication with *other prisoners*. To see a fellow being is a solace to the soul. Communication with one's own kind is a balm to the aching spirit. Denial of both, with complete segregation superimposed, is the journey to insanity. To test whether a certain type of segregation is, in Indian terms, solitary confinement, we have merely to verify whether interdict on sight and communication with *other prisoners* is imposed. It is no use providing view of or conversation with jail visitors, jail officers or stray relations. The crux

of the matter is communication with *other prisoners* in full view. …

…

110. The ingenious arguments to keep Batra in solitudinous cell must fail and he shall be given facilities and amenities of common prisoners even before he is '*under sentence of death'.*

112. Clearly, there is a sentence of death passed against Batra by the Sessions Court but it is provisional and the question is whether under Section 30(2) the petitioner can be confined in a cell all by himself under a 24-hour guard. …

…

115. So it is clear that the sentence of death is inexecutable until 'confirmed by the High Court'. A self-acting sentence of death does not come into existence in view of the impediment contained in Section 366(1) even though the Sessions Court might have pronounced that sentence.

118. …Thus, until rejection of the clemency motion by these two high dignitaries, it is not possible to predicate that there is a self executory death sentence. Therefore, a prisoner becomes legally subject to a self-working sentence of death only when the clemency application by the prisoner stands rejected. Of course, thereafter Section 30(2) is attracted. …

119. The conclusion inevitably follows that Batra, or, for that matter, others like him, cannot be classed as persons "under sentence of death". Therefore, they cannot be confined apart from other prisoners. Nor is he sentenced to rigorous imprisonment and so cannot be forced to do hard labour. He is in custody because the Court has, pending confirmation of the death sentence, commanded the Prison Authority to keep the sentencee in custody …

…

139. I now switch to the averments in the petition by Sobraj. …

140. …The State has controverted the arithmetic but has not refuted the thrust of the submission that a substantial number of undertrial prisoners have suffered aching irons over their anatomy. …

…

143. …The State defends bar fetters statutorily by Section 56 of the Prisons Act and realistically as preventive medicine for 'dangerousness'

pathology, in exercise of the wise discretion of the Jail Superintendent, overseen by the revisory eye of the Inspector General of Prisons and listened to by Jail Visitors. The bar fetter procedure, denounced by counsel as intolerable, is described by the State as inconvenient but not inhumane, evil but inevitable, where the customer is one with dangerous disposition and attainments. It is admitted that Sobraj has been in fetters to inhibit violence and escape.

…

152. Right at this stage, I may read Section 56, which is the law relied on to shackle the limited freedom of movement of Sobraj:

> *"56. Whenever the Superintendent considers it necessary (with reference either to the State of the prison or the character of the prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector-General with the sanction of the Local Government, so confine them."*

…

165. Even otherwise, the Rules come into play only to the extent the Act permits, since the stream cannot rise above the source. Therefore, Section 56 demands close scrutiny. Confinement in irons is permitted for the safe custody of prisoners. Therefore, the sine qua non is the presence of safety to the point of necessity compelling fetters. Safe custody is imperilled only where escape probability exists. Such escape becomes a clear and present danger only where the prisoner has by his precedents shown an imminent attempt to escape. Mere violence by a prisoner or bad behaviour or other misconduct which has no reference to safe custody has no relevance to Section 56. …The focus is on his escape and, may be, on overt and covert attempts in that behalf. Other disorder or vice may deserve disciplinary attention but Section 56 is no nostrum for all administrative aches within jails.

166. The second requirement of Section 56 is that the Superintendent must *consider* it *necessary* to keep the prisoner in irons for the sake of safe custody. The character of the prisoner, not generally, but with specific reference to safe custody, must be studied by the Superintendent and if he reaches the conclusion responsibly that there is necessity to confine the man in irons to prevent escape from custody, he may exercise his powers

under Section 56. To consider a step as necessary the authority must exercise intelligent care, bestow serious consideration and conclude that the action is not only desirable or advisable but necessary and unavoidable. A lesser standard shows scant regard for the statutory imperative.

167. Section 56 empowers the Deputy Superintendent to put a prisoner in irons only in situations of *urgent necessity* followed by an immediate report to the Superintendent. The point that emerges is that only a finding of *absolute necessity* ran justify the exercise of the "iron" power …This must be an objective finding, and must, therefore, be based on tangible matters which will be sufficient to satisfy a man acting with a sense of humane justice, properly instructed in the law and assessing the prognosis carefully. Random decisions, freak impressions, mounting suspicions, subjective satisfaction and well-grounded allergy to a particular prisoner may be insufficient. We must remember that even though Section 56 is a pre-Constitution measure its application must be governed by the imperatives of Articles 14, 19 and 21. Life and liberty are precious values. Arbitrary action which tortuously tears into the flesh of a living man is too serious to be reconciled with Articles 14, or 19, or even by way of abundant caution. Whatever is arbitrary in executive action is pregnant with discrimination and violates Article 14. Likewise, whatever decision is the product of insufficient reflection or inadequate material or unable to lead to the inference of a clear and present danger, is unreasonable under Article 19, especially when human freedom of helpless inmates behind prison walls is the crucial issue. Article 21, as we have explained in dealing with Batra's case, must obey the prescriptions of natural justice. (see *Maneka Gandhi* as to the quantum and quality of natural justice even in an emergency) Reasonableness in this area also involves some review of the action of an executive officer, so that the prisoner who suffers may be satisfied that a higher official has, with detachment, satisfied himself about the necessity to fetter him. Such administrative fairness is far more productive of order in prison than the counter productive alternative of requiring every security suspect to wear iron. Prison disorder is the dividend from such reckless "discipline" and violent administrative culture, which myopic Superintendents usually miss.

…

170. The power to confine in iron can be constitutionalised only if it is hemmed in with severe restrictions. Woven around the discretionary power, there must be a protective web that balances security of the prison and the integrity of the person. It is true that discretion has been vested by Section 56 in the Superintendent to require a prisoner to wear fetters.

It is a narrow power in a situation of necessity. It has to be exercised with extreme restraint. The discretion has to be based on an objective assessment of facts and the facts themselves must have close relevance to safe custody. It is good to highlight the total assault on the human flesh, free movement and sense of dignity this, "iron" command involves. To sustain its validity in the face of Article 19, emergencies uncontrollable by alternative procedures are the only situations in which this drastic disablement can be prescribed. Secondly processual reasonableness cannot be burked by invoking panic-laden pleas …

171. Such a power, except in cases of extreme urgency, difficult to imagine in a grim prison setting where armed guards are obviously available at instant notice and watch towers vigilantly observe (save in case of sudden riot or mutiny extraordinary), can be exercised only after giving notice and hearing and in an unbiased manner. May be that the hearing is summary, may be that the communication of the grounds is brief, may be that oral examination does not always take place; even so natural justice, in its essentials, must be adhered to for reasons we have explained in *Gill* [*Mohinder Singh Gill* v. *Chief Election Commr.*, (1978) 1 SCC 405] and *Maneka Gandhi.*]

172. I regard as essential that reasons must be assigned for such harsh action as is contemplated and such reasons must be recorded in the history ticket of the prisoner as well as in the journal. Since the reasons are intended to enable the petitioner to challenge, if aggrieved; the record must be in the language of the petitioner or of the region, and not in English as is being done now.

173. There must be special reasons of an extraordinary or urgent character when fetters are fastened on an unconvicted prisoner. Those substantial reasons must be recorded and its copy furnished to the prisoner. … And the constitutional survival of Section 56 depends on the formula of reasonableness.

174. … Indeed, in our view, except in remotely extraordinary situations, rational justification for bar fetters of an unconvicted prisoner cannot be found except on the confession that the Prison Superintendent and his staff are incompetent to manage and indifferent to reasonableness. We cannot be swept off our constitutional feet by scary arguments of deadly prisoners and rioting gangs, especially when we find States in India which have abandoned the disciplinary barbarity of bar fetters (Tamil Nadu, Kerala et al).

175. …The fact that, even as a punishment, irons must be restricted in its use [see Section 46 (7)] which argues for prophylactic irons being for the shortest spell. At night, when the prisoner is in a cell there is no particular reason to apprehend a possibility of escape. So, nocturnal hand-cuffs and chains are obnoxious and vindictive and anathema in law.

176. The infraction of the prisoner's freedom by bar fetters is too serious to be viewed lightly and the basic features of "reasonableness" must be built into the administrative process for constitutional survival. Objectivity is essential when the shackling is prima facie shocking. Therefore, an outside agency, in the sense of an officer higher than the Superintendent or external to the prison department, must be given the power to review the order for "irons". …A right of appeal or revision from the action of the Superintendent to the Inspector General of Prisons, and quick action by way of review are implicit in the provision. If there is delay, the negation of good faith, in the sense of absence of due care, is inevitable and the validity of the order is in peril.

…

179. The learned Additional Solicitor-General urged that there was a built-in guideline for the superintendent's discretion. Considerations of safety, expressed in para 435 and Section 56, remove the vice of arbitrariness and unreasonableness. Reference to para 433 was made to make out that only dangerous prisoners were to be chained in this manner. We cannot lose sight of the fact that a non-convict prisoner is to be regarded differently and it may even be a misnomer to treat such a remandee as a prisoner. We see a distinction between unconvicted prisoners and convicted prisoners being dealt with differently. (see para 392 of the Manual). Assuming the indiscriminate provision in para 399 embracing dangerous prisoners "whether they are awaiting trial or have been convicted" to be applicable, we should deal with the two categories differently. Para 399(3) reads:

> *"Special precautions should be taken for the safe custody of dangerous prisoners whether they are awaiting trial or have been convicted. On being admitted to jail they should be (a) placed in charge of trustworthy warders, (b) confined in the most secure building available, (c) as far as practicable confined in different barracks or cells each night, (d) thoroughly searched at least twice daily and occasionally at uncertain hours (the Deputy Superintendent must search them at least*

> *once daily and he must satisfy himself that they are properly searched by a trustworthy subordinate at other time), (e) fettered if necessary (the special reasons for having recourse to fetters should be fully recorded in the Superintendent's journal and noted in the prisoner's history ticket). They should not be employed on any industry affording facilities for escape and should not be entrusted with implements that can be used as weapons. Warders on taking over charge of such prisoners must satisfy themselves that their fetters are intact and the iron bars or the gratings of the barracks in which they are confined are secure and all locks, bolts, etc. are in proper order. They should during their turns of duty frequently satisfy themselves that all such prisoners are in their places, and should acquaint themselves with their appearance."*

181. The learned Additional Solicitor-General argued that the expression "dangerous" was neither vague nor irrational but vivid and precise, and regulated the discretion of the officer sufficiently to eliminate the vice of arbitrariness. He cited authorities to which we will presently come but before examining them as validation of incapacitation of risky prisoners we may as well refer to some aspects of the problem presented by (*1*) what kind of danger should lead to incapacitation? (*2*) What authority is to make the decision on whether or not that danger is present? (*3*) On what basis is that authority to decide who among offenders is dangerous and for how long?

…

186. If our law were to reflect a higher respect for life, restraint of the person is justified only if the potential harm is considerable. …

…

187-A. The key preconditions are —

> *"(i) absolute necessity for fetters;*
>
> *(ii) special reasons why no other alternative but fetters will alone secure custodial assurance;*
>
> *(iii) record of those reasons contemporaneously in extenso;*

(iv) *such record should not merely be full but be documented both in the journal of the Superintendent and the history ticket of the prisoner. This latter should be in the language of the prisoner so that he may have communication and recourse to redress.*

(v) *the basic condition of dangerousness must be well-grounded and recorded;*

(vi) *all these are conditions precedent to "irons" save in a great emergency;*

(vii) *before preventive or punitive irons (both are infliction of bodily pain) natural justice in its minimal form shall be complied with (both audi alteram and the nemo judex Rules).*

(viii) *the fetters shall be removed at the earliest opportunity. That is to say, even if some risk has to be taken it shall be removed unless compulsive considerations continue it for necessities of safety;*

(ix) *there shall be a daily review of the absolute need for the fetters, none being easily conceivable for nocturnal manacles;*

(x) *if it is found that the fetters must continue beyond a day, it shall be held illegal unless an outside agency, like the District Magistrate or Sessions Judge, on materials placed, directs its continuance".*

…

188. Although numerically large, these requirements are reasonably practical and reconcile security with humanity. Arguments to the contrary are based on alarmist a priori and may render Section 56 ultra vires. Having regard to the penumbral zone, fraught with potential for tension, tantrums and illicit violence and malpractice, it is healthy to organize a prison ombudsman for each State. Sex is an irrepressible urge which is forced down by long prison terms and homosexuality is of hidden prevalence in these dark campuses. Liberal paroles, open jails, frequency of familial meetings, location of convicts in jails nearest their homes

tend to release stress, relieve distress and ensure security better than flagellation and fetters.

189. The upshot of the discussion is that the shackles on Sobraj shall be shaken off right away and shall not be re-worn without strict adherence to the injunctions spelt out. Active prison justice bids farewell to the bloodshot heritage of fierce torture of flesh and spirit; and habilitative pi accesses reincarnate as a healing hope for the tense, warped and morbid minds behind bars. This correctional orientation is a constitutional implication of social justice whose index finger points to Article 14 (anti-arbitrariness), Article 19 (anti-reasonableness) and Article 21 (sensitized processual humanism).

...

192. I hold that bar fetters are a barbarity generally and, like whipping, must vanish. Civilised consciousness is hostile to torture within the walled campus. We hold that solitary confinement, cellular segregation and marginally modified editions of the same process are inhuman and irrational. …The revisory power of the Inspector General of Prisons is illusory when the prisoner does not know of his right to seek revision and the Inspector General has no duty to visit the solitary or 'fettered' creatures or to examine every case of such infliction. Jail visitors have no powers to cancel the superintendent's orders nor obligation to hold enquiry save to pity and to make remarks. Periodical parades of prisoners, when the visitors or dignitaries call for a turn-out, prove a circus in a zoo from a practical standpoint or/and journal entries and history-tickets a voodoo. According to Rule, the key point to be noted being that after this public exhibition within the prison, the complaining prisoners are marked men at the iron mercy of the hierarchy, there being no active legal aid project busy within the prison. This ferocious Rule of law, rude and nude, cannot be sustained as anything but arbitrary, unreasonable and procedurally heartless. The peril to its life from the lethal stroke of Articles 14, 19 and 21 read with 13 needs no far-fetched argument. The abstruse search for curative guidelines in such words as "dangerous" and "necessary", forgetting the totalitarian backdrop of stone walls and iron bars, is bidding farewell to raw reality and embracing verbal *marga*. The law is not abracadabra but at once pragmatic and astute and does not surrender its power before scary exaggerations of security by prison bosses. Alternatives to "solitary" and "irons" are available to prison technology, given the will, except where indifference, incompetence and unimaginativeness hold prison authorities prisoner. Social justice cannot sleep if the Constitution hangs limp where its consumers most need its humanism.

193. An allegedly unconscionable action of Government which disables men in detention from seeking judicial remedies against State torture was brought to our notice. …Democratic legality stands stultified if the Corpus Juris is not within the actual ken or reasonable reach of the citizen; for it is a travesty of the Rule of law if legislation, primary or subordinate, is not available in published form or is beyond the purchase of the average affected Indian. …we were told that the Punjab Jail Manual was not made available to the prisoners and, indeed, was priced so high that few could buy. …It was suggested that by this means the indigent prisoner could be priced out of his precious liberties because he could not challenge incarceratory injury without precise awareness of the relevant provisions of law beyond his means. Were this motivation true the seriousness of the impropriety deepens. …Access to law is fundamental to freedom in a Government of laws. If the Rule of law is basic to our constitutional order, there is a double imperative implied by it — on the citizen to know and on the State to make known. Fundamental rights cease to be viable if laws calculated to canalise or constrict their sweep are withheld from public access; and the freedoms under Article 19(1) cannot be retracted by hidden on "low visibility" Rules beyond discovery by fair search. The restriction must be *reasonable* under Article 19(2) to (6) and how can any normative prescription be reasonable if access to it is not available at a fair price or by rational search? Likewise, under Article 21, procedural fairness is the badge of constitutionality if life and liberty are to be leashed or extinguished; and how can it be fair to bind a man by normative processes collected in books too expensive to buy? The baffling proliferation and frequent modification of subordinate legislation and their intricacies and inaccessibility are too disturbing to participate legality so vital to democracy, to leave us in constitutional quiet. Arcane law is as bad as lawless fiat, a caveat the administration will hopefully heed.

…

197-A. (1) I uphold the vires of Section 30 and Section 56 of the Prisons Act, as humanistically read by interpretation. These and other provisions, bring somewhat out of tune with current penological values and mindless to human-rights moorings, will, I hope, be revised by fresh legislation. It is a pity that Prison Manuals are mostly callous colonial compilations and even their copies are beyond prisoners' ken. Punishments, in civilised societies, must not degrade human dignity or wound flesh and spirit. The cardinal sentencing goal is correctional changing the consciousness of the criminal to ensure social defence. Where prison treatment abandons the reformatory

purpose and practises dehumanising techniques; it is wasteful, counterproductive and irrational, hovering on the hostile brink of unreasonableness (Article 19). Nor can torture tactics jump the constitutional gauntlet by wearing a "preventive" purpose. Naturally, inhumanity, masked as security, is outlawed beyond backdoor entry, because what is banned is brutality, be its necessity punitive or prophylactic

(2) I hold that solitary confinement, even if mollified and modified marginally, is not sanctioned by Section 30 for prisoners "under sentence of death". But it is legal under that section to separate such sentences from the rest of the prison community during hours when prisoners are generally locked in. I also uphold the special watch, day and night, of such sentences by guards. Infraction of privacy may be inevitable. But guards must concede minimum human privacy in practice

(3) By necessary implication, prisoners "under sentence of death" shall not be denied any of the community amenities, including games, newspapers, books, moving around and meeting prisoners and visitors, subject to reasonable regulation of prison management. Be it noted that Section 30 is no substitute for sentence of imprisonment and merely prescribes the manner of organising safe jail custody authorised by Section 366 of the CrPC.

(4) More importantly, if the prisoner desires loneliness for reflection and remorse, for prayers and making peace with his maker, or opportunities for meeting family or friends, such facilities shall be liberally granted, having regard to the stressful spell of terrestrial farewell his soul may be passing through — the compassion society owes to him whose life it takes.

(5) The crucial holding under Section 30(2) is that a person is *not* "under sentence of death", even if the sessions court has sentenced him to death subject to confirmation by the High Court. He is not "under sentence of death" even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, *so long as* an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, Section 30 does not

cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed. Of course, once rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he is "under sentence of death", even if he goes on making further mercy petitions. During that interregnum he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be "under a sentence of death" means "to be under a finally executable death sentence".

(6) I do not rule out further restraint on such a condemned prisoner if clear and present danger of violence or likely violation of custody is, for good reasons, made out, with due regard to the rules of fairplay implied in natural justice. Minimal hearing shall be accorded to the affected if he is subjected to further severity.

197-B. (1) Section 56 must be tamed and trimmed by the Rule of law and shall not turn dangerous by making the Prison "brass" an *imperium in imperio*. The Superintendent's power shall be pruned and his discretion bridled in the manner indicated.

(2) Under-trials shall be deemed to be in custody, but not undergoing *punitive* imprisonment. So much so, they shall be accorded more relaxed conditions than convicts.

(3) Fetters, especially bar fetters, shall be shunned as violative of human dignity, within and without prisons. The indiscriminate resort to handcuffs when accused persons are taken to and from court and the expedient of forcing irons on prison inmates are illegal and shall be stopped forthwith save in a small category of cases dealt with next below. Reckless handcuffing and chaining in public degrades, puts to shame finer sensibilities and is a slur on our culture.

(4) Where an undertrial has a credible tendency for violence and escape a humanely graduated degree of "iron" restraint is permissible if — only if — other disciplinary alternatives are unworkable. The burden of proof of the ground is on the custodian. And if he fails, he will be liable in law.

(5) The "iron" regimen shall in no case go beyond the intervals, conditions and maxima laid down for punitive "irons". They shall be for short spells, light and never applied if sores exist.

(6) The discretion to impose "irons" is subject to quasi-judicial oversight, even if purportedly imposed for reasons of security.

(7) A previous hearing, minimal may be, shall be afforded to the victims. In exceptional cases, the hearing may be soon after. The Rule in *Gill case* and *Maneka Gandhi case* gives the guidelines.

(8) The grounds for "fetters" shall be given to the victim. And when the decision to fetter is made, the reasons shall be recorded in the journal and in the history ticket of the prisoner in the State language. If he is a stranger to that language it shall be communicated to him, as far as possible, in his language. This applies to cases as much of prison punishment as of "safety" fetters.

(9) Absent provision for independent review of preventive and punitive action, for discipline or security, such action shall be invalid as arbitrary and unfair and unreasonable. The prison officials will then be liable civilly and criminally for hurt to the person of the prisoner. The State will urgently set up or strengthen the necessary infra-structure and process in this behalf — it already exists in embryo in the Act.

(10) Legal aid shall be given to prisoners to seek justice from prison authorities, and, if need be, to challenge the decision in court — in cases where they are too poor to secure on their own. …

(11) No "fetters" shall condone beyond day time as punitive fetters on locked-in detenus are ordinarily uncalled for, viewed from considerations of safety.

(12) The prolonged continuance of "irons", as a punitive or preventive step, shall be subject to previous approval by an external examiner like a Chief Judicial Magistrate or Sessions Judge who shall briefly hear the victim and record reasons. They are ex-officio visitors of most central prisons.

(13) The Inspector General of Prisons shall, with quick despatch consider revision petitions by fettered prisoners and direct the continuance or discontinuation of the irons. In the absence of such prompt decision, the fetters shall be deemed to have been negatived and shall be removed.

…

205. I hold that even though Section 30 is intra vires, Batra shall not be kept under constant guard in a cell, all by himself, unless he seeks such an exclusive and "lonely life". If he loses all along the way right to the summit court and the top executive, then and only then, shall he be kept *apart from the other prisoners* under the constant vigil of an armed guard. Of course, if proven grounds warrant disciplinary segregation, it is permissible, given fair hearing and review.

206. The petitioner, Sobhraj, cannot be granted the relief of striking down Section 56 or related prison Rules but he succeeds, in substance, with regard to his grievance of bar fetters. Such fetters shall forthwith be removed and he will be allowed the freedom of undertrials inside the jail, including locomotion — not if he has already been convicted. In the eventuality of display of violence or escape attempts or credible evidence bringing home such a potential adventure by him, he may be kept under restraint. Irons shall not be forced on him unless the situation is one of emergency leaving no other option and in any case that torture shall not be applied without compliance with natural justice and other limitations indicated in the judgment."

…

Desai, J.: "217. It may be conceded that solitary confinement has a degrading and dehumanising effect on prisoners. Constant and unrelieved isolation of a prisoner is so unnatural that it may breed insanity. Special isolation represents the most destructive abnormal environment. Results of long solitary confinement are disastrous to the physical and mental health of those subjected to it. It is abolished in U.K. but is still retained in U.S.A.

…

233. Undoubtedly, the limited locomotion that a prisoner may enjoy while being incarcerated is seriously curtailed by being put in bar fetters. In order to enable us to know what a bar fetter is and how, when a prisoner is subjected thereto, his locomotion is severely curtailed, a bar fetter was shown to us and its use was demonstrated in the Court. It may be mentioned that the iron rings which are put on the ankles are welded. Therefore, when the fetter is to be removed, the rings have to be broken open. Then there is a horizontal bar which keeps the two legs apart and there are two vertical bars which are hooked to the waist-belt which makes even a slow motion walking highly inconvenient. If along with

this, handcuffs are put on the prisoner, his life to put it mildly, would be intolerable. The bar fetters are kept day and night even when the prisoner is kept in cellular confinement. It needs not much of an elaboration to come to the conclusion that bar fetters to a very considerable extent curtail, if not wholly deprive locomotion, which is one of the facets of personal liberty. And this is being done as a safety measure with a view to preventing the prisoner from walking as freely as others or from running away. It was tartly said that the prisoners have no fundamental freedom to escape from lawful custody and, therefore, they cannot complain against precautionary measures which impede escape from the prison.

...

241. It was said that continuously keeping a prisoner in fetters day and night reduces the prisoner from a human being to an animal, and that this treatment is so cruel and unusual that the use of bar fetters is an anathema to the spirit of the Constitution. Now, we do not have in our Constitution any provision like the VIIIth Amendment of the U.S. Constitution forbidding the State from imposing cruel and unusual punishment as was pointed out by a Constitution Bench of this Court in *Jagmohan Singh* v. *State of U.P.* [(1973) 1 SCC 201973 SCC (Cri) 169 : (1973) 2 SCR 541] But we cannot be oblivious to the fact that the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14. Now, putting bar fetters for an unusually long period without due regard for the safety of the prisoner and the security of the prison would certainly be not justified under Section 56. All the more so when it was found in this case that the medical opinion suggested removal of bar fetters and yet it is alleged that they were retained thereafter. One cannot subscribe to the view canvassed with some vigour that escape from jail cannot be prevented except by putting the prisoner continuously in bar fetters. That will be a sad commentary on the prison administration and the administrators. Therefore, Section 56 does not permit the use of bar fetters for an unusually long period, day and night, and that too when the prisoner is confined in secure cells from where escape is somewhat inconceivable. Now that bar fetters of the petitioner have been removed in February 1978, the question of re-imposing them would not arise until and unless the requirement herein delineated and the safeguards herein provided are observed."

IN THE SUPREME COURT OF INDIA

Francis Coralie Mullin v. Administrator, Union Territory of Delhi & Ors.

(1981) 1 SCC 608

P.N. Bhagwati & S. Murtaza Fazal Ali, JJ.

The petitioner was detained under the CFEPSA Act, 1974. She challenged the constitutionality of the Conditions of Detention Order promulgated by the Delhi Administration which prescribed certain restrictions and conditions relating to interviews between detenues and their legal advisers and family members. In its decision, the Court considered the scope of a constitutionally just detention regime, and in that context, discussed the incompatibility of torture and cruel, inhuman and degrading treatment with the Article 21 guaranteed right to life with dignity.

Bhagwati, J.: "6. Article 21…is a fundamental right which has, after the decision in *Maneka Gandhi case*…a highly activist magnitude and it embodies a constitutional value of supreme importance in a democratic society. It provides that no one shall be deprived of his life or personal liberty except according to procedure established by law and such procedure shall be reasonable, fair and just. Now what is the true scope and ambit of the right to life guaranteed under this article? While arriving at the proper meaning and content of the right to life, we must remember that it is a constitutional provision which we are expounding and moreover it is a provision enacting a fundamental right and the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content…This principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

7. Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. In *Kharak Singh* v. *State of U.P*. [(1964) 1 SCR 232] Subba Rao, J. quoted with approval the following passage from the judgment of Field, J. in *Munn* v. *Illinois* [(1877) 94 US 113 : 24 L Ed 77] to emphasize the quality of life covered by Article 21 : [*Sunil Batra (I)* v. *Delhi Admn*, SCR p 503 : SCC p 574 : SCC (Cri) p 235] "By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world" and this passage was again accepted as laying down the correct law by the Constitution Bench of this Court in the first *Sunil Batra case*. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiorari, this would include the faculties of thinking and feeling. Now, deprivation which is inhibited by Article 21 may be total or partial; neither can any limb or faculty be totally destroyed nor can it be partially damaged. Moreover, it is every kind of deprivation that is hit by Article 21, whether such deprivation is permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.

8. But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country; but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited

by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21. It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment; which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights. This right to live which is comprehended within the broad connotation of the right to life can concededly be abridged according to procedure established by law and therefore when a person is lawfully imprisoned, this right to live is bound to suffer attenuation to the extent to which it is incapable of enjoyment by reason of incarceration. The prisoner or detenu obviously cannot move about freely by going outside the prison walls nor can he socialise at his free-will with persons outside the jail. But, as part of the right to live with human dignity and therefore as a necessary component of the right to life, he would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulations, regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Articles 14 and 21, unless it is reasonable, fair and just.

9. The same consequence would follow even if this problem is considered from the point of view of the right to personal liberty enshrined in Article 21, for the right to have interviews with members of the family and friends is clearly part of personal liberty guaranteed under that article. The expression "personal liberty" occurring in Article 21 has been given a broad and liberal interpretation in *Maneka Gandhi case* [Under Article 32 of the Constitution] and it has been held in that case that the expression "personal liberty" used in that article is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and it also includes rights which "have been raised to the status of distinct fundamental rights and given additional protection under Article 19". There can therefore be no doubt that "personal liberty" would include the right to socialise with members of the family and friends subject, of course, to any valid prison regulations and under Articles 14 and 21, such prison regulations must be reasonable and non-arbitrary. If any prison regulation or procedure laid down by it regulating the right to have interviews with members of the family and friends is arbitrary or unreasonable, it would be liable to be struck down as invalid as being violative of Articles 14 and 21."

IN THE SUPREME COURT OF INDIA

Sheela Barse v. State of Maharashtra

(1983) 2 SCC 96

P.N. Bhagwati, R.S. Pathak & A.N. Sen, JJ.

This writ petition was based on a letter addressed by a journalist to the Supreme Court, complaining of custodial violence inflicted on women prisoners whilst confined in the police lock up in the city of Bombay. In this case, the Supreme Court issued certain directions for providing security, safety and protection to women prisoners in lock-ups.

Bhagwati, J.: **"**4. We may now take up the question as to how protection can be accorded to women prisoners in police lock-ups. ...We propose to give the following directions as a result of meaningful and constructive debate in court in regard to various aspects of the question argued before us:

(*i*) We would direct that four or five police lock-ups should be selected in reasonably good localities where only female suspects should be kept and they should be guarded by female constables. Female suspects should not be kept in a police lock-up in which male suspects are detained. The State of Maharashtra has intimated to us that there are already three cells where female suspects are kept and are guarded by female constables and has assured the Court that two more cells with similar arrangements will be provided exclusively for female suspects.

(*ii*) We would further direct that interrogation of females should be carried out only in the presence of female police officers/ constables.

(*iii*) Whenever a person is arrested by the police without warrant, he must be immediately informed of the grounds of his arrest and in case of every arrest it must immediately be made known to the arrested person that he is entitled to apply for bail. The Maharashtra State Board of Legal Aid and Advice will forthwith get a pamphlet prepared setting out the legal rights of an arrested

person and the State of Maharashtra will bring out sufficient number of printed copies of the pamphlet in Marathi which is the language of the people in the State of Maharashtra as also in Hindi and English and printed copies of the pamphlet in all the three languages shall be affixed in each cell in every police lock-up and shall be read out to the arrested person in any of the three languages which he understands as soon as he is brought to the police station.

(*iv*) We would also direct that whenever a person is arrested by the police and taken to the police lock-up, the police will immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps for the purpose of providing legal assistance to the arrested person at State cost provided he is willing to accept such legal assistance. The State Government will provide necessary funds to the concerned Legal Aid Committee for carrying out this direction.

(*v*) We would direct that in the City of Bombay, a City Sessions Judge, to be nominated by the principal Judge of the City civil court, preferably a lady Judge, if there is one, shall make surprise visits to police lock-ups in the city periodically with a view to providing the arrested persons an opportunity to air their grievances and ascertaining what are the conditions in the police lock-ups and whether the requisite facilities are being provided and the provisions of law are being observed and the directions given by us are being carried out. If it is found as a result of inspection that there are any lapses on the part of the police authorities, the City Sessions Judge shall bring them to the notice of the Commissioner of Police and if necessary to the notice of the Home Department and if even this approach fails, the City Sessions Judge may draw the attention of the Chief Justice of the High Court of Maharashtra to such lapses. This direction in regard to police lock-ups at the district headquarters shall be carried out by the Sessions Judge of the district concerned.

(*vi*) We would direct that as soon as a person is arrested, the police must immediately obtain from him the name of any relative or friend whom he would like to be informed about his arrest and the police should get in touch with such relative or friend and inform him about the arrest; and lastly

(*vii*) We would direct that the Magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody and inform him that he has right under Section 54 of the Code of Criminal Procedure, 1973 to be medically examined. We are aware that Section 54 of the Code of Criminal Procedure, 1973 undoubtedly provides for examination of an arrested person by a medical practitioner at the request of the arrested person and it is a right conferred on the arrested person. But, very often the arrested person is not aware of this right and on account of his ignorance, he is unable to exercise this right even though he may have been tortured or maltreated by the police in police lock-up. It is for this reason that we are giving a specific direction requiring the Magistrate to inform the arrested person about this right of medical examination in case he has any complaint of torture or maltreatment in police custody.

5. We have no doubt that if these directions which are being given by us are carried out both in letter and in spirit, they will afford considerable protection to prisoners in police lock-ups and save them from possible torture or ill treatment. The writ petition will stand disposed of in terms of this order."

IN THE SUPREME COURT OF INDIA

Nilabati Behera alias Lalita Behera v. State of Orissa & Ors.

(1993) 2 SCC 746

J.S. Verma, Dr. A.S. Anand & N. Venkatachala, JJ.

A writ petition was filed seeking compensation for the death of the petitioner's son in police custody. The Court, in its decision, examined the Court's power to provide compensation for contravention of human rights and fundamental freedoms.

Verma, J.: "10. …[T]he liability of the State of Orissa in the present case to pay the compensation cannot be doubted and was rightly not disputed by the learned Additional Solicitor General. It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in an action on tort. It may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings. We shall now refer to the earlier decisions of this Court as well as some other decisions before further discussion of this principle.

11. In *Rudul Sah* [(1983) 4 SCC 141: 1983 SCC (Cri) 798: (1983) 3 SCR 508] it was held that in a petition under Article 32 of the Constitution, this Court can grant compensation for deprivation of a fundamental right. That was a case of violation of the petitioner's right to personal liberty under Article 21 of the Constitution. Chandrachud, CJ., dealing with this aspect, stated as under: (SCC pp. 147-48, paras 9 and 10)

> *"It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously*

> *through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases. …*
>
> *…One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."*

12. It does appear from the above extract that even though it was held that compensation could be awarded under Article 32 for contravention of a fundamental right, yet it was also stated that "the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was actually controversial" and "Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes". This observation may tend to raise a doubt that the remedy under Article 32 could be denied "if the claim to compensation was factually controversial" and, therefore,

optional, not being a distinct remedy available to the petitioner in addition to the ordinary processes. The later decisions of this Court proceed on the assumption that monetary compensation can be awarded for violation of constitutional rights under Article 32 or Article 226 of the Constitution, but this aspect has not been adverted to. It is, therefore, necessary to clear this doubt and to indicate the precise nature of this remedy which is distinct and in addition to the available ordinary processes, in case of violation of the fundamental rights.

13. Reference may also be made to the other decisions of this Court after *Rudul Sah* [(1983) 4 SCC 141 : 1983 SCC (Cri) 798 : (1983) 3 SCR 508] . In *Sebastian M. Hongray* v. *Union of India* [(1984) 1 SCC 339 : 1984 SCC (Cri) 87 : (1984) 1 SCR 904(I)] it was indicated that in a petition for writ of *habeas corpus*, the burden was obviously on the respondents to make good the positive stand of the respondents in response to the notice issued by the court by offering proof of the stand taken, when it is shown that the person detained was last seen alive under the surveillance, control, and command of the detaining authority. In *Sebastian M. Hongray* v. *Union of India (II)* [(1984) 3 SCC 82 : 1984 SCC (Cri) 407 : (1984) 3 SCR 544(II)] in such a writ petition, exemplary costs were awarded on failure of the detaining authority to produce the missing persons, on the conclusion that they were not alive and had met an unnatural death. The award was made in *Sebastian M. Hongray-(II)* [(1984) 3 SCC 82 : 1984 SCC (Cri) 407 : (1984) 3 SCR 544(II)] apparently following *Rudul Sah* [(1983) 4 SCC 141: 1983 SCC (Cri) 798 : (1983) 3 SCR 508] , but without indicating anything more. In *Bhim Singh* v. *State of J & K* [(1985) 4 SCC 677 : 1986 SCC (Cri) 47] , illegal detention in police custody of the petitioner Bhim Singh was held to constitute violation of his rights under Articles 21 and 22(2) and this Court exercising its power to award compensation under Article 32 directed the State to pay monetary compensation to the petitioner for violation of his constitutional right by way of exemplary costs or otherwise, taking this power to be settled by the decisions in *Rudul Sah* [(1983) 4 SCC 141 : 1983 SCC (Cri) 798 : (1983) 3 SCR 508] and *Sebastian M. Hongray* [(1984) 3 SCC 82 : 1984 SCC (Cri) 407 : (1984) 3 SCR 544(II)]. In *Saheli* [(1990) 1 SCC 422 : 1990 SCC (Cri) 145] the State was held liable to pay compensation payable to the mother of the deceased who died as a result of beating and assault by the police. However, the principle indicated therein was that the State is responsible for the tortious acts of its employees. In *State of Maharashtra* v. *Ravikant S. Patil* [(1991) 2 SCC 373: 1991 SCC (Cri) 656] the award of compensation by the High Court for violation of the fundamental right under Article 21 of an undertrial prisoner,

who was handcuffed and taken through the streets in a procession by the police during investigation, was upheld. However, in none of these cases, except *Rudul Sah* [(1983) 4 SCC 141: 1983 SCC (Cri) 798 : (1983) 3 SCR 508] anything more was said. In *Saheli* [(1990) 1 SCC 422 : 1990 SCC (Cri) 145] reference was made to the State's liability for tortious acts of its servants without any reference being made to the decision of this Court in *Kasturilal Ralia Ram Jain* v. *State of U.P.* [(1965) 1 SCR 375 : AIR 1965 SC 1039 : (1965) 2 Cri LJ 144] wherein sovereign immunity was upheld in the case of vicarious liability of the State for the tort of its employees. The decision in *Saheli* [(1990) 1 SCC 422 : 1990 SCC (Cri) 145] is, therefore, more in accord with the principle indicated in *Rudul Sah* [(1983) 4 SCC 141 : 1983 SCC (Cri) 798 : (1983) 3 SCR 508] .

…

15. The decision of Privy Council in *Maharaj* v. *Attorney-General of Trinidad and Tobago (No. 2)* [(1978) 2 All ER 670] is useful in this context. That case related to Section 6 of the Constitution of Trinidad and Tobago 1962, in the chapter pertaining to human rights and fundamental freedoms, wherein Section 6 provided for an application to the High Court for redress. The question was, whether the provision permitted an order for monetary compensation. The contention of the Attorney General therein, that an order for payment of compensation did not amount to the enforcement of the rights that had been contravened, was expressly rejected. It was held, that an order for payment of compensation, when a right protected had been contravened, is clearly a form of 'redress' which a person is entitled to claim under Section 6, and may well be 'the only practicable form of redress'. Lord Diplock who delivered the majority opinion, at page 679, stated:

> *"It was argued on behalf of the Attorney General that Section 6(2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in Jaundoo v. Attorney General of Guyana [(1971) AC 972 : (1971) 3 WLR 13] . Reliance was placed on the reference in the sub-section to 'enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections' as the purpose for which orders etc. could be made. An order for payment of compensation, it was submitted, did not amount to the enforcement of the rights that had been*

> *contravened. In their Lordships' view an order for payment of compensation when a right protected under Section 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) and may well be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6(2), viz. jurisdiction 'to hear and determine any application made by any person in pursuance of sub-section (1) of this section'. The very wide powers to make orders, issue writs and give directions are ancillary to this."*

Lord Diplock further stated at page 680, as under:

> "Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. *The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone.*"

16. Lord Hailsham while dissenting from the majority regarding the liability for compensation in that case, concurred with the majority opinion on this principle and stated at page 687, thus:

> "… I am simply saying that, on the view I take, the expression 'redress' in sub-section (1) of Section 6 and the expression 'enforcement' in sub-section (2), 'although capable of embracing damages where damages are available as part of the legal consequences of contravention, do not confer and are not in the context capable of being construed so as to confer a right of damages where they have not hitherto been available, in this case against the State for the judicial errors of a judge."

Thus, on this principle, the view was unanimous, that enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention.

17. It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in *Rudul Sah* [(1983) 4 SCC 141 : 1983 SCC (Cri) 798 : (1983) 3 SCR 508] and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.

…

19. This view finds support from the decisions of this Court in the *Bhagalpur Blinding cases*: *Khatri (II)* v. *State of Bihar* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] and *Khatri (IV)* v. *State of Bihar* [(1981) 2 SCC 493 : 1981 SCC (Cri) 503] wherein it was said that the court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared "to forge new tools and devise new remedies" for the purpose of vindicating these precious fundamental rights. It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry, needed to ascertain the necessary facts, for granting the relief, as the available mode of redress, for enforcement of the guaranteed fundamental rights. More recently in *Union Carbide Corpn.* v. *Union of India* [(1991) 4 SCC 584] Misra, CJ. stated that "we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future … there is no reason why

we should hesitate to evolve such principle of liability …". To the same effect are the observations of Venkatachaliah, J. (as he then was), who rendered the leading judgment in the *Bhopal gas case* [(1991) 4 SCC 584] with regard to the court's power to grant relief.

20. We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

21. We may also refer to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Article 9(5) reads as under:

> "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

22. The above discussion indicates the principle on which the court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. …In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son."

Anand, J.: "30. On basis of the above conclusion, we have now to examine whether to seek the right of redressal under Article 32 of the Constitution, which is without prejudice to any other action with respect to the same matter which may be lawfully available, extends merely to a declaration that there has been contravention and infringement of the guaranteed fundamental rights and rest content at that by relegating the party to seek relief through civil and criminal proceedings or can it go further and grant redress also by the only practicable form of redress — by awarding monetary damages for the infraction of the right to life.

31. It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law. I agree with Brother Verma, J. that the defence of "sovereign immunity" in such cases is not available to the State …

32. Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. …

33. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations.

34. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution, seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.

35. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings.

The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law — through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with *Rudul Sah* v. *State of Bihar* [(1983) 4 SCC 141: 1983 SCC (Cri) 798 : (1983) 3 SCR 508] granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Article 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so, the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly particularly where the fundamental right of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred to by Brother Verma, J."

IN THE SUPREME COURT OF INDIA

S.P. Vaithianathan v. K. Shanmuganathan

(1994) 4 SCC 569

A.M. Ahmadi & N. Venkatachala, JJ.

The appellant filed a criminal complaint alleging torture and consequently the commission of offences under various provisions of the Indian Penal Code. The High Court held that prosecution was barred by limitation in view of Section 53 of the T.N. District Police Act, 1859. On appeal, the Supreme Court examined whether limitation applies to filing a complaint of torture against a police officer.

Ahmadi, J.: "4. Section 53 of the Act reads as under:

> "*Limitation of action*.— All actions and prosecutions against any persons which may be lawfully brought for anything done or intended to be done, under the provisions of this Act, or under the provisions of any other law for the time being in force conferring powers on the police shall be commenced within three months after the act complained of shall have been committed and not otherwise…."

On a plain reading of this provision it becomes clear all actions and prosecutions for anything done "under the provisions of the Act or any other law in force conferring powers on the police" must be commenced within three months after the act complained of is committed and not otherwise. There is no doubt that the said provision applies to prosecutions; also in respect of any action taken or anything done under the provisions of the Act or under the provisions of any other law conferring powers on the police. Two questions, therefore, arise — (*i*) Is the action of the respondent complained of done under the provisions of the Act? or (*ii*) Is the said action done under the provisions of any other law for the time being in force conferring powers on the police? The High Court placing reliance on the decision of a learned Single Judge of the High Court of Andhra Pradesh (1978) XXII Mad LJR 412 [**Ed.**: See *R. Meeriah* v. *State of A.P.*, 1977 Cri LJ NOC 258] came to the conclusion:

> "…whereas Section 53 of the Act does not provide

> for limitation in relation to particular categories of offences unlike Section 468 of the CrPC, which provides for limitation in respect of prosecution, irrespective of their nature instituted against police officers. As such Section 468 CrPC and Section 53 of the Act operate in different fields. Section 53 of the Act is a special provision in regard to police officers while Section 468 of the CrPC is a general provision in regard to offenders in general. Therefore, these two sections do not operate in the same field or area and do not overlap and that apart, the provision of Section 53 of the Act, which is a special provision, must prevail over the general law enacted in Section 468 of the CrPC."

On the above line of reasoning it held the complaint to be barred by Section 53 of the Act. It is clear that after coming to the conclusion that Section 53 of the Act would prevail over the general provision found in Section 468 of the Code, the High Court did not examine, if in the facts and circumstances of the case, the provision of Section 53 of the Act was attracted. It did not address itself to the aforesaid two questions but relying on the aforesaid case law by which it was held that Section 53 of the Act would prevail, it concluded that the prosecution was time-barred and quashed the same.

5. …Section 21 states that every police officer, shall, for the purposes of the Act, be considered to be always on duty and it should be his endeavour to prevent all crimes, offences and public nuisances, etc. Section 50 lays down that any charge against a police officer above the rank of a Constable under this Act shall be enquired into and determined only by an officer exercising the powers of a Magistrate. Section 53 extracted above then provides for limitation of action. We will assume, without deciding, that Section 53 of the Act will prevail over Section 468 of the Code.

6. It seems clear to us that before a prosecution is terminated as barred by Section 53 of the Act, the accused must show that on the allegations made in the complaint it ex facie appears that the act complained of was done under the provisions of the Act or under the provisions of any other law for the time being in force whereunder powers are conferred on the police. It is true that under Section 21 of the Act a police officer can be said to be on duty all the 24 hours. The prosecution launched against the respondent is in regard to the ill-treatment meted out to the appellant when the latter visited the former in response to the summons. It was no part of the duty

under the Act, Code or any other law for the time being in force conferring power on the police to beat and torture the appellant when he presented himself before the respondent in response to the summons. By no stretch of reasoning can it be said that the respondent's action of torturing the appellant was in discharge of any duty or function under the Act or under any other law. It is also difficult to say, if the allegations made are taken at their face value, that the respondent's action was incidental to or in furtherance of his duties and functions under any law. It must be realised that in order to avail of the benefit of Section 53 of the Act, the respondent must show that he acted 'under' the Act or any other law. Merely because the appellant was called through a summons issued under law, the conduct of beating and torturing the appellant on the latter appearing in obedience to the summons cannot establish any nexus between the official act of issuance of summons and the action of the respondent on the appearance of the appellant. Unless a relationship is established between the provision of law 'under' which the respondent purports to act and the misdemeanour complained of, the provision of Section 53 will not be attracted. In the present case the allegation in the complaint is that while the appellant was called by service of a summons presumably to inquire into allegations of illicit distillation, the respondent had merely used it as an excuse to secure his presence but in fact his real intention was to beat him up to prevent him from complaining against those who were paying him 'mamool' (illegal gratification) money. Thus, according to the appellant the respondent bore a grudge against him and, therefore, he misused his power, issued a summons, secured his presence and then tortured him. He has charged him for the commission of offences under Sections 341, 342, 363, 364, 506 (Part II) and 307 IPC. These do not attract the provision of Section 53 of the Act.

7. In this view which we are inclined to take in the facts and circumstances of this case, we are fortified by a three-Judge Bench decision of this Court in *State of A.P.* v. *N. Venugopal* [(1964) 3 SCR 742 : AIR 1964 SC 33 : (1964) 1 Cri LJ 16] . The background facts in which this decision was rendered were that during the course of investigation information was received that one Ramanna had received stolen articles. Ramanna was, therefore, taken into custody and within less than 3 days thereafter his dead body was found with a number of injuries. The police officers were prosecuted for having caused the injuries to Ramanna for the purpose of extorting from him information which might lead to the detection of an offence and restoration of stolen property. The police officers pleaded that the prosecution was barred by limitation by reason of the provisions of Section 53 of the Act. Dealing with this contention in the backdrop of the

aforesaid facts this Court held on the language of that provision that the protection of Section 53 is not confined only to acts done or intended to be done under the provisions of the Act but extends to acts done or intended to be done under the provisions of any other law conferring powers on the police such as the Code of Criminal Procedure which confers numerous powers of arrest, search and investigation. Any prosecution in respect of any act done or intended to be done under the provisions of any of these laws has also to be commenced within the period prescribed by Section 53; but the Court held:

> "… it becomes the task of the Court, whenever any question whether this section applies or not arises to bestow particular care on its decision. In doing this, it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the police under which it may be said to have been done or intended to be done. The Court has to remember in this connection that an act is not 'under' a provision of law merely because the point of time at which it is done coincides with the point of time when some act in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done 'under' a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done 'under' the particular provision of law."

Proceeding further this Court pointed out that the act of beating or the act of confining was, it is true, alleged to be done at a time when the police officer was engaged in investigation. But it is not possible to see what reasonable relationship these acts had with the process of investigation. Nor can one see how the act of sending away the injured person had any relation to the process of investigation. This Court pointed out that the High Court fell into an error in thinking that whatever a police officer does to a person suspected of a crime at the time when the said officer is engaged in investigating that crime should be held to be done in the discharge of his official duties to investigate, and would, therefore, be covered by Section 53 of the Act. Taking this view, this Court reversed the finding recorded by the High Court in this behalf. Applying the said principles to the facts alleged against the officer in this case, it is difficult to agree with the High

Court that the case falls within the mischief of Section 53 of the Act.

8. Our attention was also invited to two decisions of this Court in *Maulud Ahmad* v. *State of U.P.* [1963 Supp 2 SCR 38] and *Ajaib Singh* v. *Joginder Singh* [AIR 1968 SC 1422 : (1969) 1 SCR 145 : 1969 Cri LJ 4] which turned on the language of Section 42 of the Police Act, 1861. The language of that provision is not the same as that of Section 53 of the Act, in that, it does not carry the expression "or under the provisions of any other law for the time being in force conferring powers on the police" although it uses the words "under the general police powers hereby given" and, therefore, confined itself to anything done or intended to be done under that enactment. Therefore, that section cannot be said to apply to prosecution or anything done under the provisions of any other Act or under police powers conferred by any other Act.

9. In view of the above, we have no hesitation in concluding that the High Court committed an error in quashing the complaint on the ground that it was barred by Section 53 of the Act. We, therefore, allow the appeal, set aside the order of the High Court and remit the matter to the trial court for disposal in accordance with law. …"

IN THE SUPREME COURT OF INDIA

State of M.P. v. Shyamsunder Trivedi & Ors.

(1995) 4 SCC 262

Dr. A.S. Anand & M.K. Mukherjee, JJ.

The deceased died in police custody as a result of extensive injuries received by him during interrogation. In deciding the criminal case against the accused police officers, the Supreme Court held that strict adherence to standard of proof beyond reasonable doubt was not possible in cases such as these, in view of the ground reality that it is often impossible to procure direct or ocular evidence. The Court convicted the defendants under Section 304 Part II IPC, and sentenced them to various terms of imprisonment. Further, fine was imposed on the defendants, the entire amount of which was directed to be paid to the legal heirs of the deceased as compensation.

Anand, J.: "14. We are … not impressed with the approach of the High Court in dealing with the case of the other respondents as well as with the acquittal of Trivedi, Respondent 1, for the offences under Sections 147 and 302/149 IPC. Having recorded a clear and conclusive finding, and on a proper appreciation of the evidence, that the deceased Nathu Banjara had remained in custody at the police station right from the time he was brought there in the evening on 13-10-1981 by Constables Rajaram, Respondent 4 and Ganniuddin, Respondent 5 till the time his dead body was removed from the police station on the next day and that Respondent 1 and others had with a view to conceal the truth created false evidence and fabricated false clues, the High Court could not have acquitted SI Trivedi — respondent, whose presence at the police station was amply established by the prosecution evidence, of the offence of causing multiple external injuries to the deceased which ultimately resulted in the death of Nathu. Similarly, the materials on the record established not only the presence of Respondents 3, 4 and 5 at the police station during the period Nathu had remained in custody but also their participation in the removal of the dead body to the hospital with a view to screen the offence.

…

17. From our independent analysis of the materials on the record, we are satisfied that Respondents 1 and 3 to 5 were definitely present at the police station and were directly or indirectly involved in the torture

of Nathu Banjara, and his subsequent death while in the police custody as also in making attempts to screen the offence to enable the guilty to escape punishment. The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a "could not care less" attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used at some police stations, despite being illegal. The *exaggerated* adherence to and insistence upon the establishment of *proof beyond every reasonable doubt*, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, *because there would hardly be any evidence available to the prosecution to directly implicate them with the torture*. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves to be above the law, and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day.

18. In its 4th Report of June 1980, The National Police Commission noticed the prevalence of custodial torture etc. and observed that nothing is as *dehumanizing* as the conduct of police in practising torture of any kind on a person in their custody. The Commission noticed with regret that the police image in the estimation of the public has badly suffered on account of the prevalence of this practice in varying degrees over the past several years. and noted with concern the inclination of even some of the supervisory ranks in the police hierarchy to countenance this practice in a bid to achieve quick results by short-cut methods. Though Sections 330 and 331 of the Indian Penal Code make punishable those persons

who cause hurt for the purpose of extorting the confession, by making the offence punishable with sentence up to 10 years of imprisonment, but the convictions, as experience shows us, have been very few *because the atrocities within the precincts of the police station are often left without any ocular or other direct evidence to prove who the offenders are*. Disturbed by this situation, the Law Commission in its 113th Report recommended amendments to the Indian Evidence Act so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the court *may presume* that the injury was caused by the police officer having the custody of that person during that period unless, the police officer *proves to the contrary*. The onus to prove the contrary must be discharged by the police official concerned. The recommendation, however, we notice with concern, appears to have gone unnoticed and the crime of custodial torture etc. flourishes unabated. Keeping in view the dehumanising aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don't, we hope that the Government and Legislature would give serious thought to the recommendation of the Law Commission (*supra*) and bring about appropriate changes in the law not only to curb the custodial crime but also to see that the custodial crime does not go unpunished. The courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed.

19. From the evidence available on the record both documentary and oral, we are satisfied that Respondents 1 and 3 to 5 had participated in causing injuries to Nathu Banjara while in police custody, directly or indirectly, and even if it is not possible to say that they intended to cause the death of Nathu, and they can certainly be clothed with the knowledge that the injuries which were being caused to the deceased at the police station were likely to cause his death though probably without any intention to cause his death or even to cause such bodily injuries to him as were likely to cause death. Their offence would, thus, squarely fall under Sections 304 Part II/34 IPC. Respondents 3 to 5 are also guilty of the offences under Sections 201 and 342 IPC and holding them so guilty, we convict them for the said offences.

...

21. Since the occurrence took place 14 years ago, the respondents have gone through the ordeal of a protracted trial and the appeals in the High Court and in this Court. The learned counsel for the State-appellant has very fairly submitted that though an adequate and exemplary sentence of imprisonment would have been normally called for the crime committed by them the respondents may, because of the lapse of time, be sentenced to some imprisonment but they be also sentenced to pay a substantial amount of fine, which if realised may go to the heirs of the deceased. Learned counsel for the respondents has also urged that sending the respondents to the prison at this distant point of time would cause great hardship to them and might make them hardened criminals. We have given our anxious consideration to the submissions made by learned counsel for the parties on the question of sentence. We are conscious that a precious human life has been lost at the hands of those who are expected to protect the life and liberty of the citizens of this country. We are also conscious of the fact that the crime is a dehumanising one and is an affront to the human dignity. The long lapse of period is indeed a consideration which may weigh in favour of the respondents for not being awarded a long sentence of imprisonment but then the interests of the victim of the crime have also to be kept in view. Keeping in view the consideration of the human factor involved and particularly the interests of the heirs of Nathu — deceased to whom mere imprisonment of the respondents at this belated stage may not offer much solace, we have to strike a balance between these disparate considerations …

…

24. We, further direct that the *entire* amount of fine on realisation from Respondents 1, 3 to 5 shall be paid to the heirs of the deceased, Nathu Banjara, by way of compensation. The trial court shall ensure, in case the fine is deposited by the accused respondents, that the payment of the same is made to the heirs of deceased, Nathu Banjara, and the court shall take all such precautions as are necessary to see that the money is not allowed to fall into wrong hands and is utilised for the benefit of the members of the family of the deceased, Nathu Banjara, and if found practical by deposit in a nationalised bank or post office on such terms as the trial court may in consultation with the heirs of the deceased consider fit and proper."

IN THE HIGH COURT OF KARNATAKA

Smt. Parvathamma v. Chief Secretary Government

1995 SCC OnLine Kar 245

S. Rajendra Babu & Kumar Rajaratnam, JJ.

In this case involving the custodial death of the petitioner's husband due to police atrocities, the petitioner filed for issuance of a writ of mandamus directing the respondents to pay compensation, provide petitioner with a job and further direction to refer the matter to C.B.I. for investigation. The Court discussed the issue of burden of proof, compensation and interim compensation in case of custodial death.

Order: "7. We have carefully considered the report of the learned Magistrate and we are not satisfied that the Magistrate has applied his mind in bringing out the real cause of death and the act of negligence, if any, on the part of the police. Neither the police nor the learned Magistrate insisted on the doctor who conducted the post-mortem to be examined at the enquiry. No opportunity was given to the petitioner to cross-examine the doctor. We have perused the post-mortem report of the doctor and the doctor has given an opinion that the death was due to asphyxia as a result of hanging. The doctor has stated that there was an external injury, an abrasion on the outer aspect of upper part of left arm measuring 3 cms × 5 cms transverse, thin scab formed. In this situation it would have been fit and proper that the doctor ought to have been examined to arrive at the whole truth. It was also contended even at the enquiry the two vital eyewitnesses to the occurrence, namely, Head Constable Muniswamy and Police Constable Beeraiah were not examined, even though a point was made by the learned Counsel for the petitioner at the enquiry that they ought to have been examined. The learned Magistrate has approached the whole enquiry as if the onus is on the petitioner to prove the entire case. The learned Magistrate did not insist on the two eye witnesses or the post-mortem doctor to be examined at the enquiry. On a careful perusal of the enquiry report, we are not satisfied that it meets the requirement of law with respect to the nature of enquiry with regard to lock-up deaths.

8. We have given our anxious consideration to this unfortunate episode and we feel that in the circumstances of the case it would have been

necessary for the police to show that there was no negligence on their part. After all when a prisoner is in police custody it is the duty of the police to keep him alive and well till judicial remand. …

9. We are also on a larger issue that when a person is taken into custody, it is the paramount duty of the police to keep him safely. If there is any dereliction of that duty, then undoubtedly the onus will be on the police to show that there was no negligence on their part. Even assuming for a moment that the case before us is one of suicide, we would like to state that there is a duty on the part of the police to show that there was no negligence. However, it cannot be ruled out that there may be some cases where inspite of best efforts by the police a prisoner commits suicide by a method that is beyond the control of the police. In those cases if the police can show that they were not negligent, then it is possible that they may be absolved of the blame. We have in mind, for instance a prisoner inspite of best efforts of the police commits suicide by consuming cyanide immediately on arrest. There may also be other cases where inspite of best efforts of the police the prisoner commits suicide which could not have been prevented by the police. Ultimately it all depends on the facts of each case.

…

13. In the light of the law laid down by the Supreme Court, we have no hesitation to hold that there has been negligence on the part of the police and the police did not take advantage of the opportunity afforded to them in the enquiry in satisfying this Court that there was no negligence. The non-examination of the doctor and the alleged eyewitnesses and the non-furnishing of information as to the mode of hanging have all clearly gone to show that the police had not exercised due diligence and care with respect to the deceased while in their custody. In the light of the decision of the Supreme Court, we propose to assess the damages that the petitioner will be entitled to.

14. It is brought to our notice from the Bar that the petitioner is a widow with three minor children at the time of the occurrence. It is also brought to our notice that the deceased was aged about 40 years at the time of occurrence and was an autorickshaw driver and was in a position to earn Rs. 300/- per day. Considering the age of the deceased and his income, we hold that a sum of Rs. 2,00,000/- would be a reasonable amount of compensation to be paid to the petitioner and her minor children. We direct the respondents to pay the said sum to the petitioner and her minor children. Half the amount of Rs. 2,00,000/- will be paid to the petitioner

and the balance amount will be kept in deposit in a nationalised bank in the name of the children of the petitioner and the petitioner as their natural guardian till the minors attain majority. The interest that may accrue on the amount deposited in nationalised bank will be paid to the petitioner. The petitioner is entitled to draw the interest on the amount deposited in nationalised bank for the maintenance of her children. Time for compliance three months. Rule made absolute accordingly.

15. Before parting with this case we are pained to notice that in recent times there has been an increase in custodial deaths and by the time the family of the victim receives any compensation it takes years and sometimes more than a decade. In the meanwhile, the family is driven to poverty, despair and helplessness. When breadwinner is gone, the wife and children invariably become destitutes. We also notice that most of the family members with respect to custodial deaths come from the lower economic strata of society. We also find no effort is made on the part of the State to rehabilitate the family. We have not even come across one case where even the funeral expenses have been borne by the State. For these victims Article 21 of the Constitution becomes an empty promise.

17. In that view of the matter we do hope that the State will work out a scheme for payment of interim compensation of not less than Rs. 25,000/- in case of custodial deaths to the legal heirs whether it is due to alleged torture or other acts of atrocities or negligence of the police resulting in death including a case of suicide within a time span of one month from the date of occurrence. We are of this view, because we hold the State to be the ultimate protector of the citizen while he is in police custody. The State cannot escape the liability in providing immediate interim relief for the victim's family whenever the death occurs while in their custody. The amount which is to be paid by way of interim compensation will undoubtedly go towards the immediate needs of the family of the deceased for funeral expenses, education of the children and for the rehabilitation of the victim's family. This direction in all cases of custodial deaths is without prejudice to the rights of the citizen to claim compensation in accordance with law and in accordance with the principles laid down by the Supreme Court in *Smt. Nilabati Behera's, case*, supra. We hold that the State to be the ultimate custodian of the prisoner and any violation of his fundamental rights will have to be compensated without delay."

IN THE SUPREME COURT OF INDIA

D. K. Basu v. State of West Bengal

(1997) 1 SCC 416

Kuldip Singh & Dr. A. S. Anand, JJ.

In this public interest writ petition, the Court's attention was drawn to various instances of custodial torture and deaths. The Court elaborated upon its "custody jurisprudence", focusing, inter alia, on the impermissibility of torture within the constitutional set-up. The Court also framed certain guidelines for the protection of fundamental rights of detainees.

Anand, J.: "9. The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

10. "Torture" has not been defined in the Constitution or in other penal laws. "Torture" of a human being by another human being is essentially an instrument to impose the will of the "strong" over the "weak" by suffering. The word *torture* today has become synonymous with the darker side of human civilisation.

> "Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so

> intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."
>
> — Adriana P. Bartow

11. No violation of any one of the human rights has been the subject of so many Conventions and Declarations as "torture" — all aiming at total banning of it in all forms, but in spite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward — flag of humanity must on each such occasion fly half-mast.

12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law.

13. "Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite the pious declaration the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

14. In England, torture was once regarded as a normal practice to get information regarding the crime, the accomplices and the case property or to extract confessions, but with the development of common law and more radical ideas imbibing human thought and approach, such inhuman practices were initially discouraged and eventually almost done away with, certain aberrations here and there notwithstanding. The police powers of arrest, detention and interrogation in England were examined in depth by

Sir Cyril Philips Committee — "*Report of a Royal Commission on Criminal Procedure*" (Command Papers 8092 of 1981). The report of the Royal Commission is instructive. In regard to the power of arrest, the Report recommended that the power to arrest without a warrant must be related to and limited by the object to be served by the arrest, namely, to prevent the suspect from destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested or where there is a good reason to suspect the repetition of the offence and not to every case irrespective of the object sought to be achieved.

15. The Royal Commission suggested certain restrictions on the power of arrest on the basis of the "necessity principle". The Royal Commission said:

> "… We recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:
>
> (a) the person's unwillingness to identify himself so that a summons may be served upon him;
>
> (b) the need to prevent the continuation or repetition of that offence;
>
> (c) the need to protect the arrested person himself or other persons or property;
>
> (d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and
>
> (e) the likelihood of the person failing to appear at court to answer any charge made against him."
>
> The Royal Commission also suggested:
>
> "To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power

> to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case…."

16. The power of arrest, interrogation and detention has now been streamlined in England on the basis of the suggestions made by the Royal Commission and incorporated in Police and Criminal Evidence Act, 1984 and the incidence of custodial violence has been minimised there to a very great extent.

17. Fundamental Rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State. In tune with the constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of the Criminal Procedure Code, 1973 deals with the powers or arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41 CrPC confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint

than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Sections 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death.

18. However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third-degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

19. The Third Report of the National Police Commission in India expressed its deep concern with custodial violence and lock-up deaths. It appreciated the demoralising effect which custodial torture was creating on the society as a whole. It made some very useful suggestions. It suggested:

> "… An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:
>
> (i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary

to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines. …"

The recommendations of the Police Commission (*supra*) reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. These recommendations, however, have not acquired any statutory status so far.

…

22. Custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised nation can permit that to happen. Does a citizen *shed off* his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in *abeyance* on his arrest? These questions touch the spinal cord of human rights' jurisprudence. The answer, indeed, has to be an emphatic "No". The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in

custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

...

24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometimes resulted in his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting in death, as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either policemen or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third-degree methods since they are in charge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. …

…

28. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

29. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third-degree methods during interrogation.

30. Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, RAW, Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well. *Death of Sawinder Singh Grover, Re* [1995 Supp (4) SCC 450 : 1994 SCC (Cri) 1464] , (to which Kuldip Singh, J. was a party) this Court took suo motu notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge an FIR and initiate criminal proceedings against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs 2 lakhs to the widow of the deceased by way of *ex gratia* payment at the interim stage. Amendment of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

31. There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and

order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself.

...

33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of *torture* for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated — indeed subjected to sustained and scientific interrogation — determined in accordance with the provisions of law. He cannot, however, be *tortured or subjected to third-degree methods* or *eliminated* with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a

person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

34. In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be countersigned by the arrestee.

35. We, therefore, consider it appropriate to issue the following *requirements* to be followed in all cases of arrest or detention till legal provisions are made in that behalf as *preventive measures*:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held

in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

36. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

37. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

38. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

39. The *requirements* mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the *requirements* on All India Radio besides being shown on the National Network of Doordarshan any by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

Punitive Measures

40. *Ubi jus, ibi remedium.*—There is no wrong without a remedy. The law wills that in every case where a man is wronged and endamaged he must have a remedy. A mere declaration of invalidity of an action or finding

of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done.

41. Some punitive provisions are contained in the Indian Penal Code which seeks to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Sections 330 and 331 provide for punishment of those who inflict injury or grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustrations (*a*) and (*b*) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions are, however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.

42. Article 9(5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". Of course, the Government of India at the time of its ratification (of ICCPR) in 1979 and made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. (See with advantage *Rudul Sah* v. *State of Bihar* [(1983) 4 SCC 141 : 1983 SCC (Cri) 798] ; *Sebastian M. Hongray* v. *Union of India* [(1984) 1 SCC 339 : 1984 SCC (Cri) 87 and (1984) 3 SCC 82 : 1984 SCC (Cri) 407] ; *Bhim Singh* v. *State of J&K* [1984 Supp SCC 504 : 1985 SCC (Cri) 60 and (1985) 4 SCC 677:

1986 SCC (Cri) 47] ; *Saheli, A Women's Resources Centre* v. *Commr. of Police* [(1990) 1 SCC 422 : 1990 SCC (Cri) 145] .) There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life. (See *Nilabati Behera* v. *State* [(1993) 2 SCC 746 : 1993 SCC (Cri) 527 : 1993 Cri LJ 2899])

43. Till about two decades ago the liability of the Government for tortious acts of its public servants was generally limited and the person affected could enforce his right in tort by filing a civil suit and there again the defence of sovereign immunity was allowed to have its play. For the violation of the fundamental right to life or the basic human rights, however, this Court has taken the view that the defence of sovereign immunity is *not* available to the State for the tortious acts of the public servants and for the established violation of the rights guaranteed by Article 21 of the Constitution of India. …

44. The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or Article 226 of the Constitution of India for the *established* violation of the fundamental rights guaranteed under Article 21, is an exercise of the courts under the public law jurisdiction for penalising the wrongdoer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

45. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their

aspirations. A court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim — civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at time perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family.

...

54. Thus, to sum up, it is now a well-accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the *established* infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the *established* invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

IN THE SUPREME COURT OF INDIA

Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble & Anr.

(2003) 7 SCC 749

Doraiswamy Raju & Arijit Pasayat, JJ.

The appellant's husband was tortured in police custody and died as a result. While the accused police personnel were ultimately acquitted in a criminal trial, the Supreme Court exercised its powers under Article 142 of the Constitution to award compensation to the heirs of the deceased. Further, it directed the head of police force of the State to conduct an enquiry into how injuries were received by the deceased, and to initiate proceedings against the errant officials, notwithstanding the order of acquittal in the criminal case.

Pasayat, J.:"2.Custodial violence, torture and abuse of police power are not peculiar to this country, but it is widespread. It has been the concern of the international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948 which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite this pious declaration, the crime continues unabated, though every civilized nation shows its concern and makes efforts for its eradication.

…

4. Article 21 which is one of the luminary provisions in the Constitution of India, 1950 (in short "the Constitution") and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e. personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short "the Code") deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20(3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen

and the guarantees held out for making life meaningful and not a mere animal existence. It is, therefore, difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of the rule of law and administration of the criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetuated by the protectors of law. …

5. The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because the guardians of law destroy the human rights by custodial violence and torture, invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them. …

…

36. Though justice is depicted to be blind, as popularly said it is only a veil not to see who the party before it is, while enforcing law and administrating justice and not to ignore or turn the mind/attention of the court from the cause or lies before it, in disregard of its duty to prevent injustice being done. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or slumber will tend to paralyse by such inaction or lethargic action of the courts and erode in stages the faith, ultimately destroying the justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diverted by manipulative red herrings. We consider this to be a fit case for exercise of our jurisdiction under Article 142 of the Constitution. We direct the State Government to pay compensation of Rs 1,00,000 to the mother and the children of the deceased. We are not granting any compensation to the widow because she appears to have remarried. A sum of Rs 25,000 be given to the mother and balance to the children. The amounts paid are to be kept in a fixed deposit, and only the interest shall be allowed to be drawn by the mother and the children. If the children are minors, the fixed deposit shall be made in their names through a proper legal guardian till they attain majority. This amount of compensation shall be as a palliative measure and does not preclude the affected person(s) from bringing a suit to recover appropriate damages from the State Government and its erring officials if such a remedy is available in law. The suit, it goes without saying, if filed, shall be decided in accordance with law, uninfluenced by

any finding, observation or conclusion herein. We further direct that an enquiry be conducted by the Head of the police force of the State under the direct control of the Chief Secretary of the State, to find out as to who were the persons responsible for the injuries on the body of the deceased. The starting point of course would be the enquiry as to the necessity for taking the deceased to the hospital on 15-10-1983 where DW 3 examined him. If on further enquiry and on the basis of materials collected it appears that the accused who is being acquitted had a role to play, it shall be open to the authorities to initiate proceedings for action and the same shall be taken notwithstanding the order of acquittal passed by the High Court and affirmed by us. This is so, because on the materials now placed on record the acquittal was justified. Action will also be taken against the officials who did not register the FIR and the authorities who were requested to conduct the Crime Branch enquiry but yet do not appear to have done anything in the matter. Our awarding compensation also shall not be considered as a factor to decide either way as to whether any particular official was responsible for custodial torture. The appeal stands dismissed with the aforesaid observations."

IN THE HIGH COURT OF BOMBAY

Sheela S. Yerpude v. Home Department, Mumbai & Ors.

2005 SCC OnLine Bom 1563

J.N. Patel & S.T. Kharche, JJ.

The petitioner filed a petition under Article 226 and 227 of the Constitution, claiming compensation for the illegal confinement, custodial torture and death of her spouse. The High Court examined the factors that must be taken into consideration while determining the amount to be awarded as compensation.

Patel, J.: "11. In the present petition, the petitioner has also claimed that her husband was earning an amount of Rs. 7,500/- per month and was about 40 years old while he met with an untimely death at the hands of police in police custody. Therefore, his annual income comes to Rs.90000/-. It is submitted that the life expectancy of the deceased would definitely had been not less than 60 years in normal course. As such the petitioner had another 20 years to live. Therefore, on multiplication by the remaining life expectancy, the income comes to Rs. 18 lacs. It is further submitted that out of this amount of Rs. 18 lacs, if the amount of 25% is deducted towards the personal expenses of the deceased, then the amount which he would have given to his family would come to Rs. 13,50,000/-. Thus, the petitioner claims that she is entitled to receive the compensation of Rs. 13,50,000/-. It is contended by the petitioner that she has received a sum of Rs. 2 lacs from the State by way of interim compensation during the pendency of the petition and, therefore, she may be awarded the remaining compensation of Rs. 11,50,000/-.

…

13. At the time when the respondent-State deposited the sum of Rs. 2 lacs, the petitioner moved an application for withdrawal of the said amount, on which this Court observed as under:

> "That we have considered the contentions canvassed by the learned respective Counsel for the parties. In the instant case in view of submission filed by the

> State, it is prima facie clear to us that this is a case of custodial death. Even the investigation carried out by the CID prima facie reveals that husband of the petitioner Sudhakar Yerpude died while he was in the custody due to beating given by the concerned police officials. It is really unfortunate that in spite of various directions given by the Apex Court to the police in regard to custodial interrogation, the Police in utter disregard to such direction given by the Apex Court, is carrying out custodial interrogation, which reveals shocking state of affairs. We expect at least from the Police Department to adhere to the directions given by the Apex Court as well as this Court time and again regarding steps, which the Police Department is required to take while carrying out custodial interrogation. We must express that giving compensation in terms of money is not enough to recover the loss caused to the wife and children of the deceased. The loss caused to them due to death of Shri Sudhakar Yerpude is an irreparable loss and entire family goes through not only financial crisis, but it is also a psychological trauma to the entire family and it will take a long time for them to come out of the same."

14. This Court permitted the petitioner to withdraw the said amount treating it as an interim compensation and further observed that however, final quantum of compensation would be considered and decided at the time of final hearing of the criminal writ petition and disposed of Criminal Application No. 2590 of 2002 in the aforesaid terms.

15. This is a case where the respondent-State has not disputed the accusations made by the petitioner against the State and its officials, that is, the police officers of Lakadganj Police Station and Gittikhadan Police Station. On the other hand, the State has itself offered to pay a sum of Rs. 2 lacs towards compensation to the legal heirs of the victim, who admittedly died in police custody as a result of torture inflicted on him by the police officers of Gittikhadam Police Station.

16. In this background, the only question, which was to be examined by this Court, was the compensation, to which the petitioner and her children

are entitled, for the custodial death of deceased Sudhakar Yerpude. In the course of hearing, this Court expressed that taking into consideration all the facts and circumstances, which are not disputed by the respondent-State, the compensation of Rs. 2 lacs was too meagre and it will be proper on the part of the State to offer reasonable compensation to the petitioner. The learned A.P.P. submitted that he would seek further instructions in the matter from the Home Department and make a statement before the Court, otherwise the matter stood closed for delivering the judgment.

…

20. In the affidavit, it has been tried to be justified that though the State Government has already paid compensation of Rs. 2 lacs to the heirs of the deceased and it is on the suggestion made by this Court and in the facts and circumstances of the case, the State Government has further considered the matter and is inclined to pay additional compensation of Rs. 1 lac, making the total compensation of Rs. 3 lacs in the matter of custodial death. It specifically stated that it will not be just and proper to pay any more compensation on the count that it will untimely burden the State exchequer and will also set a precedent. It is submitted that particularly, in view of the fact that some stolen property was recovered from the deceased in this case and the case is pending trial, the compensation granted is just and reasonable and, therefore, this Court should dispose of the petition on the payment of compensation of Rs. 3 lacs and that a sum of Rs. 1 lac will be immediately paid to the heirs of the deceased after this Court passes an appropriate order in this matter.

…

22. Amongst the aforesaid preventive measures laid down in the case of *D.K. Basu*, 1997 Cri. L.J. 610 (cited supra), there is an utter violation of all the aforesaid guidelines, *viz.* guideline Nos. (1) to (10). Therefore, we treat this as an independent incident for which, in the opinion of this Court, the victim's legal heirs will have to be compensated, as he is no more alive.

…

25. Therefore, according to us, it is not necessary for this Court to wait for the result of the criminal trial, which is pending against the police officers found responsible for causing custodial death of deceased …The other plea raised by the State in para 9 of the said affidavit is that in cases of death due to torturous act, it is humbly submitted that, disputed question of fact arises and proper remedy will be to file a suit for recovery of compensation.

We were rather harbouring an impression that considering the various pronouncements of the Supreme Court and our High Court, out of which we will refer to some of those pronouncements, the State should accept its liability to pay compensation to such victims and the compensation should be just and fair and commensurate with the wrong suffered. It is really surprising that in the affidavit filed by the Joint Secretary, it is stated that this being a case where disputed question of fact arises, the proper remedy will be to file a suit for recovery of compensation. We may remind the State of observations made by the Supreme Court in the case of *D.K Basu*, 1997 Cri. L.J 743, cited above, wherein it has been observed by reiterating the principle *Ubt jus, ibi remedium* as under:

> "There is no wrong without a remedy. The law wills that in every case where a man is wronged and endamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done. There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, the Supreme Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life.
>
> Awarding appropriate punishment for the offence (irrespective compensation) must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional

> remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

26. In this case, there is no doubt about the fact that the victim was on first occasion kept in illegal detention of three days and coerced to give to the police 130 gms. of gold, 100 gms. of silver and a bribe of Rs. 15,000/- to come out of their clutches and on the second occasion, he was tortured to death while in their custody and, therefore, the respondents have no choice but to pay the compensation to the widow and children of the deceased.

…

30. The only question, which now remains for our consideration, is as to how much compensation should be awarded in this case. On this count, the petitioner has claimed the compensation in the sum of Rs. 10 lacs in the present petition. She had also sought compensation of Rs. 10 lacs in the earlier petition filed by her. In the present petition, by way of amendment, she has claimed the compensation of Rs. 13,50,000/-. As the petitioner has received the amount of Rs. 2 lacs by way of interim compensation, she has restricted her claim to Rs. 11,50,000/-.

31. On the other hand, the respondent-State has examined the matter and it finds that a sum of Rs. 1 lac more can be given as an additional compensation by taking a plea that it will not be just and proper to pay any more compensation and has further pleaded that it will untimely burden the State exchequer and will also set a precedent and particularly, in view of that some stolen property was recovered from the deceased in this case and the case is pending trial, the compensation of Rs. 3 lacs is just and reasonable.

32. In our view, the stand taken by the respondent-State that some stolen property was recovered from the deceased in this case and the case is pending trial cannot be a reason to deny the compensation to the widow and children of the deceased for the simple reason that firstly because it is not the case of the respondent-State that the deceased was arrested in the said case as an accused and secondly the claim of the petitioner that her husband was wrongfully detained for three days and tortured in police custody so as to coerce him to part with 130 gms. of gold, 100 gms. of silver and cash of Rs. 15,000/- by way of bribe for letting him to go scot-free, is not challenged by filing any affidavit in the matter.

33. …The Apex Court has clearly expressed that it is not only violation of fundamental rights of a citizen, which are guaranteed under arts. 21 and 22 of the Constitution of India, but also violation of human rights of a citizen. Therefore, these types of cases cannot be considered and compared to cases where the State has awarded compensation to the victims of riot, accident and natural calamity. This is a case where there is a willful act on the part of the officials of the State in violating the fundamental rights of a citizen guaranteed under the Constitution of India and also human rights.

34. Therefore, after considering that the petitioner has already been paid a sum of Rs. 2 lacs by the respondent-State, which was treated as an interim compensation by this Court, we find that for first violation of the fundamental as well as human rights of deceased Sudhakar Yerpude, that is his wrongful detention in police custody by the police officers of Lakadganj Police Station for three days and custodial torture and extortion of gold, silver and an amount of Rs. 15,000/- by way of bribe, a sum of Rs. 3 lacs would be just and reasonable and it would meet the ends of justice.

35. On the count of second incident, that is his wrongful detention and custodial torture, resulting in his death, an additional sum of Rs. 5 lacs would be just and reasonable after taking into account a sum of Rs. 2 lacs, which is already paid to the petitioner.

36. We have arrived at such a conclusion by taking into consideration not only the loss suffered by the petitioner and her children due to custodial death of deceased Sudhakar at the hands of the officers of the State, but also the anguish, mental torture, loneliness, welfare of children and loss of company and care.

37. The compensation awarded to the petitioner as above would be just and appropriate, as the deceased was merely 40 years old.

38. The Courts have time and again deprecated such conduct on the part of police, which is already spelt out in three decisions referred to above by this Court, and the compensation, which is to be awarded, should also have a deterrent effect on the State so that it officers should not be encouraged to indulge in such illegal acts to the extent of taking away human life, which is guaranteed as a fundamental right under the Constitution.

39. Taking into consideration that there are three children of victim Sudhakar, who are minors, we direct that the respondent-State to deposit the amount of compensation of rupees eight lacs in the Court within four weeks from the date of pronouncement of this Judgment. …"

IN THE HIGH COURT OF DELHI

C.B.I. v. Dharampal Singh & Anr.

(2005) 123 DLT 592

R.S. Sodhi, J.

In a case involving the prosecution of police officers for committing offences which amounted to torture, the accused sought the protection of Section 140 of the DPA, 1978 and Section 197, CrPC. The High Court examined whether acts which amount to torture could be granted the protection of these sections.

Sodhi, J.: "7. Having carefully examined the case in hand, it appears to me that this is a case which does not call for nor qualify for the protection under Section 140 of the Delhi Police Act or sanction under Section 197 Cr. P.C. From the narration of facts it is clearly made out that the beating/ torture inflicted on the deceased - Hari Shankar nor detaining of Hari Shankar and other detainees was a part of official duty of the policemen. In other words, it was a flagrant violation of the procedure established by law which cannot be sanctified as a mere aberration in the call of duty.

8. Section 140 of Delhi Police Act, 1918, reads as under:

> "140. Bar to suits and prosecutions
>
> (1) In any case of alleged offence by a police officer or other person, or of a wrong alleged to have been done by such police officer or other person, by any act done under colour of duty or authority or in excess of any such duty or authority or wherein it shall appear to the court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained and if entertained shall be dismissed if it is instituted more than three months after the date of the act complained of;
>
> Provided that any such prosecution against a police

> officer or other person may be entertained by the court, if instituted with the previous sanction of the Administrator, within one year from the date of the offence.
>
> (2) In the case of an intended suit on account of such a wrong as aforesaid the person intending to sue shall give to the alleged wrongdoer not less than one month's notice of the intended suit with sufficient description of the wrong complained of, and if no such notice has been given before the institution of the suit, it shall be dismissed.
>
> (3) The plaint shall set forth that a notice as aforesaid has been served on the defendant and the date of such service and shall state what tender of amends, if any, has been made by the defendant and a copy of the said notice shall be annexed to the plaint endorsed or accompanied with a declaration by the plaintiff of the time and manner of service thereof."

9. A reading of the section clearly makes out that what is necessary to invoke the protection thereunder is "if the act is done under colour of duty or in excess of such duty or authority". This section does not protect every act of omission or commission of a police officer in service. The extent of an act of omission or commission of a policeman in the discharge of his duties has been explained by the Supreme Court in *K. Kalimuthu* v. *State by D.S.P.*, JT 2005(11) SC 48 while dealing with Section 197 CrPC which sought to protect acts of public servants in the discharge of their duties. The Supreme Court has held

> "Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the

> official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It's the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty (under colour of duty) and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case,"

10. From the aforesaid it is clear that not only is every act of a policeman not covered for protection under Section 140 of the Delhi Police Act, 1958, but also must justify that the colour of duty satisfies the test i.e. "if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of official duty; if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty (under colour of duty) and there was every connection with the act complained of and the official duty of the public servant." In the facts of the present case, as has already been stated, there is no connection between the acts done and the duty cast on the policemen)."

IN THE SUPREME COURT OF INDIA

Sube Singh v. State of Haryana & Ors.

(2006) 3 SCC 178

Y.K. Sabharwal,C.J., B.N. Srikrishna & R.V. Raveendran, JJ.

The petitioner filed a writ petition alleging harassment, torture and illegal detention by the police during interrogation regarding the whereabouts of his son who was wanted in various criminal cases. The Supreme Court was called upon to decide what compensation, if any, should be awarded to the petitioner. In its decision, the Court discussed the evolution of award of compensation as a public law remedy for the violation of fundamental rights under Article 21. The Court also suggested several remedial and preventive measures to curb police excesses.

Raveendran, J.: "29. There was … reasonable cause for the police to think that the family members of Joginder might know about his whereabouts. The repeated questioning of the family members of Joginder in the years 1998 and 2001, either at their houses or by calling them to the police station/post was part of the investigation process and cannot, per se, be considered as harassment or violation of Article 21. Whether the police exceeded their limits in questioning the petitioner or his relatives is of course a different aspect. The report of CBI shows that there is prima facie evidence about the petitioner and some of his relatives being illegally detained in the police station/post and subjected possibly to some third-degree methods, to extract information regarding the whereabouts of Joginder Singh. At the same time, the report makes it clear that neither the illegal detention nor the alleged torture (if true) was of an extent alleged by the petitioner and his relatives. The claims were clearly exaggerated and many a time false also. It is quite probable that the allegations against the police were levelled and/or exaggerated to avoid enquiries by the police in regard to Joginder.

30. This leads us to the question whether, in addition to directing the CBI inquiry and prosecution of the officers concerned, on the facts and circumstances of this case, compensation should be awarded to the

petitioner and his family members, as a public law remedy for the violation of their fundamental rights under Article 21 of the Constitution.

Compensation as a public law remedy

31. Though illegal detention and custodial torture were recognised as violations of the fundamental rights of life and liberty guaranteed under Article 21, to begin with, only the following reliefs were being granted in the writ petitions under Article 32 or 226:

(a) direction to set at liberty the person detained, if the complaint was one of illegal detention.

(b) direction to the Government concerned to hold an inquiry and take action against the officers responsible for the violation.

(c) if the enquiry or action taken by the department concerned was found to be not satisfactory, to direct an inquiry by an independent agency, usually the Central Bureau of Investigation.

Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the law of torts, was evolved in the last two-and-a-half decades.

32. …The question was expanded in a subsequent order in *Bhagalpur Blinding case [Khatri (IV) v. State of Bihar* [(1981) 2 SCC 493: 1981 SCC (Cri) 503]] thus:

> "If an officer of the State acting in his official capacity threatens to deprive a person of his life or personal liberty without the authority of law, can such person not approach the court for injuncting the State from acting through such officer in violation of his fundamental right under Article 21? Can the State urge in defence in such a case that it is not infringing the fundamental right of the petitioner under Article 21, because the officer who is threatening to do so is acting outside the law and therefore beyond the scope of his authority and hence the State is not responsible for his action? Would this not make a mockery of Article 21 and reduce it to nullity, a mere rope of sand, for, on this view, if the officer is acting according to law there would ex concessionis be no

> breach of Article 21 and if he is acting without the authority of law, the State would be able to contend that it is not responsible for his action and therefore there is no violation of Article 21. So also if there is any threatened invasion by the State of the fundamental right guaranteed under Article 21, the petitioner who is aggrieved can move the court under Article 32 for a writ injuncting such threatened invasion and if there is any continuing action of the State which is violative of the fundamental right under Article 21, the petitioner can approach the court under Article 32 and ask for a writ striking down the continuance of such action, but where the action taken by the State has already resulted in breach of the fundamental right under Article 21 by deprivation of some limb of the petitioner, would the petitioner have no remedy under Article 32 for breach of the fundamental right guaranteed to him? Would the court permit itself to become helpless spectator of the violation of the fundamental right of the petitioner by the State and tell the petitioner that though the Constitution has guaranteed the fundamental right to him and has also given him the fundamental right of moving the court for enforcement of his fundamental right, the court cannot give him any relief."

33. Answering the said questions, it was held that when a court trying the writ petition proceeds to inquire into the violation of any right to life or personal liberty, while in police custody, it does so, not for the purpose of adjudicating upon the guilt of any particular officer with a view to punishing him but for the purpose of deciding whether the fundamental right of the petitioners under Article 21 has been violated, and the State is liable to pay compensation to them for such violation. This Court clarified that the nature and object of the inquiry is altogether different from that in a criminal case and any decision arrived at in the writ petition on this issue cannot have any relevance, much less any binding effect, in any criminal proceeding which may be taken against a particular police officer. This Court further clarified that in a given case, if the investigation is still proceeding, the Court may even defer the inquiry before it until the investigation is completed or if the Court considered it necessary in the interests of justice, it may postpone its inquiry until after the prosecution was terminated, but that is a matter entirely for the exercise of the discretion of the Court and there is no bar precluding the Court from proceeding with the inquiry before it, even if the

investigation or prosecution is pending.

34. In *Rudul Sah* v. *State of Bihar* [(1983) 4 SCC 141 : 1983 SCC (Cri) 798] the petitioner therein approached this Court under Article 32 of the Constitution, alleging that though he was acquitted by the Sessions Court on 3-6-1968, he was released from jail only on 6-10-1982, after 14 years, and sought compensation for his illegal detention. This Court while recognising that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal, raised for consideration the important question as to whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for payment of money, as compensation for the deprivation of a fundamental right. This Court answered the question thus while awarding compensation: (SCC pp. 147-48, para 10)

> "Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringement of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

Rudul Sah [(1983) 4 SCC 141 : 1983 SCC (Cri) 798] was followed in *Bhim Singh* v. *State of J&K* [(1985) 4 SCC 677 : 1986 SCC (Cri) 47] and *Peoples' Union for Democratic Rights* v. *Police Commr.* [(1989) 4 SCC 730 : 1990 SCC (Cri) 75]

35. The law was crystallised in *Nilabati Behera* v. State of Orissa [(1993) 2 SCC 746: 1993 SCC (Cri) 527]. In that case, the deceased was arrested by the police, handcuffed and kept in police custody. The next day, his dead body was found on a railway track. This Court awarded compensation to the mother of the deceased. J.S. Verma, J. (as he then was) spelt out the following principles:

> "[A]ward of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.
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> … enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention.
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> … 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is

> claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution." (emphasis supplied)

36. Dr. A.S. Anand, J., (as he then was) in his concurring judgment elaborated the principle thus:

> "[C]onvicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental rights by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody.
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> The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by [the Supreme] Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law

> for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

37. In *D.K. Basu* v. State of W.B. [(1997) 1 SCC 416: 1997 SCC (Cri) 92] this Court again considered exhaustively the question and held that monetary compensation should be awarded for established infringement of fundamental rights guaranteed under Article 21. This Court held:

> "Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society.
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> ***
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> Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become lawbreakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put

> in abeyance on his arrest? … The answer, indeed, has to be an emphatic 'No'.
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> Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it."

38. It is thus now well settled that the award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure.

39. This takes us to the next question as to whether compensation should be awarded under Articles 32/226 for every violation of Article 21 where illegal detention or custodial violence is alleged.

Whether compensation should be awarded for every violation of Article 21

40. In *M.C. Mehta v. Union of India* [(1987) 1 SCC 395: 1987 SCC (L&S) 7] a Constitution Bench of this Court while considering the question whether compensation can be awarded in a petition under Article 32, observed thus:

> "We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article

> 32. The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words 'in appropriate cases' because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the court in a petition under Article 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the civil courts. Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32. … If we make a fact analysis of the cases where compensation has been awarded by this Court, we will find that in all the cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil court for claiming compensation."

41. In *Nilabati Behera* [(1993) 2 SCC 746 : 1993 SCC (Cri) 527] this Court put in a word of caution thus:

> "Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible.

> … Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law."

42. In *D.K. Basu* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] this Court repeatedly stressed that compensation can be awarded only for redressal of an established violation of Article 21. This Court also drew attention to the following aspect:

> "31. There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worse than

> the disease itself."

43. In *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble* [(2003) 7 SCC 749: 2003 SCC (Cri) 1918] and *Munshi Singh Gautam* v. State of M.P. [(2005) 9 SCC 631: 2005 SCC (Cri) 1269] this Court warned against non-genuine claims: (*Munshi Singh Gautam case* [(2005) 9 SCC 631: 2005 SCC (Cri) 1269] , SCC p. 639, para 9)

> "9. But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence."

44. In *Dhananjay Sharma v. State of Haryana* [(1995) 3 SCC 757: 1995 SCC (Cri) 608] this Court refused compensation where the petitioner had exaggerated the incident and had indulged in falsehood. …

45. Cases where violation of Article 21 involving custodial death or torture is established or is incontrovertible stand on a different footing when compared to cases where such violation is doubtful or not established. Where there is no independent evidence of custodial torture and where there is neither medical evidence about any injury or disability, resulting from custodial torture, nor any mark/scar, it may not be prudent to accept claims of human rights violation, by persons having criminal records in a routine manner for awarding compensation. That may open the floodgates for false claims, either to mulct money from the State or as to prevent or thwart further investigation. The courts should, therefore, while zealously protecting the fundamental rights of those who are illegally detained or subjected to custodial violence, should also stand guard against false, motivated and frivolous claims in the interests of the society and to enable the police to discharge their duties fearlessly and effectively. While custodial torture is not infrequent, it should be borne in mind that every arrest and detention does not lead to custodial torture.

46. In cases where custodial death or custodial torture or other violation of the rights guaranteed under Article 21 is established, the courts may award compensation in a proceeding under Article 32 or 226. However, before awarding compensation, the Court will have to pose to itself the

following questions: (*a*) whether the violation of Article 21 is patent and incontrovertible, (*b*) whether the violation is gross and of a magnitude to shock the conscience of the court, (*c*) whether the custodial torture alleged has resulted in death or whether custodial torture is supported by medical report or visible marks or scars or disability. Where there is no evidence of custodial torture of a person except his own statement, and where such allegation is not supported by any medical report or other corroborative evidence, or where there are clear indications that the allegations are false or exaggerated fully or in part, the courts may not award compensation as a public law remedy under Article 32 or 226, but relegate the aggrieved party to the traditional remedies by way of appropriate civil/criminal action.

47. We should not, however, be understood as holding that harassment and custodial violence is not serious or worthy of consideration, where there is no medical report or visible marks or independent evidence. We are conscious of the fact that harassment or custodial violence cannot always be supported by a medical report or independent evidence or proved by marks or scars. Every illegal detention irrespective of its duration, and every custodial violence, irrespective of its degree or magnitude, is outright condemnable and per se actionable. Remedy for such violation is available in civil law and criminal law. The public law remedy is additionally available where the conditions mentioned in the earlier paragraph are satisfied. We may also note that this Court has softened the degree of proof required in criminal prosecution relating to such matters. In State of *M.P. v. Shyamsunder Trivedi* [(1995) 4 SCC 262 : 1995 SCC (Cri) 715] , reiterated in *Abdul Gafar Khan* [(2003) 7 SCC 749 : 2003 SCC (Cri) 1918] and *Munshi Singh Gautam* [(2005) 9 SCC 631 : 2005 SCC (Cri) 1269] , this Court observed:

> "[R]arely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, …. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues,….
>
> … The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case, …, often results in miscarriage of justice and makes the justice-delivery

> system suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture." Improving the present situation

48. …Time has come for an attitudinal change not only in the minds of the police, but also on the part of the public. Difficulties in criminal investigation and the time required for such investigation should be recognised, and police should be allowed to function methodically without interferences or unnecessary pressures. If police are to perform better, the public should support them, Government should strengthen and equip them, and men in power should not interfere or belittle them. The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution. Be that as it may.

49. Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurrences. Following steps, if taken, may prove to be effective preventive measures:

(*a*) Police training should be reoriented, to bring in a change in the mindset and attitude of the police personnel in regard to investigations, so that they will recognise and respect human rights, and adopt thorough and scientific investigation methods.

(*b*) The functioning of lower level police officers should be continuously monitored and supervised by their superiors to prevent custodial violence and ensure adherence to lawful standard methods of investigation.

(*c*) Compliance with the eleven requirements enumerated in *D.K. Basu* [(1997) 1 SCC 416: 1997 SCC (Cri) 92] should be ensured in all cases of arrest and detention.

(*d*) Simple and foolproof procedures should be introduced for prompt registration of first information reports relating to all crimes.

(*e*) Computerisation, video-recording and modern methods of record maintenance should be introduced to avoid manipulations, insertions, substitutions and antedating in regard to FIRs, mahazars, inquest proceedings, post-mortem reports and statements of witnesses, etc. and to bring in transparency in action.

(*f*) An independent investigating agency (preferably the respective Human Rights Commissions or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against police personnel and take stern and speedy action followed by prosecution, wherever necessary.

The endeavour should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence-building measures (CBMs), and at the same time, firmly deal with organised crime, terrorism, white-collared crime, deteriorating law and order situation, etc."

IN THE SUPREME COURT OF INDIA

Selvi & Ors. v. State of Karnataka

(2010) 7 SCC 263

K.G. Balakrishnan, C.J., R.V. Raveendran & J.M. Panchal, JJ.

The petitioner filed a special leave petition challenging the constitutional validity of subjecting accused persons, suspects and witnesses in an investigation to Narcoanalysis, Polygraph examination and the BEAP tests. In its judgment, the Court determined whether involuntary administration of the impugned techniques amounts to torture and cruel, inhuman and degrading treatment.

Balakrishnan, C.J.:"102. As mentioned earlier "the right against self-incrimination" is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

103. The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the

person being examined. In this sense, "the right against self-incrimination" is a vital safeguard against torture and other "third-degree methods" that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such "short cuts" will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the "right against self-incrimination" is a vital protection to ensure that the prosecution discharges the said onus.

…

132. In the light of these observations, we must examine the permissibility of extracting statements which may furnish a link in the chain of evidence and hence create a risk of exposure to criminal charges. The crucial question is whether such derivative use of information extracted in a custodial environment is compatible with Article 20(3). It is a settled principle that statements made in custody are considered to be unreliable unless they have been subjected to cross-examination or judicial scrutiny. The scheme created by the Code of Criminal Procedure and the Evidence Act also mandates that confessions made before police officers are ordinarily not admissible as evidence and it is only the statements made in the presence of a Judicial Magistrate which can be given weightage. The doctrine of "excluding the fruit of a poisonous tree" has been incorporated in Sections 24, 25 and 26 of the Evidence Act, 1872.

133. We have already referred to the language of Section 161 CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the "theory of confirmation by subsequent facts" i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for a successful prosecution.

134. [Section 27 of the Indian Evidence Act] permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of *Miranda* [16 L Ed 2d 694 : 384 US 436 (1965)] warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).

135. The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in *Kathi Kalu Oghad* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] . It was observed in the majority opinion by Jagannadhadas, J., at SCR pp. 33-34: (AIR pp. 1815-16, para 13)

> "13. …The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion [has] been used in obtaining the information."

This position was made amply clear at SCR pp. 35-36: (AIR p. 1816, para 15)

> "15. …Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled

> to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised. In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it."

136. The minority opinion also agreed with the majority's conclusion on this point since Das Gupta, J., held at SCR p. 47: (*Kathi Kalu Oghad case* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] , AIR p. 1820, para 36)

> "36. … Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It cannot be disputed that by giving such information the accused furnishes evidence and therefore is a 'witness' during the investigation. Unless however he is 'compelled' to give the information he cannot be said to be 'compelled' to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under Section 27. There will be other cases where the accused gives the information without any compulsion. Where the accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information without any compulsion."

…

Safeguarding the "right against cruel, inhuman or degrading treatment"

227. We will now examine whether the act of forcibly subjecting a person to any of the impugned techniques constitutes "cruel, inhuman or degrading treatment", when considered by itself. This inquiry will account for the permissibility of these techniques in all settings, including those where a person may not be subsequently prosecuted but could face adverse consequences of a non-penal nature. The appellants have contended that the use of the impugned techniques amounts to "cruel, inhuman or degrading treatment".

228. Even though the Indian Constitution does not explicitly enumerate a protection against "cruel, inhuman or degrading punishment or treatment" in a manner akin to the Eighth Amendment of the US Constitution, this Court has discussed this aspect in several cases. For example, in *Sunil Batra* v. Delhi *Admn*. [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] , V.R. Krishna Iyer, J. observed: (SCC pp. 518-19, para 52)

> "*52*. True, our Constitution has no 'due process' clause or the Eighth Amendment; but, in this branch of law, after *Cooper* [*Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248] and *Maneka Gandhi* [*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597] the consequence is the same. For what is punitively outrageous, scandalisingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. *Is a person under death sentence or undertrial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears?* Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Article 19) become chimerical constitutional claptrap. Judges, even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanise and civilise the

> lifestyle within the *carcers*. The operation of Articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether."

229. In *Sunil Batra case* [(1978) 4 SCC 494 : 1979 SCC (Cri) 155] this Court had disapproved of practices such as solitary confinement and the use of bar fetters in prisons. It was held that the prisoners were also entitled to "personal liberty" though in a limited sense, and hence Judges could enquire into the reasonableness of their treatment by the prison authorities. Even though "the right against cruel, inhuman and degrading punishment" cannot be asserted in an absolute sense, there is a sufficient basis to show that Article 21 can be invoked to protect the "bodily integrity and dignity" of persons who are in custodial environments. This protection extends not only to prisoners who are convicts and undertrials, but also to those persons who may be arrested or detained in the course of investigations in criminal cases.

230. Judgments such as *D.K. Basu* v. State of W.B. [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610] , have stressed upon the importance of preventing the "cruel, inhuman or degrading treatment" of any person who is taken into custody. In respect of the present case, any person who is forcibly subjected to the impugned tests in the environs of a forensic laboratory or a hospital would be effectively in a custodial environment for the same. The presumption of the person being in a custodial environment will apply irrespective of whether he/she has been formally accused or is a suspect or a witness. Even if there is no overbearing police presence, the fact of physical confinement and the involuntary administration of the tests is sufficient to constitute a custodial environment for the purpose of attracting Article 20(3) and Article 21. It was necessary to clarify this aspect because we are aware of certain instances where persons are questioned in the course of investigations without being brought on the record as witnesses. Such omissions on the part of the investigating agencies should not be allowed to become a ground for denying the protections that are available to a person in custody.

231.The appellants have also drawn our attention to some international conventions and declarations. For instance in the Universal Declaration of Human Rights, 1948, Article 5 states that:

> "5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

232. Article 7 of the International Covenant on Civil and Political Rights, 1966 also touches on the same aspect. It reads as follows:

> "7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

233. Special emphasis was placed on the definitions of "torture" as well as "cruel, inhuman or degrading treatment or punishment" in Articles 1 and 16 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

> "*Article 1*
>
> 1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.
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> ***
>
> *Article 16*
>
> 1. Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment

which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."

234. We were also alerted to the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988 which have been adopted by the United Nations General Assembly. Principles 1, 6 and 21 hold relevance for us:

"Principle 1
All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

***

Principle 6
No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses,

> whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.
> ***
>
> Principle 21
>
> 1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.
> 2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."
>
> It was shown that protections against torture and "cruel, inhuman or degrading treatment or punishment" are accorded to persons who are arrested or detained in the course of armed conflicts between nations.

235. In the Geneva Convention Relative to the Treatment of Prisoners of War, 1949 the relevant extract reads:

> Article 17
>
> … No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. …

236. Having surveyed these materials, it is necessary to clarify that we are not absolutely bound by the contents of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (hereinafter "the Torture Convention"). This is so because even though India is a signatory to this Convention, it has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and

neither do we have a national legislation which has provisions analogous to those of the Torture Convention. However, these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms.

237. The definition of "torture" indicates that the threshold for the same is the intentional infliction of physical or mental pain and suffering, by or at the instance of a public official for the purpose of extracting information or confessions. "Cruel, inhuman or degrading treatment" has been defined as conduct that does not amount to torture but is wide enough to cover all kinds of abuses. Hence, proving the occurrence of "cruel, inhuman or degrading treatment" would require a lower threshold than that of torture. In addition to highlighting these definitions, the counsel for the appellants have submitted that causing physical pain by injecting a drug can amount to "injury" as defined by Section 44 IPC or "hurt" as defined in Section 319 of the same Code.

238. In response, the counsel for the respondents have drawn our attention to the literature which suggests that in the case of the impugned techniques, the intention on part of the investigators is to extract information and not to inflict any pain or suffering. Furthermore, it has been contended that the actual administration of either the narcoanalysis technique, polygraph examination or the BEAP test does not involve a condemnable degree of "physical pain or suffering". Even though some physical force may be used or threats may be given to compel a person to undergo the tests, it was argued that the administration of these tests ordinarily does not result in physical injuries. (*See* Linda M. Keller, "Is Truth Serum Torture?" [20 American University International Law Review 521-612 (2005)] .)

239. However, it is quite conceivable that the administration of any of these techniques could involve the infliction of "mental pain or suffering" and the contents of their results could expose the subject to physical abuse. When a person undergoes a narcoanalysis test, he/she is in a half-conscious state and subsequently does not remember the revelations made in a drug-induced state. In the case of polygraph examination and the BEAP test, the test subject remains fully conscious during the tests but does not immediately know the nature and implications of the results derived from the same. However, when he/she later learns about the contents of the revelations, they may prove to be incriminatory or be in the nature of testimony that can be used to prosecute other individuals. We have also highlighted the likelihood of a person making incriminatory

statements when he/she is subsequently confronted with the test results. The realisation of such consequences can indeed cause "mental pain or suffering" for the person who was subjected to these tests. The test results could also support the theories or suspicions of the investigators in a particular case. These results could very well confirm suspicions about a person's involvement in a criminal act. For a person in custody, such confirmations could lead to specifically targeted behaviour such as physical abuse. In this regard, we have repeatedly expressed our concern with situations where the test results could trigger undesirable behaviour.

240. We must also contemplate situations where a threat given by the investigators to conduct any of the impugned tests could prompt a person to make incriminatory statements or to undergo some mental trauma. Especially in cases of individuals from weaker sections of society who are unaware of their fundamental rights and unable to afford legal advice, the mere apprehension of undergoing scientific tests that supposedly reveal the truth could push them to make confessional statements. Hence, the act of threatening to administer the impugned tests could also elicit testimony. It is also quite conceivable that an individual may give his/her consent to undergo the said tests on account of threats, false promises or deception by the investigators. For example, a person may be convinced to give his/her consent after being promised that this would lead to an early release from custody or dropping of charges. However, after the administration of the tests the investigators may renege on such promises. In such a case the relevant inquiry is not confined to the apparent voluntariness of the act of undergoing the tests, but also includes an examination of the totality of circumstances.

241. Such a possibility had been outlined by the National Human Rights Commission which had published "Guidelines Relating to Administration of Polygraph Test (Lie Detector Test) on an Accused (2000)". The relevant extract has been reproduced below:

> "… The lie detector test is much too invasive to admit of the argument that the authority for lie detector tests comes from the general power to interrogate and answer questions or make statements. (Sections 160-167 CrPC) However, in India we must proceed on the assumption of constitutional invasiveness and evidentiary impermissiveness to take the view that such holding of tests is a prerogative of the individual,

> not an empowerment of the police. Inasmuch as this invasive test is not authorised by law, it must perforce be regarded as illegal and unconstitutional unless it is voluntarily undertaken under non-coercive circumstances. If the police action of conducting a lie detector test is not authorised by law and impermissible, the only basis on which it could be justified is, if it is volunteered. There is a distinction between: (a) volunteering, and (b) being asked to volunteer. This distinction is of some significance in the light of the statutory and constitutional protections available to any person. There is a vast difference between a person saying, 'I wish to take a lie detector test because I wish to clear my name', and when a person is told by the police, 'If you want to clear your name, take a lie detector test.' A still worse situation would be where the police say, 'Take a lie detector test, and we will let you go.' In the first example, the person voluntarily wants to take the test. It would still have to be examined whether such volunteering was under coercive circumstances or not. In the second and third examples, the police implicitly (in the second example) and explicitly (in the third example) link up the taking of the lie detector test to allowing the accused to go free."

242. We can also contemplate a possibility that even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the test subject does not exercise such a choice in a continuous manner. After the initial consent is given, the subject has no conscious control over the subsequent responses given during the test. In case of the narcoanalysis technique, the subject speaks in a drug-

induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the "relevant questions" that will be asked or the "probes" that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot exercise an effective choice between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent.

243. In this respect, we can re-emphasise Principles 6 and 21 of the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988. The Explanation to Principle 6 provides that:

> "The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."
>
> Furthermore, Principle 21(2) lays down that:
>
> "21. (2) No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."

244. It is undeniable that during a narcoanalysis interview, the test subject does lose "awareness of place and passing of time". It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's "capacity of decision or judgment". Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes "cruel, inhuman or degrading treatment" in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as "torture" and "cruel, inhuman or degrading treatment" are associated with gory images of blood-letting and broken bones. However, we must recognize that a

forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. [A similar conclusion has been made in the following paper: Marcy Strauss, "Criminal Defence in the Age of Terrorism—Torture" [48 New York Law School Law Review 201-274 (2003/2004)]].

245. It would also be wrong to sustain a comparison between the forensic uses of these techniques and the practice of medicine. It has been suggested that patients undergo a certain degree of "physical or mental pain and suffering" on account of medical interventions such as surgeries and drug treatments. However, such interventions are acceptable since the objective is to ultimately cure or prevent a disease or disorder. So it is argued that if the infliction of some "pain and suffering" is permitted in the medical field, it should also be tolerated for the purpose of expediting investigations in criminal cases. This is the point where our constitutional values step in. A society governed by rules and liberal values makes a rational distinction between the various circumstances where individuals face pain and suffering. While the infliction of a certain degree of pain and suffering is mandated by law in the form of punishments for various offences, the same cannot be extended to all those who are questioned during the course of an investigation. Allowing the same would vest unlimited discretion and lead to the disproportionate exercise of police powers."

IN THE SUPREME COURT OF INDIA

Mehmood Nayyar Azam v. State of Chhattisgarh & Ors.

(2012) 8 SCC 1

K. S. P. Radhakrishnan & Dipak Misra, JJ.

The appellant, while in police custody, was compelled to hold a placard containing humiliating statements about himself. He was photographed in this state, and the photographs were disseminated amongst the public. Arguing that he had thereby been defamed and harassed, the appellant sought compensation. The Supreme Court, in its judgment, discussed mental torture and humiliation as elements of custodial torture.

Misra, J.: "6. …[T]he petitioner was compelled to invoke the extraordinary jurisdiction of the High Court of Judicature of Chhattisgarh, at Bilaspur with a prayer for punishing Respondents 4, 5 and 7 on the foundation that their action was a complete transgression of human rights which affected his fundamental right especially his right to live with dignity as enshrined under Article 21 of the Constitution. In the writ petition, prayer was made for awarding compensation to the tune of Rs 10 lakhs.

…

12. Mr Niraj Sharma, learned counsel appearing for the appellant, submitted that when the conclusion has been arrived at that the appellant was harassed at the hands of the police officers and in the departmental enquiry they have been found guilty and punished, just compensation should have been awarded by the High Court. It is further urged by him that this Court had directed to submit a representation to grant an opportunity to the functionaries of the State to have a proper perceptual shift and determine the amount of compensation and grant the same, but the attitude of indifference reigned supreme and no fruitful result ensued.

…

…

18. At this juncture, it is condign to refer to certain authorities in the field. In *D.K. Basu* v. *State of W.B.* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR

1997 SC 610] it has been held thus: (SCC p. 424, paras 10-12)

> "10.'Torture' has not been defined in the Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. …
>
> 11. No violation of any one of the human rights has been the subject of so many conventions and declarations as 'torture' — all aiming at total banning of it in all forms, but in spite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. 'Custodial torture' is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward — flag of humanity must on each such occasion fly half-mast.
>
> 12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law."

…

19. We have referred to the aforesaid paragraphs of *D.K. Basu case* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610] to highlight that this Court has emphasised on the concept of mental agony when a person is confined within the four walls of police station or lock-up. Mental agony stands in contradistinction to infliction of physical pain. In the said case, the two-Judge Bench referred to Article 5 of the Universal Declaration of Human Rights, 1948 which provides that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Thereafter, the Bench adverted to Article 21 and proceeded to state that the expression "life or personal liberty" has been held to include the right to live with human dignity and thus, it would also include within itself a guarantee against torture and assault by the State or its

functionaries. Reference was made to Article 20(3) of the Constitution which postulates that a person accused of an offence shall not be compelled to be a witness against himself.

…

21. After referring to *Joginder Kumar* [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] , A.S. Anand, J. (as His Lordship then was), dealing with the various facets of Article 21 in *D.K. Basu case* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610] , stated that any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen, for a citizen does not shed off his fundamental right to life, the moment a policeman arrests him. The right to life of a citizen cannot be put in abeyance on his arrest. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

22. At this juncture, it becomes absolutely necessary to appreciate what is meant by the term "harassment". In P. RamanathaAiyar's *Law Lexicon*, 2nd Edn., the term "harass" has been defined thus:

> "Harass.—'Injure' and 'injury' are words having numerous and comprehensive popular meanings, as well as having a legal import. A line may be drawn between these words and the word 'harass', excluding the latter from being comprehended within the word 'injure' or 'injury'. The synonyms of 'harass' are: to weary, tire, perplex, distress tease, vex, molest, trouble, disturb. They all have relation to mental annoyance, and a troubling of the spirit."

The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment. The accused in custody can be put under tremendous psychological pressure by cruel, inhuman and degrading treatment.

28. In *Arvinder Singh Bagga v. State of U.P.* [(1994) 6 SCC 565 : 1995 SCC (Cri) 29 : AIR 1995 SC 117] it has been opined that torture is not merely physical but may even consist of mental and psychological torture calculated to create fright to submit to the demands of the police.

…

36. From the aforesaid discussion, there is no shadow of doubt that any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. … The Constitution as the organic law of the land has unfolded itself in a manifold manner like a living organism in the various decisions of the court about the rights of a person under Article 21 of the Constitution of India. When citizenry rights are sometimes dashed against and pushed back by the members of City Halls, there has to be a rebound and when the rebound takes place, Article 21 of the Constitution springs up to action as a protector. That is why, an investigator of a crime is required to possess the qualities of patience and perseverance as has been stated in *Nandini Satpathy* v.*P.L. Dani* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236: AIR 1978 SC 1025].

…

38. It is imperative to state that it is the sacrosanct duty of the police authorities to remember that a citizen while in custody is not denuded of his fundamental right under Article 21 of the Constitution. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed but his basic human rights are not crippled so that the police officers can treat him in an inhuman manner. On the contrary, they are under obligation to protect his human rights and prevent all forms of atrocities. We may hasten to add that a balance has to be struck and, in this context, we may fruitfully quote a passage from *D.K. Basu* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610] : (SCC pp. 434-35, para 33)

> "33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. … The action of the State, however, must be 'right, just and fair'. Using any form of torture for

> extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime suspect must be interrogated — indeed subjected to sustained and scientific interrogation — determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons, etc. His constitutional right cannot be abridged [except] in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal."

39. In the case at hand, the appellant, while in custody, was compelled to hold a placard in which condemning language was written. He was photographed with the said placard and the photograph was made public. …The High Court has recorded the findings in the favour of the appellant but left him to submit a representation to the authorities concerned. This Court, as has been indicated earlier, granted an opportunity to the State to deal with the matter in an appropriate manner but it rejected the representation and stated that it is not a case of defamation. We may at once clarify that we are not at all concerned with defamation as postulated under Section 499 IPC. We are really concerned how in a country governed by the rule of law and where Article 21 of the Constitution is treated to be sacred, the dignity and social reputation of a citizen has been affected.

40. As we perceive, from the admitted facts borne out on record, the appellant has been humiliated. Such treatment is basically inhuman and causes mental trauma. In *Kaplan and Sadock's Synopsis of Psychiatry*, while dealing with torture, the learned authors have stated that intentional physical and psychological torture of one human by another can have emotionally damaging effects comparable to, and possibly worse than, those seen with combat and other types of trauma. Any psychological torture inflicts immense mental pain. A mental suffering at any age in life can carry the brunt and may have nightmarish effect on the victim. The hurt develops a sense of insecurity, helplessness and his self-respect gets gradually atrophied. We have referred to such aspects only to highlight

that in the case at hand, the police authorities possibly had some kind of sadistic pleasure or to "please someone" meted out the appellant with this kind of treatment.

…

48. On a reflection of the facts of the case, it is luculent that the appellant had undergone mental torture at the hands of insensible police officials. He might have agitated to ameliorate the cause of the poor and the downtrodden, but, the social humiliation that has been meted out to him is quite capable of destroying the heart of his philosophy. It has been said that philosophy has the power to sustain a man's courage. But courage is based on self-respect and when self-respect is dented, it is difficult even for a very strong-minded person to maintain that courage. The initial invincible mind paves the path of corrosion. As is perceptible, the mindset of the protectors of law appears to cause torment and insult and tyrannise the man who is helpless in custody. There can be no trace of doubt that he is bound to develop stress disorder and anxiety which destroy the brightness and strength of the will power. It has been said that anxiety and stress are slow poisons. When torment is added, it creates commotion in the mind and the slow poisons get activated. The inhuman treatment can be well visualised when the appellant came out from custody and witnessed his photograph being circulated with the self-condemning words written on it. This withers away the very essence of life as enshrined under Article 21 of the Constitution. Regard being had to the various aspects which we have analysed and taking note of the totality of facts and circumstances, we are disposed to think that a sum of Rs 5 lakhs (Rupees five lakhs only) should be granted towards compensation to the appellant and, accordingly, we so direct. The said amount shall be paid by the respondent State within a period of six weeks and be realised from the erring officers in equal proportions from their salary as thought appropriate by the competent authority of the State."

IN THE HIGH COURT OF BOMBAY

Leonard Xavier Valdaris & Ors. v. Officer-in-charge, Wadala Railway Police Station, Mumbai & Ors.

WP/2110/2014

V.M. Kanade & P.D. Kode, JJ.

In this writ petition dealing with the custodial death and torture of four youths, the Bombay High Court gave various directions for reducing instances of custodial torture and custodial death.

Kode, J.:"3. …Dr. Yug Chaudhry, the learned Counsel appearing on behalf of the Petitioner has given us statistical data in respect of custodial deaths which take place in State of Maharashtra and has submitted that, unfortunately, though there were 333 custodial deaths over a period of 15 years from 1999 to 2013 and 43 FIRs were filed and 19 chargesheets were filed, no police officer has been convicted so far in these cases. He has also submitted a note pointing out the directions which can be given by this Court to the State to ensure firstly that custodial deaths do not take place and the remedial measures which can be implemented to ensure that cases of torture in custody and resultant custodial death does not take place. He has also submitted regarding the manner in which investigation has to be made in cases of custodial torture and or custodial death. He has relied upon the judgment of the Supreme Court in D.K. Basu's case (1997) 1 SCC 416. He has also submitted that, in fact, as a result of the directions given by the Supreme Court in D.K. Basu (supra), in the year 2006 and 2009 several amendments were made in the Code of Criminal Procedure and these remedial measures were incorporated in the Criminal Procedure Code. It is submitted that, however, in spite of the amendment being brought into force in 2009, in large number of cases these safety measures which have been introduced in the CrPC are not adhered to by the State and by the Police. He has also submitted that certain general directions can also be given by this Court. He has given statistical data regarding details of deaths which have taken place in police custody of persons not remanded to police custody by the courts and also regarding the deaths in police custody of persons

who are remanded to police custody by the courts. He has also given the statistics of total deaths in police custody from 1999 to 2013. He has also invited our attention to the recommendation made by the Law Commission of India in its Report No.239 regarding the steps which have to be taken for dealing with this menace. He has submitted that in the said report recommendations have been made to install CCTV Cameras in all the rooms of all Police Stations and steps which have to be taken for modernization of Police Stations and also making use of Mobile Forensic Vans and filing of Chargesheets by CDs. It is submitted that in spite of the said report being filed and tabled in the case of Virender Kumar Ohri vs. Union of India & Others [WP (C) No.341 of 2004) in the Supreme Court, none of the States has completely followed the recommendations made by the said Law Commission. Our attention is also invited to the judgment of the Gujarat High Court given in PIL No. 200 of 2012 (Prakash Kapadia –President of Jagega Gujarat Sangharsh – Petitioner vs.Commissioner of Police (Ahmedabad City) & 3 – Respondent)in which directions have been given by the Gujarat High Court in respect of custodial torture and death after going through various provisions and judgments of the Apex Court as well as Law Commission Report. Our attention is also invited to the order passed by Division Bench of this Court in Criminal Writ Petition No.780 of 2013 dated 16/06/2014.

4. We are also informed that in European Countries also CCTV Cameras have been installed in almost all the rooms in Police Stations and this has resulted in reduction of custodial deaths and torture by almost 40%.

5. We propose to give some directions in this case to the State and to the Police Department and time to CBI to give final report to this Court after they have completed their investigation. We find that statistical data which is mentioned in the Note submitted by the learned Counsel for the Petitioner and which is not controverted since these are figures which are found from the National Crime Records Bureau, indicates that number of custodial deaths in the State of Maharashtra is alarmingly high and constitute almost 23.48% of the total custodial deaths in the country and comparatively there is no conviction of Police Officers who are accused in such cases.

6. We, therefore, direct the State Government to immediately install and maintain closed circuit television (CCTV) with rotating cameras in every corridor, room and lock up of each Police Station so that every part of the Police Station is covered 24 hours of the day and the tapes of the CCTV shall be preserved for a minimum period of one year and responsibility

of ensuring that CCTV is kept operational shall be on the Senior Police Officer in-charge of the Police Station.

7. We further direct that the directions given by the Apex Court in the case of D.K. Basu (supra) are followed to the hilt and similarly amendments which have been brought into force in 2006 and 2009 in respect of arrest, production of the accused and remand are also scrupulously followed in letter and spirit. The responsibility for safety, health and well being of the arrestee shall be that of the Arresting Officer, Investigating Officer, Station House Officer and the Senior Inspector of the Police Station. As and when it is found that the person who is arrested and remanded to Police Custody suffers any injury, he shall be immediately taken to the nearest hospital where he should be given the best possible medical attention that can save his life and restore him to health. The Senior Inspector in-charge of the Police Station shall promptly produce the accused within 24 hours after his arrest and inform his relatives about his arrest and reason for his arrest. If any injuries are found on the person who is in police custody, photographs should be taken. In the event of death in custody, post-mortem shall be video-graphed and preserved. If such an arrested person is injured as a result of police torture and produced before the Magistrate, the learned Magistrate shall apply his mind and consider whether he should be again remanded to police custody. The Magistrate also should ensure that provisions of arrest and production which are now incorporated in sections 41 to 50 are scrupulously followed. In the event the person dies in custody and injuries are found on his person, an FIR should immediately be registered for the offences punishable under the IPC and immediate steps should be taken to arrest the perpetrators of the crime. Magisterial inquiry should be conducted under section 176 (1A) of the CrPC and efforts should be taken to ensure that evidence is not destroyed. Investigation in such cases shall be monitored by the Magistrate. In the case of prosecution of cases of custodial deaths, court shall deal with such cases on high priority and the State shall appoint a Special Public Prosecutor who shall be assisted by a woman Public Prosecutor.

8. We hope and trust that these directions which are given are complied with by the State Government."

CHAPTER 7
PREVENTIVE DETENTION

PREVENTIVE DETENTION

Article 22 of the Constitution of India, as well as a multitude of central and state Acts authorize preventive detention. A constitutional challenge, on grounds of vagueness, to the preventive detention provisions of the National Security Act was turned down in **A. K. Roy v. Union of India**,[1] where the Supreme Court held that such laws by their very nature are incapable of any precise definition, which is why they cannot be struck down as vague.

Pre-Conditions for Preventive Detention

While preventive detention is constitutional, recourse to preventive detention laws can be taken only when ordinary criminal laws and procedure are insufficient to deal with the situation at hand, as held by the Supreme Court in **Rekha v. State of Tamil Nadu**.[2]At the same time, however, the Court in **Dropti Devi v. Union of India**,[3] has allowed preventive detention even in respect of acts which were not legally defined offences. The gravity of the offence though cannot be a factor determining the exercise of preventive detention laws, as stated in **Kundanbhai Shaikh v. District Magistrate**.[4]

In **Bhanwarlal Ganeshmalji v. State of Tamil Nadu**,[5] the Court held that there must be a 'live and proximate link' between the grounds of detention alleged by the detaining authority and the avowed purpose of detention, and that in cases of unexplained delay this link is 'snapped.' However, the link cannot be deemed to have 'snapped' when the delay is not only adequately explained but also has been caused due to the recalcitrant conduct of the detenu.[6]

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1 (1982) 1 SCC 271
2 (2011) 5 SCC 244
3 (2012) 7 SCC 499
4 (1996) 3 SCC 194
5 (1979) 1 SCC 465
6 See also Subhash Popatlal Dave v. Union of India, (2014) 1 SCC 280 (Delay beyond period of detention does not lead to snapping of live and proximate link if it is an explained delay i.e. due to recalcitrant conduct of the detainees)

There might also be situations where a preventive detention order is passed against a person who is already in custody. For such an order to be valid in the eyes of law, the Supreme Court laid down three conditions in **Huidrom Konungjao Singh v. State of Manipur**.[7] The Court held that the authority must have been aware of the factum of custody of the detenu, and further must have had reasons based on reliable material to believe that there was a real possibility of the detenue being released on bail, and of him indulging in activities prejudicial to public order, which it was necessary for the State to prevent.[8]

The Pre-Execution Stage

In **Pooja Batra v. Union of India**,[9] the Supreme Court held that the subjective satisfaction of the detaining authority is found to be unreasonable; the order of detention can be struck down at the pre-execution stage.[10] However, interference at this stage must be done by the judiciary only in exceptional circumstances, a list of which was drawn up by the Court in **Additional Secretary to the Government of India v. Alka Subhash Gadia**.[11] Later, in **Deepak Bajaj v. State of Maharashtra**,[12] the Court clarified that the above list of circumstances is not exhaustive.

Procedure

The Supreme Court in **Jayanarayan Sukul v. State of West Bengal**,[13] laid down four basic principles to be followed in regard to representation of detenus. Improving on this, the Court held in **Kamleshkumar Ishwardas Patel v. Union of India**[14] that the right to representation in Article 22(5) of the Constitution of India necessarily implies that the detenu must be informed about that right; and that an officer especially empowered by the Government to pass an order of detention must also entertain the representation of the detenu. In subsequent cases such as **Rajammal v. State of Tamil Nadu**,[15] the Court has held that inordinate delay by the Government in considering the detenu's representation would vitiate

7 (2012) 7 SCC 181
8 See also Rekha v. State of TamilNadu tr. Sec. to Govt. &Anr.,(2011) 5 SCC 244
9 (2009) 5 SCC 296
10 See alsoState of Maharashtra and Others v. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613 (Subjective satisfaction of detaining authority is not immune from judicial review)
11 1992 Supp (1) SCC 496
12 (2008) 16 SCC 14
13 (1970) 1 SCC 219
14 (1995) 4 SCC 51
15 (1999) 1 SCC 417

the order of detention.[16] In **Icchu Devi Choraria v. Union of India**,[17] the Court held that the order of preventive detention would stand vitiated if all relevant documents were not supplied to the detenu.[18] In **Union of India v. Ranu Bhandari**,[19] the Court clarified that this would include all relevant documents, irrespective of whether the detenu knew about them or not, that are necessary for the detenu to make an adequate representation before the concerned authority.

Further, the State as well as the detenu must be provided with an equal opportunity to put forth their case in front of the authority, as per **State of Andhra Pradesh v. Balajangam Subbarajamma**.[20] Even though no legal or constitutional right to counsel exists in cases of preventive detention, the Court in **Kavita v. State of Maharashtra**,[21] held that an application for the counsel, if made, must be considered on its merits and must be given due application of mind.

Finally, the Delhi High Court in **Pramod Kumar Garg v. Union of India**,[22] has held that once the Advisory Board has expressed its opinion on the lack of sufficient grounds for detention, the detenu cannot be held back any further and is to be released immediately.

Period of Detention

In **Sunil Fulchand Shah v. Union of India**,[23] the Supreme Court was dealing with the effect of temporary release of the detenu on the total period of detention. The Constitution Bench held that the period of parole would have to be included within the period of detention. However, if the parole extended for a period long enough to snap the live and proximate link, it would be fatal to the detention order.

Remedies

Finally, it is important to note that apart from quashing the order of detention, in cases of illegal detention, the Court has also granted compensation as

16 See alsoVijay Kumar v. State of J&K, (1982) 2 SCC 43 (Delay in considering the detenu's representation vitiates an order of detention)
17 (1980) 4 SCC 531
18 See also State of Tamil Nadu and Anr. v. Abdullah Kadher Batcha and Anr., (2009) 1 SCC 333
19 (2008) 17 SCC 348
20 (1989) 1 SCC 193
21 (1981) 3 SCC 558
22 1994 Cri. L.J. 3121
23 (2000) 3 SCC 409

a public law remedy for infringement of fundamental rights in cases such as **N. Sengodan v. Secretary to Government, Home (Prohibition & Excise) Department, Chennai**,[24] and **Yuvraj Ramchandra Pawar v. Dr. N. Ramaswami.**[25]

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In **Pooja Batra v. Union of India**,[26] the Supreme Court held that the subjective satisfaction of the detaining authority is found to be unreasonable; the order of detention can be struck down at the pre-execution stage.[27] However, interference at this stage must be done by the judiciary only in exceptional circumstances, a list of which was drawn up by the Court in **Additional Secretary to the Government of India v. Alka Subhash Gadia**.[28] Later, in **Deepak Bajaj v. State of Maharashtra**,[29] the Court clarified that the above list of circumstances is not exhaustive.

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24 (2013) 8 SCC 664
25 2015 (1) Bom. C.R. (Crl.) 43
26 (2009) 5 SCC 296
27 See alsoState of Maharashtra and Others v. Bhaurao Punjabrao Gawande, (2008) 3 SCC 613 (Subjective satisfaction of detaining authority is not immune from judicial review)
28 1992 Supp (1) SCC 496
29 (2008) 16 SCC 14
30 (1970) 1 SCC 219
31 (1995) 4 SCC 51
32 (1999) 1 SCC 417
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36 (2008) 17 SCC 348
37 (1989) 1 SCC 193
38 (1981) 3 SCC 558
39 1994 Cri. L.J. 3121
40 (2000) 3 SCC 409
41 (2013) 8 SCC 664
42 2015 (1) Bom. C.R. (Crl.) 43

IN THE SUPREME COURT OF INDIA

Jayanarayan Sukul v. State of West Bengal

(1970) 1 SCC 219

M. Hidayatullah, C.J., J.M. Shelat, C.A. Vaidialingam, A.N. Grover & A.N. Ray, JJ.

On 5 June, 1969 the District Magistrate made an order under Section 3(2) of the Preventive Detention Act, 1950 for the detention of the petitioner. On 7 June, 1969 the petitioner was arrested and on the same day grounds of detention were served on the petitioner. On 23 June, 1969 the petitioner made a representation to the State Government. On 1 July, 1969 the State Government placed the case of the petitioner before the Advisory Board under Section 9 of the Act together with the said representation. On 13 August, 1969, the Advisory Board, after consideration of the materials placed before it, determined that there was sufficient cause for the detention of the petitioner. On 19 August, 1969 the State Government rejected the petitioner's representation. The Court, in its judgment, analysed whether inordinate delay by the State in considering the detenu's representation would vitiate the order of detention.

Ray, J.: "20. Broadly stated, four principles are to be followed in regard to representation of detenus. First, the appropriate authority is bound to give an opportunity to the detenu to make a representation and to consider the representation of the detenu as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenu by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raises a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenu's representation to the Advisory Board. If the appropriate

Government will release the detenu, the Government will not send the matter to the Advisory Board. If however, the Government will not release the detenu the Government will send the case along with the detenu's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenu. If the Advisory Board will express any opinion against the release of the detenu the Government may still exercise the power to release the detenu.

21. In the present case, the State of West Bengal is guilty of infraction of the constitutional provisions not only by inordinate delay of the consideration of the representation but also by putting of the consideration till after the receipt of the opinion of the Advisory Board…."

IN THE SUPREME COURT OF INDIA

Bhawarlal Ganeshmalji v. State of Tamil Nadu

(1979) 1 SCC 465

N.L. Untwalia & O. Chinnappa Reddy, JJ.

The impugned detention order was made on 19th December, 1974 by the Government of Tamil Nadu. The grounds for the order were contained in a memorandum dated 20th December, 1974. The order of detention could not be executed immediately as the appellant-petitioner was absconding and could not be apprehended despite a proclamation made pursuant to Section 7 of the CFEPSA Act, 1974. The appellant-petitioner surrendered himself before the Commissioner of Police, Madras on 1st February, 1978. First the order of detention and later the grounds of detention were served on the appellant-petitioner. In its judgment, the Court analyzed whether the 'live and proximate link' between the grounds of detention alleged by the detaining authority and the avowed purpose of detention is snapped where the delay in execution is caused due to the recalcitrant conduct of the detenu.

Reddy, J.: "4. Shri Jethmalani, learned counsel for the detenu, submitted that the order of detention which was made more than three years before its execution must be considered to have lapsed or ceased to be effective without a fresh application of the mind of the detaining authority to the facts and circumstances of the case and the necessity for preventive detention. Otherwise, the learned counsel submitted, the order of preventive detention would change its character and become an order of punishment for an unproven crime…

5. Shri A.V. Rangam, learned counsel for the State of Tamil Nadu urged that the appellant-petitioner was himself responsible for the long delay in the execution of the order of detention and he could not be allowed to take advantage of his own wrong.…

6. It is true that the purpose of detention under the COFEPOSA is not punitive but preventive. The purpose is to prevent organized smuggling

activities and to conserve and augment Foreign Exchange. It is true that the maximum period for which a person may be detained under the COFEPOSA is one year. It is further true that there must be a "live and proximate link" between the grounds of detention alleged by the detaining authority and the avowed purpose of detention, namely, the prevention of smuggling activities. We may in appropriate cases assume that the link is "snapped" if there is a long and unexplained delay between the date of the order of detention and the arrest of the detenu. In such a case we may strike down an order of detention unless the grounds indicate a fresh application of the mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequately explained but is found to be the result of the recalcitrant or refractory conduct of the detenu in evading arrest, there is warrant to consider the "link" not snapped but strengthened. That, precisely, is the state of affairs before us…"

IN THE SUPREME COURT OF INDIA

Smt. Icchu Devi Choraria v. Union of India

(1980) 4 SCC 531

P.N. Bhagwati & E.S. Venkataramiah, JJ.

Though several statements and documents were relied upon in the grounds of detention and considerable reliance was also placed on two tape recorded conversations, the detaining authority did not provide the detenue copies of those statements, documents and tapes, when serving the grounds of detention upon him. In deciding the case, the Court evaluated whether the above fact is sufficient to vitiate the order of detention.

Bhagwati, J.:"3. There were several grounds on which the detention of the detenu was challenged in the petition. But it is not necessary to refer to all the grounds since there is one ground which is, in our opinion, fatal to the continued detention of the detenu and it will be sufficient if we confine our attention to that ground. The contention of the petitioner under this ground was that though several statements and documents were relied upon in the grounds of detention and considerable reliance was also placed on two tape-recorded conversations in the grounds of detention, the detaining authority did not serve on the detenu along with the grounds of detention, copies of those statements, documents and tapes and it could not therefore be said that the grounds of detention were duly served on the detenu as required by subsection (3) of Section 3 of the COFEPOSA Act and clause (5) of Article 22 of the Constitution. The petitioner urged that sub-section (3) of Section 3 of the COFEPOSA Act and clause (5) of Article 22 of the Constitution required that the detaining authority should as soon as may be, communicate to the detenu the grounds on which the order of detention has been made and such grounds would comprise not merely a bare recital of the grounds of detention but also all statements and documents relied upon in the grounds of detention, because these latter would also form part of such grounds. It was also contended by the petitioner in the alternative that, in any event, the detaining authority was bound to give copies of the statements, documents and tapes relied upon in the grounds of detention to the detenu without any avoidable delay in order that the detenu should have the earliest opportunity of making an effective representation against the order of detention. The argument

of the petitioner was that, in the present case, though the detenu asked for the copies of statements, documents and material relied upon in the grounds of detention as early as June 6, 1980, the detaining authority did not supply copies of such statements, documents and materials until July 11, 1980 and on that day also, what were supplied were merely copies of the statements and documents and not the copies of the tapes which were supplied only on July 20, 1980… [I]tis quite possible that the effect of the order may be to let loose on the society, a smuggler who might in all probability, resume his nefarious activities causing incalculable mischief and harm to the economy of the nation. But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil… The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind… It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the Constitution and the law… This Court would be laying down a dangerous precedent if it allows a hard case to make bad law…

4. It is also necessary to point out that in case of an application for a writ of habeas corpus, the practice evolved by this Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to activize this Court into examining the legality of detention. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention… It has also been insisted by this Court that, in answer to this rule, the detaining authority must place all the relevant facts before the court which would show that the detention is in accordance with the provisions of the Act. It would be no argument on the part of the detaining authority to say that a particular ground is not taken in the petition…

5. The practice marks a departure from that obtaining in England where observance of the strict rules of pleading is insisted upon even in case of an application for a writ of habeas corpus, but it has been adopted by this Court in view of the peculiar socio-economic conditions prevailing in the country. Where large masses of people are poor, illiterate and ignorant and access to the courts is not easy on account of lack of financial resources, it would be most unreasonable to insist that the petitioner should set out

clearly and specifically the grounds on which he challenges the order of detention and make out a prima facie case in support of those grounds before a rule is issued or to hold that the detaining authority should not be liable to do anything more than just meet the specific grounds of challenge put forward by the petitioner in the petition. The burden of showing that the detention is in accordance with the procedure established by law has always been placed by this Court on the detaining authority because Article 21 of the Constitution provides in clear and explicit terms that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law.

…

7. Now, in the present case… copies of these documents, statements and other materials were not supplied to the detenu until July 11, 1980 and… even if we assume that there were exceptional circumstances and reasons for not supplying such copies within five days were recorded in writing, such copies should have been supplied to the detenu not later then fifteen days from the date of detention… clause (5) of Article 22 read with Section 3 sub-section (3) of COFEPOSA Act lays down an inexorable rule of law that the grounds of detention shall be communicated to the detenu not later than fifteen days from the date of detention. There are no exceptions or qualifications proved to this rule which operates in all its rigour and strictness and if there any breach of this rule, it must have the effect of invalidating the continued detention of the detenu.

8. It may be pointed out that even if our interpretation of the words "the grounds on which the order has been made" in clause (5) of Article 22 and Section 3 sub-section (3) of the COFEPOSA Act be wrong and these words do not include the documents, statements and other materials relied upon in the grounds of detention, it is unquestionable that copies of such documents, statements and other materials must be supplied to the detenu without any unreasonable delay, because otherwise the detenu would not be able to make an effective representation and the fundamental right conferred on him to be afforded the earliest opportunity of making a representation against his detention would be denied to him. The right to be supplied copies of the documents, statements and other materials relied upon in the grounds of detention without any undue delay flows directly as a necessary corollary from the right conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available, the latter cannot be meaningfully exercised…

9. The facts as we find them here are that the detenu asked for copies of

the documents, statements and other materials relied upon in the grounds of detention by his letters dated June 6, 1980 and June 9, 1980 and he also complained about non-supply of such copies in his representation dated June 26, 1980 but it was only on July 11, 1980 that such copies were supplied to him and even then the copies of the tapes were not furnished until July 20, 1980. There was thus a delay of more than one month in supply of copies of the documents, statements and other materials to the detenu… It was urged before us that the documents and statements of which copies were requested by the detenu ran into 89 pages and it was therefore reasonable to assume that a few days must have been taken in the Customs Department to make copies of these documents and statements and hence the time of 12 days taken up by the Assistant Collector of Customs in sending copies of the documents and statements to the Deputy Secretary could not be said to be unreasonable. This argument is patently unsound, because the Assistant Collector of Customs ought to have kept ready with him copies of the documents, statements and other materials relied upon in the grounds of detention since it should have been anticipated that these copies would have to be supplied to the detenu in order to enable him to make an effective representation against his detention and it does not lie in the mouth of the Assistant Collector of Customs to say that his department started making copies for the first time when a request for copies was made by the detenu. In fact, copies of the documents, statements and other materials relied upon in the grounds of detention should have been available with the detaining authority itself so that they could be supplied to the detenu immediately as soon as a request was made in that behalf…

10. It is also necessary to point out that there was unreasonable delay in considering the representations of the detenu dated June 9, 1980 and June 26, 1980. It is now settled law that on a proper interpretation of clause (5) of Article 22, the detaining authority is under a constitutional obligation to consider the representation of the detenu as early as possible, and if there is unreasonable delay in considering such representation, it would have the effect of invalidating the detention of the detenu… Here in the present case… it is difficult to see why the concerned officer in the Mantralaya should have taken seven days for just forwarding a copy of the representation of the detenu to the Assistant Collector of Customs. There is no explanation at all for this delay in any of the affidavits filed on behalf of the detaining authority. The Assistant Collector of Customs thereafter forwarded his remarks on June 30, 1980 and here again there was a delay of seven days for which no explanation is forthcoming. The remarks of the Assistant Collector of Customs were received by the concerned officer on July 2, 1980 and thereafter the representation started on its upward

journey from the Under-Secretary to the Chief Minister. It appears that by this time the second representation of the detenu dated June 26, 1980 was also received by the State Government and hence this representation was also subjected to the same process as the representation dated June 9, 1980. It was only on July 11, 1980 that these two representations dated June 9, 1980 and June 26, 1980 came to be considered by the Under-Secretary and he made a noting on the file recommending that the request of the detenu for revocation of the order of detention may be rejected, and this noting was approved by the Deputy Secretary as well as the Secretary on the same day and the Chief Minister endorsed it on July 14, 1980. It is indeed difficult to see how these two representations of the detenu could be rejected by the detaining authority when the request of the detenu for copies of the tapes was pending and the Secretary to the State Government in fact made a noting on July 11, 1980 that the copies of the tapes must be given to the detenu by the Customs Department. But even if we take the view that it was not necessary for the detaining authority to wait until after the copies of the tapes were supplied to the detenu, it is difficult to resist the conclusion that the detaining authority was guilty of unreasonable delay in considering the two representations of the detenu, and particularly the representation dated June 9, 1980. This ground is also in our opinion sufficient to invalidate the continued detention of the detenu.

11. These were the reasons for which we allowed the writ petition and directed immediate release of the detenu from detention…"

IN THE SUPREME COURT OF INDIA

Kavita v. State of Maharashtra

(1981) 3 SCC 558

O. Chinnappa Reddy, A.P. Sen & Baharul Islam, JJ.

The Government of Maharashtra, in exercise of powers under Section 3(1) of the CFEPSA, directed the detention of one Sunder Shankardas Devidasani by an order dated March 9, 1981, with a view to prevent him from smuggling goods and abetting the smuggling of goods. When the matter came before the advisory board, the detenu was not allowed to be represented by a lawyer. His application was rejected on the ground that there was no right to legal representation available to the detenu. In its judgment, the Court discussed whether an application for legal representation must be considered on its merits despite the fact that there is no right to the same.

Reddy, J.:"6. The learned Counsel next submitted that the detenu was not permitted to be represented by a lawyer despite his request that he might be allowed to engage the services of a lawyer before the Advisory Board. In his representation to the Government the detenu did make a request to be permitted to be represented by a lawyer... We agree that the importance of legal assistance can never be over-stated and as often than not adequate legal assistance may be essential for the protection of the Fundamental Right to life and personal liberty guaranteed by Article 21 of the Constitution and the right to be heard given to a detenu by Section 8(e), COFEPOSA. These rights may be jeopardized and reduced to mere nothings without adequate legal assistance. That would depend on the facts of each individual case, in the light of the intricacies of the problems involved and other relevant factors. Therefore, where a detenu makes a request for legal assistance, his request would have to be considered on its own merit in each individual case. In the present case, the Government merely informed the detenu that he had no statutory right to be represented by a lawyer before the Advisory Board. Since it was for the Advisory Board and not for the Government to afford legal assistance to the detenu the latter, when he was produced before the Advisory Board, could have, if he was so minded, made a request to the Advisory Board for permission to be represented by a lawyer. He preferred not to do so. In the special circumstances of the present case we are not prepared to hold that the detenu was wrongfully denied the assistance of counsel so as to lead to the conclusion that procedural fairness, a part of the Fundamental Right guaranteed by Article 21 of the Constitution was denied to him."

IN THE SUPREME COURT OF INDIA

A.K. Roy v. Union of India

(1982) 1 SCC 271

Y.V. Chandrachud, C.J., P.N. Bhagwati, A.C. Gupta, V.D. Tulzapurkar & D.A. Desai, JJ.

The constitutionality of Section 3(1)(a) and Section 3(2) of the NSA, 1980 was challenged on the ground that the provisions are so vague, general, and elastic that even conduct which is otherwise lawful can easily be comprehended within those expressions, depending upon the whim and caprice of the detaining authority. In deciding the case, the Court examined whether the impugned provisions of the NSA, 1980 are vague and hence unconstitutional.

Chandrachud, C.J.:"1. This is a group of Writ Petitions under Article 32 of the Constitution challenging the validity of the National Security Ordinance, 2 of 1980, and certain provisions of the National Security Act, 65 of 1980, which replaced the Ordinance…

…

4. The National Security Ordinance, 1980, was passed in order "to provide for preventive detention in certain cases and for matters connected therewith"…

…

58. It is contended by Shri Jethmalani that the expressions 'defense of India', 'relations of India with foreign powers 'security of India' and 'security of the State' which occur in sub-sections (1)(a) and (2) of Section 3 are so vague, general and elastic that even conduct which is otherwise lawful can easily be comprehended within those expressions, depending upon the whim and caprice of the detaining authority…

…

63. We see that the concepts aforesaid, namely, 'defense of India', 'security of India', 'security of the State' and 'relations of India with foreign powers', which are mentioned in Section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. We cannot therefore strike down these provisions of Section 3 of the Act on the ground of their vagueness and uncertainty. We must, however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a precise definition, courts must strive to

give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in Section 3, which are fraught with grave consequences to personal liberty, if construed liberally.

64. What we have said above in regard to the expressions 'defense of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" which occurs in Section 3(2) of the Act. Which supplies and services are essential to the community can easily be defined by the legislature and indeed, legislations which regulate the prices and possession of essential commodities either enumerate those commodities or confer upon the appropriate Government the power to do so. In the absence of a definition of 'supplies and services essential to the community', the detaining authority will be free to extend the application of this clause of sub-section (2) to any commodities or services the maintenance of supply of which, according to him, is essential to the community.

65. But that is not all. The Explanation to sub-section (2) gives to the particular phrase in that sub-section a meaning which is not only uncertain but which, at any given point of time, will be difficult to ascertain or fasten upon. According to the Explanation, no order of detention can be made under the National Security Act on any ground on which an order of detention may be made under the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980. The reason for this, which is stated in the Explanation itself, is that for the purposes of sub-section (2), "acting in any manner prejudicial to the maintenance of supplies essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of Section 3 of the Act of 1980. Clauses (a) and (b) of the Explanation to Section 3(1) of the Act of 1980 exhaust almost the entire range of essential commodities. Clause (a) relates to committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 10 of 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community. Clause (b) of the Explanation to Section 3(1) of the Act of 1980 relates to dealing in any commodity which is an essential commodity as defined in the Essential Commodities Act, 1955, or with respect to which provisions have been made in any such other law as is referred to in clause (a). We find it quite difficult to understand as to which are the remaining commodities outside

the scope of the Act of 1980, in respect of which it can be said that the maintenance of their supplies is essential to the community. The particular clause in sub-section (2) of Section 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context of the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21.

66. Insofar as "services essential to the community" are concerned, they are not covered by the Explanation to Section 3(2) of the Act. But in regard to them also, in the absence of a proper definition or a fuller description of that term or a prior enumeration of such services, it will be difficult for any person to know with reasonable certitude as to which services are considered by the detaining authority as essential to the community. The essentiality of services varies from time to time, depending upon the circumstances existing at any given time. There are, undoubtedly, some services like water, electricity, posts and telegraph, hospitals, railways, ports and road and air transport which are essential to the community at all times but, people have to be forewarned if new categories are to be added to the list of services which are commonly accepted as being essential to the community.

67. We do not, however, propose to strike down the power given to detain persons under Section 3(2) on the ground that they are acting in any manner prejudicial to the maintenance of supplies and services essential to the community. The reason for this is that it is vitally necessary to ensure a steady flow of supplies and services which are essential to the community, and if the State has the power to detain persons on the grounds mentioned in Section 3(1) and the other grounds mentioned in Section 3(2), it must also have the power to pass orders of detention on this particular ground. What we propose to do is to hold that no person can be detained with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community unless, by a law, order or notification made or published fairly in advance, the supplies and services, the maintenance of which is regarded as essential to the community and in respect of which the order of detention is proposed to be passed, are made known appropriately, to the public."

IN THE SUPREME COURT OF INDIA

State of Andhra Pradesh v. Balajangam Subbarajamma

(1989) 1 SCC 193

G. L. Oza & K. Jagannatha Shetty, JJ.

An order of detention was passed against the respondent under the PBMMSECA, 1980. While the advisory board heard the high ranking officers of the Police Department and others on behalf of the Government and detaining authority, the detenu was not provided the assistance of any other person. In its decision, the Court examined whether an equal opportunity must be provided to the State as well as the detenu to present their cases, before the advisory board forms its opinion on the validity of the order of preventive detention.

Shetty, J.:"9. More recently in Johney D'Couto v. State of Tamil Nadu (1988) 1 SCC 116; Ranganath Misra, J. speaking for a Bench of this Court, said: [SCC p. 121: SCC (Cri.) pp. 75-76, para 6]:9. More recently in Johney D'Couto v. State of T.N. [(1988) 1 SCC 116: 1988 SCC (Cri) 70: AIR 1988 SC 109, 112] , Ranganath Misra, J. speaking for a Bench of this Court, said: [SCC p. 121 : SCC (Cri) pp. 75-76, para 6]

> "*The rule in A.K. Roy case [(1982) 1 SCC 271: 1982 SCC (Cri) 152: (1982) 2 SCR 272, 339] made it clear that the detenu was entitled to the assistance of a* '*friend*'. *The word* '*friend*' *used there was obviously not intended to carry the meaning of the term in common parlance. One of the meanings of the word* '*friend*', *according to the Collins*
>
> *English Dictionary is* '*an ally in a fight or cause; supporter*'. *The term* '*friend*' *used in the judgments of this Court was more in this sense than meaning* '*a person known well to another and regarded with liking, affection and loyalty*'. *A person not being a friend in the normal sense could be picked up for rendering*

> *assistance within the frame of the law as settled by this Court. The Advisory Board has, of course, to be careful in permitting assistance of a friend in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. As has been indicated by this Court, what cannot be permitted directly should not be allowed to be done in an indirect way. Sundararajan, in this view of the matter, was perhaps a friend prepared to assist the detenu before the Advisory Board and the refusal of such assistance to the appellant was not justified*."

10. …The safeguards in regard to preventive detention are incorporated under Article 22 of the Constitution. Article 22(4) provides:

> *"No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—*
>
> *(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:*
>
> *Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or…"*

Article 22(5) provides:

> "When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

11. These are the two important constitutional safeguards. The Advisory Board is a constitutional imperative. It has an important function to perform. It has to form an opinion whether there is sufficient cause for the detention of the person concerned… But any procedure that it adopts must satisfy the procedural fairness… That opinion as to sufficient cause is required to be reached with equal opportunity to the State as well as the person concerned, no matter what the procedure. It is important for laws and authorities not only to be just but also appear to be just. Therefore, the action that gives the appearance of unequal treatment or unreasonableness — whether or not there is any substance in it — should be avoided by Advisory Board…

12. In the instant case, since the Advisory Board has heard the high ranking officers of the Police Department and others on behalf of the Government and detaining authority, it ought to have permitted the detenu to have the assistance of a friend who could have made an equally effective representation on his behalf. Since that has been denied to the detenu, the High Court, in our opinion, was justified in quashing the detention order."

IN THE SUPREME COURT OF INDIA

Additional Secretary to the Government of India v. Alka Subhash Gadia

1992 Supp (1) SCC 496

A. M. Ahmadi, P. B. Sawant & S. C. Agrawal, JJ.

An order of detention was passed on 13th December, 1985 against the first respondent's husband, Subhash Chander Gadia under Section 3(1) of the CFEPSAA. He could not, however, be served with the said order as he was absconding. In its decision, the Court examined whether the detenu or anyone on his behalf is entitled to challenge the detention order without the detenu submitting or surrendering to it i.e. at the pre-execution stage. The Court also analyzed whether the detenu or the petitioner on his behalf, as the case may be, is entitled to a copy of the detention order and the grounds on which the detention order is made before the detenu submits to the order.

Sawant, J.:"2. …The High Court by its impugned decision held that the writ petition was maintainable for challenging the detention order even though the detenu was not served with the order and he had thus not surrendered to the authorities. The High Court further directed that the detention order, the grounds of detention, and the documents relied upon for passing the detention order be furnished to the detenu and that they should also be produced before the court. The High Court also directed the authorities to supply the said documents to the counsel for respondent. …

…

25. …It was contended by Shri Sibal, learned Additional Solicitor-General, on behalf of the appellants that since the detention law is constitutionally valid, the order passed under it can be challenged only in accordance with the provisions of, and the procedure laid down by it. In this respect, there is no distinction between the orders passed under the detention law and those passed under other laws. Hence, the High Court under Article 226 and this Court under Article 32 of the Constitution should not exercise its extraordinary jurisdiction in a manner which will enable a party to by-pass

the machinery provided by the law. In this connection, it was emphasized by him that unlike the order passed under other laws, the detention order if stayed or not allowed to be executed, will be frustrated and the very object of the detention law would be defeated. …

…

30. …[I]t is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question.

…

32. This still leaves open the question as to whether the detenu is entitled to the order of detention prior to its execution at least to verify whether it can be challenged at its pre-execution stage on the limited grounds available. In view of the discussion aforesaid, the answer to this question has to be firmly in the negative for various reasons. In the first instance, as stated earlier, the Constitution and the valid law made thereunder do not make any provision for the same. On the other hand, they permit the arrest and detention of a person without furnishing to the detenu the order and the grounds thereof in advance. Secondly, when the order and the grounds are served and the detenu is in a position to make out prima facie the limited grounds on which they can be successfully challenged, the courts, as pointed out earlier, have power even to grant bail to the detenu pending the final hearing of his petition. Alternatively, as stated earlier, the Court can and does hear such petition expeditiously to give the necessary relief to the detenu. Thirdly, in the rare cases where the detenu, before

being served with them, learns of the detention order and the grounds on which it is made, and satisfies the Court of their existence by proper affirmation, the Court does not decline to entertain the writ petition even at the pre-execution stage, of course, on the very limited grounds stated above. The Court no doubt even in such cases is not obliged to interfere with the impugned order at that stage and may insist that the detenu should first submit to it. It will, however, depend on the facts of each case. The decisions and the orders cited above show that in some genuine cases, the courts have exercised their powers at the pre-execution stage, though such cases have been rare. This only emphasizes the fact that the courts have power to interfere with the detention orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right. The discretion is of the Court and it has to be exercised judicially on well settled principles."

IN THE HIGH COURT OF DELHI

Pramod Kumar Garg v. Union of India

1994 SCC OnLine Del 346

D.P. Wadhwa & D.K. Jain, JJ.

The petitioner, a detenu under the CFEPSAA, 1974, filed this petition under Article 226 of the Constitution for his release from custody. The petitioner was detained on 3 January 1994 under order dated 22 December 1993 by the Lt. Governor of the National Capital Territory of Delhi, in the exercise of the powers under Section 3 of the Act. On 22 February 1994, th e advisory board determined that there was no sufficient cause for the detention of the petitioner. However, the petitioner was released only on 22 March 1994, i.e. after a gap of 28 days. In deciding the case, the Court examined whether the detenu may be kept in custody for three months despite the advisory board's opinion that there are no sufficient grounds for the same.

Wadhwa, J.:"7. It is quite a piquant situation that it should have taken 28 days to revoke the order of detention. … The affidavit on behalf of the second respondent was filed by the Deputy Secretary (Home) on 19 April 1994. In this affidavit, clause (f) of section 8 of the Act has been reproduced and then it is stated that the plain reading of this clause would reveal that it had two limbs, the first limb being not qualified with the word "forthwith", and that thereafter followed the second limb which said "and cause the person to be released forthwith". It was stated that the word "release" was qualified with the word "forthwith" and that the release of the person was a consequential action after the order was revoked by the appropriate Government, and it was the function of the authority with whom the detenu was detained, i.e., the Superintendent, Jail, to comply with the order of the Government revoking the detention order and to release the detenu "forthwith". It was stated that the detention order might be illegal if the detenu was kept in detention for long after the order was revoked by the Government, and that clause (f) did not enjoin upon the Government to revoke the detention order "forthwith", and that if the revocation order was passed within the overall limit of three months for which a person could be detained without referring the matter to the Advisory Board, the provision of law stood complied with…

Then it is stated that the petitioner could have been detained up to three months irrespective of the opinion of the Advisory Board and that in the present case the petitioner was released within 77 days of his detention, i.e., within 3 months from the date of detention and immediately after the revocation of the detention order by the Government, and that he was not kept in detention beyond the period of three months which respondents said was the maximum period prescribed for detention without referring the matter to the Advisory Board…

…

9. The proposition given by the respondents is startling. It is unthinkable that when the Advisory Board has given its opinion that there is no sufficient cause for the detention of the detenu he can nevertheless be kept in custody for a period of three months. We repeatedly asked Mr. Sharma, Standing Counsel for Delhi Administration, that in case a detenu is taken into custody on 1 January 1994 and his case is referred to the Advisory Board for its opinion within one week of the detention and the Advisory Board within one week there after gives its opinion that there is no sufficient cause for detention of the detenu and that opinion reaches the detaining authority by 15 January 1994, could it be that the detenu can still be kept in detention up to 30 or 31 March 1994. He parried the question and again and again referred to the aforesaid decisions of the Supreme Court to submit that there would not be any illegality if the detenu is nevertheless detained for a period of three months from the date of detention. It appears to us that the respondents have no regard for the personal liberty of the petitioner and Article 21 of the Constitution has perhaps no meaning for them…

10. It has been held that the Act is valid under Article 22 of the Constitution and therefore, one has to refer to the provisions of the Act itself for the purpose of passing of the order of detention, the detention, the opinion of the Advisory Board, and action on that by the detaining authority. It is apparent, therefore, that the moment opinion of the Advisory Board is received that there is no sufficient cause for the detention of the detenu, the detaining authority "shall revoke the detention order and cause the person to be released forthwith". The law as laid does not contemplate any exceptions and we cannot read into this law the case put by the respondents that in spite of opinion of the Advisory Board that there is no sufficient cause for the detention of a person ,the detaining authority has, no doubt ,to revoke the detention order but that could be done within three months of the date of detention of the detenu irrespective of the

fact when opinion of the Advisory Board was received, and that once the detention order is revoked it is for the jail authorities where the person is confined to release him "forthwith". We do not think such proposition could ever have been advanced by the respondents. Of course, we are not unmindful of the fact that once the opinion of the Advisory Board is received the detenu is not to be released at once and time is required to meet administrative exigencies. As to what the expression "as soon as may be" or the word "forthwith" mean, the Supreme Court has already laid down the guidelines.

11. Then the Explanation offered by the respondents as to how the delay occurred only adds insult to an injury. Is the personal liberty of a person dependent upon the presence or absence of a clerk in the office or that he or the department looking after COFEPOSA matters over-worked? Stand of the respondents appears to be that unless the file moves in a prescribed fashion it cannot reach the detaining authority. Nothing can be more incongruous than that. The Lt. Governor himself while revoking the detention order disapproved the conduct of the officers handling the case terming it "negligence". Yet the stand taken by the respondents is sought to be justified before us. It is just illogical. We, however, record our satisfaction with the order issued by the Lt. Governor for future guidance to the officers, which was shown to us during course of hearing. It is as under:

> **"***LT.GOVERNOR'S Secretariat Raj NIWAS: DELHI. No.F.9 (3)(11)/94-RN/ 3922231*
>
> *Order*
>
> *In order to eliminate any possible delay due to administrative exigencies, it is hereby ordered that cases relating to COFEPOSA Act, cases for revocation of Orders and release of detenus/ prisoners that involve the personal liberty of citizens may be brought in person by a responsible officer of the department concerned and immediately placed before me for my consideration. Heads of Departments may please ensure strict compliance of these instructions. sd/- (P.K. Dave) Lieut. Governor, Delhi. 13.5.1994 Copy to: 1. Chief Secretary,*

Govt. of Nct of Delhi. 2. All Heads of Departments, Govt.of Nct of Delhi."

12. Nevertheless, in the present case the petitioner has been illegally detained for a period of 28 days. His fundamental right as enshrined in Article 21 of the Constitution has been breached. He would be entitled to compensation. Following our judgment in Burhanuddin Tahevali Bilaspurwala v. Union of India, (1993) 4 Delhi Lawyer 430 (Division Bench), in which we relied on the decisions of the Supreme Court in Nilabati Behera Nilabati Behera (Smt.) alias Lalita Behera v. State of Orissa, (1993) 2 SCC 746 and Bhim Singh v. State of J&K, (1985) 4 SCC, we award compensation to the petitioner at the rate of Rs. l,000/ for each day of his illegal detention. This will total to Rs. 25,000. Petitioner could have been released within 2/3 days of the opinion of the Advisory Board. A question also arises: why should State suffer and compensation paid out of the public revenue for the negligence shown by the functionaries of the State. In the circumstances of the present case we leave it to the Lt. Governor to recover the compensation, or any part of it, from the officers who were negligent in processing the case of the petitioner with urgency it required. We find there has been a failure at all levels.

13. Since the petitioner has already been set at liberty no further orders are required in this petition except that we award a sum of Rs. 25,000/- as compensation to the petitioner to be paid by the Government of the National Capital Territory of Delhi."

IN THE SUPREME COURT OF INDIA

Kamlesh Kumar Ishwardas Patel v. Union of India

(1995) 4 SCC 51

A. M. Ahmadi, C.J. S. C. Agrawal, S. P. Bharucha, K. S. Paripoornan & Sujata V. Manohar, JJ.

In this case, the Supreme Court dealt with a number of petitions concerning preventive detention under the CFEPSA. In its decision, the Court examined the scope and importance of the detenue's right to make a representation, as well as the authorities before which such representation can be made.

Agrawal, J.: "4. The question posed has to be considered in the light of the provisions relating to preventive detention contained in Article 22 of the Constitution as well as the provisions contained in the relevant statutes.

5. The Constitution, while permitting Parliament and the State Legislatures to enact a law providing for preventive detention, prescribes certain safeguards in Article 22 for the protection of the persons so detained. One such protection is contained in sub-clause (a) of clause (4) of Article 22 which requires that no law providing for preventive detention shall authorize the detention of a person for a period longer than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for the detention. The other safeguard is contained in clause (5) of Article 22 which provides as under:

> *"22. (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."*

6. This provision has the same force and sanctity as any other provision relating to fundamental rights. (See: State of Bombay v. Atma Ram Shridhar Vaidya [AIR 1951 SC 157]) Article 22(5) imposes a dual obligation on the authority making the order of preventive detention: (i) to communicate to the person detained as soon as may be the grounds on which the order of detention has been made; and (ii) to afford the person detained the earliest opportunity of making a representation against the order of detention. Article 22(5) thus proceeds on the basis that the person detained has a right to make a representation against the order of detention and the aforementioned two obligations are imposed on the authority making the order of detention with a view to ensure that right of the person detained to make a representation is a real right and he is able to take steps for redress of a wrong which he thinks has been committed. Article 22(5) does not, however, indicate the authority to whom the representation is to be made. Since the object and purpose of the representation that is to be made by the person detained is to enable him to obtain relief at the earliest opportunity, the said representation has to be made to the authority which can grant such relief, i.e., the authority which can revoke the order of detention and set him at liberty. The authority that has made the order of detention can also revoke it. This right is inherent in the power to make the order. It is recognized by Section 21 of the General Clauses Act, 1897 though it does not flow from it. It can, therefore, be said that Article 22(5) postulates that the person detained has a right to make a representation against the order of detention to the authority making the order. In addition, such a representation can be made to any other authority which is empowered by law to revoke the order of detention.

…

14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.

…

23. If the power of revocation is to be treated as the criterion for ascertaining the authority to whom representation can be made, then the representation against an order of detention made by an officer specially empowered by the State Government can be made to the officer who has made the order as well as to the State Government and the Central Government who are competent to revoke the order. Similarly, the representation against an order made by the State Government can be made to the State Government as well as to the Central Government and the representation against an order made by an officer specially empowered by the Central Government can be made to the officer who has made the order as well as to the Central Government.

…

38. Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered: Where the detention order has been made under Section 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorized by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation.

…

47. In both the appeals the orders of detention were made under Section 3 of the PIT NDPS Act by the officer specially empowered by the Central

Government to make such an order. In the grounds of detention the detenu was only informed that he can make a representation to the Central Government or the Advisory Board. The detenu was not informed that he can make a representation to the officer who had made the order of detention. As a result the detenu could not make a representation to the officer who made the order of detention. The Madras High Court, by the judgments under appeal dated 18-11-1994 and 17-1-1994, allowed the writ petitions filed by the detenus and has set aside the order of detention on the view that the failure on the part of the detaining authority to inform the detenu that he has a right to make a representation to the detaining authority himself has resulted in denial of the constitutional right guaranteed under Article 22(5) of the Constitution. In view of our answer to the common question posed the said decisions of the Madras High Court setting aside the order of detention of the detenus must be upheld and these appeals are liable to be dismissed."

IN THE SUPREME COURT OF INDIA

Kundanbhai Shaikh v. District Magistrate

(1996) 3 SCC 194

Kuldip Singh & S. Saghir Ahmad, JJ.

Kundanbhai Dulabhai Shaikh and Rameshchandra Somchand Shan were detained in pursuance of orders dated 16th August, 1995, passed by the District Magistrate, Ahmedabad and District Magistrate, Surat, respectively, under Section 3(2) of the PBMMSECA, 1980. In its judgment, the Court re-emphasized that the gravity of an offence irrelevant in preventive detention proceedings.

Ahmad, J.:"5. In both these petitions, the principal contention raised by the counsel for the petitioners is that the representation made by the petitioners against the order of detention were not dealt with expeditiously and were not disposed of by the State Government at the earliest.

…

25. Black marketing is a social evil. Persons found guilty of economic offences have to be dealt with a firm hand, but when it comes to fundamental rights under the Constitution, this Court, irrespective of enormity and gravity of allegations made against the detenu, has to intervene as was indicated in Mahesh Kumar Chauhan case [(1990) 3 SCC 148: 1990 SCC (Cri) 434] and in an earlier decision in Prabhu Dayal Deorah v. Distt. Magistrate [(1974) 1 SCC 103: 1974 SCC (Cri) 18: AIR 1974 SC 183] , in which it was observed that the gravity of the evil to the community resulting from anti-social activities cannot furnish sufficient reason for invading the personal liberty of a citizen, except in accordance with the procedure established by law particularly as normal penal laws would still be available for being invoked rather than keeping a person in detention without trial. …"

IN THE SUPREME COURT OF INDIA

Rajammal v. State of Tamil Nadu

(1999) 1 SCC 417

K.T. Thomas, D.P. Wadhwa & S.S.M. Quadri, JJ.

There was a delay by the Government in considering the detenu's representation. The Government which received remarks from different authorities submitted the relevant files before the Under Secretary for processing it on the next day. The Under Secretary forwarded it to the Deputy Secretary on the next working day. Thereafter, the file was submitted before the Minister who received it while he was on tour. The Minister passed the order only 5 days after that. The Court examined whether delay by the Government in considering the detenu's representation would vitiate the order of detention.

Thomas, J.:"7. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words "as soon as may be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. …

8. …If delay was caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

9. …In this case… Though there is explanation for the delay till 9-2-1998, we are unable to find out any explanation whatsoever as for the delay

which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only on 14-2-1998 is not a justifiable explanation when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay, since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen.

…

11. We are, therefore, of the opinion that the delay from 9-2-1998 to 14-2-1998 remains unexplained and such unexplained delay has vitiated further detention of the detenu. The corollary thereof is that further detention must necessarily be disallowed. We, therefore, allow this appeal and set aside the impugned judgment. We direct the appellant-detenu to be set at large forthwith."

IN THE SUPREME COURT OF INDIA

Sunil Fulchand Shah v. Union of India & Ors.

(2000) 3 SCC 409

G.T. Nanavati, A.S. Anand, D.P. Wadhwa, K.T. Thomas & S. Rajendra Babu, JJ.

A 10 year period had lapsed since the detenus were released on parole, and no material had been placed before the Court by the detaining authority to warrant further detention of the detenus. In its decision, the Court dealt with whether the period of detention is a fixed period running from the dates specified in the detention order and ending with the expiry of that period or the period is automatically extended by any period of parole granted to the detenu. The Court also examined whether a detenue who is released by the High Court, but the decision is revered on appeal, will have to be re-arrested and undergo detention for the remaining period of detention as mentioned in the original detention order.

Anand, J.: "16. …The detenus, in my opinion need not be directed to undergo "the remaining period of detention" because the nexus between detention and the object of detention would appear to have been snapped during this period of about ten years, during which period the detenus were free. ...

…

26. In this country, there are no statutory provisions dealing with the question of grant of parole. The Code of Criminal Procedure does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking, an administrative action. The distinction between grant of bail and parole has been clearly brought out in the judgment of this Court in *State of Haryana* v. *Mohinder Singh* [(2000) 3 SCC 394] to which one of us (Wadhwa, J.) was a party. That distinction is explicit and I respectfully agree with that distinction.

27. Thus, it is seen that "parole" is a form of "temporary release" from

custody, which does not suspend the sentence or the period of detention, but provides conditional release from custody and changes the mode of undergoing the sentence. COFEPOSA does not contain any provision authorizing the grant of parole by judicial intervention. As a matter of fact, Section 12 of COFEPOSA, which enables the administration to grant *temporary release* of a detained person expressly lays down that the *Government may direct* the release of a detenu for any specified period either without conditions or upon such conditions as may be specified in the order granting parole, which the parolee accepts.…

…

30. Since release on parole is only a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards the total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise. The period during which parole is availed of is not aimed to extend the outer limit of the maximum period of detention indicated in the order of detention. The period during which a detenu has been out of custody on temporary release on parole, unless otherwise prescribed by the order granting parole, or by rules or instructions, has to be *included* as a part of the total period of detention because of the very nature of parole. An order made under Section 12 of temporary release of a detenu on parole does not bring the detention to an end for any period — it does not interrupt the period of detention — it only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. The detenu is not a free man while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of detention keeps ticking during this period of temporary release of a detenu also because a parolee remains in legal custody of the State and under the control of its agents, subject at any time, for breach of condition, to be returned to custody. …

…

32. The quashing of an order of detention by the High Court brings to an end such an order and if an appeal is allowed against the order of the High Court, the question whether or not the detenu should be made to surrender to undergo the remaining period of detention, would depend

upon a variety of factors and in particular on the question of lapse of time between the date of detention, the order of the High Court, and the order of this Court, setting aside the order of the High Court. A detenu need not be sent back to undergo the remaining period of detention, after a long lapse of time, when even the maximum prescribed period intended in the order of detention has expired, unless there *still* exists a proximate temporal nexus between the period of detention prescribed when the detenu was required to be detained and the date when the detenu is required to be detained pursuant to the appellate order and the State is able to satisfy the court about the desirability of "further" or "continued" detention. Where, however, a long time has *not* lapsed or the period of detention initially fixed in the order of detention has also not expired, the detenu may be sent back to undergo the balance period of detention. It is open to the appellate court, considering the facts and circumstances of each case, to decide whether the period during which the detenu was free on the basis of an erroneous order should be excluded while computing the total period of detention as indicated in the order of detention, though normally the period during which the detenu was free on the basis of such an erroneous order may not be given as a "set-off" against the total period of detention. The actual period of incarceration cannot, however, be permitted to exceed the maximum period of detention, as fixed in the order, as per the prescription of the statute.

IN THE SUPREME COURT OF INDIA

Deepak Bajaj v. State of Maharashtra

(2008) 16 SCC 14

Altamas Kabir & Markandey Katju, JJ.

A writ petition under Article 32 of the Constitution of India was filed to challenge the detention order dated 22.05.2008 passed against the petitioner, Deepak Gopaldas Bajaj, under Section 3(1) of the CFEPSA Act, 1974. The Court examined whether a petition challenging a detention order may be filed before it is executed.

Katju, J.:"3. An objection has been taken by the learned Counsels for the respondents that this petition should not be entertained because the petition has been filed at a pre-execution stage i.e. before the petitioner has surrendered or was arrested…

…

8. Shri Shekhar Naphade, learned Senior Counsel for the State of Maharashtra submitted that the five conditions mentioned in *Alka Subhash Gadia case* [1992 Supp (1) SCC 496] were exhaustive and not illustrative. We cannot agree. As already stated above, a judgment is not a statute, and hence cannot be construed as such. In *Alka Subhash Gadia case* [1992 Supp (1) SCC 496] this Court only wanted to lay down the principle that entertaining a petition against a preventive detention order at a pre-execution stage should be an exception and not the general rule. We entirely agree with that proposition. However, it would be an altogether different thing to say that the five grounds for entertaining such a petition at a pre-execution stage mentioned in *Alka Subhash Gadia case* [1992 Supp (1) SCC 496] are exhaustive. In our opinion, they are illustrative and not exhaustive.

9. If a person against whom a preventive detention order has been passed can show to the court that the said detention order is clearly illegal, why should he be compelled to go to jail? To tell such a person that although such a detention order is illegal, he must yet go to jail though he will be released later, is a meaningless and futile exercise."

IN THE SUPREME COURT OF INDIA

Union of India v. Ranu Bhandari

(2008) 17 SCC 348

Altamas Kabir & Markandey Katju, JJ.

On 15th December, 2005, the Joint Secretary (CFEPSA), Government of India, Ministry of Finance, Department of Revenue, New Delhi, issued an order of detention against Sanjay Bhandari, the husband of the respondent/writ petitioner, under Section 3(1) of the CFEPSA, 1974. However, the detenu was not supplied with all relevant documents prior to making his representation before the detaining authority. In its judgment, the Court examined whether the detaining authority should supply to the detenu all the documents in its possession regarding the case in order to enable him to make an effective representation.

Kabir, J.: "9. The learned Additional Solicitor General, Mr A. Sharan, questioned the decision of the High Court on the ground that all the documents which had been considered by the detaining authority and found to be relevant in issuing the detention order, had been indicated in the detention order and supplied to the detenu. Furthermore, it was pointed out by the learned Solicitor General that the documents which were not supplied originated from the detenu himself.

10. The learned Additional Solicitor General submitted that the question as to what documents were required to be supplied to a detenu along with the detention order has fallen for consideration of this Court in innumerable cases. The consistent view which has been taken by this Court is that documents which had been relied upon by the detaining authority to come to a decision that it was necessary to issue the order of detention, would have to be supplied to the detenu to enable him to understand the grounds on which the detention order had been passed and to make an effective representation in respect thereof, in keeping with Article 22(5) of the Constitution.

…

15. The learned Additional Solicitor General urged that the instant case

would fall within that class of cases wherein this Court has held that non-supply of all the documents mentioned in the detention order, which had no relevance in regard to the detaining authority's satisfaction in passing the order of detention, would not vitiate the same.

…

18. It was submitted that in the instant case certain vital documents which could have had a bearing on the decision of the detaining authority while passing the detention order, had not been placed before the detaining authority as the same were in the detenu's favour and upon considering the same the detaining authority may not have issued the said detention order.

…

26. We have indicated hereinbefore that the consistent view expressed by this Court in matters relating to preventive detention is that while issuing an order of detention, the detaining authority must be provided with all the materials available against the individual concerned, both against him and in his favour, to enable it to reach a just conclusion that the detention of such individual is necessary in the interest of the State and the general public.

27. It has also been the consistent view that when a detention order is passed all the material relied upon by the detaining authority in making such an order, must be supplied to the detenu to enable him to make an effective representation against the detention order in compliance with Article 22(5) of the Constitution, irrespective of whether he had knowledge of the same or not. …

…

29. This brings us to the next question as to whether even such material as had not been considered by the detaining authority while issuing the detention order, is required to be supplied to the detenu to enable him to make an effective representation against his detention.

31. … What is, therefore, imperative is that copies of such documents which had been relied upon by the detaining authority for reaching the satisfaction that in the interest of the State and its citizens the preventive detention of the detenu is necessary, have to be supplied to him. Furthermore, if in this case, the detenu's representation and writ petition had been placed before the detaining authority, which according to the detenu contained his

entire defence to the allegations made against him, the same may have weighed with the detaining authority as to the necessity of issuing the order of detention at all.

32. We are inclined to agree with the submissions made on behalf of the respondent that, notwithstanding the nature of the allegations made, he was entitled to the assurance that at the time when the detention order was passed all the materials, both for and against him, had been placed for the consideration of the detaining authority and had been considered by it before the detention order was passed, having particular regard to the orders passed by the Settlement Commission appointed under the provisions of the Customs Act, 1962, which absolved the detenu from all criminal prosecution.

33. In the instant case, as some of the vital documents which have a direct bearing on the detention order, had not been placed before the detaining authority, there was sufficient ground for the detenu to question such omission. We are also of the view that on account of the non-supply of the documents mentioned hereinbefore, the detenu was prevented from making an effective representation against his detention."

IN THE SUPREME COURT OF INDIA

Pooja Batra v. Union of India

(2009) 5 SCC 296

Dalveer Bhandari &P. Sathasivam, JJ.

The appellant's husband was detained under the CFEAPSA Act, 1974. The appellant filed for a writ of habeas corpus in the High Court seeking her husband's release from detention, which was dismissed. She then appealed to the Supreme Court. In deciding this case, the Court examined whether a single incident may be enough to prove propensity for the purposes of preventive detention and, whether the subjective satisfaction of the authority may be challenged before the court on the ground of unreasonableness.

Sathasivam, J.: "39. As already discussed, even based on one incident the detaining authority is free to take appropriate action including detaining him under COFEPOSA Act. The detaining authority has referred to the violation in respect of importable goods covered under Bill of Entry No. 589144 dated 25-4-2007. In an appropriate case, an inference could legitimately be drawn even from a single incident of smuggling that the person may indulge in smuggling activities, however, for that purpose antecedents and nature of the activities already carried out by a person are required to be taken into consideration for reaching justifiable satisfaction that the person was engaged in smuggling and that with a view to prevent, it was necessary to detain him. If there is no adequate material for arriving at such a conclusion based on solitary incident the court is required and is bound to protect him in view of the personal liberty which is guaranteed under the Constitution of India.

40. Further, subjective satisfaction of the authority under the law is not absolute and should not be unreasonable. In the matter of preventive detention, what is required to be seen is that it could reasonably be said to indicate any organized act or manifestation of organized activity or give room for an inference that the detenu would continue to indulge in similar prejudicial activity warranting or necessitating the detention of the person to ensure that he does not repeat this activity in future.

41. In other words, while a single act of smuggling can also constitute the basis for issuing an order of detention under the COFEPOSA Act, the highest standards of proof are required to exist. In the absence of any specific and authenticated material to indicate that he had the propensity and potentiality to continue to indulge in such activities in future, the mere fact that on one occasion person smuggled goods into the country would not constitute a legitimate basis for detaining him under the COFEPOSA Act. This can be gathered from the past or future activities of the said person.

42. In the case on hand, we have already pointed out that there were no such past activities as could lead to a reasonable conclusion that the detenu possesses the propensity or the potentiality to indulge in smuggling activities in future, to prevent which, it is necessary to detain him. At present there is nothing in the order of detention which would indicate that any of the said earlier imports was effective in contravention of any of the provisions of the Customs Act, 1962 or that they could have been regarded as having been smuggled into the country within the meaning of Section 2(39) of the said Act. In such a case, as held by this Court in *Chowdarapu Raghunandan* [(2002) 3 SCC 754] the invocation of the COFEPOSA Act against such a person would not be justified.

IN THE SUPREME COURT OF INDIA

Rekha v. Tamil Nadu

(2011) 5 SCC 244

Markandey Katju, S. S. Nijjar & Gyan Sudha Misra, JJ.

In this appeal under Article 136 of the Constitution, the detenue, Ramakrishnan, was detained by an order dated 08.04.2010 passed under the TN Goondas Act, 1982 on the allegation that he was selling expired drugs after tampering with the labels and printing fresh labels showing them as non-expired drugs. The habeas corpus petition filed by the wife of the detenu before the Madras High Court challenging the said detention order was dismissed by the impugned order dated 23.12.2010, pursuant to which this appeal was filed. In its judgment, the Supreme Court examined whether an order for preventive detention may be passed against a person who is already in custody.

Katju, J.:"3. Several grounds have been raised before us, but, in our opinion, this appeal is liable to succeed on one ground itself, and hence we are not going into the other grounds.

…

6. In Para 4 of the grounds of detention, it is stated:

> *"4. I am aware that Thiru. Ramakrishnan is in remand in P-6, Kodungaiyur Police Station, Crime No. 132 of 2010 and he has not moved any bail application so far. The sponsoring authority has stated that the relatives of Thiru. Ramakrishnan are taking action to take him on bail in the above case by filing bail applications before the higher courts since in similar cases bails were granted by the courts after a lapse of time. Hence, there is real possibility of his coming out on bail in the above case by filing a bail application before the higher courts. If he comes out on bail he will indulge in further activities,*

> *which will be prejudicial to the maintenance of public health and order. Further, the recourse to normal criminal law would not have the desired effect of effectively preventing him from indulging in such activities, which are prejudicial to the maintenance of public health and order. On the materials placed before me, I am fully satisfied that the said Thiru. Ramakrishnan is also a drug offender and that there is a compelling necessity to detain him in order to prevent him from indulging in such further activities in future which are prejudicial to the maintenance of public order under the provisions of Tamil Nadu Act 14 of 1982."* *(emphasis sup*plied)

7. A perusal of the above statement in Para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the court concerned. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co-accused in cases on the same footing as the case of the accused. All that has been stated in the grounds of detention is that "in similar cases bails were granted by the courts". In our opinion, in the absence of details this statement is mere ipse dixit, and cannot be relied upon. In our opinion, this itself is sufficient to vitiate the detention order.

…

10. In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of the co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored.

…

27. In our opinion, there is a real possibility of release of a person on bail who is already in custody *provided he has moved a bail application which is pending*. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.

…

30. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.

…

32. … This point which we are emphasizing is of extreme importance, but seems to have been overlooked in the decisions of this Court.

33. No doubt it has been held in the Constitution Bench decision in *Haradhan Saha case* [(1975) 3 SCC 198: 1974 SCC (Cri) 816] that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). *Article 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right*. It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a

person to prison a trial must ordinarily be held giving him an opportunity of placing his defense through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (the Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

34. Hence, the observation in SCC para 34 in *Haradhan Saha case* [(1975) 3 SCC 198] cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.

…

38. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experiences."

IN THE SUPREME COURT OF INDIA

Dropti Devi v. Union of India

(2012) 7 SCC 499

R. M. Lodha & H. L. Gokhale, JJ.

The constitutional validity of Section 3(1)* of CFEPSA *Act, 1974 was challenged to the extent that it empowered the competent authority to make an order of detention against any person with a view to prevent him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange. In its decision, the Court examined whether Parliament through legislation can provide for preventive detention for an act not otherwise declared to be an offence by any law in force.

Lodha, J.:"1. The central issue in this petition under Article 32 of the Constitution concerns the constitutional validity of Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA") to the extent it empowers the competent authority to make an order of detention against any person "with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange".

…

13. The crux of the argument advanced by Mr. Vikram Chaudhari is this: Articles 14, 19 and 21 of the Constitution do not contemplate preventive detention for an "act" where no punitive detention (arrest and prosecution) is even contemplated or provided under law. Such an "act" cannot be made the basis for a preventive detention and such an "act" could not be termed as prejudicial so as to invoke the power of preventive detention and, therefore, Section 3(1) of COFEPOSA to the extent noted above is unconstitutional.

14. Elaborating his arguments, Mr Vikram Chaudhari submitted that there were three other Central Preventive Acts apart from COFEPOSA, namely, (*a*) the National Security Act, 1980, (*b*) the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, and (*c*) the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Act, 1988. In all these three enactments, there are corresponding penal provisions in the form of prosecution. However, in COFEPOSA viz. the power to detain a person to prevent him from indulging in any prejudicial activities relating to conservation or augmentation of foreign exchange is given although there is no corresponding penal punitive law available.

15. Mr Vikram Chaudhari referred to various provisions of FEMA, particularly, Chapter IV that deals with contravention and penalties; Chapter V that provides for adjudication as well as appeal against the order of adjudicating authority vide Sections 16 and 17; Chapter VI that provides for establishment of Directorate of Enforcement; Section 40 that stipulates that the Central Government may in any peculiar circumstances suspend either indefinitely or for a limited period the operation of all or any of the provisions of FEMA and Section 49 which provides for repeal of FERA and sub-section (3) thereof that envisages that no court shall take cognizance of an offence under the repealed Act and submitted that there was major shift in the approach of the legislature inasmuch as foreign exchange violation has been made a civil compoundable offence only under FEMA.

16. It was argued by the learned counsel for the petitioners that a dichotomy had arisen on repeal of FERA as conviction under FERA would be no longer a relevant basis for initiation of proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (Safema) whereas on the same set of accusations detention order under COFEPOSA could be made thereby warranting proceedings under Safema.

…

57. FERA was enacted to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interest of the economic development of the country. Section 2(*b*) defined "authorized dealer". Section 6 provided, inter alia, for authorization of any person by Reserve Bank of India (RBI) to deal in foreign exchange.

58. The restrictions on dealing in foreign exchange were provided in Section 8. Sub-sections (1) and (2) of Section 8 read as follows:

> *"8. Restrictions on dealing in foreign exchange.—*
>
> *(1) Except with the previous general or special permission of Reserve Bank, no person other than an authorized dealer shall in India, and no person resident in India other than an authorized dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorized dealer, any foreign exchange:*
>
> *Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money changer.*
>
> *Explanation— For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.*
>
> *(2) Except with the previous general or special permission of Reserve Bank, no person, whether an authorized dealer or a money changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorized by Reserve Bank."*

59. FERA contained penal provisions. Section 50 provided for imposition of fiscal penalties while Section 56 made provision for prosecution and punishment. FERA stood repealed by FEMA in 1999.

60. Before we refer to FEMA, a brief look at COFEPOSA may be appropriate. COFEPOSA came into force on 19-12-1974. Its Preamble reads as under:

> *"An Act to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for matters connected therewith.*

Whereas violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and thereby a serious adverse effect on the security of the State;

And whereas having regard to the persons by whom and the manner in which such activities or violations are organized and carried on, and having regard to the fact that in certain areas which are highly vulnerable to smuggling, smuggling activities of a considerable magnitude are clandestinely organized and carried on, it is necessary for the effective prevention of such activities and violations to provide for detention of persons concerned in any manner therewith;"

61. Section 3 of COFEPOSA provides for power to make orders detaining certain persons. Sub-section (1) thereof to the extent it is relevant, reads as follows:

"3. Power to make orders detaining certain persons.—(1) The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from—

(i) smuggling goods, or

(ii) abetting the smuggling of goods, or

(iii) engaging in transporting or concealing or keeping smuggled goods, or

> *(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or*
>
> *(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,*
>
> *it is necessary so to do, make an order directing that such person be detained."*

62. Sub-section (3) of Section 3 mandates compliance set out therein as required in Article 22(5). Certain other safeguards as required under Article 22, particularly, sub-clause (*a*) to clause (4) and sub-clause (*c*) to clause (7) of Article 22 of the Constitution have been provided in Sections 8 and 9. Maximum period of detention is provided in Section 10. Notwithstanding the provision contained in Section 10, Section 10-A provides for extension of period of detention in the situations contemplated therein and to the extent provided. Section 11 empowers the Central Government or the State Government, as the case may be, to revoke any detention order.

63. As noted above, FERA has been repealed by FEMA. FEMA was enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating the external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. …

…

66. It is true that provisions of FERA and FEMA differ in some respects, particularly in respect of penalties. It is also true that FEMA does not have provision for prosecution and punishment like Section 56 of FERA and its enforcement for default is through civil imprisonment. However, insofar as conservation and/or augmentation of foreign exchange is concerned, the restrictions in FEMA continue to be as rigorous as they were in FERA. FEMA continues with the regime of rigorous control of foreign exchange and dealing in the foreign exchange is permitted only through authorized person. While its aim is to promote the orderly development and maintenance of foreign exchange markets in India, the Government's control in matters of foreign exchange has not been diluted. The conservation and augmentation of foreign exchange continues to be as important as it was under FERA. The restrictions on the dealings in foreign exchange continue to be as rigorous in FEMA as they were in

FERA and the control of the Government over foreign exchange continues to be as complete and full as it was in FERA.

…

67. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continue to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardizing the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind COFEPOSA is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on national economy.

68. In today's world physical and geographical invasion may be difficult but it is easy to imperil the security of a State by disturbing its economy. Smugglers and foreign exchange manipulators by flouting the regulations and restrictions imposed by FEMA—by their misdeeds and misdemeanours—directly affect the national economy and thereby endanger the security of the country. In this situation, the distinction between acts where punishments are provided and the acts where arrest and prosecution are not contemplated pales into insignificance. We must remember: the person who violates foreign exchange regulations or indulges in smuggling activities succeeds in frustrating the development and growth of the country. His acts and omissions seriously affect national economy. Therefore, the relevance of provision for preventive detention of the antisocial elements indulging in smuggling and violation and manipulation of foreign exchange in COFEPOSA continues even after repeal of FERA.

IN THE SUPREME COURT OF INDIA

Huidrom Konungjao Singh v. State of Manipur

(2012) 7 SCC 181

Dr. B.S. Chauhan & Dipak Misra, JJ.

A habeas corpus writ petition filed in the Gauhati High Court was dismissed and came on appeal to the Supreme Court. The son of the appellant was arrested on 19.6.2011 by the Imphal police under Section 302, Indian Penal Code, 1860 read with Section 25(1-C), Arms Act, 1959. The District Magistrate, Imphal West passed the detention order dated 30.6.2011 under the Act apprehending that the detenue may be enlarged on bail and he may indulge in activities prejudicial to public order. In its decision, the Court analyzed whether an order for preventive detention may be passed against a person who is already in custody.

Chauhan, J.:"6. Whether a person who is in jail can be detained under detention law has been the subject-matter of consideration before this Court time and again.…

…

9. …There is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged the detaining authority has to satisfy the Court the following facts:

(*1*) The authority was fully aware of the fact that the detenu was actually in custody.

(*2*) There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which are prejudicial to public order.

(*3*) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.

In case either of these facts does not exist the detention order would stand vitiated. The present case requires to be examined in the light of the aforesaid settled legal proposition."

IN THE SUPREME COURT OF INDIA

N. Sengodan v. Secretary to Government, Home (Prohibition & Excise) Department, Chennai & Ors.

(2013) 8 SCC 664

Sudhansu Jyoti Mukhopadhaya & G.S. Singhvi, JJ.

After taking into consideration the representation and the connected records, the advisory board expressed its unanimous opinion that there was no sufficient cause for detention of the appellant. In view of the non-approval of the detention order by the Advisory Board and its finding, the State Government revoked the detention order. A writ petition was filed by the appellant alleging that his detention and confinement in prison amounted to mental and physical cruelty, for which he should be compensated. The Court, in its judgment, dealt with whether the appellant was entitled to damages for having been detained for around two months u/s. 3(2) of the TN Goondas Act, 1982

Mukhopadhaya, J.:"49. It has already been noticed that the respondents before the Advisory Board or before the trial court failed to bring on record any evidence to frame the charges against the appellant under Section 3 of the Police (Incitement to Disaffection) Act, 1922 and under Section 505(1)(*b*) IPC or under Tamil Nadu Act 14 of 1982. In spite of the same, first respondent, second respondent, V. Jegannathan, the then Inspector General and Commissioner of Police, Salem City and the third respondent, M. Ramasamy, the then Inspector of Police, Fairlands Police Station, Salem City before this Court have taken similar plea that the appellant was inciting the police personnel in Tamil Nadu to form an association to fight for their rights and toured the districts of Coimbatore, Tiruchirapalli, Pudukottai and Chennai City and incited the serving police personnel over forming of an association, and acted in a manner prejudicial to the maintenance of public order. By way of additional affidavit certain so-called statements of persons have been enclosed which have been filed without any affidavit and were neither the part of the trial court record or material placed before the Advisory Board. The aforesaid action on the part of the first, second, third and

fourth respondents in support of their act of detaining the appellant illegally by placing some material which has beyond the record justifies the appellant's allegation that the respondents abused their power and position to support their unfair order.

50. In view of the observation made above, though we do not give specific finding on mala fide action on the part of the first, second, third and fourth respondents but we hold that the respondent State and its officers have grossly abused legal power to punish the appellant to destroy his reputation in a manner non-oriented by law by detaining him under Tamil Nadu Act 14 of 1982 in lodging a criminal case No. 11 of 1998 under Section 3 of the Police (Incitement to Disaffection) Act, 1922 and under Section 505(1)(*b*) IPC based on the wrong statements which were fully unwarranted.

51. This Court in *Bhut Nath Mete* v. *State of W.B.* [(1974) 1 SCC] held that:

> *"9. … An administrative order which is based on reasons of fact which do not exist must therefore be held to be infected with an abuse of power." [Ed.: As observed in S.R. Venkataraman v. Union of India, (1979) 2 SCC 491, p. 495, para 9]*

The present case is also covered by the observation as we find that the action was taken by the respondents based on the reasons of fact which do not exist and therefore, the same is held to be infected with an abuse of power.

52. In view of the finding aforesaid, we allow the appeal and impose a cost of Rs 2 lakhs on the State of Tamil Nadu for payment in favour of the appellant. The respondents are directed to ensure the payment within two months. However, there shall be no separate order as to costs."

IN THE HIGH COURT OF BOMBAY

Yuvraj Ramchandra Pawar v. Dr. N. Ramaswami & Ors.

2014 SCC OnLine Bom 1509

S. Oka & A. S. Chandurkar, JJ.

An order of preventive detention was passed against the petitioner on 2nd December, 2013 under Section 3 of the MPDA Act, 1981. The detention order was held to be illegal since there was non-application of mind on part of the detaining authority. In the meantime, the petitioner's employment was terminated as a result of his detention. The Court examined whether compensation can be granted as a public law remedy.

Oka, J.: "21. As far as the grant of compensation by taking recourse to public law remedy is concerned, the law is well settled right from the landmark judgment of the Apex Court in the case of Nilabati Behera. In paragraph 35 of the decision, the Apex Court has observed thus:-

> *"35. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction u/arts. 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights u/art. 21 of the Constitution of India are established to have been flagrantly infringed by called upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law - through appropriate proceedings. Of course, relief in exercise of the power u/art. 32 or 226 would be granted only once it is established that there has been an*

> *infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, it possible. The decisions of this Court in the line of cases starting with Rudul Sah v. State of Bihar 1983 Indlaw SC 231 granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed u/art. 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly particularly where the fundamental right of a citizen u/art. 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings u/art. 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred to by Brother Verma, J."*

22. It is true that the impugned order of detention is illegal. It is true that this is a case where there is a non-application of mind by the Detaining Authority. As we have observed earlier, a person cannot be deprived of his liberty in such casual manner, more so in the case of preventive detention where the liberty is taken away without conducting a trial. The question is whether the Petitioner is entitled to compensation by invoking public law remedy.

23. The Petitioner has not placed on record any material to show that he was regularly employed in Tata Technologies and that he lost his employment due to his detention. He has not placed on record his educational qualifications. Moreover, from the material on record and the affidavit of Detaining Authority, it cannot be said that the Detaining Authority has acted in a malafide manner. In our view, considering all the relevant facts, this is not a case where compensation can be granted in a public law remedy. However, considering the facts of the case and especially the order dated 18th January, 2014 passed by the State Government under Sub-S. (1) of S. 12 of the said Act, this is a fit case where the Petitioner will have to be granted costs of this Petition. The State Government accepted opinion of the Advisory Board that there was no sufficient cause for detention of the Petitioner. In the present case, we quantify the costs at Rs.10,000/-.

24. We make it clear that this Judgment and Order should not be understood to mean that in every case where the order of preventive detention is found to be illegal or is revoked by the State Government on the basis of the opinion of the Advisory Board that the detenu is entitled to compensation or costs. 25. Hence, we dispose of the Petition by passing the following order :-

ORDER:

(i) The State Government shall comply with the assurances recorded in the affidavit of Shri Bajrang Digambar Umate and in particular paragraphs 4 and 5 thereof within a period of two months from today. The affidavit of compliances shall be filed on or before 1st December, 2014;

(ii) We hold that the impugned order of detention is illegal;

(iii) We direct the Respondents to pay costs to the Petitioner quantified at Rs.10,000/- within a period of four weeks from today;

(iv) Rule is partly made absolute on above terms;

(v) For reporting compliance, Petition shall be listed on daily board on 3rd December, 2014 under the caption of "Directions".

CHAPTER 8
HABEAS CORPUS

Habeas corpus

The writ of habeas corpus is enshrined in Article 32 and Article 226 of the Constitution of India.

In **Ghulam Sarwar v. Union of India,**[1] a Constitution Bench examined the importance and scope of the writ of habeas corpus. The Court also held that the doctrine of constructive res judicata is not applicable to the writ of habeas corpus, as that would be whittling down the wide sweep of the constitutional protection.

The Supreme Court in **Kanu Sanyal v. District Magistrate, Darjeeling,**[2] settled various questions pertaining to the writ of habeas corpus. It held that the production of the body of the person detained is not an essential perquisite for the Court to have jurisdiction to deal with the petition. The Court also held that any infirmity in the petitioner's detention at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits.[3] Recently, the Supreme Court in **Manubhai Ratilal Patel Tr. Ushaben v. State of Gujarat**,[4] re-iterated the holding in ***Kanu Sanyal***. It examined various cases,[5] and held that a writ of habeas corpus can only be granted if the Court is satisfied that a person has been committed to jail by virtue of an order that does not suffer from "the vice of lack of jurisdiction or absolute illegality."

Another landmark case on the writ of habeas is **Sebastian M. Hongray v. Union of India**[6] pertains to issuing an ex parte writ of habeas corpus. The Court held that ordinarily the Court would not issue an ex-parte writ of habeas corpus except for situations where not doing so was likely to result in defeating justice. It would be reluctant to issue a writ of habeas corpus ex-parte where the fact of detention may be controverted and it is necessary to investigate the facts.

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1 (1967) 2 SCR 271
2 (1973) 2 SCC 674
3 Kanu Sanyal v. District Magistrate, Darjeeling (1973) 2 SCC 674.
4 (2013) 1 SCC 314
5 Naranjan Singh v. State of Punjab, 1952 Cri.L.J. 656 (S.C.); Ram Narain Singh v. State of Delhi, 1953 Cri.L.J. 113 (S.C.); B.R. Rao v. State of Orissa, (1972) 3 SCC 256; Talib Husain v. State of Jammu and Kashmir, (1971) 3 SCC 118; Sanjay Dutt v. State through C.B.I., Bombay (II), (1994) 5 SCC 410
6 (1984) 1 SCC 339

The writ of habeas corpus has been availed of in case of violation of fundamental rights of convicts and undertrial prisoners. In **Sunil Batra v. Delhi Administration**,[7] a Constitution Bench of the Supreme Court held that the constitutionality of imprisonment, its duration, and conditions of the prison can be validly tested by means of habeas corpus. This was further reiterated by the Supreme Court in **Rakesh Kaushik v. B.L. Vig, Superintendent, Central Jail, New Delhi**,[8] wherein the habeas corpus petition complaining of ill-treatment at the hands of senior officials and other prisoners was granted, and it was held that being convicted and sentenced does not deprive a prisoner of his fundamental rights.

Since the writ of habeas corpus is intrinsically linked with the liberty of a person, the traditional doctrine of locus standi has been relaxed by the Supreme Court. The Court in the case of **Kishore Samrite v. State of U.P.**[9] held that a writ of habeas corpus lies not only against the executive authority but also against private individuals. While examining the issue of locus standi, it opined that apart from the person imprisoned or detained, any person who is not an absolute stranger, can institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment. A plethora of cases have reiterated the point that locus standi is relaxed in cases dealing with the writ of habeas corpus.[10]

The Supreme Court has held that proceedings for a writ of habeas corpus have to be expeditious, and as simple and free from technicality as possible.[11] In **Ummu Sabeena v. State of Kerala**,[12] it was held that technical objections cannot be entertained while dealing with the writ of habeas corpus, since such a writ is "a key that unlocks the door to freedom" and is a writ of highest constitutional importance. This has been further strengthened in **Icchu Devi Choraria v. Union of India**,[13] wherein the Court observed that strict rules of pleading need not be followed, nor should undue emphasis be placed on questions regarding burden of proof. Moreover, it was held that the Court may act on an informal communication (such as a postcard written by a detenu from jail) to examine the legality of detention.

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7 (1980) 3 SCC 488
8 (1980) SCC (Cri) 834
9 (2013) 2 SCC 398
10 Vinoy Kumar v State of U.P. &Anr,(2001) 4 SCC 734;JasbhaiMotibhai Desai v. Roshan Kumar, Haji Bashir Ahmed and Ors.,(1976) 1 SCC 671; State of Orissa v. Madan Gopal, (1952) 1 SCR 28
11 Ranjit Singh v. State of Pepsu, 1959 Cri.L.J. 1124 (S.C.)
12 2011(13) SCALE 28
13 (1980) 4 SCC 5

A plethora of reliefs can be sought under the broad scope of writ of habeas corpus. In **Rudul Sah v. State of Bihar and Anr**,[14] the Court held that in case of an illegal detention, it can pass an order of compensation consequential upon the deprivation of a fundamental right. The Court observed that Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of the Court were limited to only passing orders for release from illegal detention. It held that the State must repair the damage done by its officers to the petitioner's rights. The Apex Court also granted notable reliefs in **Sebastian M. Hongray (II) v. Union of India and Ors**,[15] wherein the issue revolved around enforcing a writ of habeas corpus. It was held that the appropriate mode of enforcing obedience to a writ of habeas corpus is issuing a contempt order and that such an order can be made against a person who intentionally provides false information to a writ of habeas corpus, but not against a person who makes an unintentional misrepresentation. The Court also held that exemplary costs are permissible in such cases.

Another type of relief was the one granted in **Inder Singh v. State of Punjab**,[16] where the Supreme Court did not find a valid explanation from the police or the detaining authority. It hence ordered an enquiry by an independent investigation under a writ of habeas corpus. The Court opined that the police could not be trusted with further investigation in the matter, which necessitated an independent investigation.

Habeas corpus petitions can be invoked both when an individual has been detained by the State, and when such detention takes place at the hands of a private party. Habeas corpus petitions have often been used to curtail the free movement of women. The Apex Court, in the case of **Gian Devi v. The Superintendent, Nari Niketan, Delhi & Others**,[17] wherein a habeas corpus petition under Article 32 was filed, held that a major cannot be detained in women's shelters and no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. This has been further reiterated in **Mrs. Kalyani Chaudhari v. the State of U.P. and Ors**.,[18] wherein the Court held that detention of a major in a Protective Home, even pursuant to a Magistrate's order is not tenable if such order discloses no legally valid reasons for detaining the woman in such Protective Home. Furthermore, in the case of **Oroos Fatima alias Nisha and Anr. v. Senior Superintendent of Police and Anr**,[19] the Court held that when an adult

14 (1983) 4 SCC 141
15 (1984) 3 SCC 82
16 (1994) 6 SCC 275
17 (1976) 3 SCC 234
18 1978 Cri.L.J. 1003 (All)
19 1993 Cri.L.J. 1 (All)

woman voluntarily departs from her father's company and voluntarily stays with her husband, a writ of habeas corpus cannot be granted. This position has been reiterated in **Dwarka Prasad v. State of Rajasthan and Ors**.[20]

A counterpart of the writ of habeas corpus is found in Sections 97 and 98 of the CrPC, 1973. These provisions vest a certain class of judicial officers with the power to issue a search warrant for persons wrongfully confined and the power to compel restoration of abducted females respectively. In the case of **M.G. Shivaraj v. Inspector of Police, Thuraipakkam Police Station**,[21] it was noted that it is not necessary in every case to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution with a petition for issue of writ of habeas corpus, and that the relief which may be needed by the party can easily be obtained by resorting to other remedies, such as Section 97 CrPC.

In **Ashok Thadani v. Ramesh K. Advani and Ors**,[22] a Division Bench of the Andhra Pradesh High Court held that there must be 'reason to believe that any person is confined under such circumstances that the confinement amounts to an offense', i.e. a belief in the judicial mind, after consideration of all available material without ignoring the other side. The same position was reiterated by the Allahabad High Court in **Smt. Shahana alias Shanti v. State of U.P**.,[23] wherein it was held that if a person is not in wrongful confinement, the magistrate has no jurisdiction to issue a search warrant. In **Anuara Begum v. Habil Mea**,[24] it was held that if the woman produced before the magistrate is a major and is not in wrongful confinement, the magistrate cannot direct her to go with her husband.

In the absence of any definition in the Code of Criminal Procedure, the High Court of Bombay,[25] the High Court of Kerala,[26] and the High Court of Nagpur[27] have held that the expression "unlawful" in Section 98 of the CrPC cannot be considered equivalent to or synonymous with the expression "illegal" appearing in Section 43 of the IPC, and hence, merely because an act can furnish a ground for civil action, does not imply that a criminal court can invoke its powers under Section 98,CrPC in relation to that act. Further, the detention must be first shown to be unlawful and it must additionally be proved that the detention was for an unlawful purpose.[28]

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20 2002 Cri.L.J. 1278 (Raj.)
21 1994 Cri.L.J. 1770 (Mad.)
22 1982 Cri.L.J. 1446 (A.P.)
23 2003 Cri.L.J. 3438 (All.)
24 1962 Cri L.J. 159 (Gau.)
25 Punjaji Bagul v. Emperor, AIR 1935 Bom. 164
26 Zeenath v.Kadeeja,2007 Cri.L.J. 600 (Ker.)
27 State v. Billi,1953 Cri.L.J. 743 (Nag.)
28 Abraham v. Mahtabo, 16 Cal. 487

IN THE SUPREME COURT OF INDIA

Ghulam Sarwar v. Union of India & Ors.

(1967) 2 SCR 271

K. Subba Rao, C.J., J.M. Shelat, M. Hidayatullah, R.S. Bachawat & S.M. Sikri, JJ.

The petitioner (a Pakistan national) entered India without any travel documents and was arrested under provisions of the Customs Act. When the petitioner was about to be enlarged on bail, he was detained under the Foreigners Act, as an investigation was in progress in a case of conspiracy of smuggling in which the petitioner was involved. He filed a writ of habeas corpus in the High Court challenging his detention, which was dismissed. Subsequently, he filed a petition before the Supreme Court for issue of a writ of habeas corpus against the respondents directing them to set him at liberty on the ground that the provisions of the Act were invalid. In its judgment, the Court discussed the scope of a writ of habeas corpus and the applicability of the principle of res judicata to habeas corpus petitions.

Subba Rao, C.J.:"6. This leads us to the consideration of the scope of a writ of habeas corpus. The nature of the writ of habeas corpus has been neatly summarized in Corpus Juris Secundum, Vol. 39 at p. 424 thus:

> "The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designated time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or Judge awarding the writ shall consider in that behalf."

Blackstone in his Commentaries said of this writ thus:

> "It is a writ antecedent to statute, and throwing its root deep into the genius of our common law.... It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal

> restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."

This writ has been described by John Marshall, C.J., as "a great constitutional privilege". An eminent Judge observed "there is no higher duty than to maintain it unimpaired". It was described as a magna carta of British liberty. Heavy penalties are imposed on a Judge who wrongfully refuses to entertain an application for a writ of habeas corpus. The history of the writ is the history of the conflict between power and liberty. The writ provides a prompt and effective remedy against illegal restraints. It is inextricably intertwined with the fundamental right of personal liberty. "Habeas corpus" literally means "have his body". By this writ the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo-Saxon jurisprudence.

7. We need not go into the history of this writ in India, for it is now incorporated in Article 226 and Article 32 of the Constitution.

8. On the question of res judicata, the English and the American Courts agreed that the principle of res judicata is not applicable to a writ of habeas corpus, but they came to that conclusion on different grounds. It was held in England that a decision in a writ of habeas corpus was not a judgment, and therefore it would not operate as res judicata and on that basis it was thought at one time that a person detained could file successive applications before different judges of the same High Court. But subsequently the English courts held that a person detained cannot file successive petitions for a writ of habeas corpus before different courts of the same division or before different divisions of the same High Court on the ground that the Divisional Court speaks for the entire division and that each division for the entire Court, and one division cannot set aside the order of another division of the same Court [See Re Hastings [(1958) 3 All ER 625] (No. 2) and Re Hastings [(1959) 1 All ER 698] (No. 3)]. The Administration of Justice Act, 1960 has placed this view on a statutory basis, for under the said Act no second application can be brought in the same court except on fresh evidence. The American Courts reached the same conclusion, but on a different principle. In Edward M. Fay v. Charles Nola [9 L Ed 859] the following passage appears: "As put by Mr Justice Holmes in Frank v. Mangum [237 US 348] : If the petition discloses facts that amount to loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of law. It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void. Hence, the familiar principle

that res judicata is inapplicable in habeas proceedings." The same view was expressed in Wong Doo v. United States; [68 LED 999] Harmon Metz Waley v. James A. Johnston; [86 LED 1302]: Salinger v. Loisel [(1925) 265 US 224] United States v. Shaughnessy; [(1954) 347 US 260] : and others.

9. But coming to India, so far as the High Courts are concerned, the same principle accepted by the English Courts will equally apply, as the High Court functions in divisions not in benches. When it functions as a division, it speaks for the entire court, and, therefore, it cannot set aside the order made in a writ of habeas corpus earlier by another Division Bench. But this principle will not apply to different courts. The High Courts of Allahabad, Bombay, Madras, Nagpur and Patna and East Punjab have accepted this view, though the Calcutta High Court took the view that successive applications of habeas corpus could be filed. But unlike in England, in India the person detained can file original petition for enforcement of his fundamental right to liberty before a court other than the High Court, namely, this Court. The order of the High Court in the said writ is not res judicata as held by the English and the American Courts either because it is not a judgment or because the principle of res judicata is not applicable to a fundamentally lawless order. If the doctrine of res judicata is attracted to an application for a writ of habeas corpus, there is no reason why the principle of constructive res judicata cannot also govern the said application, for the rule of constructive res judicata is only a part of the general principles of the law of res judicata, and if that be applied, the scope of the liberty of an individual will be considerably narrowed. The present case illustrates the position. Before the High Court the petitioner did not question the constitutional validity of the President's order made under Article 359 of the Constitution. If the doctrine of constructive res judicata be applied, this Court, though it is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. That would be whittling down the wide sweep of the constitutional protection.

10. We, therefore, hold that the order of Khanna, J., made in the petition for habeas corpus filed by the petitioner does not operate as res judicata and this Court will have to decide the petition on merits."

IN THE SUPREME COURT OF INDIA

Kanu Sanyal v. District Magistrate, Darjeeling & Ors.

(1973) 2 SCC 674

A.N. Ray, C.J., D.G. Palekar, P.N. Bhagwati, V.R. Krishna Iyer & Y.V. Chandrachud, JJ.

The petitioner filed a petition for a writ of habeas corpus contending that he had been wrongfully deprived of liberty and should be released. In its judgment, the Court examined whether the production of the body of the person alleged to be unlawfully detained is essential before an application for a writ of habeas corpus can be finally heard and disposed of by the courts.

Bhagwati, J.:"7. ...When we find, both on a priori reasoning as also on the basis of the practice in England and the United States, that the production of the body of the person detained is not a basic or essential requirement of a proceeding for a writ of habeas corpus — it is a superfluous element which can be discarded without effecting the utility and effectiveness of the remedy — there is no reason or justification why we should insist upon it while dealing with an application for a writ of habeas corpus. …We must, therefore, hold that while dealing with an application for a writ of habeas corpus under Article 32, the Supreme Court may not require the body of the person detained to be brought before the Court. The production of the body of the person detained is not essential to the jurisdiction of the Supreme Court to deal with the application. The Supreme Court can examine the legality of the detention on the hearing of the rule nisi without requiring that the person detained be brought before the Court, and if the detention is found unlawful, order him to be released forthwith.

8. We are, therefore, of the view that there is nothing in Article 32 which requires that the body of the person detained must be produced before an application for a writ of habeas corpus can be heard and decided by the Court. It is competent to the Court to dispense with the production of the body of the person detained while issuing a rule nisi under Order 35 Rule 4 and the rule nisi can be heard and an appropriate order passed in terms of Order 35 Rule 5, without requiring the body of the person detained to be brought before the Court."

IN THE SUPREME COURT OF INDIA

Gian Devi v. The Superintendent, Nari Niketan, Delhi & Ors.

(1976) 3 SCC 234

H.R. Khanna, Y.V. Chandrachud & P.K. Gowasmi, JJ.

The petitioner filed for a writ of Habeas Corpus before the High Court in response to an order of a Magistrate directing detention of the petitioner in a Nari Niketan. The High Court dismissed the petition on the ground that the petitioner was a minor. Thereafter, the petitioner filed another habeas corpus petition in the Supreme Court. In its judgment, the Court examined whether the petitioner is a major and whether she could be detained in Nari Niketan in accordance with law.

Khanna, J.: "7. It is the case of the petitioner that she was born on June 5, 1954. As against that, the plea of Sheesh Pal Singh, father of the petitioner, is that she was born on April 20, 1956. Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter. The fact that the petitioner has been cited as a witness in a case is no valid ground for her detention in Nari Niketan against her wishes. Since the petitioner has stated unequivocally that she does not want to stay in Nari Niketan, her detention therein cannot be held to be in accordance with law. We accordingly direct that the petitioner be set at liberty."

IN THE HIGH COURT OF ALLAHABAD

Kalyani Chaudhari v. State of U.P. & Ors.

1978 Cri. L. J. 1003 (All.)
Hari Swarup & U.C. Srivastava, JJ.

The petitioner filed for a writ of habeas corpus, claiming that she was being wrongfully detained in a Mahila Ashram. She was detained in the Ashram pursuant to a Magistrate's order in a case involving a dispute between her husband and her father. The petitioner stated she was being detained in the Ashram against her will. The Court examined whether a woman can be detained in a Mahila Ashram, even if it is pursuant to a Magistrate's order, if the order does not disclose any legally valid reasons for detention.

Swarup, J.:"3. Protective Homes find a mention In the Suppression of Immoral Traffic in Women and Girls Act, 1956. "Protective home" has been defined under Section 2(g) as meaning:

an institution, by whatever name called, in which women and girls may be kept in pursuance of this Act and includes-

(i) a shelter where female under-trials may be kept in pursuance of this Act; and

(ii) a corrective institution in which women and girls rescued and detained under this Act may be imparted such training and instruction and subjected to such disciplinary and moral influences as are likely to conduce to their reformation and the prevention of offences under this Act.

Sub-sec. (2) of S. 10 of the Act provides that where a woman or girl is convicted of any offence under S. 7 or S. 8, she may be kept in the protective homes.

4. A reading of the provision of the Suppression of Immoral Traffic in Women and Girls Act clearly shows that a person can be kept in a Protective Home only when she is being dealt with under the Act. No person can be kept in the protective home unless she is required to be kept there either in pursuance of the Suppression of Immoral Traffic in Women and Girls Act, or under some other law permitting her detention in such a Home. It is

admitted that the case does not fall under this Act, no other law has been referred to.

5. The order of the learned Magistrate gives no reason why the girl be kept in the Protective Home. His order mentions no provision of law under which he has passed such a direction. The order of the Magistrate directing the girl to be kept in the 'Protective Home' thus suffers from inherent lack of jurisdiction. Her custody in the protective home cannot, therefore, be held to be a legal custody.

6. Learned counsel for the father of the girl has urged that because according to him, the girl was a minor she could be kept in the protective home and if not, she should be given in custody of the father as she was not a legally married woman. The evidence of the girl shows that she is a major. Moreover, in the present case the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home. The question of giving the girl in the custody of the father also does not arise in the present case as the father was himself instrumental in getting the girl, sent into the Protective Home through the aid of the Police. We are, in these proceedings, also not required to determine the question about the minority or marriage of the girl or about the right of any person to keep in his custody the petitioner, as that is a matter which can arise in proceedings such as under the Guardians and Wards Act and not in a petition for Habeas Corpus where the petitioner seeks freedom from illegal detention. The objection raised on behalf of the father cannot therefore be sufficient for holding that the petitioner is not entitled to liberty from her illegal detention.

7. Learned counsel for the petitioner Mrs. Kalyani Chowdhary (Kumari Kalyani Devi) and the girl herself have stated that she will appear in the criminal court whenever she is summoned in connection with the case which the police may be investigating and in connection with which the order was secured from the City Magistrate.

8. There is no allegation that the petitioner has committed any offence; there can therefore be no legal validity for the curtailment of the petitioner's liberty.

9. The order of the learned Magistrate cannot accordingly validate the detention."

IN THE SUPREME COURT OF INDIA

Smt. Icchu Devi Choraria v. Union of India & Ors.

(1980) 4 SCC 531

E.S. Venkataramiah & P.N. Bhagwati, JJ.

This petition for a writ of habeas corpus challenged the continued detention of Mahendra Choraria under Sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. In its judgment, the Court analysed whether strict rules of pleadings are to be followed in case of an application for a writ of habeas corpus.

Bhagwati, J.:.. "4. It is also necessary to point out that in case of an application for a writ of habeas corpus, the practice evolved by this Court is not to follow strict rules of pleading nor place undue emphasis on the question as to on whom the burden of proof lies. Even a postcard written by a detenu from jail has been sufficient to activize this Court into examining the legality of detention. This Court has consistently shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. Whenever a petition for a writ of habeas corpus has come up before this Court, it has almost invariably issued a rule calling upon the detaining authority to justify the detention. This Court has on many occasions pointed out that when a rule is issued, it is incumbent on the detaining authority to satisfy the court that the detention of the petitioner is legal and in conformity with the mandatory provisions of the law authorising such detention: vide Niranjan Singhv. State of Madhya Pradesh [(1972) 2 SCC 542 : 1972 SCC (Cri) 880 : AIR 1972 SC 2215] ; Shaikh Hanif, Gudma Majhi & Kamal Saha v. State of West Bengal[(1974) 3 SCR 258 ; (1974) 1 SCC 637 : 1974 SCC (Cri) 292] and Dulal Roy v. District Magistrate, Burdwan [(1975) 1 SCC 837 : 1975 SCC (Cri) 329 : (1975) 3 SCR 186] . It has also been insisted by this Court that, in answer to this rule, the detaining authority must place all the relevant facts before the court which would show that the detention is in accordance with the provisions of the Act. It would be no argument on the part of the detaining

authority to say that a particular ground is not taken in the petition: vide Nizamuddin v. State of West Bengal [(1975) 3 SCC 395: 1975 SCC (Cri) 21: (1975) 2 SCR 593] . Once the rule is issued it is the bounden duty of the court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and the citizen is not deprived of his personal liberty otherwise than in accordance with law: vide Mohd. Alam v. State of West Bengal [(1974) 4 SCC 463: 1974 SCC (Cri) 499: (1974) 3 SCR 379] and Khudiram Das v. State of West Bengal [(1975) 2 SCC 81: 1975 SCC (Cri) 435 : (1975) 2 SCR 832].

5. The practice marks a departure from that obtaining in England where observance of the strict rules of pleading is insisted upon even in case of an application for a writ of habeas corpus, but it has been adopted by this Court in view of the peculiar socio-economic conditions prevailing in the country. Where large masses of people are poor, illiterate and ignorant and access to the courts is not easy on account of lack of financial resources, it would be most unreasonable to insist that the petitioner should set out clearly and specifically the grounds on which he challenges the order of detention and make out a prima facie case in support of those grounds before a rule is issued or to hold that the detaining authority should not be liable to do anything more than just meet the specific grounds of challenge put forward by the petitioner in the petition. The burden of showing that the detention is in accordance with the procedure established by law has always been placed by this Court on the detaining authority because Article 21 of the Constitution provides in clear and explicit terms that no one shall be deprived of his life or personal liberty except in accordance with procedure established by law. This constitutional right of life and personal liberty is placed on such a high pedestal by this Court that it has always insisted that whenever there is any deprivation of life or personal liberty, the authority responsible for such deprivation must satisfy the court that it has acted in accordance with the law. This is an area where the court has been most strict and scrupulous in ensuring observance with the requirements of the law, and even where a requirement of the law is breached in the slightest measure, the court has not hesitated to strike down the order of detention or to direct the release of the detenu even though the detention may have been valid till the breach occurred. The court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade."

IN THE HIGH COURT OF ANDHRA PRADESH

Ashok Thadani v. Ramesh K. Advani & Ors.

1982 Cri.L.J. 1446 (A.P.)

P.A. Choudary & K. Punnayya, JJ.

A husband initiated a petition under Section 97, CrPC alleging wrongful confinement of his wife and daughter. A search warrant was issued and the wife and daughter were taken away by the police. The wife stated that she had left with her daughter as she apprehended danger to her life at the hands of her husband, and hence, they voluntarily went with her cousin, the petitioner, in the instant case. The cousin then filed a writ of habeas corpus for release of his sister and her daughter. In its judgment, the Court examined the meaning of the requirement in Section 97 that that a magistrate should have a 'reason to believe' that any person is confined under such circumstances that the confinement amounts to an offence.

Punnayya, J.: "10. …A careful reading of the provisions of S. 97 CrPC makes it abundantly clear that the Magistrate is not empowered to issue search warrant under this section on the mere allegations made in the affidavit filed along with the petition before him. The expression "has reason to believe that any person is confined under such circumstances that the confinements amounts to an offence" requires the Magistrate on guard before he issues search warrant.

11. It is true that this Section is a provision of emergency but this does not mean that a warrant for search may be issued automatically without application of a judicial mind to the allegations made in the application moved for the purpose and some other material as may be placed before the Magistrate. The expression "reason to believe" implies a belief in the judicial mind, arrived at after consideration of the available material with a sense of responsibility and effort of mind without ignoring as far as possible the other side of controversy. But before issuing a warrant for search the Magistrate must have reasonable grounds to believe that the confinements in question are such that it amounts to an offence. The words "so confined" should be understood "believed to be also confined".

It is for the magistrate to find whether there are reason for believing that any person is in wrongful confinements and if he is so satisfied, then he can issue search warrant. If a person is not in wrongful confinement, then the Magistrate has no jurisdiction to issue search warrant. Magistrate should, therefore, exercise due caution and circumspection in issuing a warrant under Section 97 CrPC even on a petition filled by a husband making an allegation that his wife is in a wrongful confinement and that she should therefore, be produced before the Court. But the Magistrate has no jurisdiction to issue a search warrant under this Section, if the wife is living elsewhere of her own accord. Merely by a husband making an allegation that his wife is in wrongful confinement, it cannot be said that the magistrate can issue a search warrant for the production of his wife without examining the circumstances whether she was really in wrongful confinement or not. It is true that when a husband makes an allegation that his wife is in wrongful confinement it may touch the sentiment of the Court. In order to avoid such sentimental considerations, the Legislature has employed the expression "has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence". There is no presumption under law that if a wife stays elsewhere away from the husband it should be deemed that she is in wrongful confinement and the husband is entitled to obtain search warrant under section 97 CrPC There may be so many reasons as to why a wife is living elsewhere and does not like to live with her husband. It is open to the husband to pursue the remedies available under Matrimonial Law. But he is not entitled to resort to the provisions of S. 97 CrPC The Magistrate is, therefore, required to exercise high amount of caution before issuing a search warrant when a petition is filed by a husband under this Section.

12. When a search warrant is issued under Section 97 CrPC against a wife who is living elsewhere away from the husband of her own accord, but is not wrongful confined amounting to an offence, it is open to her to question the illegality of the issuance of such a warrant.

13. It is true that she can question the illegality of the order of the Magistrate on the ground that she is living voluntarily away from her husband unable to live with him due to torturing and harassment caused by him and is also apprehending danger to her life at the hands of her husband, as proclaimed in this case by Usha Advani against her husband the first respondent and the warrant issued is therefore, illegal and in such a case the Magistrate has got the power on being satisfied with the fact that she is not in wrongful confinements to set aside the illegal order. But such a course is open only

after she is taken into custody by the police deputed by the Magistrate in execution of the warrant and produced before the Magistrate.

14. But without following this ordeal, she has also got the right to approach under Art. 226, the High Court within whose jurisdiction she is residing and explain to the Court that she is residing willfully and voluntarily away from her husband, but not under circumstances amounting to wrongful confinements and seek for these issuance of a writ of habeas corpus against the illegal custody taken by the police in pursuance of the illegal order passed by the Magistrate. It is preposterous and even absurd to say that the custody of the person taken by the police in pursuance of the order of the Magistrate became lawful even though the order of the Magistrate issuing warrant is contrary to the mandatory provisions of Section 97 CrPC When once an illegal order is passed by the Magistrate the custody of the person taken by the police in pursuance of such an illegal order becomes illegal and such a person should be deemed to be in unlawful confinement and as such she is entitled to invoke the jurisdiction of the concerned High Court for the issuance of writ of habeas corpus. The case of Usha Advani exactly comes within the purview of this legal position and she is therefore, justified under the law to approach this Court through her cousin brother, Ashok Thandani. The writ petition is therefore, maintainable.

…

25. The order passed by the Judicial First Class Magistrate, Gandhidham, for the production of Usha Advani and Shilpa and deputing respondents 2 and 3 to execute the warrant issued by him under S. 97, CrPC for taking custody of Usha Advani and Shilpa is patently illegal, as the learned Magistrate did not apply his judicial mind whether with the petitioner Usha Advani and Shilpa were residing at Vijayawada of their own accord or against their will. When Usha Advani herself states unequivocally before this court that she is living with the petitioner of her own will and volition, she is not in wrongful confinement of the petitioner. As she also apprehends danger to her life if she is sent to live with the first respondent, the contentions of the first respondent that she is in wrongful confinement of the petitioner, cannot therefore, be accepted. Hence the custody of the wife taken by respondents 2 and 3 in pursuance of the illegal order of the Magistrate becomes illegal and as such UshaAdvani and Shilpa are entitled to issuance of a writ of habeas corpus and the habeas corpus petitioner filed by her cousin, who is the petitioner herein, is therefore, maintainable."

IN THE SUPREME COURT OF INDIA

Rudul Sah v. State of Bihar & Anr.

(1983) 4 SCC 141

Y.V. Chandrachud, C.J., Ranganath Misra & A.N. Sen, JJ.

The petitioner was imprisoned for 15 years in spite of his acquittal by the Court. The petitioner filed a habeas corpus petition under Article 32 of the Constitution to claim compensation for violation of his fundamental rights. The Court examined whether compensation can be awarded under Article 32 and whether the State can be made to pay damages for the acts of its officers.

Chandrachud, C.J.:"8. That takes us to the question as to how the grave injustice which has been perpetrated upon the petitioner can be rectified, insofar as it lies within our power to do in the exercise of our writ jurisdiction under Article 32 of the Constitution. That Article confers power on the Supreme Court to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by Part III. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is "guaranteed", that is to say, the right to move the Supreme Court under Article 32 for the enforcement of any of the rights conferred by Part III of the Constitution is itself a fundamental right.

9. It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a Court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases. The petitioner was detained illegally in the prison for over 14 years after his

acquittal in a full-dressed trial. He filed a habeas corpus petition in this Court for his release from illegal detention. He obtained that relief, our finding being that his detention in the prison after his acquittal was wholly unjustified. He contends that he is entitled to be compensated for his illegal detention and that we ought to pass an appropriate order for the payment of compensation in this habeas corpus petition itself.

10. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

IN THE SUPREME COURT OF INDIA

Sebastian M. Hongray v. Union of India & Ors.

(1984) 1 SCC 339

D.A. Desai & O. Chinnappa Reddy, JJ.

A petition for a writ for habeas corpus was filled seeking that an army regiment be directed to produce two people who were allegedly taken away by the army after a search of a village. In its judgment, the Court analysed whether an ex parte writ of habeas corpus can be issued.

Desai, J.: "31. ...When a petition for a writ of habeas corpus under Article 32 of the Constitution is moved before the Court, ordinarily the Court would not issue ex parte a writ of habeas corpus unless the urgency of the situation so demands or issuing of a notice of motion was likely to result in defeat of justice. Further the Court will be reluctant to issue a writ of habeas corpus ex parte where the fact of detention may be controverted and it may become necessary to investigate the facts. The normal practice is that when a petition for a writ of habeas corpus is moved, the Court would direct a notice to be served upon the respondents with a view to affording the respondents to file evidence in reply. If the facts alleged in the petition are controverted by the respondents appearing in response to the notice by filing its evidence, the Court would proceed to investigate the facts to determine whether there is substance in the petition for a writ of habeas corpus. (See Halsbury's Laws of England, Fourth Edition, Vol. II, para 1482.) If on investigation of facts, the Court rejects the contention of the respondent and is satisfied that the respondent was responsible for unauthorised and illegal detention of the person or persons in respect of whom the writ is sought, the Court would issue a writ of habeas corpus which would make it obligatory for the respondents to file a return. It is in this sense that in Thomas John Barnardo v. Mary Ford [1892 AC 326 (HL)], the House of Lords held that even if upon a notice of motion, it is contended by the person against whom the writ is sought that the person alleged to be in the custody of the respondents has long since left the custody, a writ can be issued and return insisted upon. … In the meantime, the casein Reg. v. Barnardo Tye [(1889) 23 QBD 305: 37 WR 789] was decided by the Court of Appeal in which it was laid down that it was not an excuse for non-compliance with a writ that the defendant had parted with the custody of the child to another person if he had done so wrongfully, and accordingly a fresh application was made for a writ of habeas corpus."

IN THE SUPREME COURT OF INDIA

Sebastian M. Hongray v. Union of India & Ors.

(1984) 3 SCC 82

D.A. Desai & O. Chinnappa Reddy, JJ.

A petition for a writ for habeas corpus was filled seeking that an army regiment be directed to produce two people who were allegedly taken away by the army after a search of a village. However, the respondents were not able to produce the persons. The Court analysed the appropriate mode enforcing obedience to a writ of habeas corpus.

Desai, J.: "4....Again it is well-settled that "the appropriate mode of enforcing obedience to a writ of habeas corpus is by committal for contempt. A committal order may be made against a person who intentionally makes a false return to a writ of habeas corpus, but an unintentional misrepresentation on a return is not a ground for committal". [Halsbury's Laws of England, 4th Edn, Vol 11, para 1497]

...

7. ...[K]eeping in view the torture, the agony and the mental oppression through which Mrs C. Thingkhuila, wife of Shri C. Daniel and Mrs C. Vangamla, wife of Shri C. Paul had to pass and they being the proper applicants, the formal application being by Sebastian M. Hongray, we direct that as a measure of exemplary costs as is permissible in such cases, Respondents 1 and 2 shall pay Rs 1 lac to each of the aforementioned two women within a period of four weeks from today."

IN THE SUPREME COURT OF INDIA

Inder Singh & Anr. v. State of Punjab & Ors.

(1994) 6 SCC 275

M.N. Venkatachaliah, CJ, Dr. A.S. Anand & S.P. Bharucha, JJ.

A habeas corpus petition was filed to secure the release of seven persons who were allegedly abducted by the police. The police stated that they were unable to locate the required persons. The Court analysed whether relief under the writ of habeas corpus can include a direction by the court for an independent investigation.

Order: "17. For the reasons that we have already set out, we are unwilling to entrust the investigation of the abduction and presumable liquidation of the said 7 persons to the Punjab Police. We are satisfied that an independent investigation at a very high level is called for. The investigation shall cover — (a) the circumstances of the abduction of said 7 persons; (b) their present whereabouts or the date and circumstances of their liquidation; (c) how it was that the inquiry into the complaint was delayed from 25-1-1992, when it was received by the office of the 2nd respondent, till 23-3-1994, when the case was registered; (d) whether it is in conformity with good police administration that a complaint of abduction of 7 citizens by a high-ranking police officer should not be required to be brought to the attention of the officer-in-command of the police force even after the allegations made in the complaint had been found to be correct on inquiry by a specially designated officer; (e) whether there has been an attempt to cover up the misdoings of police officers and policemen involved in the abduction of the said 7 persons and their subsequent incarceration or liquidation; and (f) if so, who was involved therein.

18. The inquiry shall be conducted personally by the Director of the Central Bureau of Investigation and he shall make a report to us within 4 weeks from today. For the purposes of recording statements and such other purposes, the Director shall be free to utilise the services of officers of the rank of Deputy Director, CBI, and above. The report shall be submitted in a sealed envelope to the Registrar-General of the Supreme Court and it shall be opened by us."

IN THE HIGH COURT OF MADRAS

M.G. Shivaraj v. Inspector of Police, Thuraipakkam Police Station

1994 Cri.L.J. 1770 (Mad)

M. Srinivasan & Thangamani, JJ.

A habeas corpus petition was filed through a telegram to the Chief Justice, alleging that a minor had been forcibly detained by the Inspector General of Police. In deciding the case, the Court examined whether Section 97 of the CrPC operates as an alternate remedy to the writ of habeas corpus.

Order: "15. ...In our opinion, when an advocate receives instruction from the party with regard to the facts, it is his duty to adopt the appropriate procedure prescribed by law. It is not as if there is no provision in the law with regard to these matters. For example, there is a provision in S. 97 of the Code of Criminal Procedure which enables a person to approach the District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class in cases where a person is stated to be wrongfully confined. The advocates can always avail themselves of such provisions of law and file appropriate proceedings. In fact, it is not necessary in every case to approach this Court and invoke its extraordinary jurisdiction under Art. 226 of the Constitution with a petition for issue of writ of habeas corpus. Even without a writ petition, the relief which may be needed by the party can easily be obtained by resorting to other remedies. Hence, we are of the opinion that in no case an advocate who receives instructions from the parties with regard to the facts should send a telegram to this Court or the Judges with an expectation that it would be treated as a writ petition."

IN THE HIGH COURT OF RAJASTHAN

Dwarka Prasad v. State of Rajasthan & Ors.

2002 Cri.L.J. 1278 (Raj.)

Gyan Sudha Misra & A.C. Goyal, JJ.

A FIR was registered by the petitioner, the father of a missing girl. He alleged that his daughter had been abducted by Respondent no. 3. The police neither took any action on the FIR nor submitted a charge sheet. The petitioner then moved a habeas corpus petition before the High Court. In deciding the case, the Court examined in what circumstance a court can issue a writ of habeas corpus where a person is alleged to have been abducted by a private person.

Misra, J.: "3. Happily, the alleged detenu Vedwati Kumari Sharma in the instant case has been finally traced out and hence her statement be recorded by the Deputy Registrar (Judicial) in course of the day. In case it comes out that she was a major and had eloped voluntarily with Rajesh Sharma and that she had not been kidnapped by Rajesh Sharma, it will be open for the respondents to initiate action against Dwarka Prasad as to why he had lodged a false report of abduction when her daughter was major and had left voluntarily along with Rajesh Sharma, provided it is established that the detenu Vedwati Kumari Sharma was a major at the time when she disappeared.

4. In case such a prosecution is launched, the same will have to be decided on the evidence which is adduced at the appropriate stage. We deem it appropriate to grant this liberty to the State in order to curb and check frivolous litigations which is repeatedly brought before this Court in the form of habeas corpus petitions.

5. After the statement of the alleged, detenu Vedwati Kumari Sharma was recorded before the Deputy Registrar (Judicial) which we have perused, we are satisfied that it was not a case of illegal detention since the detenu has stated her age as 19 years who had voluntarily married Rajesh Sharma and out of the wedlock she has given birth to a child who is three months old."

IN THE HIGH COURT OF ALLAHABAD

Smt. Shahana alias Shanti v. State of U.P. & Ors.

2003 Cri.L.J. 3438 (All)

Uma Shankar Tripathi & Devendra Prasad Gupta, JJ.

The petitioner's father lodged a FIR against the petitioner's husband alleging that his daughter was a minor and had been abducted. She was picked up by the police and placed in a Nari Niketan. Her age was ascertained to be 17 years (plus or minus two years) by ossification test. The Magistrate directed her release from the Nari Niketan, after giving her the benefit of two years. However, in revision, the Sessions Judge ordered her to remain at the Nari Niketan. The petitioner filed for a writ of habeas corpus, seeking direction to the respondents to set her at liberty immediately. In its decision, the Court examined when a search warrant under Section 97 of CrPC can be issued in situations when a person has departed voluntarily from her parent's house.

Judgment: "7. The contention of the learned counsel for the petitioner was that the petitioner was not an accused in any case and she is major and had married with Damodar Das with her own free will and she cannot be detained in Nari Niketan under any law. That the petitioner is above 19 years of age and in medical report, her age was wrongly assessed as 17 years. He also placed reliance on Division Bench decisions of this Court in Tara Chand Seth v. Superintendent, District Jail, Rampur 1983 (2) ACC 168: 1983 ALJ 16; Smt. Raj Kumari v. Superintendent, Women Protection House, Meerut; Smt. Parvati Devi v. State of U. P. 1982 (19) ACC 32: 1982 ALJ 115 and single Judge decision in Pushpa Devi alias Rajwanti Devi v. State of U. P. (1995) 1 JIC 189.

8. In the case of Parvati Devi the mother of Smt. Parvati Devi lodged a report under Section 366, IPC against Jokhu, alleging that he had enticed away Smt. Parvati Devi, who was a minor girl. The police arrested Jokhu and also recovered Smt. Parvati Devi from his house and produced Smt. Parvati Devi before the Judicial Magistrate, Handia and prayed for

appropriate orders for her custody. The Magistrate took steps to obtain medical report with regard to age of Smt. Parvati Devi and directed that in the meantime she be kept in the NariNiketan, Khuldabad, Allahabad. On the above act it was held that the confinement of Smt. Parvati Devi in NariNiketan, Khuldabad, Allahabad against her wishes could not be authorised either under Section 97 or under Section 171, Cr. P.C. The respondents failed to bring to the notice of the Bench any legal provision whereunder the Magistrate has been authorised to issue direction that a minor female witness shall, against her wishes, be kept in Nari Niketan.

9. In the case of Smt. Raj Kumari, the mother of Raj Kumari moved an application before the City Magistrate, Bulandshahar for issuing search warrant and for recovery of Raj Kumari. The City Magistrate issued search warrant under Section 97, Cr. P.C. The petitioner was recovered and the City Magistrate ordered her detention in Government Women Protective Home, Meerut. Her medical examination was also got done and according to medical report the age of the petitioner was about 19 years. While the petitioner was detained in the Government Protective Home, she filed Habeas Corpus Petition. Considering the various decisions of the Apex Court and of this Court, Division Bench of this Court held as below:-

> "In view of above it is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes. In the instant matter petitioner has desired to go with Sunil Kumar, besides this according to the two medical reports i.e. of the Chief Medical Officer and LLRM, Medical College, Meerut, the petitioner is certainly not less than 17 years and she understands her well being and is also capable of considering her future welfare. As such we are of the opinion that her detention in Government Protective Home, Meerut against her wishes is undesirable and impugned order dated 23-11-96 passed by the Magistrate directing her detention till the party concerned gets a declaration by the civil Court or the competent Court of law regarding her age, is not sustainable and is liable to be quashed."

10. In the instant case Magistrate had directed the petitioner to be released and to go to place of her choice. However, a revision was preferred against

the said order and the Revisional Court directed detention of petitioner in Nari Niketan, Bareilly. Undisputedly, the petitioner is not an accused in any offence. Assuming that her age is about 17 years she cannot be detained against her will as provisions of Sections 97 and 171, Cr. P.C. do not justify detention of the petitioner. No other provision has been shown under which the petitioner could be detained against her wishes. Therefore, we are of the view that detention of the petitioner in Nari Niketan Bareilly is illegal and order directing her detention passed by the Sessions Judge, Bareilly in Criminal Revision No. 605 of 2002 being against law is quashed. The respondent No. 2, Superintendent, Nari Niketan, Bareilly is directed to release the petitioner forthwith to go to place of her choice."

IN THE HIGH COURT OF KERALA

Zeenath v. Kadeeja

2007 Cri.L.J. 600 (Ker)

R. Basant, J.

The petitioner had applied for a search warrant under Sections 97 and 98 of the CrPC alleging that her minor children had been confined at her matrimonial home, and such confinement amounted to an unlawful detention for unlawful purpose. The respondents claimed that the petitioner had abandoned her children and was unheard of for many years, and that there was no unlawful detention for any unlawful purpose. The petitioner was unsuccessful before the Magistrate. Thereafter she filed a Revision Petition against the order of the Magistrate. In deciding the petition, the Court analysed the circumstances under which the power under Section 97 and/or Section 98 of the CrPC may be invoked by a magistrate in a dispute regarding custody of minor children.

Basant, J.: "9. … A careful reading of S. 97 must lead to the conclusion that powers under S. 97 can be invoked only when the court has reason to believe that any person is confined and that confinement is under such circumstances that the confinement amounts to an offence. The plain language must convey eloquently that every confinement does not give a cause of action for an action under S. 97. The confinement must be under such circumstances that the confinement amounts to an offence before powers under S. 97 can be invoked. ...

…

12. My attention has been drawn to three decisions of the Kerala High Court on this aspect. In Pareekutty v. Ayissakutty (1978 KLT 33) Justice P. Janaki Amma had taken the view that forcible removal of a minor child from the custody of the mother of the child in whose favour an order of maintenance was passed by the court would be revolting to all refined notions of justice and fair play and that the Magistrate was justified in concluding that the confinement amounts to an offence for the purpose of issuing the search warrant. I extract the following passage appearing in para. 12 of that decision:

> "It is revolting to modem sense of justice and fair-play that a person who has lawful custody of the minor should be deprived of such custody by crude means which has no sanction under law. Removal of the child using physical force from the custody of the mother is prima facie a wrongful act. Keeping the child beyond the reach of the person who is entitled to its custody would amount to wrongful confinement. The Chief Judicial Magistrate had, therefore, reason to believe that the confinement amounted to an offence for the purpose of issuing a search warrant."

13. It would be myopic from the said decision to conclude that it is not necessary to prove that confinement amounts to an offence. …

14. Later, in Fathima v. Kunhammed Haji (1993 (2) KLT 943) the question came up for consideration pointedly and another single Judge of this Court had taken the view that the Magistrate must have reasons to believe the existence of, at least, two things: First is that there is a confinement and second is that such confinement amounts to an offence. It was opined that the Magistrates have to be doubly circumspect in dealing with a petition which contains the allegation that the child is in wrongful confinement of its guardian. The decision in Fathima v. Kunhammed Haji (supra) also reiterates the plain language of the Section that there must be a confinement and such confinement must amount to an offence.

15. Still later, in Abdul Azeez v. State of Kerala (2002 (3) KLT SN Case No. 23 at page 16) Justice G. Sasidharan had clearly observed that the mere fact that the grandparents of the child are having the custody of the child does not lead to the inference that the child was taken away forcibly or that such custody amounts to an offence to warrant action under S. 97.

…

20. On simple analysis of the Section it would appear that action under Section 98 is warranted only if the following conditions are satisfied:

(1) There must be a complaint made on oath before the Magistrate

(2) Such complaint must be of the unlawful abduction or detention of a woman including a female child under the age of 18 years.

(3) Such unlawful detention must be for any unlawful purpose.

Unless these three requirements are satisfied, powers under S. 98 cannot be invoked and are not available to the Magistrate to be invoked. Even when such powers are invoked, later part of the Section shows that such persons under unlawful detention for unlawful purpose must be restored to her husband, parent, guardian or significantly other person having the lawful charge of such child. Custody of a person having lawful charge of the child cannot be disturbed; it is evident from the language of S. 98.

21. I must straightaway note that S. 98 of the CrPC is a special procedure available. It is not available for all persons. It is available only for the rescue and restoration of persons belonging to the female species. Such person must be shown to be abducted or unlawfully detained. Such detention must be proved to be for unlawful purpose. What is crucial is that, this provision it is not available for all children or all persons unlawfully detained for unlawful purposes. It has unmistakably a very special purpose to serve and that is the protection of the person belonging to the female species against unlawful detention for unlawful purpose.

…

23. … I am unable to accept the argument that the definition of the expression "illegal" in S. 43 of the IPC must straightaway be mechanically imported into S. 98 of the Cr. P.C. when we consider the ambit and play of the expression "unlawful" in S. 98 of the CrPC

24. Adopting such a course may lead to dangerous and disastrous consequences. If an act can furnish a ground for a civil action, it can be contended to be unlawful and then action by a criminal court under S. 98 of the CrPC can be insisted. This would obliterate the distinction between civil and criminal proceedings. …

25. … These observations of the Bombay High Court support the view which I prefer to take that the expression "unlawful" cannot be reckoned as equivalent to or synonymous with the expression "illegal" appearing in S. 43 of the IPC as to conclude that any act which would furnish a ground for a civil action can ipso facto justify or compel the court to invoke the powers under S. 98 of the CrPC In this view of the matter, I conclude that the mere fact that the alleged custody of the minor children with the respondent may furnish ground for civil action cannot ipso facto render such keeping/ custody unlawful. It must hence be held that there is no unlawful detention in the instant case.

…

28. That takes us to the next question as to whether the custody of the minors by the respondent which is alleged to be unlawful detention can be said to be for any unlawful purpose. It is hot now disputed that the detention must be first shown to be unlawful and it must further be shown that the detention was for unlawful purpose also. To my mind thereasons in Abraham v. Mahtabo (16 Cal. 487) appear to be most impressive and acceptable. Whether the purpose is lawful or unlawful is certainly to be decided not with reference to the consequences which any other person may suffer because of the conduct. The lawfulness or otherwise of the purpose of detention will have to be considered vis-a-vis the detenue and not vis-a-vis the parent of the detenue whose rights may be affected or trammeled by the alleged conduct. The observations of the Calcutta High Court in Abraham v. Mabtabo (16 Cal. 487) at pages 501 to 503 which have been extracted in State v. Billi (1953 Cri.L.J. 743) by the Nagpur High Court appear to have lucidly considered this aspect. I extract the same below:

> "Undoubtedly there was an unlawful detention. It was immaterial whether the girl did or did not consent; she was kept against the will of those who were lawfully entitled to have charge of her, and this keeping and the refusal to give her up amounted to detention which was unlawful.

The question whether the purpose was unlawful is however, more difficult to determine. Admittedly the only purpose was that the girl should become a Christian, and the Magistrate finding that this involved destruction of her caste and severance from her proper home, held that detention for such a purpose against the will of her guardian was a detention for an unlawful purpose. It is not easy to say what is the meaning of the words "unlawful detention for an unlawful purpose" as used in this section, but their effect clearly is to limit the Magistrate's power of interference to particular cases. …(why underlined)

… The section was not enacted for the protection of (sic female?) children only or of children generally. It applies to women and to female children only, and this combination and exclusion of male children, goes to show not only that some definite purpose unlawful in itself, was contemplated, but that the purpose had some special reference to the sex of the person against whom it was entertained. … In Secretary, S.P.C. v. Archana Das (43 C.W.N. 362) also it has been held that the mere fact that detention of the child/woman may be against the wishes of the mother cannot be said to be an unlawful purpose within the meaning of Section.

29. In the decision reported in Umbai v. Limbaji (AIR 1955 Hydrabad 153) also it has clearly been held that the civil right which a guardian may have in respect of the child cannot entitle him to an order under S. 552 of the Code (present S. 98) for proceedings of civil nature cannot be converted into those of criminal by invoking the powers under S. 98 of the CrPC

30. For the purpose of detention to be held to be unlawful, satisfactory reasons must be shown. ...

31. Any unlawful purpose' in S. 98,I agree with the rationale in Mahtabo, must be unlawful purpose peculiar to the group of persons for whose safety and protection the section is enacted - i.e., women and female children. A mere grievance of the mother about the deprivation or infringement of her right to custody of her female children as against her husband or mother-in-law cannot certainly give rise to a valid cause of action under S. 98. There is neither unlawful detention nor unlawful purpose as to warrant action under S. 98 of the CrPC

32. It therefore appears to me to be beyond controversy that the mere fact that the right of the parent, guardian, husband etc., of the woman or female child may be affected by continued retention/custody of such minor/woman is not sufficient to justify invocation of the powers under S. 98 of the CrPC There must be an unlawful detention. Such unlawful detention must be for an unlawful purpose and the lawfulness and the unlawfulness of the purpose must be gauged and assessed from the point of view of the child/detenue and not on the basis of the possible impact on the right of the parent, guardian etc., of such detenue.

…

36. … Even hard cases cannot persuade a court to ignore the legal principles and it is, in these circumstances that I am persuaded to hold that the petitioner cannot seek relief from the criminal court by invoking its powers under S. 97/98 of the CrPC …"

IN THE SUPREME COURT OF INDIA

Ummu Sabeena v. State of Kerala & Ors.

(2011) 10 SCC 781

A.K. Ganguly & J.S. Khehar, JJ.

A petition for a writ of habeas corpus was filed against an order of preventive detention. In deciding the case, the Court examined whether technical objections can be entertained while dealing with the writ of habeas corpus.

Ganguly, J.: "12. ...The learned counsel for the Union of India further argued that the question of delay has not been urged before the High Court.

13. …We find that the question of delay was urged before the High Court as it appears from pp. 6 and 7 of the impugned judgment. But, insofar as the question of technical plea which has been raised by the learned counsel on the question of prayer in the habeas corpus petition is concerned, we are constrained to observe that in dealing with writs of habeas corpus, such technical objections cannot be entertained by this Court.

14. Reference in this connection may be made to the Law of Habeas Corpus by James A. Scott and Charles C. Roe of the Chicago Bar (T.H. Flood & Company, Publishers, Chicago, Illinois, 1923) where the learned authors have dealt with this aspect in a manner which we should reproduce as we are of the view that the same is the correct position in law:

> "A writ of habeas corpus is a writ of right of very ancient origin, and the preservation of its benefit is a matter of the highest importance to the people, and the regulations provided for its employment against an alleged unlawful restraint are not to be construed or applied with over-technical nicety, and when ambiguous or doubtful, should be interpreted liberally to promote the effectiveness of the proceeding. (Ware v. Sanders [146 Iowa 233: 124 NW 1081 (1910)] .)"

15. In this connection, if we may say so, the writ of habeas corpus is the oldest writ evolved by the common law of England to protect the individual liberty against its invasion in the hands of the executive or may be also at the instance of private persons. This principle of habeas corpus has

been incorporated in our constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on fundamental rights, to protect individual liberty the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the Court by issuing a writ of habeas corpus.

16. This facet of the writ of habeas corpus makes it a writ of the highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority (see Halsbury's Laws of England, 4th Edn., Vol. 11, para 1454). That is why it has been said that the writ of habeas corpus is the key that unlocks the door to freedom (see The Common Law in India, 1960 by M.C. Setalvad, p. 38).

17. Following the aforesaid time-honoured principles, we make it very clear that if we uphold such technical objection in this proceeding and send the matter back to the High Court for re-agitation of this question, the same would deprive the detenus of their precious liberty, which we find, has been invaded in view of the manner in which their representations were unduly kept pending. We, therefore, overrule the aforesaid technical objection and allow these appeals."

IN THE SUPREME COURT OF INDIA

Manubhai Ratilal Patel Tr. Ushaben v. State of Gujarat & Ors.

(2013) 1 SCC 314

K.S. Panicker Radhakrishnan & Dipak Misra, JJ.

The petitioner was arrested on 16.7.2012 and produced before the Judicial Magistrate at 4.00 p.m. on 17.7.2012. The police prayed for remand of the accused to police custody which was granted by the learned Magistrate upto 2.00 p.m. on 19.7.2012. On 18.7.2012, it was brought to the notice of the concerned investigation agency that a stay order had been passed by the High Court on 17.7.2012. On this ground, the investigating agency was asked not to proceed further with the investigation in compliance with the High Court stay order. Thus the order of remand had been passed after the stay order was issued. The Court examined whether the legality of detention should be determined by the Court from the date of institution of proceedings or the date of hearing of the petition for habeas corpus.

Misra, J.: "13. In Ranjit Singh v. State of Pepsu [AIR 1959 SC 843 : 1959 Cri LJ 1124] , after referring to Greene v. Secy. of States for Home Affairs [1942 AC 284 : (1941) 3 All ER 388 (HL)] , this Court observed that: (Ranjit Singh case [AIR 1959 SC 843 : 1959 Cri LJ 1124] , AIR pp. 845-46, para 4)

> "4. … the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible."

The Bench quoted Lord Wright who, in Greene case [1942 AC 284: (1941) 3 All ER 388 (HL)], had stated thus: (AC p. 302)

> "… The incalculable value of habeas corpus is that it enables the immediate determination of the right to the applicant's freedom."

Emphasis was laid on the satisfaction of the court relating to justifiability and legality of the custody.

14. In Kanu Sanyal v. District Magistrate, Darjeeling [(1973) 2 SCC 674: 1973 SCC (Cri) 980], it was laid down that the writ of habeas corpus deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty.

15. Speaking about the importance of the writ of habeas corpus, a two-Judge Bench in Ummu Sabeena v. State of Kerala [(2011) 10 SCC 781: (2012) 1 SCC (Cri) 426] has observed as follows: (SCC p. 786, para 15)

> "15. … the writ of habeas corpus is the oldest writ evolved by the common law of England to protect the individual liberty against its invasion in the hands of the executive or may be also at the instance of private persons. This principle of habeas corpus has been incorporated in our constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on fundamental rights, to protect individual liberty the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the court by issuing a writ of habeas corpus."

In the said case, a reference was made to Halsbury's Laws of England, 4th Edn., Vol. 11, para 1454 to highlight that a writ of habeas corpus is a writ of highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority.

16. Having stated about the significance of the writ of habeas corpus as a weapon for protection of individual liberty through judicial process, it is condign to refer to certain authorities to appreciate how this Court has dwelled upon and expressed its views pertaining to the legality of the order of detention, especially that ensuing from the order of the court when an accused is produced in custody before a Magistrate after arrest. …

17. In Col. B. Ramachandra Rao v. State of Orissa [(1972) 3 SCC 256: 1972 SCC (Cri) 481: AIR 1971 SC 2197] , it was opined that a writ of habeas corpus is not granted where a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal.

18. In Madhu Limaye, In re [(1969) 1 SCC 292: AIR 1969 SC 1014] the Court referred to the decision in Ram Narayan Singh v. State of Delhi [AIR 1953 SC 277 : 1953 Cri LJ 1113 : 1953 SCR 652] and opined that the court must have regard to the legality or otherwise of the detention at the time of return.

19. In Kanu Sanyal v. District Magistrate, Darjeeling [(1974) 4 SCC 141 : 1974 SCC (Cri) 280], contentions were raised to the effect that the initial detention of the petitioner in District Jail, Darjeeling was illegal because he was detained without being informed of the grounds for his arrest as required under clause (i) of Article 22 of the Constitution and that the Sub-Divisional Magistrate, Darjeeling had no jurisdiction to try and, therefore, he could not authorise the detention of the petitioner under Section 167 of the Code. The two-Judge Bench adverted to the aforesaid aspects and referred to the earlier decisions in Naranjan Singh Nathawanv. State of Punjab [AIR 1952 SC 106 : 1952 Cri LJ 656: 1952 SCR 395] , Ram Narayan Singh [AIR 1953 SC 277 : 1953 Cri LJ 1113 : 1953 SCR 652] , B. Ramachandra Rao [(1972) 3 SCC 256 : 1972 SCC (Cri) 481 : AIR 1971 SC 2197] and Talib Hussain v. State of J&K [(1971) 3 SCC 118 : AIR 1971 SC 62] and noted that three views had been taken by this Court at various times pertaining to the relevant date to determine the justifiability of the detention and opined as follows: (Kanu Sanyal case [(1974) 4 SCC 141 : 1974 SCC (Cri) 280], SCC pp. 145-46, para 4)

> "4. … This Court speaking through Wanchoo, J. (as he then was) said inA.K. Gopalan v. Govt. of India [AIR 1966 SC 816: 1966 Cri LJ 602 : (1966) 2 SCR 427] : (AIR p. 818, para 5)
>
> '5. It is well settled that in dealing with petition for habeas corpus the court is to see whether the detention on the date on which the application is made to the court is legal, if nothing more has

> intervened between the date of the application and the date of the hearing.'

In two early decisions of this Court, however, namely, Naranjan Singh Nathawan v. State of Punjab [AIR 1952 SC 106 : 1952 Cri LJ 656 : 1952 SCR 395] and Ram Narayan Singh v. State of Delhi [AIR 1953 SC 277 : 1953 Cri LJ 1113 : 1953 SCR 652] , a slightly different view was expressed and that view was reiterated by this Court in Col. B. Ramachandra Rao v. State of Orissa[(1972) 3 SCC 256 : 1972 SCC (Cri) 481 : AIR 1971 SC 2197] , where it was said: (SCC p. 259, para 7)

> '7. … in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings.'

and yet in another decision of this Court in Talib Hussain v. State of J&K [(1971) 3 SCC 118: AIR 1971 SC 62] , Mr Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that: (SCC p. 121, para 6)

> '6. … in habeas corpus proceedings the court has to consider the legality of the detention on the date of hearing.'

Of these three views taken by the court at different times, the second appears to be more in consonance with the law and practice in England and may be taken as having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the court cannot order release of the person detained by issuing a writ of habeas corpus. …

20. After so stating, the Bench in Kanu Sanyal case [(1974) 4 SCC 141: 1974 SCC (Cri) 280] opined that for adjudication in the said case, it was immaterial which of the three views was accepted as correct but eventually referred to para 7 in B. Ramachandra Rao [(1972) 3 SCC 256 : 1972 SCC (Cri) 481 : AIR 1971 SC 2197] wherein the Court had expressed the view in the following manner: (SCC p. 259)

> "7. …in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings."

Eventually, the Bench ruled thus: (Kanu Sanyal case [(1974) 4 SCC 141 : 1974 SCC (Cri) 280], SCC p. 148, para 5)

> "5. … The production of the petitioner before the Special Judge, Visakhapatnam, could not, therefore, be said to be illegal and his subsequent detention in the Central Jail, Visakhapatnam, pursuant to the orders made by the Special Judge, Visakhapatnam, pending trial must be held to be valid. This Court pointed out in Col. B. Ramachandra Rao v. State of Orissa [(1972) 3 SCC 256 : 1972 SCC (Cri) 481 : AIR 1971 SC 2197] (SCC p. 258, para 5) that a writ of habeas corpus cannot be granted 'where a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal'."

21. The principle laid down in Kanu Sanyal [(1974) 4 SCC 141 : 1974 SCC (Cri) 280] , thus, is that any infirmity in the detention of the petitioner at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits.

22. At this juncture, we may profitably refer to the Constitution Bench decision in Sanjay Dutt v. State [(1994) 5 SCC 410: 1994 SCC (Cri) 1433] wherein it has been opine d thus: (SCC p. 442, para 48)

> "48. … It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order."

...

31. ...It is well-accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in B. Ramachandra Rao[(1972) 3 SCC 256 : 1972 SCC (Cri) 481 : AIR 1971 SC 2197] and Kanu Sanyal[(1974) 4 SCC 141 : 1974 SCC (Cri) 280] , the court is required to scrutinise the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. ..."

IN THE SUPREME COURT OF INDIA

Kishore Samrite v. State of U.P. & Ors.

(2013) 2 SCC 398

B.S. Chauhan & Swatanter Kumar, JJ.

A petition for habeas corpus was filed by the appellant on the basis of news on some websites that certain people were in illegal detention of a Member of Parliament. In its judgment, the Court dealt with the question of compliance with a writ of habeas corpus.

Kumar, J.:"47. ...The question of locus standi would normally be a question of fact and law both. The issue could be decided with reference to the given facts and not in isolation. We have stated the facts and the stand of the respective parties in some detail. Both, the appellant and Respondent 8, had filed their respective writ petitions before the Allahabad High Court as next friends of the three petitioners whose names have not been stated with complete correctness in both the writ petitions. There has been complete contradiction in the allegations made in the two writ petitions by the respective petitioners. According to the appellant, the three stated petitioners were illegally detained by Respondent 6 while according to Respondent 8 they were detained by the authorities. These contradictory and untrue allegations are the very foundation of these writ petitions. It may also be noticed that in both the writ petitions, baseless allegations in regard to the alleged incident of 3-12-2006, involving Respondent 6, had also been raised.

48. Ordinarily, the party aggrieved by any order has the right to seek relief by questioning the legality, validity or correctness of that order. There could be cases where a person is not directly affected but has some personal stake in the outcome of a petition. In such cases, he may move the court as a guardian or next friend for and on behalf of the disabled aggrieved party. Normally, a total stranger would not act as next friend. In Simranjit Singh Mann v. Union of India [(1992) 4 SCC 653: 1993 SCC (Cri) 22], this Court held that (SCC p. 657, para 7) a total stranger to the trial commenced against the convicts, cannot be permitted to question the correctness of the conviction recorded against some convicts unless an aggrieved party is under some disability recognised by law, otherwise it would be unsafe or hazardous to allow a third party to question the decision against him.

...

50. Dealing with the question of the next friend bringing a petition under Article 32 of the Constitution, this Court in Karamjeet Singh v. Union of India [(1992) 4 SCC 666 : 1993 SCC (Cri) 17] , held as under: (SCC p. 670, para 3)

> "We are afraid these observations do not permit a mere friend like the petitioner to initiate the proceedings of the present nature under Article 32 of the Constitution. The observations relied upon relate to a minor or an insane or one who is suffering from any other disability which the law recognises as sufficient to permit another person, e.g. next friend, to move the Court on his behalf; for example see: Sections 320(4)(a), 330(2) read with Sections 335(1)(b) and 339 of the Code of Criminal Procedure. Admittedly, it is not the case of the petitioner that the two convicts are minors or insane persons but the learned counsel argued that since they were suffering from an acute obsession such obsession amounts to a legal disability which permits the next friend to initiate proceedings under Article 32 of the Constitution. We do not think that such a contention is tenable. The disability must be one which the law recognises."

…

52. On the analysis of the above principles, it is clear that a person who brings a petition even for invocation of a fundamental right must be a person having some direct or indirect interest in the outcome of the petition on his behalf or on behalf of some person under a disability and/ or unable to have access to the justice system for patent reasons. Still, such a person must act bona fide and without abusing the process of law. Where a person is a stranger/unknown to the parties and has no interest in the outcome of the litigation, he can hardly claim locus standi to file such petition. There could be cases where a public-spirited person bona fide brings petition in relation to violation of fundamental rights, particularly in habeas corpus petitions, but even in such cases, the person should have some demonstrable interest or relationship to the involved persons, personally or for the benefit of the public at large, in a PIL. But in

all such cases, it is essential that the petitioner must exhibit bona fides, by truthful and cautious exercise of such right. The courts would be expected to examine such requirement at the threshold of the litigation in order to prevent abuse of process of court...

53. This Court, in Charanjit Lal Chowdhury v. Union of India [AIR 1951 SC 41] , while discussing the distinction between the rights and possibility of invocation of legal remedy by a company and a shareholder, expressed the view that: (AIR p. 52, para 43)

> "43. … This follows logically from the rule of law that a corporation has a distinct legal personality of its own with rights and capacities, duties and obligations separate from those of its individual members. As the rights are different and inhere in different legal entities, it is not competent to one person to seek to enforce the right of another except where the law permits him to do so. A well-known illustration of such exception is furnished by the procedure that is sanctioned in an application for a writ of habeas corpus. Not only the man who is imprisoned or detained in confinement but any person, provided he is not an absolute stranger, can institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment." …

...

55. Another contention that has been raised on behalf of the appellant is that a petition of habeas corpus lies not only against the executive authority but also against private individual. Reliance is placed on Sham Lal, In re [(1978) 2 SCC 479: 1978 SCC (Cri) 291] . As a proposition of law, there is no dispute raised before us to this proposition. ..."

CHAPTER 9

OTHER FORMS OF DETENTION

OTHER FORMS OF DETENTION

Section 151, CrPC empowers a police officer to arrest a person without a warrant and without an order of the Magistrate to prevent the commission of a cognizable offence. However, a person cannot be detained for a period longer than 24 hours. In **Ahmed Noormohmed Bhatti v. State of Gujarat**,[1] the constitutionality of this provision was examined by the Supreme Court. It was held that the section is constitutional because it does not confer any arbitrary powers upon the police i.e. the powers conferred have limitations built into them - detention can only be for a limited period, and the arrest can only be made there is no other way to prevent the commission of the offence.

In **Rajender Singh Patania and Ors v. State of NCT Delhi and Ors.**,[2] the Supreme Court, while dealing with a case under Section 107, 151 of the CrPC, observed that the objective of the impugned sections is preventive, not punitive, and hence they can only be invoked if there is a likelihood of breach of peace or an imminent danger to peace, respectively. Further, the Supreme Court held that in certain circumstances, compensation may be awarded for wrongful detention under this provision.

The Gujarat High Court in **Bharat Valji Hangama v. State of Gujarat,**[3] discussed the powers under Section 107 and Section 151, and traced the jurisprudence of the Supreme Court in this regard. The Bombay High Court in **Vijay Lahu Patil v State of Maharashtra**,[4] dealt with the question of what constitutes suspicious behavior warranting an arrest under Section 151 of the CrPC, and held that the past criminal record is an irrelevant consideration and cannot be used as a justification for possible future criminal activity.

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1 (2005) 3 SCC 647
2 (2011) 13 SCC 329
3 Special Criminal Application (Direction) No. 5241 of 2014, available at MANU/GJ/0052/2015
4 2014 (1) Bom.C.R. (Cri) 422

IN THE SUPREME COURT OF INDIA

Ahmed Noormohmed Bhatti v. State of Gujarat & Ors.

(2005) 3 SCC 647

N. Santosh Hegde, B.P. Singh & S.B. Sinha, JJ.

In this case the Supreme Court examined the constitutionality of Section 151 of the CrPC. In upholding the constitutionality of the Section, the Court discussed the limitations upon the powers in Section 151, as well as conditions under which such powers can be exercised.

Singh, J.:"2. … the High Court considered the arguments addressed before it and rejected the same holding that the powers conferred upon the police authorities under Section 151 of the Code of Criminal Procedure were well defined, and guidelines for their exercise are also found in the provision so as to save it from the charge of being either arbitrary or unreasonable. The detention under Section 151 of the Code of Criminal Procedure was only for a limited period of 24 hours for the purpose mentioned therein and the said provision, therefore, offended no provision of the Constitution. …

…

5. A mere perusal of Section 151 of the Code of Criminal Procedure makes it clear that the conditions under which a police officer may arrest a person without an order from a Magistrate and without a warrant, have been laid down in Section 151. He can do so only if he has come to know of a design of the person concerned to commit any cognizable offence. A further condition for the exercise of such power, which must also be fulfilled, is that the arrest should be made only if it appears to the police officer concerned that the commission of the offence cannot be otherwise prevented. The section, therefore, expressly lays down the requirements for the exercise of the power to arrest without an order from a Magistrate and without a warrant. If these conditions are not fulfilled and a person is arrested under Section 151 of the Code of Criminal Procedure, the arresting authority may be exposed to proceedings under the law. Sub-section (2) lays down the rule that normally a person so arrested shall be detained in custody not

for a period exceeding 24 hours. It, therefore, follows that in the absence of anything else, on expiry of 24 hours, he must be released. The release, however, is not insisted upon only when his further detention is required or authorized under any other provision of the Code or of any other law for the time being in force. It, therefore, follows that if before the expiry of 24 hours of detention it is found that the person concerned is required to be detained under any other provision of the Code of Criminal Procedure, or of any other law for the time being in force, he may not be released and his detention may continue under such law or such provision of the Code. The detention thereafter is not under Section 151 of the Code of Criminal Procedure but under the relevant provision of the Code or any other law for the time being in force as the case may be. Section 151, therefore, only provides for arrest of a person to prevent the commission of a cognizable offence by him. The provision by no stretch of imagination can be said to be either arbitrary or unreasonable or infringing upon the fundamental rights of a citizen under Articles 21 and 22 of the Constitution.

…

7. This Court laid down certain requirements in *Joginder Kumar* [(1994) 4 SCC 260: 1994 SCC (Cri) 1172] for effective enforcement of the fundamental rights inherent in Articles 21 and 22(1) of the Constitution which require to be recognised and scrupulously protected. …

8. In *D.K. Basu* v. *State of W.B.* [(1997) 1 SCC 416: 1997 SCC (Cri) 92] this Court has issued requirements to be followed in all cases of arrest and detention till legal provisions are made in that behalf as preventive measures. …

9. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee. This Court has also cautioned that failure to comply with the requirements aforesaid, shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court.

10. Counsel for the petitioner submitted that such requirements must be laid down in the case of an arrest under Section 151 of the Code of Criminal Procedure. Counsel for the respondents conceded that the requirements laid down in *Joginder Kumar* [(1994) 4 SCC 260: 1994 SCC (Cri) 1172] and *D.K. Basu* [(1997) 1 SCC 416: 1997 SCC (Cri) 92] apply also to an

arrest made under Section 151 of the Code of Criminal Procedure. As we have noticed earlier, Section 151 of the Code of Criminal Procedure itself makes provision for the circumstances in which an arrest can be made under that section and also places a limitation on the period for which a person so arrested may be detained. The guidelines are inbuilt in the provision itself. Those statutory guidelines read with the requirements laid down by this Court in *Joginder Kumar* [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] and *D.K. Basu* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] provide an assurance that the power shall not be abused and in case of abuse, the authority concerned shall be adequately punished. A provision cannot be held to be unreasonable or arbitrary and, therefore, unconstitutional, merely because the authority vested with the power may abuse his authority. Since several cases of abuse of authority in matters of arrest and detention have come to the notice of this Court, this Court has laid down the requirements which have to be followed in all cases of arrest and detention.

11. We, therefore, find no substance in the contention that Section 151 of the Code of Criminal Procedure is unconstitutional and ultra vires the constitutional provisions."

IN THE SUPREME COURT OF INDIA

Rajender Singh Pathania & Ors. v. State of N.C.T of Delhi & Ors.

(2011) 13 SCC 329

P. Sathasivam & Balbir Singh Chauhan, JJ.

The respondents while on patrol found the appellants fighting with each other in an intoxicated condition. On being taken to the hospital for examination, they misbehaved with the doctors and other staff there. They were detained under Sections 107 and 151, CrPC. A Criminal Writ Petition filed before the High Court of Delhi to quash these proceedings was allowed. On appeal before the Supreme Court, the Court examined whether the proceedings initiated against the appellants should be quashed, and whether they were entitled to compensation for illegal detention.

Chauhan, J.:"17. The objects of Sections 107/151 CrPC are of preventive justice and not punitive. Section 151 should only be invoked when there is imminent danger to peace or likelihood of breach of peace under Section 107 CrPC. An arrest under Section 151 can be supported when the person to be arrested designs to commit a cognizable offence. If a proceeding *under Sections 107/151* appears to be absolutely necessary to deal with the threatened apprehension of breach of peace, it is incumbent upon the authority concerned to take prompt action. The jurisdiction vested in a Magistrate to act under Section 107 is to be exercised in an emergent situation.

18. A mere perusal of Section 151 of the Code of Criminal Procedure makes it clear that the conditions under which a police officer may arrest a person without an order from a Magistrate and without a warrant have been laid down in Section 151. He can do so only if he has come to know of a design of the person concerned to commit any cognizable offence. A further condition for the exercise of such power, which must also be fulfilled, is that the arrest should be made only if it appears to the police officer concerned that the commission of the offence cannot be otherwise prevented. The section, therefore, expressly lays down the requirements for exercise of the power to arrest without an order from a Magistrate and without a warrant. If these conditions are not fulfilled and, a person is

arrested under Section 151 CrPC, the arresting authority may be exposed to proceedings under the law for violating the fundamental rights inherent in Articles 21 and 22 of the Constitution. (Vide *Ahmed Noormohmed Bhatti* v. *State of Gujarat* [(2005) 3 SCC 647: 2005 SCC (Cri) 794: AIR 2005 SC 2115] , SCC p. 650, para 5.) (See also *Joginder Kumar* v. *State of U.P.* [(1994) 4 SCC 260: 1994 SCC (Cri) 1172 : AIR 1994 SC 1349] and *D.K. Basu* v. *State of W.B.* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610])

19. In the instant case the proceedings under Sections 107/151 CrPC were initiated on 4-2-2007 and the High Court has quashed the proceedings. At such a belated stage, correctness of the decision to that extent does not require consideration. Even otherwise the issue regarding quashing of those proceedings at this stage remains purely academic. So, we uphold the impugned judgment to that extent.

20. The issue of award of compensation in case of violation of fundamental rights of a person has been considered by this Court time and again and it has consistently been held that though the High Courts and this Court in exercise of their jurisdictions under Articles 226 and 32 can award compensation for such violations but such a power should not be lightly exercised. These articles cannot be used as a substitute for the enforcement of rights and obligations which could be enforced efficaciously through the ordinary process of courts. Before awarding any compensation there must be a proper enquiry on the question of facts alleged in the complaint. The Court may examine the report and determine the issue after giving opportunity of filing objections to rebut the same and hearing to the other side. Awarding of compensation is permissible in case the Court reaches the same conclusion on a reappreciation of the evidence adduced at the enquiry. Award of monetary compensation in such an eventuality is permissible "when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers…." (Vide *Sebastian M. Hongray* v. *Union of India* [(1984) 3 SCC 82 : 1984 SCC (Cri) 407 : AIR 1984 SC 1026]; *Bhim Singh* v. *State of J&K* [(1985) 4 SCC 677 : 1986 SCC (Cri) 47 : AIR 1986 SC 494]; *Nilabati Behera* v. *State of Orissa*[(1993) 2 SCC 746 : 1993 SCC (Cri) 527 : AIR 1993 SC 1960], SCC p. 763, para 17;*D.K. Basu* v. *State of W.B.* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610]; *Railway Board* v. *Chandrima Das* [(2000) 2 SCC 465 : AIR 2000 SC 988] and *S.P.S. Rathore* v. *State of Haryana* [(2005) 10 SCC 1] .)"

IN THE HIGH COURT BOMBAY

Vijay Lahu Patil v. State of Maharashtra & Ors.

Criminal Writ Petition No. 1727 of 2013

(2013) SCC OnLine Bom 1197

S.C. Dharmadhikari & G.S. Patel, JJ.

The petitioner was having tea at a road-side tea stall near a police station. He was arrested under Section 151 of the CrPC because his conduct was found to be suspicious. The Court examined what constitutes suspicious behavior to warrant an arrest under Section 151 of the CrPC.

Patel, J.:"6. … There seems to be very little justification for the impugned orders or even for taking the view the police claim they did. Why exactly his behaviour was thought to be suspicious, we are not told. We are only told that he has a very long line of criminal cases. …

7. What is not in doubt, however, is that the only thing the Petitioner was doing in the late morning of 22nd February 2013 was having tea at a local tea-stall. The 4th Respondent says there is no 'satisfactory explanation' for this. This is bewildering. We were unaware that the law required anyone to give an explanation for having tea, whether in the morning, noon or night. One might take tea in a variety of ways, not all of them always elegant or delicate, some of them perhaps even noisy. But we know of no way to drink tea 'suspiciously'. The ingestion of a cup that cheers demands no explanation. And while cutting chai is permissible, now even fashionable, cutting corners with the law is not.

8. Sections 107 and 151 of the CrPC are, in terms, preventive, not punitive. Embedded in Section 151 are conditions that must be met for its invocation. A police officer may affect an arrest without a Magistrate's order and without a warrant only where he learns that the arrested person is imminently likely to commit a cognizable offence. He must, in addition, be satisfied that the impending crime cannot otherwise be prevented. This means that the record must reflect a subjective satisfaction as to all these requirements. Where these conditions are not met, there is a violation of a person's fundamental rights under Articles 21 and 22 of the Constitution of India. Similarly, a Magistrate's jurisdiction under Section 107 is to be exercised only in an emergent situation *Rajinder Singh Pathania* v. *State (NCT of Delhi).*

9. ...The Petitioner's past history of criminal cases is equally irrelevant, since it cannot possibly lead to any conclusion of imminent criminal activity…"

IN THE HIGH COURT OF GUJARAT

Bharat Valji Hangama & Ors. v. State of Gujarat & Ors.

Special Criminal Application (Direction) No. 5241 of 2014

MANU/GJ/0052/2015

J.B. Pardiwala, J.

On an application by some villagers against the petitioners, proceedings under Section 107 CrPC were initiated against the petitioners. Despite offering to furnish the necessary bonds, the petitioners were sent to jail and kept there for a period of seven days, and were not supplied with any information. In a petition under Article 226 filed before the High Court of Gujarat challenging this action, the Court discussed the requirements of Sections 107 and 151 of the CrPC.

Pardiwala, J.:"9. The events narrated above leave no doubt that the Magistrate grossly offended against the mandatory provisions contained in Sections 112, 114 and 116 of the Code and exhibited a total lack of judicial approach. When the applicant were produced before the Magistrate by the Police, neither was the order read-over, the substance thereof explained, nor was a copy of the order delivered to them intimating them the substance of the opinion received by the Magistrate on the basis whereof the proceedings under Sec. 107 had been started. They were kept totally in dark. After their appearance in the Court, they were sent to prison and were kept in unlawful detention for a period of 7 days.

…

11. The Supreme Court in the case of *Madhu Limaye v. Sub Divisional Magistrate*, (1970) 3 SCC 739, has emphasized on the position that the bare allegations cannot form the foundation of the order for a bond and failing furnishing of it detention of the delinquent but the mandate of the law is that the inquiry must commence and the Magistrate must proceed to ascertain the truth of the allegations by application of his judicial mind and look for the material which would substitute the allegation in true fact. …

…

13. Section 151 of the Code empowers the police to arrest a person, but as provided by Sec. 151(2) of the Code, no person arrested under Sub-section (1) of Sec. 151 could be detained in custody for a period exceeding 24 hours from the time of his arrest unless his further detention was required or otherwise under any other provisions of the Code or of any other law for the time being in force. In such circumstances when the applicants were produced before the second respondent who was an Executive Magistrate and before whom the proceedings under sec. 107 of the Code were initiated, no question of the second respondent releasing the three persons on bail at that stage could also have ever arisen for consideration. The second respondent was completely ignorant of the law that the proceedings under Sec. 107 of the Code are concerning proper bonds to be taken from the concerned persons by way of security for keeping peace. These proceedings as stated above are popularly known as the Chapter Proceedings. There is no question of any person being accused of any offence in such proceedings. The term "offence" has been defined under Sec. 2 (n) of the Code which would indicate that the proceedings under Sec. 107 of the Code have nothing to do with any accusation regarding any offence as such. …

14. In such circumstances referred to above the Executive Magistrate had no power, jurisdiction or authority to direct the police to send the three applicants to jail. …

…

16. While explaining the object of Section 107 CrPC a Constitution Bench of the Supreme Court in *Madhu Limaye v. Sub Divisional Magistrate,* (1970) 3 SCC 739, observed in paragraphs 33 and 34 of the judgment as under:--

> "33. The gist of S. 107 may now be given. It enables certain specified classes of Magistrates to make an order calling upon a person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix. The condition of taking action is that the Magistrate is informed and he is of opinion that there is sufficient ground for proceeding that a person is likely to commit a breach of the peace or

disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. The Magistrate can proceed if the person is within his jurisdiction or the place of the apprehended breach of the peace or disturbance is within the local limits of his jurisdiction. The section goes on to empower even a Magistrate not empowered to take action, to record his reason for acting, and then to order the arrest of the person (if not already in custody or before the Court) with a view to sending him before a Magistrate empowered to deal with the case, together with a copy of his reasons. The Magistrate before whom such a person is sent may in his discretion detain such person in custody pending further action by him.

34. The section is aimed at persons, who cause a reasonable apprehension of conduct likely to lead to a breach of the peace or disturbance of the public tranquillity. This is an instance of preventive justice which the Courts are intended to administer. This provision like the preceding one is an aid of orderly society and seeks to nip in the bud conduct subversive of the peace and public tranquillity. For this purpose, Magistrates are invested with large judicial discretionary powers for the preservation of public peace and order. Therefore, the justification for such provisions is claimed by the State to be in the function of the State which embraces not only the punishment of offenders but as far as possible, the prevention of offences.""

CHAPTER 10

ILLEGAL DETENTION AND ENFORCED DISAPPEARANCE

ILLEGAL DETENTION AND ENFORCED DISAPPEARANCE

"Enforced disappearances" or other forms of illegal detentions refer to the practice by state officials, particularly the police, of abducting persons instead of arresting or lawfully detaining them. **Prithipal Singh v. State of Punjab**,[1] is an example. In this case, a human rights activist was abducted and murdered by four police personnel. In its judgment convicting the police officers involved, the Supreme Court highlighted the importance of Articles 21and 22 of the Constitution of India. The Court held that police atrocities amount to systematic subversion and erosion of rule of law and that in cases where there is material on record to reveal police atrocities, courts should take strict action against erring police officers in accordance with law.

In **Prof. T V Eachara v. Secretary to the Ministry of Home Affairs and Others**,[2] the police arrested one P. Rajan, and refused to inform the petitioner, his father, of his whereabouts. On a writ of habeas corpus filed before the Kerala High Court, the Court ordered that the missing person be produced before the Court, and that failure to comply with the order would result in the respondents being held guilty of contempt.

In **The Advocate-General, Andhra Pradesh, Hyderabad v. Mr. Ashok Kumar, Inspector of Police**,[3] an Advocate-Commissioner had been appointed by the local court to search the premises of a police station for one, Mohammed Ayub. The respondent, a police officer, forced the Advocate-Commissioner to make an entry in the General Diary of the Police Station to the effect that he did not find Mohammed Ayub. The Court held that the respondent committed contempt of court by preventing the Advocate-Commissioner from inspecting the lock-up and for compelling him to make a false entry in the General Diary. The Court imposed a fine on the respondent.

1 (2012) 1 SCC 10
2 1978 Cri.L.J. 86 (Ker.)
3 1994 Cri.L.J. 1333 (A.P.)

In **Inder Singh v. State of Punjab**,[4] the petitioner filed a writ of habeas corpus to secure the release of seven persons who were abducted by the police. The Court stated that the attitude of the police betrays scant regard for the life and liberty of innocent citizens and that it is a trend that bodes ill for country and hence must be properly checked. The Court held that in such a case, the State must bear the consequences, and directed the State of Punjab to pay compensation to the tune of Rs. 1.50 lakhs to the legal representatives of each of the persons within 2 weeks.

4 (1995) 3 SCC 702

IN THE HIGH COURT OF KERALA

T.V. Eachara Varrier v. Secretary to the Ministry of Home Affairs & Ors.

1978 Cri.L.J. 86 (Ker.)

Subramonian Poti & Khalid, JJ.

In the instant case, the petitioner was the father of one P. Rajan who was allegedly taken into police custody, and no information was provided to the petitioner regarding his son's whereabouts. The issue in this case pertained to the relief that can be sought when a person goes missing, especially when there is a doubt regarding the involvement of the police in the same.

Poti, J.: "13. We are met with an unusual situation here. Cases that have come up before the Courts seeking the issue of rule of Habeas Corpus are those where the Courts had been called upon only to decide the legality or the validity of the order of detention by the police or others having the custody of the person who was the subject matter of the Habeas Corpus petition. We have not been referred to any authority nor have we been able to locate any case where the Court had to undertake the task of finding out the truth or otherwise of the plea of the detention itself. But such a situation has arisen here. But so long as it is the duty of this Court to protect the freedom of a citizen and his immunity from illegal detention we cannot decline to exercise our jurisdiction merely because a dispute has arisen on the issue of the detention. The Supreme Court in Mohd. Hussain v. State of U.P., AIR 1964 SC 1625 : ((1964) 2 Cri LJ 590) (at p. 1632 of AIR) said that:

> "It is wrong to think that in Habeas Corpus proceedings the Court is prohibited from ordering an inquiry into a fact. All procedure is always open to a Court which is not expressly prohibited and no rule of the Court has laid down that evidence shall not be received, if the Court requires it. No such absolute rule was brought to our notice."

…

44. We now come to the course to be adopted in this case. It is difficult to believe that any serious notice had been taken of the petitioner's complaint at any earlier stage. That it has been brought to the notice of Sri. Karunakaran, the then Home Minister, cannot be in doubt. There is some evidence disclosed to show that after the relaxation of the emergency the issue has become rather serious particularly among the student population. We are referring to the resolution passed by the Calicut Engineering College Union protesting against the statement of Sri. Karunakaran that Rajan has not been taken into custody. Possibly as a result of this or possibly as a result of this petition there is an offer by the Additional Advocate General that a Commission of enquiry will be appointed soon after the decision of this case to go into the truth or otherwise of the arrest of Sri. Rajan. As to the truth of that we have already found. If honestly the Government is not in a position to tell the Court the whereabouts of Rajan it is highly regrettable. There should no doubt be sincere anxiety to bring to book those responsible, but more than that it should be to ascertain the whereabouts of Rajan and if he is not available to make it known to the parents what happened to him after he was taken into police custody. Whether he is still in police custody and if not how such custody came to an end, has to be found out. We do not feel that any such honest anxiety is reflected in the offer to appoint a Commission under the Commission of Inquiries Act. We know that failure to comply with the direction to produce Sri. Rajan may result in the respondents being held guilty of contempt. But, our primary concern is to grant effective relief in this case if that would be possible.

45. We hereby issue a writ of Habeas Corpus to the respondents directing them to produce Sri Rajan in this Court on the 21st of April, 1977.

46. If, for any reason the respondents think that they will not be able to produce the said Sri. Rajan on that day their counsel may file a Memo submitting this information before the Registrar of the High Court on 19th April, 1977 in which case the case will stand posted to 23-5-1977, the date of re-opening of the Courts after the midsummer recess. On that day the respondents may furnish to the Court detailed information as to the steps taken by the respondents to comply with the order of this Court, and particularly to locate Sri Rajan. Thereupon it will be open to this Court to pass further orders on this petition and to that extent this order need not be taken to have closed the case. We know that we are adopting a very unusual procedure for which there is no parallel

or precedent. But our power to do so cannot be in question, for, it is to enforce the object of finding out the truth and giving relief that we are adopting this procedure. We cannot think of a better device by which the Court's conscience would be satisfied.

47. It is unfortunate that the respondents have not viewed the matter with the sense of responsibility expected of them at least when their attention was drawn to the serious situation. We once again reiterate that such responsibility cannot be disowned as if it is some stray act of some police officers somewhere. We do fervently hope that the guilty would meet with punishment though it is not our province to impose any."

IN THE HIGH COURT ANDHRA PRADESH

The Advocate-General, Andhra Pradesh v. Ashok Kumar, Inspector of Police, Mir Chowk Police Station, Hyderabad

1994 Cri. L.J.1333 (A.P.)

V. Sivaraman Nair & S.V. Maruthi, JJ.

In this case, suo moto proceedings under Contempt of Courts Act were initiated against the respondent contemnor, on the allegation that the contemnor forced an Advocate-Commissioner appointed by a court, to make an entry in the general diary of the police station to the effect that he did not find the arrested person. In its decision, the High Court examined whether the respondent committed contempt of Court by preventing the Advocate-Commissioner from inspecting the lock-up room and for compelling him to make a false entry in the General Diary.

Nair, J.:"5. We have examined the evidence recorded by the Chief Metropolitan Magistrate and the counter affidavits filed by the respondent as also the submission made by Counsel on both sides. The contemner has tendered unconditional apology subject to his assertion that the Advocate-Commissioner made the entries in the General Diary voluntarily.

6. In his report the V Metropolitan Magistrate had stated that Criminal M.P. No. 396/90 was filed under Section 97 of the Code of Criminal Procedure by one Ahmed Hussain alleging that on 9.3.1990 at 3 p.m., himself and his brother Mohammed Ayub were proceeding from Yerragadda and that two police constables caught hold of Mohammed Ayub and took him to police station, Sanjeevareddy Nagar and that the petitioner (Ahmed Hussain) followed them. When he met the Inspector of Police, Sanjeevareddy Nagar, he was told that Mohammed Ayub was required for interrogation and he would be set free within two days. He waited till 12.3.1990 and filed an application in Court. On the same day, the Court issued a warrant requiring production of Mohammed Ayub by the Station House Officer, Sanjeevareddy Nagar Police station or any other police station in twin cities. Sri V. Balraj, Advocate was appointed as Advocate-Commissioner to execute the warrant. On 13.3.1990 the

Advocate-Commissioner filed Ex.C-2 report alleging that when he and Ahmed Hussain, the petitioner went to the police station on 12.3.1990 at 5.45 p.m. and showed the search warrant to the Inspector of Police, the latter obstructed the Commissioner from entering the lock-up room and pushed him aside. At that time, the petitioner Ahmed Hussain found and identified his brother Mohammed Ayub in the Police lock-up. The Inspector, Sri Ashok Kumar, on being aware of the identification by the petitioner, directed the police constables to remove Mohammed Ayub from the lock-up. When the Commissioner questioned the obstruction caused by Sri Ashok Kumar, he forced the Commissioner Sri V. Balraj, to write in the General Diary that he had searched the premises and did not find Mohammed Ayub; and when the Commissioner refused to do so, the Inspector forced him under threat to make such an entry in the General Diary. On perusing the report of the Commissioner, the Court issued a show-cause notice on 13.3.1990 to the respondent Sri Ashok Kumar, to show-cause why he should not be proceeded against for contempt of Court for having obstructed the Commissioner and for wilful and wanton disobedience of the search warrant. In his letter dated 16.3.1990 the respondent sought further time for filing his explanation. On 19.3.1990 to which date the Magistrate adjourned the matter, the respondent asserted that on 12.3.1990 at about 6 p.m., the Commissioner came to the Police Station, Mir Chowk without any witnesses with him as required by Section 94(c) of the Code of Criminal Procedure, that he received the Commissioner well and rendered all possible assistance for facilitating the search and be requested the Commissioner to get two witnesses to be present at the time of search. He asserted further that after search, the Commissioner was satisfied that Mohammed Ayub was not present in the Police Station and he voluntarily made an entry in the General Diary over his signature. He enclosed a copy of the General Diary entry also a long with his explanation. The Magistrate then directed the petitioner Ahmed Hussain and the Advocate-Commissioner to file affidavits. They filed their affidavits reiterating their previous position. Sri Mohammed Ayub, for searching whom in the Police Station, the Commission was issued on 12.3.1990 also filed affidavit stating that the respondent had detained him in the Police Station on 12.3.1990, that when the Commissioner came with the warrant, he was physically prevented from carrying out the search, that he was shifted from the Police Station, Mir Chowk to different Police Stations. At last on 2.4.1990 he was produced before the XI Metropolitan Magistrate in Crime No. 66/90 of Charminar Police Station for offences under Sections 41 and 102 of the Code of Criminal Procedure. He asserted that he was in illegal detention for 23 days in all.

Sri Ahmed Hussain had in the meantime filed Criminal M.P. No. 431/90 for issue of a search warrant on 19.3.1990 alleging that Sri Mohammed Ayub had been removed from one Police Station to another and sought issue of a fresh warrant. On 19.3.1990 the Magistrate issued another warrant and appointed Sri Y. Subash, Advocate, as Commissioner to execute the same. Sri Mohammed Ayub filed an affidavit on 9.4.1990 as stated above. It was on the basis of the above facts that the V Metropolitan Magistrate sent a report to this Court requesting for initiation of action. He had also enclosed affidavits and explanation to which reference has been made.

7. Pursuant to our directions, the Chief Metropolitan Magistrate had examined the Commissioner Sri V. Balraj as P.W. 1, the V Metropolitan Magistrate as P.W. 2, Sri Ahmed Hussain, the petitioner in Criminal M.P. No. 396/90 as P.W. 3 and Sri Mohammed Ayub the detenu as P.W. 4. The respondent Sri Ashok Kumar, Inspector of Police was examined as D.W.I. We have perused the evidence including the depositions of witnesses, the affidavits and the exhibits which were marked by the Chief Metropolitan Magistrate. We find on a perusal of the same that there was sufficient evidence justifying the conclusion that the respondent Inspector of Police, had abused his power and jurisdiction to prevent the Advocate-Commissioner from executing the warrant and had forced him to make an entry in the General Diary of the police Station. The witnesses were cross-examined in detail by Counsel appearing for the respondent. Cross-examination by the respondent did not succeed in whittling down the evidence of P.Ws. 1 to 4.

8. On a consideration of the entire matter, we are of the opinion that the respondent had committed contempt of Court by preventing the Advocate-Commissioner from discharging his duties as ordained by the Court and by forcing the Advocate-Commissioner to make entries in the General Diary contrary to what the Commissioner had observed at the time when he went to the police station and visited the police lock-up, pursuant to the orders of Court. He was prevented from proceeding to the lock-up even though the petitioner, Ahmed Hussain who accompanied him had found and identified Mohammed Ayub, brother of the petitioner before the Magistrate, in custody. After preventing the Advocate-Commissioner from proceeding to the lock-up, the contemner caused Mohammed Ayub to be shifted away to some other destination. These acts of an Officer of the Police Force who is expected to administer law is all the more reprehensible. The increasing tendency on the part of the protectors of law to violate orders of Court and to spend their ire on Counsel who represent their clients or

discharge functions as Officers of Courts is on the increase. It is essential that in the interests of effective administration of law and justice, these tendencies are effectively curbed as soon as they manifest themselves. It is also in the interests of those who, by reason of arrogance of office and authority, behave as if they are law unto themselves. We have often seen tyrants and titans of yesteryears languishing in the corridors of Courts seeking justice from Courts, whose orders they had deliberately violated with impunity. Courts do not discriminate against them on the basis of their past. They give them just desserts which are due to them. This must be a sobering thought to the wielders of power when they are tempted to show off their authority.

9. We hold the respondent to have committed contempt of Court by his contumacious conduct in preventing the Advocate-Commissioner from inspecting the lock-up room in Mir Chowk Police Station and search for Mohammed Ayub as directed by the V Metropolitan Magistrate in Ex.C-1 search warrant dated 12-3-1990 and in compelling the Advocate-Commissioner to make Ex.C-5 entry in the General Diary of Mir Chowk Police Station. However, in view of the apology tendered by the contemner-respondent, we are inclined to impose a lighter punishment on him. The contemner-respondent shall pay a fine of Rs. 1,000/- (Rupees one thousand only) within a week from today. In default, provisions of Section 421 of the Code of Criminal Procedure will operate and appropriate directions will be issued."

IN THE SUPREME COURT OF INDIA

Inder Singh v. State of Punjab & Ors.

(1995) 3 SCC 702

A.M. Ahmadi, C.J.I., Dr. A.S. Anand & S.P. Bharucha, JJ.

Seven people were forcibly removed from their farmhouse by a police party led by a DSP because the DSP suspected them to be involved in the abduction of his younger brother by terrorists. A writ of habeas corpus was filed against the police for abduction of the seven persons. This Court, in its previous order directed the Director of the Central Bureau of Investigation to personally inquire into this matter and make a report of the same. In this decision, the Court discussed the relief to be granted owing to wrongful conduct of the police.

Order: "2. For the reasons set out in the earlier order, we directed that an enquiry should be conducted by the Director of the Central Bureau of Investigation, which would cover:

> "(a) the circumstances of the abduction of the said 7 persons; (b) their liquidation; (c) how it was that the inquiry into the complaint was delayed from 25.1.1992, when it was received by the office of the 2nd respondent, till 23-3-1994, when the case was registered; (d) whether it is in conformity with good police administration that a complaint of abduction of 7 citizens by a high-ranking police officer should not be required to be brought to the attention of the officer in command of the police force even after the allegations made in the complaint had been found to be correct on inquiry by a specially designated officer; (e) whether there has been an attempt to cover up the misdoings of police officers and policeman involved in the abduction of the said

7 persons and their subsequent incarceration or liquidation; and (f) if so, who was involved therein."

We now have before us the report dated 15-12-1994, of the Director of Central Bureau of Investigation, in which he concludes:

(a) The said 7 persons were forcibly removed from their farmhouse in Village Bagga, District Majitha, State of Punjab on 29-10-1991, by a police party led by Baldev Singh, DSP. The abduction was effected because it was suspected by the said Baldev Singh that the said 7 persons had a role to play in the abduction by terrorists of his younger brother.

(b) It could reasonably be concluded that the said 7 persons had been killed. No evidence showed that any of the said 7 persons was still alive. As the incident had taken place more than three years back, the chances of recovering the bodies or other evidence was minimal.

(c) The writ petitioner had made a written complaint two-and-a-half months after the abduction. During that period he had approached the said Baldev Singh and Sita Ram, SSP Batala, a number of times. Their assurances led to the delay in his complaining to higher officers. The said Sita Ram had not intervened when the 7 persons were still alive and in unlawful custody. An intervention at that stage would have prevented their liquidation. The enquiry into the writ petitioner's complaint remained with the DIG, Border Range, Amritsar, for more than 8 months and with the SSP Batala, for 2 months. The Crime Branch of the Punjab Police had pursued the matter and, disagreeing with the recommendations of the District and Range Officers, had registered a case and charge-sheeted 9 accused (the alleged members of the police party).

(d) The file was at no stage put up before the Director General of Police, Punjab, but it would have been "prudent and administratively correct to do so".

(e) The abduction of the said 7 persons was first brought to the notice of the said Sita Ram a few days after the incident. No enquiry was made by him. No complaint was recorded or investigated.

(f) On receipt of the information and, later, of the written complaint, the said Sita Ram should have taken immediate action and initiated a regular enquiry, if not investigation.

3. The CBI report establishes that a Punjab Police Officer of the high rank of Deputy Superintendent of Police had, upon the suspicion that the said 7 persons might have been concerned in the abduction of his brother by militants, led a police party unlawfully to their house and abducted them. The said 7 persons had then been kept under unlawful detention in police stations in the State of Punjab, for example, at Kalanaur and Dera Baba Nanak. The said 7 persons are untraceable. It is wholly reasonable, therefore, to conclude that in all probability they were killed by those who abducted them.

4. Mr K.T.S. Tulsi, learned Additional Solicitor General, appearing for the 1st and 2nd respondents, namely, the State of Punjab and the Director General of Police, Punjab, submitted that the Punjab Police should receive the "commendation of this Court": the Punjab Police had acted on its own to discover the crime and to take action against its errant officers and men and this was an indication of "the percolation of constitutional culture" to the Punjab Police.

5. A Deputy Superintendent of the Punjab Police and a police party abducted the said 7 persons. The Deputy Superintendent of Police misused the machinery of the police to wreak private vengeance upon the said 7 persons. The said 7 persons, while they were alive, were unlawfully detained in police stations in the State of Punjab. Their whereabouts are not known till today. There can be little doubt that they were in all probability liquidated by those who abducted them.

6. Sita Ram, SSP Batala, though he received oral and then written information in regard to the abduction; chose to do nothing while the said 7 persons were still alive. He sat on the complaint for two months. The DIG, Border Range, Amritsar; sat on it for 8 months. It is only the Crime Branch of the Punjab Police which acted, recognising where its duty lay.

7. Though an officer as senior as a Deputy Superintendent of Police had led a police party to abduct the said 7 persons, and they were thereafter untraceable, the matter was not serious enough to be brought to the attention of the DGP, Punjab, having regard to the delegation of

responsibilities made by him. To put it in the very mild words of the CBI report, it would have been "prudent and administratively correct to do so".

8. In the background of these facts, the Punjab Police as a whole merit this Court's disapprobation, the Crime Branch thereof a word of praise.

9. The Punjab Police would appear to have forgotten that it was a police force and that the primary duty of those in uniform is to uphold law and order and protect the citizen. If members of a police force resort to illegal abduction and assassination, if other members of that police force do not record and investigate complaints in this behalf for long periods of time, if those who had been abducted are found to have been unlawfully detained in police stations in the State concerned prior to their probable assassination, the case is not one of errant behaviour by a few members of that police force. We do not see that "constitutional culture" as Mr Tulsi put it, had percolated to the Punjab Police. On the contrary it betrays scant respect for the life and liberty of innocent citizens and exposes the willingness of others in uniform to lend a helping hand to one who wreaks private vengeance on mere suspicion.

10. This Court has in recent times come across far too many instances where the police have acted not to uphold the law and protect the citizen but in aid of a private cause and to oppress the citizen. It is a trend that bodes ill for the country and it must be promptly checked. We would expect the DGP, Punjab, to take a serious view in such cases if he is minded to protect the image of the police force which he is heading. He can ill-afford to shut his eyes to the nose-dive that it is taking with such ghastly incidents surfacing at regular intervals. Nor can the Home Department of the Central Government afford to appear to be a helpless silent spectator.

11. When the police force of a State acts as the Punjab Police has done in this case, the State whose arm that force is must bear the consequences. It must do so in token of its failure to enforce law and order and protect its citizens and to compensate in some measure those who have suffered by reason of such failure. We direct the State of Punjab to pay to the legal representatives of each of the said 7 persons the amount of Rs 1.50 lakhs within 2 weeks. Later when the guilty are identified the State should endeavour to recover the said amount which is the taxpayers' money.

12. The prosecution of those who have been charge-sheeted in connection with the abduction and disappearance of the said 7 persons should be

expeditiously conducted under the supervision of the Crime Branch of the Punjab Police. We would like to caution the court trying the accused that it should decide the case on the evidence that may be laid before it without being unduly influenced by what we have said hereinbefore.

13. Disciplinary inquiries must be started against the aforesaid accused as also the said Sita Ram and the then DIG, Border Range, Amritsar. Others responsible for delaying the registration of the complaint and inquiry thereon must also be identified and proceeded against.

14. The State of Punjab shall pay to the petitioner the costs of the writ petition, quantified at Rs 25,000."

IN THE SUPREME COURT OF INDIA

Prithipal Singh v. State of Punjab

(2012) 1 SCC 10

Balbir Singh Chauhan & P. Sathasivam, JJ.

A human right activist was abducted by the police from his residential house, taken to the police station, tortured, and murdered. His body was then thrown in a canal. The High Court upheld the conviction of the appellants and enhanced their sentence from 7 years' rigorous imprisonment to life imprisonment, hence this appeal was filed. In this context, the Court discussed the issue of police atrocities and appropriate relief for the same.

Chauhan, J.:"25. Police atrocities in India had always been a subject-matter of controversy and debate. In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. The wrongdoer is accountable and the State is responsible if a person in custody of the police is deprived of his life except in accordance with the procedure established by law. However, when the matter comes to the court, it has to balance the protection of fundamental rights of an individual and duties of the police. It cannot be gainsaid that freedom of an individual must yield to the security of the State. The Latin maxim salus populi est suprema lex—the safety of the people is the supreme law; and salus reipublicae suprema lex—the safety of the State is the supreme law, coexist. However, the doctrine of the welfare of an individual must yield to that of the community.

26. The right to life has rightly been characterised as "'supreme' and 'basic'; it includes both so-called negative and positive obligations for the State". The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that the State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take administrative and all other measures in order to protect life and investigate all suspicious deaths.

27. The State must protect the victims of torture, ill-treatment as well as the human rights defender fighting for the interest of the victims, giving the issue serious consideration for the reason that victims of torture suffer enormous consequences psychologically. The problems of acute stress as well as a post-traumatic stress disorder and many other psychological consequences must be understood in the correct perspective. Therefore, the State must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person, particularly at the hands of any State agency/ police force.

28. In addition to the protection provided under the Constitution, the Protection of Human Rights Act, 1993, also provides for protection of all rights to every individual. It inhibits illegal detention. Torture and custodial death have always been condemned by the courts in this country. In its 113th Report, the Law Commission of India recommended the amendment to the Evidence Act, 1872 (hereinafter called "the Evidence Act"), to provide that in case of custodial injuries, if there is evidence, the court may presume that injury was caused by the police having the custody of that person during that period. Onus to prove the contrary is on the police authorities. Law requires for adoption of a realistic approach rather than narrow technical approach in cases of custodial crimes. (Vide Dilip K. Basu v. State of W.B. [(1997) 6 SCC 642: AIR 1997 SC 3017], N.C. Dhoundial v. Union of India [(2004) 2 SCC 579 : 2004 SCC (Cri) 587 : AIR 2004 SC 1272] and Munshi Singh Gautam v. State of M.P. [(2005) 9 SCC 631 : 2005 SCC (Cri) 1269 : AIR 2005 SC 402])

29. This Court in Raghbir Singh v. State of Haryana [(1980) 3 SCC 70: 1980 SCC (Cri) 526: AIR 1980 SC 1087] while dealing with torture in police custody observed: (SCC pp. 71-72, para 2)

> "2. We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy [when] the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case.

> Police lock-up if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order."

30. Similarly, in Gauri Shanker Sharma v. State of U.P. [1990 Supp SCC 656 : 1991 SCC (Cri) 67 : AIR 1990 SC 709] this Court held: (SCC pp. 666-67, paras 15 & 17)

> "15. …it is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third-degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case.
>
> …
>
> 17. … The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency."

31. In Munshi Singh Gautam [(2005) 9 SCC 631: 2005 SCC (Cri) 1269: AIR 2005 SC 402] this Court held that peculiar type of cases must be looked at from a prism different from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. The Court observed as under: (SCC pp. 638-39, paras 6-7)

> "6. Rarely, in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a

person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues….

7. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case … often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged … The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'khaki' to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve; otherwise the common man may tend to gradually lose faith in the efficacy of the

> system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with."

(See also State of M.P. v. Shyamsunder Trivedi [(1995) 4 SCC 262: 1995 SCC (Cri) 715] .)

32. In State of U.P. v. Mohd. Naim [AIR 1964 SC 703: (1964) 1 Cri LJ 549] the State of U.P. filed an appeal before this Court for expunging the following remarks made by the Allahabad High Court: (AIR p. 705, para 2)

> "2. … '…that there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian police force.
>
> … Where every fish barring perhaps a few, stinks, it is idle to pick out one or two and say that it stinks.'"

This Court held that such general remarks could not be justified nor were they necessary for disposal of the said case. The Court expunged the aforesaid adverse remarks. (See also People's Union for Civil Liberties v. Union of India [(2005) 5 SCC 363: AIR 2005 SC 2419].)

33. Undoubtedly, this Court has been entertaining petition after petition involving the allegations of fake encounters and rapes by police personnel of States and in a large number of cases transferred the investigation itself to other agencies and particularly CBI. (See Rubabbuddin Sheikh v. State of Gujarat [(2010) 2 SCC 200: (2010) 2 SCC (Cri) 1006], Jaywant P. Sankpal v. Suman Gholap [(2010) 11 SCC 208 : (2011) 1 SCC (Cri) 171] and Narmada Bai v. State of Gujarat [(2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526] .)

34. Thus, in view of the above, in the absence of any research/data/material, a general/sweeping remark that a "substantial majority of the population in the country considered the police force as an institution which violates human rights" cannot be accepted. However, in a given case if there is some material on record to reveal the police atrocities, the court must take stern action against the erring police officials in accordance with law.

…

79. Both the courts below have found that the appellant-accused had abducted Shri Jaswant Singh Khalra. In such a situation, only the accused person could explain as to what happened to Shri Khalra, and if he had died, in what manner and under what circumstances he had died and why his corpus delicti could not be recovered. All the appellant-accused failed to explain any inculpating circumstance even in their respective statements under Section 313 CrPC. Such a conduct also provides for an additional link in the chain of circumstances. The fact as to what had happened to the victim after his abduction by the accused persons, has been within the special knowledge of the accused persons, therefore, they could have given some explanation. In such a fact situation, the courts below have rightly drawn the presumption that the appellants were responsible for his abduction, illegal detention and murder.

…

86. Police atrocities are always violative of the constitutional mandate, particularly, Article 21 (protection of life and personal liberty) and Article 22 (person arrested must be informed the grounds of detention and produced before the Magistrate within 24 hours). Such provisions ensure that arbitrary arrest and detention are not made. Tolerance of police atrocities, as in the instant case, would amount to acceptance of systematic subversion and erosion of the rule of law. Therefore, illegal regime has to be glossed over with impunity, considering such cases of grave magnitude."

CHAPTER 11
ENCOUNTER KILLINGS

ENCOUNTER KILLINGS

The Supreme Court of India has repeatedly held that encounter killings and other forms of extrajudicial executions violate Article 21 and "the killings in police encounters affect the credibility of the rule of law and the administration of the criminal justice system."[1] Despite this, such executions occur with frequency and impunity. In order to curb this violation of human rights and provide accountability for such executions, the Supreme Court has laid down various principles and guidelines.

In **Om Prakash v. State of Jharkhand**,[2] the Supreme Court held that police personnel will not receive the protection granted under Section 197 of the CrPC if they kill in cold blood. The same could be availed only when the personnel was acting or purporting to act in discharge of their duties.

In **People's Union for Civil Liberties v. Union of India**,[3] the Court held that even if an area is distubed and terrorist activity is affecting public order in the region, this by itself does not allow the police to conduct encounter killings.

In **Extra-Judicial Execution Victim Families Assn. v. Union of India**,[4] the Apex Court reiterated the same principle and held that the State cannot justify such "administrative liquidation" by citing the number of policemen and security forces personnel killed in the line of duty. In this case, the Court constituted a three member commission to make a thorough enquiry into extrajudicial executions in Manipur.

Similarly, in **Rohtash Kumar v. State of Haryana**,[5] the Court held that merely because a person is a dreaded criminal or a proclaimed offender, he cannot be killed in cold blood. The Court held that in case an encounter killing appears to be fake, it is the duty of the Court to direct an independent

1. (2014) 10 SCC 635
2. (2012) 12 SCC 72
3.. 1997) 3 SCC 433
4. (2013) 2 SCC 493
5. (2013) 14 SCC 290

investigating agency to conduct the investigation. The Court also held that an FIR must be registered whenever the complaint against the police makes out a case of culpable homicide.

Reiterating the importance of an impartial investigation, in **Rubabbuddin Sheikh v. State of Gujarat**,[6] the Court held that in view of the involvement of the police officials of the State in the crime, for a proper and fair investigation, CBI should be directed take up the investigation regarding the execution. Importantly, the Court held that merely because a chargesheet had already been submitted in the case, there was no bar to the Court transferring the investigation to the CBI.

One of the most important cases on this issue is **People's Union for Civil Liberties v. State of Maharashtra**,[7] where the Supreme Court laid down detailed guidelines to be followed in investigating police encounters, in order to ensure thorough, effective and independent investigation.

6. (2010) 2 SCC 200
7. (2014) 10 SCC 635

IN THE SUPREME COURT OF INDIA

People's Union For Civil Liberties v. Union of India & Anr.

(1997) 3 SCC 433

B.P. Jeevan Reddy & Suhas C. Sen, JJ.

The writ petitioner sought a judicial inquiry into a fake encounter by the Imphal police, as well as appropriate action against the erring officials, and grant of compensation to the families of the deceased. Rejecting the State of Manipur's contention that such encounters were justified since Manipur was a disturbed area, the Supreme Court held the conduct of the police violated Article 21. The Court also awarded compensation in this matter.

Jeevan Reddy, J.:"6.… It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas. If the

police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. "Administrative liquidation" was certainly not a course open to them.

…

8. In *Challa Ramkonda Reddy* v. *State of A.P.* [AIR 1989 AP 235 : (1989) 2 Andh LT 1] , a decision of the Division Bench of the Andhra Pradesh High Court, one of us (B.P. Jeevan Reddy, J.) dealt with the liability of the State where it deprives a citizen of his right to life guaranteed by Article 21. It was held:

> "In our opinion, the right to life and liberty guaranteed by Article 21 is so fundamental and basic that no compromise is possible with this right. It is 'non-negotiable'. … The State has no right to take any action which will deprive a citizen of the enjoyment of this basic right except in accordance with a law which is reasonable, fair and just."

The decision also dealt with the question whether the plea of sovereign immunity is available in such a case. The following observations are relevant:

> "The question, however, arises whether it is open to the State to deprive a citizen of his life and liberty otherwise than in accordance with the procedure prescribed by law and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State?
>
> … Can the fundamental right to life guaranteed by Article 21 be defeated by pleading the archaic defence of sovereign functions? Does it mean that the said theory clothes the State with the right to violate the fundamental right to life and liberty, guaranteed by Article 21? In other words, does the said concept constitute an exception to Article 21? We think not. Article 21 does not recognize any exception, and no such exception can be read into it by reference to clause (1) of Article 300. Where

> a citizen has been deprived of his life, or liberty, otherwise than in accordance with the procedure prescribed by law, it is no answer to say that the said deprivation was brought about while the officials of the State were acting in discharge of the sovereign functions of the State."

…

10. In *Nilabati Behera* v. *State of Orissa* [(1993) 2 SCC 746 : 1993 SCC (Cri) 527] this Court (J.S. Verma, Dr. A.S. Anand and N. Venkatachala, JJ.) held that award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the defence of sovereign immunity does not apply in such a case even though it may be available as a defence in private law in an action based on tort. It is held further that the award of damages by the Supreme Court or the High Court in a writ proceeding is distinct from and in addition to the remedy in private law for damages. It is one mode of enforcing the fundamental rights by this Court or High Court. Reliance is placed upon Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which says, "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". The two opinions rendered by J.S. Verma, J. and Dr. A.S. Anand, J. are unanimous on the aforesaid dicta. The same view has been reiterated very recently by a Bench comprising Kuldip Singh and Dr. A.S. Anand, JJ. in *D.K. Basu* v.*State of W.B.* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : (1996) 9 Scale 298] The observations in para 54 of the judgment are apposite and may be quoted: (SCC p. 443, para 54)

> "Thus, to sum up, it is now a well-accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. In the

> assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty-bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for theestablished invasion of the fundamental rights of the citizens, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

…

14. Now coming to the facts of the case, we are of the opinion that award of compensation of Rs 1,00,000 (Rupees one lakh only) to the families of each of the deceased would be appropriate and just. The same shall be paid by the Government of Manipur. The Collector/District Magistrate, Churachandpur shall hand over the cheques to the respective families of the deceased, namely Lalbeiklien and Saikaplien, within two months from today. The writ petition is disposed of accordingly. The People's Union for Civil Liberties, which has filed this writ petition and pursued it all these years shall be entitled to its costs, assessed at Rs 10,000 (Rupees ten thousand only) payable by the State of Manipur within the same period."

IN THE SUPREME COURT OF INDIA

Rubabbuddin Sheikh v. State of Gujarat & Ors.

(2010) 2 SCC 200

Tarun Chatterjee & Aftab Alam, JJ.

The writ petitioner sought a writ of habeas corpus for the production of his sister-in-law, as well as directions for investigation by the CBI into alleged fake encounters by the Gujarat Police authorities. The Supreme Court examined whether an investigation can be transferred to the CBI or any other independent agency when the chargesheet has already been submitted.

Chatterjee, J.: "33. Therefore, let us first consider the first question, namely, whether the investigation can be transferred to the CBI Authorities or any other independent agency when the charge-sheet has already been submitted.

34. In support of his contention that the investigation can be transferred to the CBI Authorities when the charge-sheet in the criminal proceeding was already filed, reference was made to *Kashmeri Devi v. Delhi Admn.* [1988 Supp SCC 482 : 1988 SCC (Cri) 864 : AIR 1988 SC 1323] by the learned Senior Counsel for the writ petitioner. He also relied on a decision of this Court in *Inder Singh v. State of Punjab* [(1994) 6 SCC 275 : 1994 SCC (Cri) 1653] in which this Court held that the enquiry should be transferred to the CBI Authorities for investigation in view of the fact that the police authorities had not been able to locate the whereabouts of the abducted persons. Therefore, these decisions were cited by the learned counsel for the writ petitioner to show that even after the charge-sheet has been filed in the court of competent jurisdiction, this Court is empowered to direct the CBI Authorities or any other independent agency to take over the investigation from the police authorities.

35. The learned counsel for the writ petitioner also placed strong reliance on a decision of this Court in *Gudalure M.J. Cherian* v. Union of India [(1992) 1 SCC 397] from which it also appears that although the charge-sheet was filed in that case, this Court directed CBI to hold further investigation in respect of the offence so committed. Similar is the question raised

in *Punjab & Haryana High Court Bar Assn. v. State of Punjab* [(1994) 1 SCC 616 : 1994 SCC (Cri) 455 : AIR 1994 SC 1023] in which case also the investigation was handed over to the CBI Authorities after the charge-sheet was submitted in the court. While making such order, this Court observed: (*Punjab & Haryana High Court Bar Assn. case* [(1994) 1 SCC 616 : 1994 SCC (Cri) 455 : AIR 1994 SC 1023] , SCC pp. 623-24, paras 8-9)

> "8. … The High Court was wholly unjustified in closing its eyes and ears to the controversy which had shocked the lawyer fraternity in the region. For the reasons best known to it, the High Court became wholly oblivious to the patent facts on the record and failed to perform the duty entrusted to it under the Constitution. After giving our thoughtful consideration to the facts and circumstances of this case, we are of the view that the least the High Court could have done in this case was to have directed an independent investigation/enquiry into the mysterious and most tragic abduction and alleged murder of Kulwant Singh, Advocate and his family.
>
> 9. We are conscious that the investigation having been completed by the police and charge-sheet submitted to the court, it is not for this Court, ordinarily, to reopen the investigation. Nevertheless, in the facts and circumstances of the present case, to do complete justice in the matter and to instil confidence in the public mind it is necessary, in our view, to have fresh investigation in this case through a specialised agency like the Central Bureau of Investigation (CBI)." (emphasis supplied)

36. Accordingly, the learned Senior Counsel appearing for the writ petitioner submitted that even if the charge-sheet was submitted it was still open to the court to direct investigation to be made by the CBI Authorities and accordingly in view of the above position in law, this Court, considering the facts and circumstances of the present case, should direct the CBI Authorities to investigate the offences alleged to have been committed by some of the Police Authorities of the State of Gujarat and submit a report if this Court is of the view that the State Police Authorities who had already filed eight action taken reports had not done such investigation in the proper direction nor had they investigated in a fair and proper manner.

37. This submission of the learned Senior Counsel for the writ petitioner was hotly contested by Mr Mukul Rohatgi, learned Senior Counsel who appeared for the State of Gujarat. According to Mr Rohatgi, after the charge-sheet was submitted in court, it was not open to the Court to hand over the investigation to CBI or any other independent agency and in support of that contention a decision of this Court in *Vineet Narain* v. Union of India [(1996) 2 SCC 199 : 1996 SCC (Cri) 264] was relied on. In this decision, this Court observed: (SCC p. 201, paras 5-6)

> "5. In case of persons against whom a prima facie case is made out and a charge-sheet is filed in the competent court, it is that court which will then deal with that case on merits, in accordance with law.
>
> 6. However, if in respect of any such person the final report after full investigation is that no prima facie case is made out to proceed further, so that the case must be closed against him, that report must be promptly submitted to this Court for its satisfaction that the authorities concerned have not failed to perform their legal obligations and have reasonably come to such conclusion. No such report having been submitted by CBI or any other agency till now in this Court, action on such a report by this Court would be considered, if and when that occasion arises."

38. Subsequent to the aforesaid decision of this Court, another decision of this Court, namely, *Union of India v. Sushil Kumar Modi* [(1998) 8 SCC 661 : 1999 SCC (Cri) 84] was relied on by Mr Rohatgi, learned Senior Counsel, in which this Court observed after considering and following the decision in *Vineet Narain case* [(1996) 2 SCC 199 : 1996 SCC (Cri) 264] that once a charge-sheet is filed, the adequacy or otherwise of the charge-sheet and the investigation cannot be gone into by this Court under Article 32 of the Constitution of India and the only remedy which can be pursued if any aggrieved party feels that in some areas the investigation is inadequate is an application under Section 173(8) of the Code of Criminal Procedure. This Court observed as follows: (*Sushil Kumar Modi case* [(1998) 8 SCC 661 : 1999 SCC (Cri) 84] , SCC p. 662, para 6)

> "6. This position is so obvious that no discussion of the point is necessary. However, we may add

> that this position has never been doubted in similar cases dealt with by this Court. It was made clear by this Court in the very first case, namely, Vineet Narain v. Union of India[(1996) 2 SCC 199: 1996 SCC (Cri) 264] that once a charge-sheet is filed in the competent court after completion of the investigation, the process of monitoring by this Court for the purpose of making CBI and other investigative agencies concerned perform their function of investigating into the offences concerned comes to an end; and thereafter it is only the court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused, including matters falling within the scope of Section 173(8) of the Code of Criminal Procedure. We make this observation only to reiterate this clear position in law so that no doubts in any quarter may survive. It is, therefore, clear that the impugned order of the High Court dealing primarily with this aspect cannot be sustained."

39. Another decision of this Court which was strongly relied on by Mr Mukul Rohatgi, learned Senior Counsel appearing for the State of Gujarat is the decision in *Rajiv Ranjan Singh 'Lalan*' (VIII) v. Union of India [(2006) 6 SCC 613 : (2006) 3 SCC (Cri) 125] . In this decision referring to *Sushil Kumar Modi* [(1998) 8 SCC 661 : 1999 SCC (Cri) 84] and *Vineet Narain*[(1996) 2 SCC 199 : 1996 SCC (Cri) 264] , this Court held: (*Rajiv Ranjan Singh case* [(2006) 6 SCC 613 : (2006) 3 SCC (Cri) 125] , SCC p. 639, paras 37-38)

> "37. … It is thus clear from the above judgment that once a charge-sheet is filed in the competent court after completion of the investigation, the process of monitoring by this Court for the purpose of making CBI and other investigative agencies concerned perform their function of investigating into the offences concerned comes to an end and thereafter, it is only the court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused including matters falling within the scope of Section 173(8).

> 38. We respectfully agree with the above view expressed by this Court. In our view, monitoring of the pending trial is subversion of criminal law as it stands to mean that the court behind the back of the accused is entering into a dialogue with the investigating agency. Therefore, there can be no monitoring after the charge-sheet is filed."

40. Mr Rohatgi, learned Senior Counsel appearing for the State of Gujarat had then drawn our attention to another decision of this Court in*Hari Singh v. State of U.P.* [(2006) 5 SCC 733 : (2006) 3 SCC (Cri) 63] in which it was held that when there is a remedy provided under the Code of Criminal Procedure, 1973, the CBI Authorities cannot be directed to investigate into the matter.

41. Before we take up the decisions cited at the Bar from the side of the writ petitioner, we may deal with the decisions cited by Mr Rohatgi, learned Senior Counsel appearing for the State of Gujarat.

42. The first decision is *Vineet Narain* [(1996) 2 SCC 199 : 1996 SCC (Cri) 264] . In that case, it was alleged that CBI and the Revenue Authorities had failed to perform their duties and legal obligations inasmuch as the investigation into "Jain Diaries" seized in raids conducted by CBI is concerned. From a careful examination of this decision of this Court relied on by the learned Senior Counsel appearing for the respondent, we are not in a position to say that the said decision has clearly held that after the charge-sheet is submitted, the question of handing over the investigation of the criminal case to CBI cannot arise at all. From that decision, it is clear that CBI and the Revenue Authorities had failed to perform their duties and legal obligations inasmuch as the investigation into "Jain Diaries" seized in raids conducted by CBI was concerned. Therefore, we are unable to accept the contention of Mr Rohatgi that this decision can at all help the State of Gujarat to substantiate their argument that after the charge-sheet is filed in court, there was no question that the investigation cannot be handed over to the CBI Authorities.

43. So far as the decision cited by Mr Rohatgi in *Union of India v. Sushil Kumar Modi* [(1998) 8 SCC 661 : 1999 SCC (Cri) 84] is concerned, it is clear that the said decision was rendered following the decision in *Vineet Narain* [(1996) 2 SCC 199 : 1996 SCC (Cri) 264] . In view of our discussions made in respect of *Vineet Narain case* [(1996) 2 SCC 199 : 1996 SCC (Cri) 264] , we do not think that any advantage could be taken by the State

of Gujarat to hold that after the charge-sheet is submitted it was not open for the Court to hand over the investigation to an independent agency.

44. In *Vineet Narain case* [(1996) 2 SCC 199 : 1996 SCC (Cri) 264] , the fact was that the investigation was already with the CBI Authorities and in that investigation charge-sheet was submitted. In that context, this Court observed that once the charge-sheet has been submitted, the CBI Authorities cannot approach the High Court for issuance of directions in such investigation where the charge-sheet was already submitted.

45. In *Sushil Kumar Modi* [(1998) 8 SCC 661 : 1999 SCC (Cri) 84] , we find that the investigation was also with CBI and the charge-sheet in that investigation was submitted, therefore, this Court in *Sushil Kumar Modi*[(1998) 8 SCC 661 : 1999 SCC (Cri) 84] observed that: (SCC p. 662, para 4)

> "4. … there was no occasion for any [of the] officer of CBI to approach the High Court or for the Division Bench of the High Court to issue any directions, oral or otherwise, for seeking the aid of the army for execution of the warrant against Shri Lalu Prasad Yadav."

46. Again in para 7 of the decision in *Sushil Kumar Modi case* [(1998) 8 SCC 661 : 1999 SCC (Cri) 84] , it would be evident that the CBI Authorities were investigating the offences and that is the reason this Court observed that after the charge-sheet was filed, no directions can be taken by the CBI Authorities or its officers from the High Court or this Court as the case may be. This is not the case before us. It is true that in the present case, the charge-sheet has already been submitted but that does not debar, in our view, this Court from handing over the investigation to the CBI Authorities.

47. So far as *Rajiv Ranjan Singh case* [(2006) 6 SCC 613 : (2006) 3 SCC (Cri) 125] which was relied on by Mr Mukul Rohatgi, learned Senior Counsel for the State of Gujarat, is concerned, we find that this decision was also rendered relying on *Sushil Kumar Modi case* [(1998) 8 SCC 661 : 1999 SCC (Cri) 84] and *Vineet Narain case* [(1996) 2 SCC 199 : 1996 SCC (Cri) 264] as noted herein earlier. In that case also, the process of monitoring by this Court for the purpose of making CBI the investigating agency perform its functions and investigate into the offence would come to an end but it is repeated that in the present case the question is whether an investigation can be handed over to the CBI Authorities even if the

charge-sheet is submitted. The question of monitoring investigation by the CBI Authorities in all the three cases cited by Mr Rohatgi in the facts and circumstances of the present case cannot arise at all.

48. It was next contended by Mr Rohatgi, learned Senior Counsel for the State of Gujarat that it was not open for this Court under Article 32 of the Constitution to direct the CBI Authorities or any other independent agency to investigate into the matter when the police authorities are proceeding with the trial and the charge-sheet has already been submitted. Therefore, according to Mr Rohatgi when there is specific remedy provided under the Code of Criminal Procedure, 1973, this Court cannot again direct CBI to investigate into the offence alleged by allowing a writ petition under Article 32 of the Constitution. In support of this contention, reliance was also placed in *Aleque Padamsee* v. Union of India [(2007) 6 SCC 171 : (2007) 3 SCC (Cri) 1].

49. Reliance was also placed in a decision of this Court in *M.C. Mehta v. Union of India* [(2008) 1 SCC 407 : (2008) 1 SCC (Cri) 216] where this Court held that once the court is satisfied itself that a proper investigation has been carried out, it would not venture to take over the functions of the Magistrate or pass any order which would interfere with its judicial functions. Accordingly, Mr Mukul Rohatgi submitted that in the absence of any error being committed by the police authorities in conducting the investigation, it would not be proper for this Court to exercise its power under Article 32 of the Constitution and direct that the CBI Authorities or any other independent agency should be given the charge of investigating the offence alleged in this writ petition.

50. Accordingly, Mr Mukul Rohatgi, learned Senior Counsel submitted that in view of the decisions of this Court, it would not be proper for this Court at this stage, when the investigation has been carried out by the police without any blemish, to hand over the investigation to the CBI Authorities or any other independent agency particularly when the charge-sheet has already been submitted.

51. Having heard the learned Senior Counsel appearing for the parties and after going through the eight action taken reports submitted by the police authorities before this Court and after considering the decisions of this Court cited at the Bar and the materials on record and considering the nature of offence sought to be investigated by the State police authorities who are themselves involved in such crime, we are unable to accept that the investigation at this stage cannot be handed over to the CBI Authorities or

any other independent agency. We have already discussed the decisions cited by Mr Mukul Rohatgi, learned Senior Counsel appearing for the State of Gujarat and have already distinguished the said cases and came to a conclusion that those decisions were rendered when CBI enquiries have already been made and at that stage this Court held that after the charge-sheet is submitted, the CBI Authorities would not be able to approach this Court or the High Court to have issuance of directions from this Court.

52. In *R.S. Sodhi* v. State of U.P. [1994 Supp (1) SCC 143 : 1994 SCC (Cri) 248 : AIR 1994 SC 38] on which reliance was placed by the learned Senior Counsel appearing for the writ petitioner, this Court observed: (SCC pp. 144-45, para 2)

> "2. … We have perused the events that have taken place since the incidents but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them. It is only with that in mind that we having thought it both advisable and desirable as well as in the interest of justice to entrust the investigation to the Central Bureau of Investigation…."
>
> (emphasis supplied)

This decision clearly helps the writ petitioner for handing over the investigation to the CBI Authorities or any other independent agency.

53. It is an admitted position in the present case that the accusations are directed against the local police personnel in which the high police officials of the State of Gujarat have been made the accused. Therefore, it would be proper for the writ petitioner or even the public to come forward to say that if the investigation carried out by the police personnel of the State

of Gujarat is done, the writ petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if investigation is allowed to be carried out by the local police authorities, we feel that all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances it would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility however faithfully the local police may carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody.

54. It is also well known that when police officials of the State were involved in the crime and in fact they are investigating the case, it would be proper and interest of justice would be better served if the investigation is directed to be carried out by the CBI Authorities, in that case CBI Authorities would be an appropriate authority to investigate the case.

55. In *Ramesh Kumari* v. State (NCT of Delhi) [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678] , this Court at para 8 observed: (SCC p. 681)

> "8. … We are also of the view that since there is allegation against the police personnel, the interest of justice would be better served if the case is registered and investigated by an independent agency like CBI. (emphasis supplied)

56. In *Kashmeri Devi v. Delhi Admn.* [1988 Supp SCC 482 : 1988 SCC (Cri) 864 : AIR 1988 SC 1323] this Court held that in a case where the police had not acted fairly and in fact acted in partisan manner to shield real culprits, it would be proper and interest of justice will be served if such investigation is handed over to the CBI Authorities or an independent agency for proper investigation of the case. In this case, taking into consideration the grave allegations made against the high police officials of the State in respect of which some of them have already been in custody, we feel it proper and appropriate and in the interest of justice even at this stage, that is, when the charge-sheet has already been submitted, the investigation shall be transferred to the CBI Authorities for proper and thorough investigation of the case.

57. In *Kashmeri Devi* [1988 Supp SCC 482 : 1988 SCC (Cri) 864 : AIR 1988 SC 1323] , this Court also observed as follows: (SCC p. 484, para 7)

> "7. Since according to the respondents charge-sheet has already been submitted to the Magistrate we direct the trial court before whom the charge-sheet has been submitted to exercise his powers under Section 173(8) CrPC to direct the Central Bureau of Investigation for proper and thorough investigation of the case. On issue of such direction the Central Bureau of Investigation will investigate the case in an independent and objective manner and it will further submit additional charge-sheet, if any, in accordance with law."

58. In *Gudalure M.J. Cherian* [(1992) 1 SCC 397] , in that case also the charge-sheet was submitted but in spite of that, in view of the peculiar facts of that case, the investigation was transferred from the file of the Sessions Judge, Moradabad to the Sessions Judge, Delhi. In spite of such fact that the charge-sheet was filed in that case, this Court directed CBI to hold further investigation in spite of the offences committed. In this case at p. 400 this Court observed: (SCC para 7)

> "7. … The investigation having been completed by the police and charge-sheet submitted to the court, it is not for this Court, ordinarily, to reopen the investigation specially by entrusting the same to a specialised agency like CBI. We are also conscious that of late the demand for CBI investigation even in police cases is on the increase. Nevertheless—in a given situation, to do justice between the parties and to instil confidence in the public mind—it may become necessary to ask CBI to investigate a crime. It only shows the efficiency and the independence of the agency."

59. In this connection, we may reiterate the decision of this Court in *Punjab & Haryana High Court Bar Assn.* [(1994) 1 SCC 616 : 1994 SCC (Cri) 455 : AIR 1994 SC 1023] strongly relied on by the learned Senior Counsel appearing for the writ petitioner. A reference of the paragraph of the said decision on which reliance could be placed has already been made in para 35 from which it would be evident that in order to do complete justice in the matter and to instil confidence in the public mind, this Court felt it necessary to have investigations through the specialised agency like CBI.

60. … [I]t can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI.

…

68. From the above factual discrepancies appearing in the eight action taken reports and from the charge-sheet, we, therefore, feel that the Police Authorities of the State of Gujarat had failed to carry out a fair and impartial investigation as we initially wanted them to do. It cannot be questioned that the offences the high police officials have committed were of grave nature which needs to be strictly dealt with.

…

79. In view of our discussions made herein earlier and the submissions of the learned Senior Counsel for the parties and the amicus curiae and keeping in mind the earlier various directions given by this Court to the Police Authorities of the State of Gujarat and the materials on record, we are of the view that although the charge-sheet was submitted but considering the nature of crime that has been allegedly committed not by any third party but by the police personnel of the State of Gujarat, the investigation concluded in the present case cannot be said to be satisfactorily held.

80. … The scope of this order, however, cannot deal with the power of this Court to monitor the investigation, but on the other hand in order to make sure that justice is not only done, but also is seen to be done and considering the involvement of the State police authorities and particularly the high officials of the State of Gujarat, we are compelled even at this stage to direct the CBI Authorities to investigate into the matter. Since the high police officials of the State of Gujarat are involved and some of them had already been in custody, we are also of the view that it would not be sufficient to instil confidence in the minds of the victims as well as of the public that still the State police authorities would be allowed to continue with the investigation when allegations and offences were mostly against them.

81. In the present circumstances and in view of the involvement of the

police officials of the State in this crime, we cannot shut our eyes and direct the State police authorities to continue with the investigation and the charge-sheet and for a proper and fair investigation, we also feel that CBI should be requested to take up the investigation and submit a report in this Court within six months from the date of handing over a copy of this judgment and the records relating to this crime to them.

82. Accordingly, in the facts and circumstances even at this stage the police authorities of the State are directed to hand over the records of the present case to the CBI Authorities within a fortnight from this date and thereafter the CBI Authorities shall take up the investigation and complete the same within six months from the date of taking over the investigation from the State police authorities. The CBI Authorities shall investigate all aspects of the case relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a larger conspiracy. The report of the CBI Authorities shall be filed in this Court when this Court will pass further necessary orders in accordance with the said report, if necessary. We expect that the Police Authorities of Gujarat, Andhra Pradesh and Rajasthan shall cooperate with the CBI Authorities in conducting the investigation properly and in an appropriate manner."

IN THE SUPREME COURT OF INDIA

Om Prakash & Ors. v. State of Jharkhand

(2012) 12 SCC 72

Aftab Alam & Ranjana P. Desai, JJ.

The appellant police officers were accused of offences under Sections 302, 203 and 120-B, IPC. They argued that the Magistrate could not have taken cognizance of the case without obtaining sanction under Section 197 CrPC In its decision, while quashing the order of the Magistrate, the Supreme Court examined the scope and applicability of Section 197 CrPC in such cases.

Desai, J.: "32. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (*K. Satwant Singh* [AIR 1960 SC 266 : 1960 Cri LJ 410 : (1960) 2 SCR 89]). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (*Ganesh Chandra Jew* [(2004) 8 SCC 40 : 2004 SCC (Cri) 2104]). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood.

…

34. In *Matajog Dobey* [AIR 1956 SC 44 : 1956 Cri LJ 140 : (1955) 2 SCR 925] the Constitution Bench of this Court was considering what is

the scope and meaning of a somewhat similar expression "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" occurring in Section 197 of the Criminal Procedure Code (5 of 1898). The Constitution Bench observed that no question of sanction can arise under Section 197 unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. On the question as to which act falls within the ambit of above quoted expression, the Constitution Bench concluded that there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim that he did it in the course of performance of his duty. While dealing with the question whether the need for sanction has to be considered as soon as the complaint is lodged and on the allegations contained therein, the Constitution Bench referred to *Hori Ram Singh* [AIR 1939 FC 43 : (1939) 1 FCR 159] and observed that at first sight, it seems as though there is some support for this view in *Hori Ram Singh* [AIR 1939 FC 43 : (1939) 1 FCR 159] because Sulaiman, J. has observed in the said judgment that as the prohibition is against the institution itself, its applicability must be judged in the first instance at the earliest stage of institution and Varadachariar, J. has also stated that: (*Matajog Dobey case* [AIR 1956 SC 44 : 1956 Cri LJ 140 : (1955) 2 SCR 925] , AIR p. 49, para 20)

> "20. … the question must be determined with reference to the nature of the allegations made against the public servant in the criminal proceedings."

It is pertinent to note that the Constitution Bench has further observed that a careful perusal of the later parts of the judgment however show that the learned Judges did not intend to lay down any such proposition. The Constitution Bench quoted the said later parts of the judgment as under: (*Matajog Dobey case* [AIR 1956 SC 44 : 1956 Cri LJ 140 : (1955) 2 SCR 925] , AIR pp. 49-50, para 20)

> "*20.* … Sulaiman, J. refers to the prosecution case as disclosed by the complaint or the 'police report' and he winds up the discussion in these words: (*Hori Ram Singh case* [AIR 1939 FC 43 : (1939) 1 FCR 159] , AIR p. 52 : FCR p. 179)

> '… Of course, if the case as put forward fails, or the defence establishes that the act purported to be done [is] in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground.'

The other learned Judge also states: (Hori Ram Singh case [AIR 1939 FC 43 : (1939) 1 FCR 159], AIR p. 55 : FCR p. 185)

> '… At this stage, we have only to see whether the case alleged against the appellant or sought to be proved against him relates to acts done or purporting to be done by him in the execution of his duty.'
>
> It must be so. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction.
>
> Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case."

The legal position is thus settled by the Constitution Bench in the above paragraph. Whether sanction is necessary or not may have to be determined from stage to stage. If, at the outset, the defence establishes that the act purported to be done is in execution of official duty, the complaint will have to be dismissed on that ground.

…

41. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant

was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. At this point, in order to exclude the possibility of any misunderstanding, we make it clear that the legal discussion on the requirement of sanction at the very threshold is based on the finding in the earlier part of the judgment that the present is not a case where the police may be held guilty of killing Munna Singh in cold blood in a fake encounter. In a case where on facts it may appear to the court that a person was killed by the police in a stage-managed encounter, the position may be completely different.

42. It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception."

IN THE SUPREME COURT OF INDIA

Extra Judicial Execution Victim Families Association (EEVFAM) & Anr. v. Union of India (UOI) & Anr.

(2013) 2 SCC 493

Aftab Alam & Ranjana P. Desai, JJ.

Two writ petitions were filed in the Supreme Court alleging that the police and security forces in Manipur had carried out numerous extrajudicial executions in the state. Petitioners sought the appointment of a Special Investigation Team to investigate these matters.

Order: "2. … In this writ petition it is stated that during the period May 1979 to May 2012, 1528 people were killed in Manipur in extra-judicial execution. The statement is mainly based on a memorandum prepared by "Civil Society Coalition on Human Rights in Manipur and the UN" and submitted to one Christ of Heyns, Special Rapporteur on extra-judicial, summary or arbitrary executions, Mission to India, 19-3-2012 to 30-3-2012. The Memorandum compiles the list of 1528 people allegedly killed unlawfully by the State Police or the security forces. The writ petitioners later on filed "Compilation 1" and "Compilation 2". In "Compilation 1" details are given of ten (10) cases relating to the killings of eleven (11) persons (out of the list of 1528); in "Compilation 2", similarly details are given of thirteen (13) cases in which altogether seventeen (17) persons (out of the list of 1528) are alleged to have been killed in extra-judicial executions.

3. A counter-affidavit is filed on behalf of the State of Manipur. In the counter-affidavit there is not only a complete denial of the allegations made in the writ petition but there also seems to be an attempt to forestall any examination of the matter by this Court. The plea is taken that the National Human Rights Commission (NHRC) is the proper authority to monitor the cases referred to in the writ petition. It is stated that in regard to all the ten (10) cases highlighted in "Compilation 1" filed by the petitioners, reports have been submitted to it and in none of those cases NHRC has recorded any finding of violation of human rights. It is stated that the occasion for

this Court to examine those cases would arise only if it holds that NHRC had failed to perform its statutory functions in safeguarding the human rights of the people in the State. This Court should not examine this matter directly but should only ask NHRC to indicate the status of the cases listed and highlighted in the writ petition. We are unable even to follow such a plea. The course suggested by the State will completely dissipate the vigour and vitality of Article 32 of the Constitution.

4. Article 21 coupled with Article 32 of the Constitution provides the finest guarantee and the most effective protection for the most precious of all rights, namely, the right to life and personal liberty of every person. Any indication of the violation of the right to life or personal liberty would put all the faculties of this Court at high alert to find out the truth and in case the Court finds that there has, in fact, been violation of the right to life and personal liberty of any person, it would be the Court's bounden duty to step in to protect those rights against the unlawful onslaught by the State. We, therefore, see no reason not to examine the matter directly but only vicariously and secondhand, through the agency of NHRC.

…

7. There is no denying that Manipur is facing the grave threat of insurgency. It is also clear that a number of the insurgent groups are operating there, some of which are heavily armed. These groups indulge in heinous crimes like extortion and killing of people to establish their hegemony. It is also evident from the counter-affidavit filed by the State that a number of police personnel and members of security forces have laid down their lives or received serious injuries in fighting against insurgency. But, citing the number of the policemen and the security forces personnel and the civilians killed and injured at the hands of the insurgents does not really answer the issues raised by the writ petitioners.

8. In *People's Union for Civil Liberties v. Union of India* [(1997) 3 SCC 433 : 1997 SCC (Cri) 434] , this Court earlier dealt with a similar issue from Manipur itself. In that case, it was alleged that two persons along with others were seized by the police and taken in a truck to a distant place and shot there. In an inquiry by the District and Sessions Judge, Manipur (West), held on the direction of this Court, the allegation was found to be correct. In that case, dealing with question of the right to life in a situation where the State was infested with terrorism and insurgency, this Court in paras 5 and 6 of the judgment observed as follows: (SCC pp. 436-37)

"5. It is submitted by Ms S. Janani, the learned counsel for the State of Manipur, that Manipur is a disturbed area, that there are several terrorist groups operating in the State, that Hamar Peoples' Convention is one of such terrorist organisations, that they have been indulging in a number of crimes affecting the public order—indeed, affecting the security of the State. It is submitted that there have been regular encounters and exchange of fire between police and terrorists on a number of occasions. A number of citizens have suffered at the hands of terrorists and many people have been killed. The situation is not a normal one. Information was received by the police that terrorists were gathering in the house on that night and on the basis of that information, police conducted the raid. The raiding party was fortunate that the people inside the house including the deceased did not notice the police, in which case the police would have suffered serious casualties. The police party was successful in surprising the terrorists. There was exchange of fire resulting in the death of the terrorists.

6. In view of the fact that we have accepted the finding recorded by the learned District and Sessions Judge, it is not possible to accede to the contention of Ms Janani insofar as the manner in which the incident had taken place. It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody can say that the police should

> wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our Independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas. If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. 'Administrative liquidation' was certainly not a course open to them." (emphasis added)

We respectfully reiterate what was earlier said by the Court in *People's Union for Civil Liberties* [(1997) 3 SCC 433 : 1997 SCC (Cri) 434] .

9. In 1997, in *People's Union for Civil Liberties* [(1997) 3 SCC 433 : 1997 SCC (Cri) 434] this Court, dealing with the case of killing of two persons in Manipur had cautioned the State against "administrative liquidation". But, after 15 years in this case, we are faced with similar allegations on a much larger scale.

10. For this Court, the life of a policeman or a member of the security forces is no less precious and valuable than any other person. The lives lost in the fight against terrorism and insurgency are indeed the most grievous loss. But to the State it is not open to cite the numbers of policemen and security forces personnel killed to justify custodial death, fake encounter or what this Court had called "administrative liquidation". It is simply not permitted by the Constitution. And in a situation where the Court finds

a person's rights, specially the right to life under assault by the State or the agencies of the State, it must step in and stand with the individual and prohibit the State or its agencies from violating the rights guaranteed under the Constitution. That is the role of this Court and it would perform it under all circumstances. We, thus, find that the third plea raised in the counter-affidavit is equally without substance.

12. … In the counter-affidavit filed by the Union, first a reference is made to different legal provisions [Section 146 and Sections 129 to 132 of the Criminal Procedure Code, Sections 99 to 106 in Chapter IV of the Penal Code and Section 4 of the Armed Forces (Special Powers) Act, 1958] and it is contended that subject to the conditions stipulated in those provisions, killing of a person by a police officer or a member of the armed forces may not amount to an offence and may be justified in law. It is stated in the counter-affidavit that all the cases listed and/or highlighted in the writ petition and described as extra-judicial executions are cases of persons who died during counter-insurgency operations or in performance of other lawful duties by the police and the personnel of the armed forces. It is emphasised that in most of the cases the so-called victims might have been killed in the lawful exercise of the powers and/or in discharge of official duties by the police and the armed forces personnel.

13. It is further said in the counter-affidavit that "public order" and, by implication, the maintenance of "law and order" are primarily State subjects and the role of the Central Government in deploying the armed forces personnel in the State is only supportive in aid of the law and order machinery of the State. The State of Manipur has the primary duty to deal with the issue of investigation in relevant cases, except where provided to the contrary in any other law for the time being in force. It is stated that the "very gloomy picture" of the State of Manipur sought to be presented by the writ petitioners is incorrect and misleading. It is asserted that Manipur is fully and completely integrated with the rest of the country and it is pointed out that in the 1990 elections the voting turnout for the 60 assembly seats in the State was 89.95%. Similarly, during the recent 2012 assembly elections, the voting turnout was 83.24%. It is added that the voting percentage in Manipur is amongst the highest in the country as a whole and it clearly shows that the people of Manipur have taken active participation in the elections showing their full faith in the Constitution and the constitutional process.

14. Coming to the issue of insurgency, it is stated in the counter-affidavit as under:

> "It is only a handful of disgruntled elements who have formed associations/groups that indulge in militant and unlawful activities in order to retain their influence and hegemony in the society. These groups also challenge the sovereignty and integrity of the country by following aims and objectives which are secessionist in nature. It is emphasised that only around 1500 militants are holding a population of 23 lakhs in Manipur to ransom and keeping the people in constant fear. The root cause of militancy in Manipur is the constant endeavour of these insurgent groups so that they can continue to extort money and the leaders of such groups can continue to lead luxurious life in foreign countries. The tribal divide and factions in the society and the unemployed youth are being exploited by these militant outfits to fuel tension in the society."

It is further stated in Para 13 of the counter-affidavit as under:

> "It may also be submitted that the ethnic rivalries amongst the different tribal groups viz. Meities, Kukis and Nagas are deep-rooted and the militant groups fervently advance their ideologies by taking advantage of the porous international border with Myanmar which is 256 km long, heavily forested and contains some of the most difficult terrain. The border area is inhabited by the same tribes on either side. These tribes have family relations and for social interactions a free movement regime for the locals to move up to 16 km on both sides is permitted. Taking advantage of this situation the militant outfits utilise the other side of the border (which is beyond the jurisdiction of the Indian Armed Forces) for conveniently conducting their operations of extortions/kidnapping/killing/looting and ambushing the security forces."

15. The counter-affidavit goes on to explain that the operations of not only the State Police but the different security forces under the control of the Central Government are being strictly monitored and kept within the

parameters set out by the different laws under which those forces operate. It is stated that different statutory agencies acting as watchdog ensure that the armed forces do not overstep the constitutional or the legal limits in carrying out the anti-insurgency operations.

16. Ms Guruswamy, the learned amicus curiae has, on the other hand, presented before us tables and charts showing the inconsistencies in the materials produced by the State of Manipur itself concerning the ten cases highlighted in "Compilation 1" filed by the petitioners. She also submitted that though enquiries were purported to be held by an Executive Magistrate in the ten cases described in "Compilation 1", in none of those cases the kin of the victims came before the Magistrate to give their statements even though they were approaching the court, complaining that the victims were killed in fake encounters. She further pointed out that in some of the cases even the police/security forces personnel who were engaged in the killings did not turn up, despite summons issued by the Magistrate, to give their version of the occurrence and the Magistrate closed the enquiry, recording that there was nothing to indicate that the victims were killed unlawfully. In some cases the Magistrate, even while recording the finding that the case did not appear to be one of fake encounter made the concluding observation that it would be helpful to sensitise the police/armed forces in human rights. She submitted that the so-called enquiries held by the Magistrate were wholly unsatisfactory and no reliance could be placed on the findings recorded in those enquiries.

17. Apart from the criticisms made by the amicus curiae against the Magisterial enquiries held in the ten cases of "Compilation 1" it is important to note that a number of cases cited by the petitioners had gone to the Gauhati High Court and on the direction of the High Court, inquiries, of a judicial nature, were made into the killings of (1) Azad Khan, age 12 years (according to the State, 15 years) (from "Compilation 1"); (2) Nongmaithem Michael Singh, age 32 years; (3) Ningombam Gopal Singh, age 39 years; (4)(i) Salam Gurung alias Jingo, age 24 years; (ii) Soubam Baocha alias Shachinta, age 24 years; (5)(i) Mutum Herojit Singh, age 28 years; (ii) Mutum Rajen, age 22 years; (6) Ngangbam Naoba alias Phulchand Singh, age 27 years; (7) Sapam Gitachandra Singh, age 22 years; (8)(i) Kabrambam Premjit Singh; (ii) Elangbam Kanto Singh; (9) Longjam Uttamkumar Singh, age 34 years; (10) Loitongbam Satish alias Tomba Singh, age 34 years; (11) ThockhomInao alias Herojit Singh, age 31 years; (12) Khumallambam Debeshower Singh; (13)(i) Km Yumnam Robita Devi; (ii) Angom Romajitn Singh; and (14) Thoudem Shantikumar

Singh (all from "Compilation 2"). In all those cases the judicial inquiry found that the victims were not members of any insurgent or unlawful groups and they were killed by the police or security forces in cold blood and stage-managed encounters.

18. It is stated on behalf of the petitioners that though it was established in the judicial enquiry that those persons were victims of extra-judicial executions, the High Court simply directed payment of monetary compensation to the kin of the victims. The learned counsel for the petitioners submitted that payment of rupees two to four lakhs for killing a person from funds that are not subjected to any audit, instead of any accountability for cold-blooded murder, perfectly suits the security forces and they only get encouraged to carry out further killings with impunity.

19. ... We are clearly of the view that this matter requires further careful and deeper consideration.

20. The writ petitioners make the prayer to constitute a Special Investigation Team comprising police officers from outside Manipur to investigate the cases of unlawful killings listed in the writ petition and to prosecute the alleged offenders but at this stage we are not inclined to appoint any Special Investigation Team or to direct any investigation under the Code of Criminal Procedure. Instead, we would first like to be fully satisfied about the truth of the allegations concerning the cases cited by the writ petitioners. To that end, we propose to appoint a High-Powered Commission that would tell us the correct facts in regard to the killings of victims in the cases cited by the petitioners.

21. We, accordingly, constitute a three-member commission as under:

(1) Mr Justice N. Santosh Hegde, a former Judge of the Supreme Court of India, as Chairperson;

(2) Mr J.M. Lyngdoh, former Chief Election Commissioner, as Member; and

(3) Mr Ajay Kumar Singh, former DGP and IGP, Karnataka.

22. We request the Commission to make a thorough enquiry in the first six cases as detailed in "Compilation 1", filed by the petitioners and record a finding regarding the past antecedents of the victims and the circumstances in which they were killed. The State Government and all other agencies concerned are directed to hand over to the Commission,

without any delay, all records, materials and evidences relating to the cases, as directed above, for holding the enquiry. It will be open to the Commission to take statements of witnesses in connection with the enquiry conducted by it and it will, of course, be free to devise its own procedure for holding the enquiry. In the light of the enquiries made by it, the Commission will also address the larger question of the role of the State Police and the security forces in Manipur. The Commission will also make a report regarding the functioning of the State Police and security forces in the State of Manipur and in case it finds that the actions of the police and/or the security forces transgress the legal bounds the Commission shall make its recommendations for keeping the police and the security forces within the legal bounds without compromising the fight against insurgency. The Commission is requested to give its report within twelve weeks from today.

23. The Central Government and the Government of the State of Manipur are directed to extend full facilities, including manpower support and secretarial assistance as may be desired by the Commission to effectively and expeditiously carry out the task assigned to it by the Court. The Registry is directed to furnish a copy of this order and complete sets of briefs in both the writ petitions to each of the members of the Commission forthwith."

IN THE SUPREME COURT OF INDIA

Rohtash Kumar v. State of Haryana

(2013) 14 SCC 290

Aftab Alam & Ranjana P. Desai, JJ.

The appellant alleged that his son died in a fake police encounter, and sought investigation into the matter. The Supreme Court examined the merits of the allegation, and held that the acts of the police officers violated Article 21. Further, holding that a fresh investigation after a huge time gap would be futile, the Court granted the appellant monetary compensation instead.

Desai, J.: "8. After carefully perusing the inquiry report dated 17-11-2008 submitted by the Tahsildar, Narnaul and the inquiry report dated 7-1-2011 submitted by the Additional Deputy Commissioner and other relevant record, we are inclined to agree with the learned counsel for the appellant and the learned amicus curiae that Sunil appears to have died in a fake encounter. …

…

10. It is the case of the police that Sunil was a dreaded criminal and six FIRs were registered against him. In none of the FIRs, however, the name of Sunil appears. It is true that it is not necessary that the FIR must contain the name of an accused. The involvement of an accused can come to light after the police record statements of the witnesses and collect relevant materials. It is possible that Sunil may be really involved in all these six cases. It also appears that he was declared absconder. But merely because a person is a dreaded criminal or a proclaimed offender, he cannot be killed in cold blood. The police must make an effort to arrest such accused. In a given case if a dreaded criminal launches a murderous attack on the police to prevent them from doing their duty, the police may have to retaliate and, in that retaliation, such a criminal may get killed. That could be a case of genuine encounter. But in the facts of this case, we are unable to draw such a conclusion.

11. We find that while inquiring whether the encounter is genuine or not, the Tahsildar, Narnaul is carried away by the fact that six FIRs are

registered against Sunil and that he is a proclaimed offender.The inquiring authority must first focus its attention on the circumstances that led to the death of a person in an encounter. If it comes to a conclusion that it was the deceased who had attacked the police to prevent them from arresting him or to prevent them from performing their public duty and, therefore, the police had to retaliate, then the antecedents of the deceased could be taken into consideration as additional material at that stage to support the police version that it was a genuine encounter. But the inquiring authority cannot start the inquiry keeping in mind the antecedents of the deceased. The Tahsildar was in error in doing so. …

…

13. What disturbs us is the fact that the police have refused to follow the guidelines dated 2.12.2003 issued by the National Human Rights Commission. The two crucial guidelines which have been completely ignored by the police are that the investigation into the encounter death must be done by an independent investigation agency and that whenever a complaint is made against the police making out a case of culpable homicide, an FIR must be registered. In the instant case, the police have refused to even register the FIR on the complaint made by the appellant alleging that his son Sunil was killed by the police. Section 154 of the Code mandates that whenever a complaint discloses a cognizable offence, an FIR must be registered. This Court has, in a catena of judgments, laid down that the police must register an FIR if a cognizable offence is disclosed in the complaint. (See *State of Haryana* v. *Bhajan Lal* [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] .) Ignoring the mandate of Section 154 of the Code and the law laid down by this Court, the police have merely conducted inquiries which appear to be an eyewash. It is distressing to note that till date, no FIR has been registered on the complaint made by the appellant. …

14. Once we come to a conclusion that Sunil is killed in an encounter, which appears to be fake, it is necessary to direct an independent investigating agency to conduct the investigation so that those who are found to be involved in the commission of crime can be tried and convicted. But, as rightly pointed out by the learned amicus curiae directing an investigation, at this distant point of time, will be an exercise in futility. We are informed that witnesses would not be available. It would be difficult to trace the record of the case from the two police stations. Handing over investigation to an independent agency and starting a fresh investigation would be of no use at this stage. Reliance placed by the

learned counsel for the appellant on *Rubabbuddin Sheikh* [*Rubabbuddin Sheikh v. State of Gujarat*, (2010) 2 SCC 200 : (2010) 2 SCC (Cri) 1006] and *Narmada Bai* [*Narmada Bai* v. State of Gujarat, (2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526] is misplaced. Those cases arose out of different fact situations. No parallel can be drawn from them.

15. We share the pain and anguish of the appellant, who has lost his son in what appears to be a fake encounter. He has conveyed to us that he is not interested in money but he wants a fresh investigation to be conducted. While we respect the feelings of the appellant, we are unable to direct fresh investigation for the reasons which we have already noted. In such situation, we turn to *Nilabati Behera* [*Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527] , wherein the appellant's son had died in custody of the police. While noting that custodial death is a clear violation of the prisoner's rights under Article 21 of the Constitution of India, this Court moulded the relief by granting compensation to the appellant.

16. In the circumstances of the case we set aside the impugned judgment and order dated 13.9.2010 [*Rohtash Kumar v. State of Haryana*, CRM-M No. 2063 of 2009, decided on 13-9-2010 (P&H)] and in light of *Nilabati Behera* [*Nilabati Behera* v. State of Orissa, (1993) 2 SCC 746 : 1993 SCC (Cri) 527] , we direct Respondent 1 State of Haryana to pay a sum of Rs 20 lakhs to the appellant as compensation for the pain and suffering undergone by him on account of the loss of his son Sunil. The payment be made by demand draft drawn in favour of the appellant "Rohtash Kumar" within a period of one month from the date of the receipt of this order. The appeal is disposed of accordingly."

IN THE SUPREME COURT OF INDIA

People's Union for Civil Liberties & Anr. v. State of Maharashtra & Ors.

(2014) 10 SCC 635

R.M. Lodha, C.J. & Rohinton F. Nariman, J.

The writ petitioner questioned the genuineness of 99 encounters by the Mumbai Police which had resulted in the deaths of 135 persons between 1995 and 1997. In its judgment, the Supreme Court framed guidelines to govern investigation into police encounters.

Lodha, C.J.: "7. Article 21 of the Constitution of India guarantees "right to live with human dignity". Any violation of human rights is viewed seriously by this Court as right to life is the most precious right guaranteed by Article 21 of the Constitution. The guarantee by Article 21 is available to every person and even the State has no authority to violate that right.

8. In D.K. Basu [D.K. Basu v. State of W.B., (1997) 1 SCC 416 : 1997 SCC (Cri) 92] , this Court was concerned with custodial violence and deaths in police lock-ups. While framing the requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf, this Court issued certain directives as preventive measures. While doing so, the Court in para 29 made the following weighty observations: (SCC p. 433)

> "29. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice

> basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third-degree methods during interrogation."

9. The observations made by this Court in *Om Prakash* [*Om Prakash v. State of Jharkhand,* (2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472] are worth noticing: (SCC p. 95, para 42)

> "42. It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception."

…

11. In some of the countries when a police firearms officer is involved in

a shooting, there are strict guidelines and procedures in place to ensure that what has happened is thoroughly investigated. In India, unfortunately, such structured guidelines and procedures are not in place where police is involved in shooting and death of the subject occurs in such shooting. We are of the opinion that it is the constitutional duty of this Court to put in place certain guidelines adherence to which would help in bringing to justice the perpetrators of the crime who take law in their own hands.

…

16. Article 21 of the Constitution provides

> "21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law."

This Court has stated time and again that Article 21 confers sacred and cherished right under the Constitution which cannot be violated, except according to procedure established by law. Article 21 guarantees personal liberty to every single person in the country which includes the right to live with human dignity.

17. In line with the guarantee provided by Article 21 and other provisions in the Constitution of India, a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights. In spite of constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, the cases of death in police encounters continue to occur. This Court has been confronted with encounter cases from time to time. In *Chaitanya Kalbagh* [*Chaitanya Kalbagh* v. *State of U.P.*, (1989) 2 SCC 314 : 1989 SCC (Cri) 363] , this Court was concerned with a writ petition filed under Article 32 of the Constitution wherein the impartial investigation was sought for the alleged killing of 299 persons in the police encounters. The Court observed that: (*R.S. Sodhi case* [*R.S. Sodhi* v. *State of U.P.*, 1994 Supp (1) SCC 143 : 1994 SCC (Cri) 248], SCC p. 144, para 1)

> "*1*. … in the facts and circumstances presented before it there was an imperative need of ensuring that the guardians of law and order do in fact observe the code of discipline expected of them and that they function strictly as the protectors of innocent citizens."

18. In *R.S. Sodhi* [*R.S. Sodhi* v. State of U.P., 1994 Supp (1) SCC 143:

1994 SCC (Cri) 248], a writ petition was brought to this Court under Article 32 of the Constitution relating to an incident in which 10 persons were reported to have been killed in what were described as "encounters" between the Punjab militants and the local police. The Court observed: (SCC p. 144, para 2)

> "2. … Whether the loss of lives was on account of a genuine or a fake encounter is a matter which has to be inquired into and investigated closely."

The Court entrusted the investigation to the Central Bureau of Investigation (for short "CBI") to ensure that the investigation did not lack credibility.

19. In *Satyavir Singh Rathi* [*Satyavir Singh Rathi* v. *State*, (2011) 6 SCC 1 : (2011) 2 SCC (Cri) 782] , the matter before this Court arose from the first information report (for short "FIR") registered against police personnel involved in a shoot-out for an offence punishable under Sections 302/34 of the Penal Code (for short "IPC"). In the complaint, it was alleged that the police officials had surrounded the car and had fired indiscriminately and without cause at the occupants, killing the two and causing grievous injuries to the third. This Court concurred with the High Court and the trial court on the conviction under Section 302 IPC and rejected the defence set up by the accused persons relying on Exception 3 in Section 300 IPC as it was found to be not in good faith or due discharge of their duty.

20. In *Prakash Kadam* [*Prakash Kadam* v. *Ramprasad Vishwanath Gupta*, (2011) 6 SCC 189 : (2011) 2 SCC (Cri) 848] , the allegation was that the accused persons decided to eliminate the deceased in a false police encounter. The Court noted that this was a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent and the police officers and the staff acted as contract killers for them. The Court warned policemen that they would not be excused for committing murder in the name of "encounter" on the pretext that they were carrying out the orders of their superior officers or politicians. The Court said that the "encounter" philosophy is a criminal philosophy.

21. In *Om Prakash* [*Om Prakash* v. State of Jharkhand, (2012) 12 SCC 72: (2013) 3 SCC (Cri) 472] , the allegation against the accused persons was that the complainant's son was killed by them in a fake police encounter. The Court, however, held that the encounter was a genuine one though NHRC guideline for photography of the autopsy was not complied with.

22. A two-Judge Bench of this Court in *B.G. Verghese* [*B.G. Verghese*

v. Union of India, (2013) 11 SCC 525 : (2012) 4 SCC (Cri) 47] dealt with two writ petitions. In Writ Petition (Criminal) No. 31 of 2007, it was stated that during the years 2003-2006, 21 police encounter killings took place in the State of Gujarat. It was alleged that the so-called police encounters were fake and the persons were killed by the police officials in cold blood. In the writ petition a prayer was made for ordering an inquiry into all the cases of police encounters, which, according to the petitioner, were fake in order to establish the rule of law and to bring out the truth in each case. In the other Writ Petition (Criminal) No. 83 of 2007, the allegation related to the killing of one person in a police encounter. It was alleged that this too was an instance of fake encounter in which the victim was killed by the officers of the Crime Branch of police in cold blood and in a premeditated manner. The prayer was made in the writ petition to order an independent investigation by a special investigation team into all the fake encounters. During the pendency of the matter before this Court, the State of Gujarat had constituted a Monitoring Authority and Special Task Force for investigation of police encounters. Since the former Judge of this Court was appointed as Chairman of the Monitoring Authority, the Court requested the Chairman of the Monitoring Authority to look into all the cases of alleged fake encounters as enumerated in the two writ petitions and to have them thoroughly investigated so that full and complete truth comes to light in each case.

23. In *Rohtash Kumar* [*Rohtash Kumar v. State of Haryana*, (2013) 14 SCC 290 : (2014) 4 SCC (Cri) 205] , again a two-Judge Bench of this Court was confronted with killing of a person in an encounter by the police officials. Having found that the death took place in the fake police encounter, the Court directed an independent investigating agency to conduct the investigation so that guilty could be brought to justice.

24. The above cases have been referred only by way of illustration to show that killings in police encounters require independent investigation. The killings in police encounters affect the credibility of the rule of law and the administration of the criminal justice system.

25. We are not oblivious of the fact that police in India has to perform a difficult and delicate task, particularly, when many hard-core criminals, like, extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society but then such criminals must be dealt with by the police in an efficient and effective manner so as to bring them to justice by following the rule of law. We are of the view that it would be useful and effective to structure appropriate guidelines to restore faith of the people in police force. In a society governed by the rule of law,

it is imperative that extra-judicial killings are properly and independently investigated so that justice may be done.

…

27. Sections 174, 175 and 176 of the Code of Criminal Procedure, 1973 (for short "the Code") provide for magisterial inquiries into cases of unnatural death. It is apposite to mention that a system for investigating the cause of death in cases of unusual or suspicious circumstances is in place in most countries. The system centres around the policy to have reassurance that unexplained deaths do not remain unexplained and that the perpetrator is tried by a competent court established by law.

28. The Universal Declaration of Human Rights (UDHR) has framed certain general principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions. The principles so framed by the UDHR are intended to guarantee independence while investigating police killings and help in preventing potential for abuse, corruption, ineffectiveness and neglect in investigation.

29. The United Nations Code of Conduct for Law Enforcement Officers (which includes all officers of the law who exercise police powers) lays down that in the performance of duties, the Law Enforcement Officers shall respect and protect human dignity and maintain and uphold human rights of all persons. Basic human rights standards for good conduct by the Law Enforcement Officers by Amnesty International, inter alia, suggest, (1) do not use force except when strictly necessary and to the minimum extent required under the circumstances, and (2) do not carry out, order or cover up extra-judicial executions or "disappearances" and refuse to obey any order to do so.

30. Minnesota Protocol (model protocol for a legal investigation of extra-legal, arbitrary and summary executions) establishes a long line of requisite steps. The Protocol sets the principles and medico-legal standards for the investigation and prevention of extra-legal, arbitrary and summary executions. The Protocol provides for in-depth guidance in a general way on the subjects: (1) purpose of an inquiry, (2) procedure for an inquiry, (3) processing of the crime scene, (4) processing of the evidence, (5) avenues to investigation, (6) personal testimony, etc. In Section C of the Minnesota Protocol, a long list of requisite steps is suggested, some of which being:

1. the area in which evidence is located should be closed off to the public;

2. photographs of the scene and physical evidence located at the scene should be taken in a prompt manner;
3. investigators should promptly record the condition of the body;
4. weapons such as guns, projectiles, bullets and cartridge cases should be taken and preserved;
5. tests for gunshot residue and trace metal detection should be performed on the victims' bodies and the police officers involved;
6. fingerprints of relevant persons should be preserved;
7. information should be obtained from witnesses;
8. all persons at the scene should be identified;
9. a report detailing the work of the investigators during their on-site visit should be kept and later disclosed;
10. evidence should be properly collected, handled, packaged, labelled, and placed in safekeeping to prevent contamination and loss of evidence.

31. In the light of the above discussion and having regard to the directions issued by the Bombay High Court, guidelines issued by NHRC, suggestions of the appellant PUCL, amicus curiae and the affidavits filed by the Union of India, the State Governments and the Union Territories, we think it appropriate to issue the following requirements to be followed in the matters of investigating police encounters in the cases of death as the standard procedure for thorough, effective and independent investigation:

31.1. Whenever the police is in receipt of any intelligence or tip-off regarding criminal movements or activities pertaining to the commission of grave criminal offence, it shall be reduced into writing in some form (preferably into case diary) or in some electronic form. Such recording need not reveal details of the suspect or the location to which the party is headed. If such intelligence or tip-off is received by a higher authority, the same may be noted in some form without revealing details of the suspect or the location.

31.2. If pursuant to the tip-off or receipt of any intelligence, as above, encounter takes place and firearm is used by the police party and as a result of that, death occurs, an FIR to that effect shall be registered and the same shall be forwarded to the court under Section 157 of the Code without any delay. While forwarding the report under Section 157 of the Code, the procedure prescribed under Section 158 of the Code shall be followed.

31.3. An independent investigation into the incident/encounter shall be conducted by the CID or police team of another police station under the supervision of a senior officer (at least a level above the head of the police party engaged in the encounter). The team conducting inquiry/investigation shall, at a minimum, seek:

(a) To identify the victim; colour photographs of the victim should be taken;

(b) To recover and preserve evidentiary material, including bloodstained earth, hair, fibres and threads, etc. related to the death;

(c) To identify scene witnesses with complete names, addresses and telephone numbers and obtain their statements (including the statements of police personnel involved) concerning the death;

(d) To determine the cause, manner, location (including preparation of rough sketch of topography of the scene and, if possible, photo/video of the scene and any physical evidence) and time of death as well as any pattern or practice that may have brought about the death;

(e) It must be ensured that intact fingerprints of deceased are sent for chemical analysis. Any other fingerprints should be located, developed, lifted and sent for chemical analysis;

(f) Post-mortem must be conducted by two doctors in the district hospital, one of them, as far as possible, should be incharge/ head of the district hospital. Post-mortem shall be videographed and preserved;

(g) Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases, should be taken and preserved. Wherever applicable, tests for gunshot residue and trace metal detection should be performed.

(h) The cause of death should be found out, whether it was natural death, accidental death, suicide or homicide.

31.4. A magisterial inquiry under Section 176 of the Code must invariably be held in all cases of death which occur in the course of police firing and a report thereof must be sent to the Judicial Magistrate having jurisdiction under Section 190 of the Code.

31.5. The involvement of NHRC is not necessary unless there is serious

doubt about independent and impartial investigation. However, the information of the incident without any delay must be sent to NHRC or the State Human Rights Commission, as the case may be.

31.6. The injured criminal/victim should be provided medical aid and his/her statement recorded by the Magistrate or Medical Officer with certificate of fitness.

31.7. It should be ensured that there is no delay in sending FIR, diary entries, panchnamas, sketch, etc. to the court concerned.

31.8. After full investigation into the incident, the report should be sent to the competent court under Section 173 of the Code. The trial, pursuant to the charge-sheet submitted by the investigating officer, must be concluded expeditiously.

31.9. In the event of death, the next of kin of the alleged criminal/victim must be informed at the earliest.

31.10. Six-monthly statements of all cases where deaths have occurred in police firing must be sent to NHRC by DGPs. It must be ensured that the six-monthly statements reach to NHRC by 15th day of January and July, respectively. The statements may be sent in the following format along with post-mortem, inquest and, wherever available, the inquiry reports:

(i) Date and place of occurrence.

(ii) Police station, district.

(iii) Circumstances leading to deaths:

(a) Self-defence in encounter.

(b) In the course of dispersal of unlawful assembly.

(c) In the course of affecting arrest.

(iv) Brief facts of the incident.

(v) Criminal case no.

(vi) Investigating agency.

(vii) Findings of the magisterial inquiry/inquiry by senior officers:

(a) disclosing, in particular, names and designation of police officials, if found responsible for the death; and

(b) whether use of force was justified and action taken was lawful.

31.11. If on the conclusion of investigation the materials/evidence having come on record show that death had occurred by use of firearm amounting to offence under IPC, disciplinary action against such officer must be promptly initiated and he be placed under suspension.

31.12. As regards compensation to be granted to the dependants of the victim who suffered death in a police encounter, the scheme provided under Section 357-A of the Code must be applied.

31.13. The police officer(s) concerned must surrender his/her weapons for forensic and ballistic analysis, including any other material, as required by the investigating team, subject to the rights under Article 20 of the Constitution.

31.14. An intimation about the incident must also be sent to the police officer's family and should the family need services of a lawyer/ counselling, same must be offered.

31.15. No out-of-turn promotion or instant gallantry rewards shall be bestowed on the officers concerned soon after the occurrence. It must be ensured at all cost that such rewards are given/ recommended only when the gallantry of the officers concerned is established beyond doubt.

31.16. If the family of the victim finds that the above procedure has not been followed or there exists a pattern of abuse or lack of independent investigation or impartiality by any of the functionaries as abovementioned, it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. Upon such complaint being made, the Sessions Judge concerned shall look into the merits of the complaint and address the grievances raised therein.

32. The above guidelines will also be applicable to grievous injury cases in police encounter, as far as possible.

33. Accordingly, we direct that the above requirements/norms must be strictly observed in all cases of death and grievous injury in police encounters by treating them as law declared under Article 141 of the Constitution of India."