For Private Circulation : Educational Purpose Only

HANDBOOK

FOR CRIMINAL COURTS & REMAND ADVOCATES

Prepared by
Jharkhand State Legal Services Authority
NYAYA SADAN, Near A.G. Office, Doranda, Ranchi
Phone : 0651-2481520, 2482392, Fax : 0651-2482397
Email : jhalsaranchi@gmail.com, Website : www.jhalsa.org
This Handbook is also available on official website of JHALSA **"www.jhalsa.org"**

For Private Circulation : Educational Purpose Only

HANDBOOK FOR CRIMINAL COURTS & REMAND ADVOCATES

Year of Publication : 2016

Compiled By
Jharkhand State Legal Services Authority
Nyaya Sadan, Near AG Office, Doranda, Ranchi – 834002
Ph No. 0651-2482392, 2481520, 2482397 (F)
E-mail :jhalsaranchi@gmail.com, Website : www.jhalsa.org
This is booklet is also available on Official Website of JHALSA ***"www.jhalsa.org"***

Justice Virender Singh
Chief Justice, High Court of Jharkhand cum
Patron-in-Chief, JHALSA

MESSAGE

It is a matter of great contentment that Jharkhand State Legal Services Authority is publishing a ***Handbook for Remand Advocates and Criminal Courts****. Crime and punishment are very sensitive issues and every civilised society aspires of crime-free environment and suitable punishment for the offender. At the same time a civilized society craves for protection of basic human rights of prisoners. Article 39-A of the Constitution of India mandates legal aid to all eligible persons including the prisoners and it is, thus, the duty of the legal services Institution to protect and promote their legal and constitutional rights.*

I am very optimistic that this work of JHALSA will be used by the Bench and Bar alike. It will not only be a useful book for the DLSAs and Remand Advocates of the State, but, would also be useful for the human rights activists who keep vigilant eye on the persons under vulnerable circumstances including prisoners.

(Virender Singh)

Dated : 29th September, 2016

Justice Navin Sinha
Chief Justice, Rajasthan High Court cum
Patron-in-Chief, Rajasthan SLSA

MESSAGE

I am happy to learn that JHALSA is organising a One day Training Programme for Remand Advocates on 4th of October, 2016, at Ranchi. A Handbook for Remand Advocates and Criminal Courts is also to be released that day. The Society owes a duty, moral and legal to ensure protection of human rights of those who have erred in conduct. It is an essential attribute of a civilised society. It is the duty-moral as well as legal - of a civilised society to ensure protection of legal as well as human rights of persons in custody.

In Ramamurthy v. State of Karnataka, (1997) S.C.C. (Cri) 386, nine major problems afflicting the prison system were identified as overcrowding, delay in trial, torture, ill treatment, neglect of health and hygiene, inadequate food, inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits and management of open air prisons. Unhealthy living conditions inside the jail was identified as a severe problem. It is the duty of the Legal fraternity in general and Legal services Authority in particular to uphold the Constitutional law and protect the rights of prisoners right from the stage of remand.

The Judicial System of our country guarantees to all the prisoners the Right to Life of with human dignity. Justice D.N. Patel has laboured hard for this outstanding compilation. It will be very useful for Members of Legal Fraternity in general and Remand Advocates in particular.

With best wishes.

(Navin Sinha)

Justice D.N. Patel

Judge, High Court of Jharkhand &
Executive Chairman, JHALSA

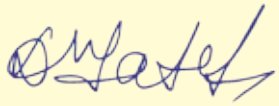
A Society is known by how it treats its ***women, children, differently abled persons, prisoners and marginalized sections of the society****. It is constitutional mandate to provide legal aid to the persons in custody, right from the time of his arrest.*

The concept of Remand Advocate is to fulfil the aforesaid constitutional mandate and provide legal aid to unrepresented accused produced in custody and oppose his remand, move bail applications, miscellaneous applications etc and undertake such action as may be necessary to effectively represent the accused. Soon after the arrest, the arrested person comes under difficult circumstances. His personal liberty is restricted. Hon'ble Supreme Court of India in catena of judgements has upheld the position that Article- 21, which guarantees Right to life with dignity is applicable to prisoners also with full force. Therefore, the duty of Remand Advocate is not only onerous but also pious one. They have not only to discharge it whole heartedly but diligently. There is urgent need to keep Remand Advocates updated through continuous training programmes. There is further need for ***Reading Material*** *comprising of letters and circulars as well as judgements on the subject for the Remand Advocates and Legal Fraternity.*

Legal Aid to poor does not, cannot and should not mean poor legal aid*. A competent lawyers well versed in law with up to date knowledge is able to protect the interests of arrested persons. There should be good knowledge of Code of Criminal Procedure and more particularly the requirements of Sec. 41 Cr.PC. The Legal position is that whoever doesn't have a private lawyer to represent him at the time of remand, needs to be represented by the Remand Advocate deputed by Legal Services Authority.*

This work of JHALSA is not only for Remand Advocates and Criminal Courts but also for the entire legal fraternity and common man.

It goes without saying that to include the latest case-laws, updated version will be published at regular intervals so that all the stakeholders may continue to be benefited from this work of JHALSA.



(Justice D.N. Patel)

INDEX

IMPORTANT LETTERS

1. **National Legal Services Authority 3**
   D.O.No.L/43/2015/Nalsa, Dated 5th July, 2016

2. **National Legal Services Authority 4**
   F.No. L/43/2015/Nalsa, Dated: 20th January, 2016

3. **National Legal Services Authority 5**
   F.No.L/12/2016/Nalsa, Dated: 5th July, 2016

4. **National Legal Services Authority 9**
   F.No.L/17/2016/Nalsa, Dated: 19th July, 2016

5. **Jharkhand State Legal Services Authority 12**
   Jhalsa/1864, Dated 26th July, 2016

IMPORTANT JUDGMENTS

6. **Md. Ajmal Md. Amir Kasab @Abu ... vs State Of Maharashtra 15**
   Criminal Appeal Nos.1899-1900 Of 2011

7. **State Of Madhya Pradesh vs Shobharam And Ors 66**

8. **Sunil Batra Etc vs Delhi Administration And Ors. Etc 79**
   Equivalent citations: 1978 AIR 1675, 1979 SCR (1) 392

9. **Sunil Batra vs Delhi Administration 94**
   Equivalent citations: 1980 AIR 1579, 1980 SCR (2) 557

10. **Hussainara Khantoon & Ors vs Home Secretary, State Of Bihar 99**
    Equivalent citations: 1979 AIR 1377, 1979 SCR (3) 760

11. **Prem Shankar Shukla vs Delhi Administration 105**
    Equivalent citations: 1980 AIR 1535, 1980 SCR (3) 855

12. **Rudul Sah vs State Of Bihar And Another 111**
    Equivalent citations: 1983 AIR 1086, 1983 SCR (3) 508

13. **Sheela Barse vs State of Maharashtra 116**
Equivalent citations: 1983 AIR 378, 1983 SCR (2) 337

14. **Shri D.K. Basu, Ashok K. Johri vs State of West Bengal, State Of U.P 123**

15. **State of Andhra Pradesh vs Challa Ramkrishna Reddy & Ors 138**

16. **R.D. Upadhyay vs State Of A.P. & Ors 145**
Writ Petition (Civil) 559 of 1994

17. **Ramraj @ Nanhoo @ Bihnun vs State of Chhattisgarh 158**
SPECIAL LEAVE PETITION (CRL.)NO.4614 OF 2006

18. **Siddharam Satlingappa Mhetre vs State of Maharashtra And Ors..... 163**
CRIMINAL APPEAL NO. 2271 of 2010.
(Arising out of SLP (Crl.) No.7615 of 2009)

19. **Arnesh Kumar vs State of Bihar & Anr 188**
CRIMINAL APPEAL NO. 1277 OF 2014
(@SPECIAL LEAVE PETITION (CRL.) No.9127 of 2013)

20. **Dr.Mehmood Nayyar Azam vs State of Chattisgarh and Ors 193**
CIVIL APPEAL No. 5703/2012
(Arising out of SLP (C) No. 34702 of 2010)

21. **RE - INHUMAN CONDITIONS IN 1382 PRISONS 204**
WRIT PETITION (CIVIL) NO.406/2013

22. **Mahadev Gope & Ors. Versus The State of Jharkhand..... 218**
I.A. No. 1105 of 2013 In Cr. Appeal (DB) No. 1088 of 2012

23. **Mahadev Gope & Ors. Versus The State of Jharkhand..... 220**
I.A. No. 1105 of 2013 In Cr. Appeal (DB) No. 1088 of 2012

24. **Mahadev Gope & Ors. Versus The State of Jharkhand..... 225**
LA. No. 1105 of 2013 in Criminal Appeal (DB) No. 1088 of 2012

25. **Jinda Oraon Versus The State of Jharkhand..... 231**
I.A. No.668 of 2014 IN Cr. Appeal (D.B.) No. 43 of 2014

IMPORTANT LETTERS

NATIONAL LEGAL SERVICES AUTHORITY

D.O.No.L/43/2015/NALSA ***5th July, 2016***

Dear Sir/Madam,

In furtherance to e-mail dated 21st January, 2016 of even number on the subject cited above, by which information was sought regarding the appointment of Remand Advocates, terms including honorarium/ fee paid to them, mechanism and monitoring their performance and best practices being followed and suggestions to strengthen legal representative to persons in custody, a perusal of the information received from the different States shows that in several States, Remand Advocates have been appointed while in other States, Remand Advocates have not been appointed. Moreover, in some of the States in which the Remand Advocates have been appointed they are paid very low honorarium per month.

2. It may be mentioned that amendments have been proposed to the NALSA (Free and Competent Legal Services) Regulations, 2010, in order to include a specific provision for appointment of Remand Advocates in each of the magisterial courts and such of the sessions courts as may be deemed fit. Meanwhile, in order to strengthen the system of providing legal aid to the accused as and when they are produced in custody before courts, it is requested that one Panel/Retainer advocate be deputed as Remand Advocate in each of the magisterial courts and the courts of sessions/special designated courts where remand proceedings are held. They may be paid honorarium as per the structure laid down for payment to Retainer Advocates. Further, the Panel/Retainer Advocates deputed as Remand Advocates would represent the unrepresented accused produced in custody, oppose remand, move bail application, miscellaneous applications etc and undertake such other action as may be necessary to effectively represent the accused at the stage of remand. It is made clear that if the same Lawyer is then engaged to represent an accused during the trial, he may additionally be paid the fees for a Panel Lawyer as per the existing fee structure.

3. You are requested to take immediate steps for appointing deputing Panel/Retainer Advocates as Remand Advocates in each of the magisterial courts/court of sessions within your jurisdiction at the earliest and provide information in this regard to NALSA on the steps taken within one month.

This is being sent with the approval of Hon'ble Executive Chairman of NALSA.

Yours sincerely,
Alok Agarwal
Member Secretary
National Legal Services Authority
23385321/23385720

NATIONAL LEGAL SERVICES AUTHORITY

F.No. L/43/2015/NALSA ***Dated: 20th January, 2016***

To

The Member Secretary,
All State Legal Services Authorities.

Dear Sir/Madam,

Article 22(1) of the Constitution of India provides that no person who is arrested shall be denied the right to consult a legal practitioner of his choice. Further, as has been held by the Supreme Court in the case of Khatri and others vs. State of Bihar [1981 SCC (1) 627], the state has a constitutional mandate, implicit in article 21 to provide free legal aid to an indigent accused person. This constitutional obligation to provide free legal aid does not arise only when the trial commences, but commences when the accused is for the first time produced before the magistrate, as also when remanded from time to time. The apex court has gone a step further in Suk Das vs. Union Territory of Arunachal Pradesh [1986 AIR 991], where it has categorically laid down that this constitutional right cannot be denied if the accused failed to apply for it.

2. As provided in Hussainara Khatoon (IV) vs. Home Secretary, State of Bihar [1980 SCC (1) 98], jeopardy to the personal liberty of a person arises as soon as he is arrested and produced before a Magistrate, According to the case of Gulab Chand Upadhyaya vs. State of U.P.[2002 Cri LJ 2907] and the Code of Criminal Procedure, a magistrate can either release the accused by refusing remand (Section 167) or he can grant bail to an accused (Section 437). It is at this stage that 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. Thus, where an accused gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody, a remand advocate can provide assistance by moving bail applications and opposing police remand before the Court of the Magistrate or Sessions Judge. It is also the duty of the remand advocate to point out to the court if there is any non-compliance with the requirements of Section 41, CrPC.

3. In view of the above, it is imperative that each and every accused, who is produced in custody before a criminal court has legal representation. Whoever does not have a private counsel to represent him at the time of remand, needs to be represented by a Remand Advocate deputed by the Legal Services Authority.

4. In this context, you are requested to provide the following information at the earliest.

(i) Whether there are remand advocates appointed for each court of a Magistrate and also for each Sessions Court/Special Court etc. whenever, accused persons are produced either from Police or Judicial Custody?

(ii) What are their terms including the honorarium/fee paid to them?

(iii) What if any, is the mechanism for monitoring their performance?

(iv) Best practices if any being followed by your DLSAs in this regard.

(v) Any suggestion to strengthen legal representative to all persons in custody at all stages of a criminal inquiry & trial.

The above information and your suggestions, if received within a week's time will be highly helpful in formulating a plan to ensure quality legal services to the under trials.

With regards,
Yours sincerely,
(Alok Agarwal)

NATIONAL LEGAL SERVICES AUTHORITY

F.No.L/12/2016/NALSA ***Dated: 5th July, 2016***

To

The Member Secretary,
All State Legal Services Authorities.

Dear Sir/Madam,

Please find enclosed herewith Standard Operating Procedure (SOP) for Redressal of Complaints/ Public Grievances prepared by NALSA and approved by the Hon'ble Executive Chairman, NALSA.

2. You are requested to communicate the aforesaid SOP of all the District Legal Services Authorities/Taluk Legal Services Committees so that immediate action can be taken on the complaints/applications.

Yours Sincerely,
(Geetanjli Goel)
Director
National Legal Services Authority,
Ph: 23385321/23072283

STANDARD OPERATING PROCEDURE FOR REDRESSAL OF COMPLAINTS/PUBLIC GRIEVANCES

Every Authority/ Committee, whether at the national, state or district or taluka level receives various complaints from time to time. While the complaints are a means for the aggrieved to voice their grievances, they also tell us the reach of our programmes and our failures. It thus becomes essential that all the complaints are addressed expeditiously and effectively. In absence of any established mechanism to deal with the complaints or address public grievances, the approach to the same has remained ad-hoc and mired in delays. NALSA is also in receipt of OM dated 7th April, 2016 of the Ministry of Personnel, Public Grievances and Pension, Department of Administrative Reforms and Public Grievances as per which the Hon'ble Prime Minister had desired that all efforts should be made to reduce the time taken for redress of a grievance from the existing 2 months period to one month. Thus the need has been felt to lay down a mechanism to address the complaints and public grievances in a systematic manner.

Source of Complaints: Complaints may be:

i) Received by NALSA directly from the public.

ii) Received by NALSA from the office of the President of India, Prime Minister of India, Chief Justice of India and the Department of Justice, Ministry of Law and Justice, Government of India.

iii) Received by the State/ District Authorities or Taluka Committees from the public directly.

iv) Received by the State/ District Authorities or Taluka Committees from the various authorities including from the office of the Chief Justice of the respective state.

v) Received by the State from NALSA.

vi) District Authorities may further receive complaints forwarded by the State Authority or NALSA.

vii) Taluka Committees may also similarly receive complaints forwarded by the State Authority or NALSA or District Authority.

Nature of Complaints: The complaints may include:

i) Against a legal aid lawyer, where a legal aid lawyer has been assigned to a party at any level, including in respect of his working and conduct.

ii) Against not being provided legal aid, where a party feels that he/ she is entitled to legal aid.

iii) Against any public authority for inability to get any entitlement.

iv) A general complaint involving a number of issues.

v) A general airing of grievances by a person.

vi) A person may simply be desirous of getting legal aid.

vii) A person may be wanting any specific information.

viii) Anonymous complaints.

Approach of the Authority/ Committee to the complaints/ public grievances

When a complaint is received by any Authority or Committee at any level, the approach should be towards problem solving rather than replying and disposing of the complaint. |Our orientation should not be towards somehow getting the complaint off our board and thereby showing disposal of the complaint at our end. Rather, we need to deal with the complaints/ public grievances pro-actively so that a party feels satisfied that he/ she has received appropriate response and knows what further course of action is available to it. The objective should be redressal and not mere disposal. Thus the following mechanism should be adopted at the different levels for addressing the complaints/ public grievances:

At the level of NALSA

i) Since NALSA itself does not have a panel of lawyers and does not give legal aid and in fact acts through the State and District level Authorities, whenever a complaint is received against a legal aid lawyer or rejection of application for legal aid or seeking legal aid or even seeking any entitlement under any Scheme, the same shall be forwarded to the concerned State Legal Services Authority and where possible to the District Authority as well. Efforts shall be made to ensure that the same is done at the earliest.

Till the development of an online portal for dealing with complaints, the complaint shall be scanned and sent by e-mail as well as a hard copy shall be sent by post. However, the State or District Authority should not wait till the receipt of the hard copy and they should act on the basis of the soft copy itself.

While forwarding the complaints to the State/ District Authority, certain complaints may be identified by NALSA for monitoring and follow up.

ii) While forwarding the complaint to the State/ District Authority, a copy of the forwarding letter should also be sent to the party concerned and/ or to the office/ Department through which the complaint has been received.

iii) The complaints which do not have any merit in them may be filed. However, a reply shall be sent to the party concerned regarding the filing of the complaint and if the party has any other alternatives available with a copy to the office/ Department through which the complaint has been received, if received from any other office/ Department.

iv) Anonymous complaints may also be filed.

v) Where a general complaint is received, if the same is not forwarded to any Authority, the party may be informed that the issues raised have been noted and there is no ground to proceed further.

vi) Where a party wants some specific information, the party may be directed to the authority/ person who would be best suited to provide the information.

At the level of SLSA

i) Whenever a complaint is received against a legal aid lawyer or seeking legal aid or even seeking any entitlement under any Scheme directly or is forwarded by NALSA, the same shall be forwarded by the concerned State Legal Services Authority to the District Authority/ Taluka Committee, except where the SLSA feels that the complaint can be disposed of at its level. The same should be done at the earliest and in any case, not later than 5 working days of the receipt of the complaint, by whatever mode.

ii) While forwarding the complaint to the District Authority/ Taluka Committee, a copy of the forwarding letter should also be sent to the party concerned and/or to the office/ Department through which the complaint has been received. Where the complaint was forwarded by NALSA to the SLSA, a copy of the forwarding letter is to be sent to NALSA as well.

iii) The SLSA shall regularly follow up the progress made on the complaints with the concerned District Authority/ Taluka Committee and keep NALSA informed where the complaint has been forwarded by NALSA.

iv) Where a complaint is received against rejection of application for legal aid, the same shall be examined by SLSA. A report may be called from the DLSA/ Committee concerned, where necessary. If the SLSA is of the view that the rejection of application for legal aid was proper, the party may be informed of the same accordingly and NALSA may also be informed if the application has been forwarded by NALSA. However, if the SLSA is of the view that the party is entitled to legal aid, it may pass appropriate orders, including appointing a legal aid lawyer from amongst the lawyers on the panel of the District Authority/ Taluka Committee. For the said purpose, the SLSA may give a personal hearing to the party, where deemed necessary.

v) The complaints which do not have any merit in them may be filed. However, a reply shall be sent to the party concerned regarding the filing of the complaint and if the party has any other alternatives available with a copy to NALSA/office/ Department through which the complaint has been received, if received from any other office/ Department or NALSA.

vi) Anonymous complaints may also be filed.

vii) Where a general complaint is received, if the same is not forwarded to any Authority, the party may be informed that the issues raised have been noted and there is no ground to proceed further.

viii) Where a party wants some specific information, the party may be directed to the authority/ person who would be best suited to provide the information.

At the level of DLSA/Taluka Committee

i) Whenever a complaint is received against a legal aid lawyer or seeking legal aid or even seeking any entitlement under any Scheme directly or is forwarded by NALSA/SLSA, the same shall be taken up by the DLSA/ Committee without any loss of time.

a) If the complaint is against a legal aid lawyer, a report may be called from the lawyer concerned and if the DLSA/ Committee is not satisfied with the report of the lawyer, appropriate action may be taken.

Besides, the party may be contacted and the legal aid lawyer may be changed immediately.

b) If the application is merely for getting legal aid, appropriate steps may be taken as are taken in all cases for grant of legal aid.

c) If the application is for seeking any entitlement under any Scheme, the party may be informed of the recourses available and a PLV may be deputed to facilitate the party to get the entitlement.

In all such cases, if necessary, the party may be requested to visit the office and discuss the problem rather than notices for appearance being sent to them.

In order to get in touch with the parties and to save time, all possible modes should be used such as sending SMS to the party where the mobile number of the party is available, calling a party telephonically, sending a letter by speed post, using e-mail if e-mail id is available. Importantly, a PLV may even be sent to contact the party.

In all these cases, intimation should be sent to the SLSA/NALSA/ concerned department or office where the same had been forwarded by them.

i) Where a complaint is received against rejection of application for legal aid, the party shall be informed of the grounds of the same and that the party has the right to prefer an appeal against the order of the DLSA/ Committee and to whom the appeal can be made.

ii) The complaints which do not have any merit in them may be filed. However, a reply shall be sent to the party concerned regarding the filing of the complaint and if the party has any other alternatives available with a copy to NALSA/SLSA/office/ Department through which the complaint has been received, if received from any other office/ Department or NALSA/SLSA.

iii) Anonymous complaints may also be filed.

iv) Where a general complaint is received, the party may be informed that the issues raised have been noted and there is no ground to proceed further.

v) Where a party wants some specific information, the party may be directed to the authority/ person who would be best suited to provide the information.

For dealing with the complaints at all levels, it is reiterated that:

- Complaints/ public grievances should be addressed expeditiously.
- A pro-active and sensitive approach should be adopted.
- There should be regular follow up of complaints.
- Where NALSA forwards the applications to SLSAs or SLSAs forward the applications to DLSAs/ Committees, they should be apprised of the fate of the complaints.

Ultimately the purpose is that the public should feel that their complaints/ grievances are effectively addressed and without any delays.

GEETANJLI GOEL
DIRECTOR

NATIONAL LEGAL SERVICES AUTHORITY

F.No.L/17/2016/NALSA ***Dated: 19th July, 2016***

To

The Member Secretaries
All State Legal Services Authorities.

Sir/Madam,

Please find enclosed herewith Standard Operating Procedure (SOP) for Representation of Persons in Custody prepared by NALSA and approved by the Hon'ble Executive Chairman, NALSA.

2. You are requested to communicate the aforesaid SOP to all the District Legal Services Authorities/Taluk Legal Services Committees so that immediate compliance is done and you are also requested to send report to NALSA on the steps taken in this regard.

Yours Sincerely,
(Geetanjli Goel)
Director
National Legal Services Authority,
Ph: 23385321/23072283

Encl: As above.

Standard Operating Procedure for Representation of persons in custody

One of the core areas of activity of the Legal Services Institutions is providing legal aid. Under Section 12 of the Legal Services Authorities Act, 1987, all persons in custody are entitled to legal aid. However the system of providing representation to those in custody is not uniform across the country. The frequency of visits by jail visiting lawyers to the jails is also not standardised with lawyers visiting only once a month in some places while at others, they may visit twice a week. The jail visiting lawyers are often not clear what is expected of them to do. Clearly the system of interaction with the inmates in jails and their representation in courts needs to be strengthened.

In several districts across the country, the persons in custody are not produced before the courts for days together. This happens even at the stage where the charge sheet has still not been filed. There are many cases where the accused was produced before the court after arrest and was remanded to custody but thereafter was not produced on several dates meant for remand. The reasons given for the same are generally non availability of sufficient number of armoured vehicles and of personnel to produce the persons in custody before the courts and that at times the accused are required to be produced in other courts. This is contrary to the mandate of Code of Criminal Procedure and also violates the basic rights of the persons in custody as enshrined in the Constitution and enunciated by the Hon'ble Apex Court in several landmark cases and most importantly is an impediment to their liberty. Due to non-production of the persons in custody

before the courts at regular intervals, the courts are unable to consider whether the persons in custody are facing any problems. Legal representation to them cannot also be ensured in such circumstances.

The persons in custody continue to languish in jails without bail applications being moved on their behalf. Even where bail orders have been granted, they continue to languish in jails as bail bonds are not furnished and the courts find it difficult to communicate with the persons in custody due to their non-production before the courts. Such cases need to be brought to the notice of the court. Further the persons in custody do not get timely information about the status of their cases and their rights. As such, there is an urgent need to bridge the gap between the accused persons and legal services to them.

Several initiatives have already been taken such as setting up of Legal Services Clinics in the Jails across the country, identifying and training PLVs who could communicate with the inmates in the prisons but much more needs to be done.

For this purpose, the District Legal Services Authorities should take the following steps:

1) Panel lawyers should be deputed as remand advocates in each of the Magisterial courts and also, in the Courts of Sessions where required.

2) Work of the Legal Service Clinics in the jails should be streamlined with clearly demarcated space for such clinics. Requisite infrastructure should be made available, if need be as per the Regulations in this regard for the efficient functioning of such clinics.

3) From amongst the panel lawyers, some lawyers should be earmarked as jail visiting lawyers. Visits to the jails must be made at least twice every week.

4) The possibility of taking the services of retired judicial officers as jail visiting lawyers may be explored and honorarium for them can be fixed by the Hon'ble Executive Chairmen of the SLSAs.

5) Sufficient number of PLVs, from amongst the convicts serving long sentences should be identified and they should be trained suitably, where not already done, so that they interact with the inmates, especially the new entrants and can bring to the notice of the jail visiting lawyers or the Secretary of the District Legal Services Authority, the cases requiring attention.

6) The PLVs should maintain the record mentioning the date a person was brought into the jail, the offence alleged against him, stage of case, next date of hearing and the name of the court.

7) The Jail visiting lawyers from the District Legal Services Authorities shall regularly interact with the inmates and especially the new inmates to find out if they are represented by any lawyer and if not, they should inform the inmate about their right to get a legal aid lawyer. They should also inform the District Secretary so that a legal aid lawyer can be appointed to represent the inmate in court.

8) The Jail visiting lawyers should prepare a brief summary of each interaction and send the same to the Secretary, District Legal Services Authority along with contact details of the family of the accused, if available so that the panel lawyer can coordinate with them.

9) The Secretary, District Legal Services Authority may take up a case brought to his notice which needs immediate attention with the District Judge or the Jail Inspecting Judge.

10) The Jail Superintendent should be called upon to send a list of inmates in jail every fortnight which should be reviewed by the Secretary of the District Legal Services Authority, who can take up the cases requiring attention with the concerned authorities.

11) The PLVs and the Jail visiting lawyers should also keep track of non-production of any inmate in the court as per the date given or of the cases where no next date is available and inform the Secretary, District Legal Services Authority.

12) If it comes to the notice of the District Secretary that for certain reasons, the persons in custody are not produced before the court on a particular day, he should bring the same to the notice of the concerned Chief Judicial Magistrate or the Chief Metropolitan Magistrate who may take appropriate action and for the time being may designate a Magistrate to go to the jails for doing the remand work for that day.

13) The matter of making available requisite armoured vehicles and personnel for taking the persons in custody to the courts for production should be taken up with the appropriate government.

14) The Jail visiting lawyers shall communicate to the Secretary, District Legal Services Authority whenever bail application has to be filed on behalf of an inmate or if subsequently, it comes to their notice that an undertrial is not being represented by a lawyer in the court, who shall issue appropriate directions for a lawyer to be appointed in the case. They should also bring to the notice of the Secretary, District Legal Services Authority cases where bail orders have been issued but bail bonds could not be furnished due to various reasons.

15) The Secretary, District Legal Services Authority shall place the cases of undertrial prisoners who are eligible under Section 436A Cr.P.C. before the Undertrial Review Committee of the District promptly.

16) The panel lawyer who is appointed to represent a person in custody in the court should interact with the person in custody to have a better understanding of the case in hand. The panel lawyer assigned a particular case shall inform the next date of hearing and the purpose of the same to the Secretary, District Legal Services Authority within 3 days of the date of hearing in the court.

17) The Legal Services Clinic in the jail shall coordinate with the Jail Superintendent and the panel lawyer through the Secretary, District Legal Services Authority to keep itself updated on the status of the legal aided cases of each inmate, including the next date of hearing and the purpose. The status of the case shall be recorded in the registers to be maintained by the Clinic and shall also be communicated to the concerned inmate and the Jail Superintendent.

18) Regular awareness camps should be organised in the jails to create awareness on legal issues and specifically on the rights of the persons in custody.

19) Suggestion/complaint box should be available in each Legal Service Clinic in the jail which should be opened once every week in the presence of the panel lawyer and the Jail Superintendent and the cases requiring attention should be brought to the notice of the Secretary, District Legal Services Authority.

20) Where possible, Video Conferencing may be used to enable communication with the jail inmates.

The Member Secretaries are requested to take up the above issue urgently.

It would be appropriate if the Member Secretaries of all the States get an inspection done of all the jails in their States to identify cases of persons who have not been produced in courts for several dates and thereafter to direct the Secretaries, District Legal Services Authorities to get applications moved in that regard in the concerned courts. Similar steps should be taken where bail applications have to be moved or for modification of bail conditions etc. The Member Secretaries should review the working of the legal service clinics in the jails on a regular basis.

All out efforts should be made to ensure that the persons in custody are effectively represented in the courts and to make them aware of their rights and availability of legal aid.

JHARKHAND STATE LEGAL SERVICES AUTHORITY

JHALSA/1864 ***26th July, 2016***

To

All the Principal District Judges-cum-Chairman
District Legal Services Authorities
Including Judicial Commissioner-cum-Chairman
District Legal Services Authority, Ranchi

Ref. : NALSA Letter D.O. No. :L/43/2015/NALSA dated 5th July, 2016.

Sub. : For appointing / deputing Panel/Retainer Advocates as Remand Advocates in each of the Magisterial Courts/Court of Sessions.

Sir,

With reference to the above I am to inform your goodself that in order to strengthen the system of providing legal aid to the accused as and when they are produced in custody before Courts. NALSA has approved that one Panel/Retainer Advocate be deputed as Remand Advocate in each of the magisterial Courts and the Courts of Sessions / Special designated Courts where remand proceedings are held. They may be paid honorarium as per the structure laid down for payment to Retainer Advocates. Further the Panel/ Retainer Advocates deputed as Remand Advocates would represent the unrepresented accused produced in custody, oppose remand, move bail application miscellaneous applications etc and undertake such other action as may be necessary to effectively represent the accused at the stage of remand. It is made clear that if the same Lawyer is then engaged to represent an accused during the trial, he may additionally be paid the fees for a Panel lawyers as per the existing fee structure.

Further you are requested to take immediate steps for appointing/deputing Panel/Retainer Advocates as Remand Advocates in each of the magisterial Courts/Courts of sessions within your jurisdiction at the earliest and provide information in this regard for onward transmission to NALSA.

With regards,

Yours faithfully,
Sd/-
(**Arun Kumar Rai)**
Member Secretary

LANDMARK JUDGMENTS

Supreme Court of India

Md. Ajmal Md. Amir Kasab @Abu ... vs State Of Maharashtra

CORAM
Aftab Alam, Chandramauli Kr. Prasad

Criminal Appeal Nos.1899-1900 Of 2011

Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid ...Appellant
Versus
State Of Maharashtra ...Respondent

With
Criminal Appeal No.1961 Of 2011
Decided On 29 August, 2012

State Of Maharashtra ...Appellant
Versus
Fahim Harshad Mohammad Yusuf Ansari & Another ...Respondents

And
Transfer Petition (Criminal) No.30 Of 2012

Radhakant Yadav ...Petitioner
Versus
Union Of India & Others ...Respondents

JUDGMENT

Aftab Alam, J.

.....

AN OBITER:

Role of the media:

402. Before parting with the transcripts, we feel compelled to say a few words about the way the terrorist attacks on Taj Hotel, Hotel Oberoi and Nariman House were covered by the mainstream, electronic media and shown live on the TV screen. From the transcripts, especially those from Taj Hotel and Nariman House, it is evident that the terrorists who were entrenched at those places and more than them, their collaborators across the border were watching the full show on TV. In the transcripts there are many references to the media reports and the visuals being shown on the TV screen. The collaborators sitting in their hideouts across the border came to know about the appellant being caught alive from Indian TV: they came to know about the killing of high ranking police officers also from Indian TV. At one place in the transcript, the collaborators and the terrorists appear to be making fun of the speculative report in the media that the person whose dead body was found in Kuber was the leader of the terrorist group whom his colleagues had killed for some reason before leaving the boat[56]. At another place in the transcript the collaborators tell the terrorists in Taj Hotel that the dome at the top (of the building) had caught fire. The terrorists holed up in some room were not aware of this. The

collaborators further advise the terrorists that the stronger they make the fire the better it would be for them[57]. At yet another place the terrorists at Hotel Taj tell the collaborators that they had thrown a grenade. The Collaborators reply, the sound of the grenade has come, they have shown the grenade, the explosion has taken place, people are wounded[58]. At yet another place the collaborators tell the terrorists at Hotel Oberoi that the troops were making their position very strong on the roof of the building[59]. At yet another place the collaborators tell the terrorists at Taj Hotel the exact position taken by the policemen (close to a building that belonged to the navy but was given to the civilians) and from where they were taking aim and firing at them (the terrorists) and advised them the best position for them to hit back at those policemen.[60] There are countless such instances to show that the collaborators were watching practically every movement of the security forces that were trying to tackle the terrorists under relentless gun fire and throwing of grenades from their end.

403. Apart from the transcripts, we can take judicial notice of the fact that the terrorists attacks at all the places, in the goriest details, were shown live on the Indian TV from beginning to end almost non-stop. All the channels were competing with each other in showing the latest developments on a minute to minute basis, including the positions and the movements of the security forces engaged in flushing out the terrorists. The reckless coverage of the terrorist attack by the channels thus gave rise to a situation where on the one hand the terrorists were completely hidden from the security forces and they had no means to know their exact position or even the kind of firearms and explosives they possessed and on the other hand the positions of the security forces, their weapons and all their operational movements were being watched by the collaborators across the border on TV screens and being communicated to the terrorists.

404. In these appeals, it is not possible to find out whether the security forces actually suffered any casualty or injuries on account of the way their operations were being displayed on the TV screen. But it is beyond doubt that the way their operations were freely shown made the task of the security forces not only exceedingly difficult but also dangerous and risky.

405. Any attempt to justify the conduct of the TV channels by citing the right to freedom of speech and expression would be totally wrong and unacceptable in such a situation. The freedom of expression, like all other freedoms under Article 19, is subject to reasonable restrictions. An action tending to violate another persons right to life guaranteed under Article 21 or putting the national security in jeopardy can never be justified by taking the plea of freedom of speech and expression.

406. The shots and visuals that were shown live by the TV channels could have also been shown after all the terrorists were neutralized and the security operations were over. But, in that case the TV programmes would not have had the same shrill, scintillating and chilling effect and would not have shot up the TRP ratings of the channels. It must, therefore, be held that by covering live the terrorists attack on Mumbai in the way it was done, the Indian TV channels were not serving any national interest or social cause. On the contrary they were acting in their own commercial interests putting the national security in jeopardy.

407. It is in such extreme cases that the credibility of an institution is tested. The coverage of the Mumbai terror attack by the mainstream electronic media has done much harm to the argument that any regulatory mechanism for the media must only come from within.

ARGUMENTS I. Denial of Due Process Mr. Raju Ramachandran:

408. In the face of the evidence stacked against the appellant, overwhelming both in volume and in weight, Mr. Ramachandran took a course that would neatly side-step everything. He struck at the root. Mr. Ramachandran submitted that the appellant did not get a fair trial and added that the denial of fair trial, for any reason, wittingly or unwittingly, would have the same result: it would render the trial a nullity and no conviction or sentence based on such a trial would be legal or enforceable. Mr. Ramachandran

prefaced his submissions by gently reminding the court that, having taken the path of the rule of law, we must walk the full mile; we cannot stop halfway and fall short of the standards we have set for ourselves.

409. The learned Counsel submitted that the right to fair trial is an integral part of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India, and that the fundamental right under Article 21 was inalienable and there can be no question of any waiver of the right by any person. In support of the first limb of his submission, he referred to the decisions in Zahira Habibullah Sheikh (5) v. State of Gujarat[61], T. Nagappa v. Y.R. Muralidhar[62], Noor Aga v. State of Punjab[63], NHRC v. State of Gujarat[64] , Jayendra Vishnu Thakur v. State of Maharashtra[65] and G. Someshwar Rao v. Samineni Nageshwar Rao[66]; and in support of the second limb he relied upon the decisions in Behram Khursheed v. State of Bombay[67] and Olga Tellis v. Bombay Municipal Corp.[68].

410. Proceeding from the premise that fair trial is an inalienable right of every person, Mr. Ramachandran submitted that in case of the appellant the Constitutional guarantee remained unsatisfied because of denial to him of two valuable Constitutional rights/protections: first, the right to counsel at the earliest, as provided under Article 22 (1) of the Constitution; and secondly, the right to protection against self-incrimination as stipulated by Article 20(3) of the Constitution.

411. Elaborating the first submission regarding the right to counsel at the earliest, Mr. Ramachandran said that the appellant was not made aware of his Constitutional right to counsel under Article 22(1) of the Constitution at the time of his arrest and production before the Judicial Magistrate in remand proceedings. Mr. Ramachandran submitted that a mere offer of legal aid is not the same as being made aware that one has the Constitutional right to consult, and to be defended by, a legal practitioner, and that simply the offer of legal aid does not satisfy the Constitutional requirement. He stated that until the appellant was produced before the Additional Chief Metropolitan Magistrate on February 17, 2009, for recording his confession, he was not informed of such a right.[69]The learned magistrate also did not tell him that under the Constitution he had the fundamental and inalienable right to consult and be represented by a lawyer, but simply asked him whether he wanted a lawyer. This, according to Mr. Ramachandran, resulted in the confession being recorded without the appellant being made aware of his Constitutional right against self- incrimination under Article 20(3). Mr. Ramachandran further submitted that the repeated cautioning administered by the learned magistrate to the appellant and her admonitions to him about making the confession undoubtedly satisfied the requirements under Section 164 of the Code of Criminal Procedure, but they fell far short of higher Constitutional standards. The learned Counsel maintained that telling the appellant that he was not bound to make the confession and that it could be used against him did not amount to Constitutional compliance. The magistrate was required to inform him of his rights under Article 22(1) and 20(3) of the Constitution. It is only if an accused is so informed that he can be said to have made a Constitutionally acceptable choice either to have or not to have a lawyer or to make or not to make a confession.

412. The learned Counsel sought to buttress his submission by referring to the decision in Nandini Satpathy v. P. L. Dani[70] and through Nandini Satpathy to the decision of the US Supreme Court in Miranda v. Arizona[71]. He referred to paragraphs 42 to 44 of the judgment that contain the discussion regarding the stage at which the right under Article 20(3) comes into operation; paragraphs 62 to 65 that deal with the stage at which the accused gets the right to have the assistance of a lawyer; and put particular stress on paragraphs 21 to 34 of the judgment, where the right under Article 20(3) of the Constitution and the provisions of Section 161(2) of the Code of Criminal Procedure (said to be the parliamentary gloss on the constitutional clause!) are seen through the Miranda prism.

413. Apart from Nandini Satpathy, Mr. Ramachandran relied upon the decision of this Court in Khatri (II) v. State of Bihar[72] relating to the infamous case of blinding of prisoners in Bihar. In Khatri, this Court

reiterated that the right to free legal aid is an essential ingredient of due process that is implicit in the guarantee of Article 21 of the Constitution.

414. Mr. Ramachandran also relied upon the decision of this Court in State (NCT of Delhi) v. Navjot Sandhu[73]. He referred to paragraphs 159 to 164 of the judgment where the Court discussed the decision in Nandini Satpathy and the US decision in Miranda and found that the safeguards and protections provided to the accused under Sections 32 and 52 of the Prevention of Terrorism Act, 2002 (POTA), apart from stemming directly from the guarantees enshrined in Articles 21 and 22 (1) of the Constitution and embodying the guidelines spelt out in the earlier decisions of this Court in Kartar Singh v. State of Punjab[74] and D.K. Basu v State of West Bengal[75], were in complete harmony with the observations of this Court in Nandini Satpathy as well as the Miranda rule enunciated by the U.S. Supreme Court. Mr. Ramachandran also referred to paragraphs 181, 182 and 185 of the judgment, where the Court eschewed the confessional statement of the accused from consideration on the grounds that they were not apprised of the right to consult a legal practitioner either when they were initially arrested or after POTA was introduced in the case. The learned Counsel contended that the reasons for which the Court held that strict compliance with the Constitutional safeguards was necessary in Navjot Sandhu would hold equally good in the present case as well. As observed in that case, the protections under Sections 32 and 52 of the POTA ultimately flow from Articles 20(3), 21 and 22(1) of the Constitution. It would, therefore, be incorrect to contend that the magistrate recording a confession under Section 164 of CrPC had no obligation to comply with the Miranda rule or the requirements of Sections 32 and 52 of the POTA only because Miranda and Navjot Sandhu are cases in which confessions to police officers were admissible while, under the normal law of the land, confession to police officers are not admissible in evidence. It is precisely because the police cannot be expected to inform the accused of his Constitutional rights that the magistrate must be required to do so when the accused is brought for recording his/her confession. Mr. Ramachandran submitted that in Navjot Sandhu the Court actually implanted the right to information within articles 20(3), 21 and 22(1) and submitted that in order to give any meaningful content to those three articles it was necessary to read them along with Article 19(1) (a) of the Constitution. He submitted that unless a person is informed, in clear terms, that it is his basic right to be defended by a lawyer he would not be in a position to exercise the right under Article 22(1) in any informed and effective manner. He contended that it should be obligatory for every authority responsible for deprivation of liberty of a person to inform him of his rights. It, thus, followed that a magistrate, at the stage of recording a confession under Section 164 CrPC, should mandatorily make the accused aware of his rights under Articles 20(3) and 22(1). Mr. Ramachandran submitted that in this case, though the magistrate (PW-218) asked the appellant whether he required a lawyer, she was also bound to find out whether he was made this offer earlier. He further submitted that even strict compliance with Section 164 CrPC would not fulfil the Constitutional requirements in the absence of a Constitutional choice by the accused to avail or not to avail of a defence lawyer. He pointed out that Section 304 of the CrPC makes it mandatory to provide a defence lawyer at the trial stage and this requirement of law cannot be waived by the accused. In the same way, he argued, the administration of justice mandates the provision of a defence lawyer at the earliest because a lawyer provided at the trial stage would be disabled from offering any effective defence if he is presented with a fait accompli in the form of a confession in which the accused condemns himself. It is, therefore, imperative that a Constitutionally acceptable choice is made by the accused before a point of no return is reached. He further submitted that a statutory caution administered by a magistrate, howsoever carefully done in letter and spirit, cannot be a substitute for a lawyers advice. By the very nature of their differing professions, a judge and a lawyer perform different roles in this context. A judge is required to be detached and can therefore only administer cautions. The nature of legal advice is entirely different.

415. Mr. Ramachandran further submitted that the omission to make the appellant aware of his Constitutional right to consult, and be defended by, a legal practitioner resulted in the denial of protection against

self- incrimination guaranteed under Article 20(3) of the Constitution. In support of the submission, he relied upon a recent decision of this Court in Selvi and others v. State of Karnataka[76]. He referred to paragraphs 92 to 101 under the marginal heading Historical origins of the right against self-incrimination; paragraphs 102 to 112 under the marginal heading Underlying rationale of the right against self-incrimination; paragraphs 113 to 119 under the marginal heading Applicability of Article 20(3) to the stage of investigation; and paragraphs 120 to 144 under the marginal heading Who can invoke the protection under Article 20(3)?.

Mr. Gopal Subramanium:

416. In reply to the submissions made on behalf of the appellant, Mr. Subramanium submitted that all Constitutional rights of the appellant, including the right to be defended by a lawyer and protection against self- incrimination, were fully secured and up-held and it is incorrect to say that the trial of the appellant was vitiated by denial of any Constitutional right or privilege to him. Mr. Subramanium agreed that the Constitution of India indeed accorded a primary status to the rights of a person accused of committing any offences. Article 21 of the Constitution guaranteed the right to life and personal liberty in the widest amplitude, and other related provisions in the Constitution provided for the safeguards essential to preserve the presumption of innocence of the accused, as well as for the trial of the accused in an adversarial system. He further pointed out that the rights, privileges and protections accorded by the Constitution to a person accused of committing a criminal offence were comprehensively translated into the statutory scheme framed by Parliament; and that the relevant provisions of the Criminal Procedure Code, 1973, and the Indian Evidence Act, 1872, were crafted in such a way as to translate the Constitutional promises to the accused into reality and to ensure that the rights, privileges and protections given to the accused are, in fact, available to him in actual practice.

417. The Constitutional rights and protection referred to by Mr. Ramachandran are to be found in Articles 20(3), 21 and 22(1) which are as follows:

20. Protection in respect of conviction for offences. ... ...

(3) No person accused of any offence shall be compelled to be a witness against himself.

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.

22. Protection against arrest and detention in certain cases.(1) 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.

418. Mr. Subramanium submitted that the Constitution prescribed values and norms and set out standards of socio-political life, but for actual enforcement those norms and standards were manifested in the provisions of the CrPC. He submitted that in order to understand the true import and contents of the provisions of the CrPC, one must look for the Constitutional norms and standards incorporated in those provisions. Thus viewed, the provisions of the CrPC would appear to be the Constitutional guarantees at work.

419. He referred to Section 161 of CrPC that provides as follows:

161. Examination of witnesses by police. (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records:

Provided that statement made under this sub-section may also be recorded by audio-video electronic means. (Emphasis supplied)

420. He pointed out that the provisions of sub-section (2) of Section 161 that disallow incriminating answers to police interrogations, are clearly an extension and application of the principle enshrined in Article 20(3).

421. A similar position obtains from the provisions of Section 162, which reads as follows:

162. Statements to police not to be signed: Use of statements in evidence. (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re- examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

Explanation.An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. (Emphasis supplied)

422. Mr. Subramanium stated that sub-section (1) of Section 162, insofar as it makes any statement, in any form, made to police officers inadmissible, is a mirror reflection of the right against self- incrimination contained in Article 20(3). He pointed out that sub-section (2) of Section 162 carves out only limited exceptions to sub-section (1), to the extent of statements falling under the provisions of Sections 32(1) and 27 of the Evidence Act, 1872.

423. Section 163 of CrPC is also significant in its import:

163. No inducement to be offered. (1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in Section 24 of the Indian Evidence Act, 1872 (1 of 1872).

(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will:

Provided that nothing in this sub-section shall affect the provisions of sub-section (4) of Section 164 (Emphasis supplied)

424. Mr. Subramanium submitted that sub-section (1) of Section 163 contains the universally accepted principle, enjoining against inducement or coercion etc.; but it is sub-section (2) that rounds off and

completes the provision by introducing the distinction between a statement obtained by inducement, coercion etc., and another made freely and voluntarily and separating the one from the other; sub-section (2) upholds the individual volition of an accused person to confess to an offence, as an attribute of his free will.

425. Mr. Subramanium further submitted that the scheme of Sections 161 to 163 needs to be understood in the context of the investigation process in India. He stated that the inadmissibility of statements by the accused to the police and the resultant distancing of the police from the accused are meant to adequately protect and uphold the rights and liberty of the accused. Though primarily providing a procedural framework, the Code also contained provisions meant to be substantive safeguards for an accused person. Under Indian law, there is no concept of incriminatory statements whilst in the course of police investigation (except as contemplated under Section 162(2)). The law contemplates only judicial confession, recorded in accordance with Section 164 CrPC, to be admissible as evidence.

426. Section 164 CrPC is another statutory incorporation of the Constitutional privilege against self-incrimination and it reads as follows:

164. Recording of confessions and statements. (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.] (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect: I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. (Signed) A.B.

Magistrate. (5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried. (Emphasis supplied)

427. Mr. Subramanium pointed out that sub-section (1) of Section 164 provides for the recording of a confession during the course of an investigation under Chapter XII of CrPC; sub-section (2) of Section 164

mandates the magistrate to administer the pre-confession caution to the accused and also requires the magistrate to be satisfied, as a judicial authority, about the confession being made voluntarily. Further, sub- section (2) has to be read with sub-section (3), wherein it is provided that if, at any time before the confession is recorded, the person appearing before the magistrate states that he is not willing to make the confession, the magistrate shall not authorise the detention of such person in police custody. The post-confession safeguard is incorporated under sub- section (4), wherein the magistrate is required to make a memorandum at the foot of the confession regarding the caution administered to the accused person and a certificate to the effect that the confession as recorded is a full and true account of the statement made.

428. The protection of the privilege of the accused against self- incrimination is thus cast as a mandatory duty upon the magistrate, a judicial authority, under sub-sections (2), (3) and (4) of Section 164.

429. Mr. Subramanian further submitted that the confession of the accused under Section 164 CrPC is not a statement recorded under oath and, therefore, the proceedings retain their adversarial character and do not take any inquisitorial colour. He contrasted the recording of a confession under Section 164 with the examination of the accused as a witness in support of his own case (under Section 315 CrPC), wherein the accused is examined on oath, and pointed out that the voluntary character of the judicial confession is, thus, ascertained at three stages:

i) Under Section 164(2), by the magistrate prior to the recording of the confession;

ii) Under Section 164(4), by the magistrate subsequent to the recording of the confession; and

iii) Upon the examination of the magistrate, who recorded the confession, on oath in course of the trial.

430. Mr. Subramanium argued that Indian law, in regard to the investigation of crimes, recognised and put into application the extremely important distinction between an involuntary statement obtained by inducement or coercion and a voluntary statement. The former was condemned and completely excluded from consideration as a piece of evidence but the latter was accepted as a sign of respect for the expression of free will. Thus, on the one hand, a confession or a statement cannot be obtained by means of inducement, threat or promise, as prohibited by sub-section (1) of Section 163, but, on the other hand, a confession made voluntarily as an expression of free will and volition cannot be disallowed as provided in sub-section (2) of Section 163 and Section 164.

431. Here Mr. Subramanium referred to the decision of this Court in State of Bombay v. Kathi Kalu Oghad[77], in which an eleven-Judge Bench of this Court examined the true import of Article 20(3) and held 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; and that the mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion.

432. In light of the decision in Kathi Kalu Oghad, Mr. Subramanium submitted that voluntary statements are not proscribed by Article 20(3) and do not amount to violation of the privilege against self-incrimination.

433. Having thus established the connections between the provisions of the CrPC and the relevant Articles of the Constitution, Mr. Subramanium contended that the provisions of Section 161, 162, 163 and 164 CrPC are mirror images of the Constitutional safeguards provided under Articles 20(3) and 21, and that compliance with the statutory provisions would amount to effective compliance with the Constitutional provisions. The provisions of the CrPC could naturally be tested against these Constitutional safeguards, and the manner in which the CrPC provisions are to be interpreted would be informed by the Constitutional safeguards in Articles 20 to 22, but once the CrPC provisions stand complied with, there is no scope for a separate and distinct species of Constitutional compliance. Thus,

the provisions of the CrPC would be amenable to be tested on the grounds of due process, but having passed such a test, compliance with the CrPC would entail compliance with the various Constitutional safeguards. The purpose of placing such safeguards in the Constitution is not to create a separate level of compliance, but to emphasize the importance and enduring nature of these protections by giving them Constitutional status.

434. Dealing with the right to legal assistance, Mr. Subramanium submitted that the right to legal aid and the stage when the right comes into effect are to be found in Article 22(1) of the Constitution, which states that no person who is arrested shall be denied the right to consult, and to be defended by, a legal practitioner of his choice. According to Mr. Subramanium, Article 22(1) has thus two significant facets:

i) The enablement of an arrested person to consult a legal practitioner of his choice;

ii) The right of an arrested person to be represented by a legal practitioner of his choice.

435. He submitted that the phrase to be defended made it clear that the character of the right guaranteed under Article 22(1) transforms from an enablement to a positive right only when an arrested person is put on trial.

436. In this regard, he made a reference to the provisions of Section 304 CrPC. He called the provisions of Section 304 CrPC as the statutory enablement of the right to legal aid and pointed out that the Section provides that, in a trial before the Court of Session, a pleader may be assigned to the accused for his defence if the accused is not represented by a pleader and it appears to the court that he may not have sufficient means to engage a pleader. The effectiveness of the right to legal aid at the stage of trial is also buttressed by the provisions of Section 169 CrPC, wherein an accused may be discharged upon the completion of the process of investigation if there is insufficient evidence or no reasonable ground of suspicion to justify the forwarding of the accused to a magistrate.

437. He added that the rationale behind the provision of the right to legal aid must be understood in the context of the Indian system of investigation. Unlike certain foreign jurisdictions, Indian procedural and evidence laws do not permit statements made to the police to be admissible, and only judicial confessions made to a magistrate in compliance with the provisions of Section 164 are admissible. The same position does not obtain in certain other jurisdictions, for example, the United States of America and the United Kingdom, where statements made to police officers are fully admissible and used as evidence against the accused. There are, therefore, consequences attached to statements made whilst in custody of the police in such jurisdictions; however, the same consequences do not attach under the Indian scheme of investigation of crimes.

438. Dealing with the Miranda decision, Mr. Subramanium submitted that the US decision was rendered in the context of a system in which statements made to police officers are admissible and it has, therefore, no application insofar as the Indian criminal process is concerned. Under Indian law, vide chapter XII of the CrPC, read with Sections 24 and 25 of the Evidence Act, 1872, statements made before the police are per se inadmissible and a confession is considered as admissible only if made to a magistrate, in accordance with the provisions of Section 164 of the CrPC. Indian law, therefore, completely excludes the possibility of an extra- judicial confession extracted by the police in the course of incommunicado interrogation in which the accused is subjected to threat, inducement or coercion.

439. The learned Counsel further submitted that the Miranda rule was substantially diluted even in the US and the Miranda decision has not been consistently and uniformly followed in the United States itself. In support of this submission, he referred to the judgment of the US Supreme Court in Davis v. United States[78], in which it was held by that Court that the suspect must unambiguously request for counsel and that the police were not prohibited from continuing with the interrogation if the request for counsel by the suspect did not meet the requisite level of clarity. Significantly, it was observed by

the US Supreme Court that a suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted.

440. Mr. Subramanium further submitted that the principle of waiver of the privilege against self-incrimination and the right to counsel was further elaborated upon by the US Supreme Court in its recent judgment in the matter of Berghuis, Warden v. Thompkins[79]. In the said judgment, the US Supreme Court reiterated the requirement of an unambiguous invocation of the Miranda rights by an accused person in order to avoid difficulties of proof and to provide guidance to officers.[80] The US Supreme Court has therefore developed a parallel jurisprudence with respect to the assessment of the waiver by the accused of his Miranda rights and has stated in Berghuis that a waiver must be voluntary, i.e. the product of a free and deliberate choice rather than of intimidation, coercion or deception, and made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

441. Mr. Subramanium also submitted that the Miranda principles that gave the accused the right to silence and an absolute right to counsel at the stage of police interrogation have not been uniformly followed in several other jurisdictions. He pointed out that the Miranda principle has been held to be inapplicable in Australia in a judgment of the High Court of Australia in Dietrich v. R.[81]. In this regard, he also referred to the judgment of the Supreme Court of Canada in R. v. Sinclair[82]. He also referred to a decision of the European Court in Salduz v. Turkey[83], and two decisions of the UK Supreme Court in Ambrose v. Harris (Procurator Fiscal, Oban) (Scotland)[84] and McGowan, (Procurator Fiscal, Edinburgh) v. B (Scotland)[85].

442. Mr. Subramanium also referred to a number of academic articles and papers to contend that, in the United States itself, the Miranda principles have been considerably eroded by later case laws.

443. Next, dealing with the issue of the right to counsel, as claimed on behalf of the appellant in light of the decision in Nandini Satpathy, Mr. Subramanium pointed out that at least in two cases, namely, Poolpandi v. Superintendent, Central Excise[86] and Directorate of Revenue Intelligence v. Jugal Kishore Samra[87], this Court had expressly declined to follow Nandini Satpathy.

444. Miranda and Nandini Satpathy, which draws heavily upon the former, are, of course, referred with approval in D.K. Basu and in Navjot Sandhu, but those decisions were in completely different contexts. In D.K. Basu, the Court was dealing with the use of compulsion during investigation and the need to insulate the accused from any coercive measures. It was in that connection that this Court issued guidelines incorporating the requirements that the arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation. Mr. Subramanium submitted that the decision in D.K. Basu has construed Article 22(1) as an enablement and not as a mandatory right.

445. Navjot Sandhu was the case of a terrorist attack on the Parliament of India and, in that case, this Court considered the import of the right to counsel in the context of the provisions of the Prevention of Terrorism Act, 2002. Mr. Subramanium submitted that a comparison of the provisions of the POTA with the Miranda principle was quite apt, in that the statutory scheme of the POTA, like US law, allowed confessions made to police to be admissible. With respect to the right to counsel, this Court made the following observation in paragraph 160 of the judgment, after analyzing the judgments in Miranda and Nandini Satpathy:

Based on the observations in Nandini Satpathy case 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 does not go so far as Miranda in establishing access to a lawyer at the interrogation stage.

446. Mr. Subramanium submitted that the Miranda principle has no application to normal criminal procedure in India because similar safeguards and precautions with respect to the rights of the accused are expressly recognized in India under the law. He emphasized that the rights of the accused (including the right against self-incrimination and the right to legal representation) have been placed on a much higher pedestal in Indian law, even prior to such judicial developments in the United States. The learned Counsel submitted that the Constitutional provisions of Article 20(3) and Article 22(1), read with the statutory protections under Sections 161, 162, 163 and 164 CrPC as well as Sections 24 and 25 of the Evidence Act, 1872, make the rights of an accused sacrosanct.

447. He also referred to the decision in Selvi, relied upon on behalf of the appellant, and submitted that in Selvi this Court made the following observations:-

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 warnings.

448. Summing up his submissions, Mr. Subramanium formulated them into the following points:- i) The right to legal assistance under Article 22(1) is not a mandatory right upon arrest, but an enablement to be exercised by the person arrested.

ii) The right against self-incrimination under Article 20(3) does not proscribe voluntary statements made in exercise of free will and volition.

iii) The right against self-incrimination under Article 20(3) has been statutorily incorporated in the provisions of CrPC (i.e. Sections 161, 162, 163 and 164) and the Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance with statutory provisions is also compliance with Constitutional requirements.

iv) The right to counsel as contemplated in the judgment of Miranda has not been followed in either the United States or in other jurisdictions, particularly due to the qualification of intelligent and voluntary waiver.

THE COURT:

449. Let us first put aside the Miranda decision that seems to have entered into the discussions of this case as a red herring. The Miranda decision was rendered under a system of law in which an utterance made by a suspect before the police could lead to his conviction and even the imposition of the death penalty. From the judgment in the Miranda case it further appears that the police would subject the suspect to incommunicado interrogation in a terribly oppressive atmosphere. The interrogator would employ all the intimidation tactics and interrogations skills at his command, not to find out the truth but to somehow crack the suspect and make him confess to his guilt. It was in such a situation that the US Supreme Court evolved the Miranda rules, in order to provide necessary protection to the accused against self-accusation and to ensure the voluntary nature of any statement made before the police, and came to hold and direct as under:

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self- incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. 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. (Emphasis Added)

450. We have not the slightest doubt that the right to silence and the right to the presence of an attorney granted by the Miranda 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 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:

A recurrent argument made in these cases is that societys need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court

451. 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:

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.

452. 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[88] in the following words:

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.

453. 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.

454. Moreover, a bare reference to the provisions of the CrPC would show that those provisions are designed to afford complete protection to the accused against self-incrimination. Section 161(2) of the 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 the CrPC is Section 25 of the Evidence Act that makes any confession by an accused made to a police officer completely inadmissible. Section 163 of the 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 authorize 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 of the CrPC is to be read along with Section 26 of the Evidence Act, which provides that no confession made by any person whilst he is in the custody of a police officer, unless

455. 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 principles for providing protection against self- incrimination to the accused.

456. Here it will be instructive to see how the Miranda decision has been viewed by this Court; in what ways it has been referred to in this Courts decisions and where this Court has declined to follow the Miranda rules.

457. Significant notice of the Miranda decision was first taken by a three- Judge bench of this Court in Nandini Satpathy. 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 Section 5(1) and (2), 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 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:

(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. Over-reaching 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 lawyers 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 advocates 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 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.

458. In later decisions, Nandini Satpathy 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.

459. In Poolpandi, the appellants before this Court, who were called for interrogation in course of investigation under the provisions of the Customs Act, 1963, and the Foreign Exchange Regulation Act, 1973, claimed the right of presence of their lawyer during interrogation, relying strongly on Nandini Satpathy. 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 paragraph 4 of the judgment as under:

Both Mr. Salve and Mr. Lalit strongly relied on the observations in Nandini Satpathy v. P.L. Dani. We are afraid, in view of two judgments of the Constitution Bench of this Court in Ramesh Chandra Mehta v. State of W.B. and Illias v. Collector of Customs, Madras, the stand of the appellants cannot be accepted. The learned counsel urged that since Nandini Satpathy case was decided later, the observations therein must be given effect to by this Court now. There is no force in this argument.

460. More recently in Directorate of Revenue Intelligence, (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 and relying upon the decision in Poolpandi, rejected the claim; but, in light of the decision in D.K. Basu 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 authorized by him, with the condition that the advocate or person authorized 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.

461. But, as has been said earlier, Nandini Satpathy and Miranda may also be found referred quite positively, though in a more general way, in several decisions of this Court. In D.K. Basu, 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 paragraph 22 of its judgment, the Court observed:

..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 otherwiseThe precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under-trials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

462. 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 paragraph 32 of the judgment, referred to the opening lines of Part IV of the judgment in Miranda.

A recurrent argument, made in these cases is that societys need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. [See e.g., Chambers v. Florida[89], US at pp. 240-41: L Ed at p. 724: 60 S Ct 472 (1940)]. 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. (Emphasis Original)

463. Navjot Sandhu is a case under the Prevention of Terrorism Act, 2002 (in short POTA). The law of the 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 the 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 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 and D.K. Basu. In that regard, the Court also referred in paragraph 55 of the judgment to the decision in Nandini Satpathy, and in paragraph 63 to the Miranda decision, observing as follows:-

In the United States, according to the decisions of the Supreme Court viz., Miranda v. Arizona[90]; Escobedo v. Illinois[91] 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 (decided in 1966), it was held that the right to have counsel present at the interrogation was indispensable to the protection of the Vth 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.

464. As we see Navjot Sandhu, it is difficult to sustain Mr. Ramachandrans submission made on that basis. To say that the safeguards built into Section 32 of the 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 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.

465. What seems to be overlooked in Mr. Ramachandrans submission is that the law of the POTA is a major departure from the common criminal law process in this country. One can almost call the POTA and a few other Acts of its ilk as exceptions to the general rule. Now, in the severe framework of the 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 the CrPC and the Indian Evidence Act, 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 the POTA should also apply to the mainstream criminal law procedure.

466. We are also not impressed by Mr. Ramachandrans 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.

467. 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 defense 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.

468. In light of the above discussion, we are in agreement with the submissions of Mr. Subramanium as formulated in paragraphs II and III of his summing up. 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 the 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.

469. But on the issue of the right of the suspect or the accused to be represented by a lawyer, we find Mr. Subramaniums submissions equally unacceptable. 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 crystallizes only at the stage of commencement of the trial in terms of Section 304 of the 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.

470. Article 22(1) was part of the Constitution as it came into force on January 26, 1950. The Criminal Procedure Code, 1973 (Act 2 of 1974), that substituted the earlier Code of 1898, came into force on April 1, 1974. The CrPC, as correctly explained by Mr. Subramanium in his submissions, incorporated the Constitutional provisions regarding the protection of the accused against self-accusation. The CrPC 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 crystallize only on the commencement of the trial.

471. 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 West Bengal v. Anwar Ali Sarkar[92] made the following observations:-

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 our times. They are not just dull, lifeless words static and hide-bound 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?

472. 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 (42nd Amendment Act,

1976) with effect from 3.1.1977 as part of the Directive Principles of the State Policy. The Article reads as under:-

Article 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.

473. 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 39A 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)

474. 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 Scheduled Castes and Scheduled Tribes, women and children and persons in receipt of annual income less than Rupees nine thousand (Rs 9,000/-) 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 concerned person 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.

475. 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 of the CrPC.

476. And this leads us to the second ground for not accepting Mr. Subramaniums submission on this issue. Mr. Subramanium is quite right and we are one with him in holding that the provisions of the 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 statutes 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 the 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.

477. 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 (IV) v. Home Secretary, State of Bihar[93], 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 paragraph 7 of the judgment the Court observed and directed as under:

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 under-trial 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 under-trial 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.

478. Two years later, in Khatri (II) 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 paragraph 5 of the judgment, the Court said:

This Court has pointed out in Hussainara Khatoon (IV) case[94] 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.

479. Then, brushing aside the plea of financial constraint in providing legal aid to an indigent, the Court went on to say:

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.

480. In paragraph 6 of the judgment, this Court further said:

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)

481. The resounding words of the Court in Khatri (II) are equally, if not more, relevant today than when they were first pronounced. In Khatri (II) 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.

482. As noted in Khatri (II) 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 chargesheet is submitted and the magistrate applies his mind to the chargesheet 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.

483. To deal with one terrorist, we cannot take away the right given to the indigent and under-privileged people of this country by this Court thirty one (31) years ago.

484. 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 concerned magistrate liable to departmental proceedings.

485. 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 chargesheet 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 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.

486. 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?

487. 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[95]).

488. 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.

489. Having thus enunciated the legal position, we may examine the facts of the appellants case. As noted in the earlier part of the judgment (under the marginal heading Kuber), the appellant was arrested by Marde (PW-48) at DCB-CID, Unit III, on November 27, 2008, at 10.45PM. At the time of his arrest the appellant stated that he was a Pakistani national and he did not have any friend or relative in India. Marde, accordingly, made a note in the Record of Formalities to be Followed at the time of Arrest[96] that intimation of his arrest could not be given to anyone in India but information about his relatives was being procured for giving intimation to them (in Pakistan). He added that information about his arrest was duly given to the Crime Branch, the Control Room and the superior officers. He also noted in the Arrest Panchnama that the appellant belonged to an economically weaker section, with an annual income of under Rupees twenty thousand (Rs.20,000/-) per annum. What is important for the present, however, is the note in the Record of Formalities .. that the appellant refused the offer of legal aid made to him.

490. We were also shown an undated letter written by the appellant to the Pakistani Consulate/High Commission (Pakistani Wakalat), New Delhi. The letter is in broken Urdu and is written in half-literate handwriting. The appellant handed over the letter to Marde on December 10, 2008. Marde passed the letter to his superiors, and the ACP (Crime), Mumbai, forwarded it to the Joint Secretary (Foreigners), Ministry of Home Affairs, Government of India, on December 11, 2008, with a request to arrange Consular access for the appellant. In this letter, the appellant asserts his Pakistani identity and nationality, and states that after having received armed training at different places in Pakistan, he and his associates made an attack on India. In the exchange of firing with the police, Ismail was killed and he received gun-shot injuries. He requested legal aid and asked that the Pakistani authorities should make arrangements to take the dead body of Ismail to his home. He signed the letter as Yours Patriotic (Aapka Watan Parast) Mohammad Ajmal.

491. Further, on December 26, 2008, on being produced before the Additional Chief Metropolitan Magistrate, he handed a similar letter, written by him in Urdu, to the magistrate. In this letter, he once again asserted his Pakistani identity and nationality, and requested a Pakistani lawyer. In this letter, he clearly said that he did not want any Indian lawyer for his defence. He also said that he had already written a letter to the Pakistani Consulate/High Commission, requesting a lawyer, but he failed to get any reply from there. He requested the magistrate to make a request on his behalf to the Pakistani Consulate/High Commission for providing him legal aid. On that date, the court remanded him to magisterial custody for the purposes of an identification parade, recording in the order sheet that the appellant had requested a Pakistani lawyer. On December 29, 2008, the Additional Chief Metropolitan Magistrate 37th Court, Esplanade, Mumbai, took the rather unusual step of directly forwarding the appellants letter to the Honble Ambassador, Pakistan, with a covering letter under his seal and signature. Unfortunately for the appellant, the country of his nationality was in a mode of complete denial at that stage, and there does not seem to be even an acknowledgement of his letters requesting a Pakistani lawyer. On February 17, 2009, the appellant was produced before the Additional Chief Metropolitan Magistrate for recording his confession under Section 164 of the CrPC, and we have already seen in great detail the proceedings of the next four dates till February 21, 2009. On February 25, 2009, a chargesheet was submitted in the case, and on March 23, 2009, the appellant was produced before the Sessions Court through electronic video linkage for the first time. He then made a request to be given a lawyer at the expense of the State. On March 30, 2009, the court appointed Ms. Anjali Waghmare to represent the appellant from the panel of lawyers maintained by the court. Moreover, since the appellant was charged with offences carrying the death penalty, under legal-aid rules he was entitled to be defended by a senior lawyer assisted by a junior. The court, therefore, appointed Mr. Pawar as the junior counsel to represent the

appellant on April 1, 2009. At this stage, one Kaikhushru Lam, who had been clamouring for some time to be allowed to represent Kasab, filed a petition against the appointment of Ms. Anjali Waghmare, stating that she was representing a victim of the terrorist attack and a potential witness in the trial for compensation for the victim, in a separate civil proceeding. When this fact came to light, the trial judge revoked the appointment of Ms. Anjali Waghmare by a reasoned order passed on April 15, 2009, observing that there was a possibility of conflict of interests. Then, after careful consideration and consultations with a number of senior advocates, the court finally chose Mr. Abbas Kazmi, advocate, to represent the appellant. The court selected Mr. Kazmi in consultation with the President of the Bar, and taking into account the magnitude of the case and the competence and experience of Mr. Kazmi. Mr.Kazmi was then provided a chamber on the first floor of the court building and was given all the facilities to conduct the case properly and without any difficulty (including round-the-clock armed security!).

492. On April 17, 2009, the confession of the appellant recorded by the Judicial Magistrate was opened before the court and copies were given to the Special Public Prosecutor and Mr. Kazmi. On that very day, Mr. Kazmi submitted an application (Exhibit 18) stating that the appellant retracted from the confession recorded before the magistrate. On the same day, the prosecution opened its case. It is another matter that, towards the end of the trial, Mr. Kazmi picked repeated quarrels with the court. From the orders passed by the court in that regard, it is clear that Mr. Kazmi was bent upon delaying the trial proceedings and was raising groundless objections at every step, trying to make it impossible for the court to proceed with the trial. As a result, the court was eventually forced to remove Mr. Kazmi from the trial. Mr. Kazmi challenged the courts order removing him from the trial before the High Court, but the High Court affirmed the order of the trial court. It may be noted here that even Mr. Ramachandran did not find any fault with the decision of the court to remove Mr. Kazmi from the court proceedings. From that stage, the appellant was represented by Mr. Pawar, who seems to have handled the case as well as anyone could have done in face of the evidence against the appellant.

493. On the basis of the appellants two letters in which he sought the help of the Pakistani Consulate/ High Commission to provide him with a Pakistani lawyer, Mr. Ramachandran submitted that it is clear that the appellant wanted a lawyer but he wanted a lawyer who should be Pakistani. He contended that it was, therefore, the duty of the court either to make arrangements for him to be represented by a Pakistani lawyer or to tell him clearly that his request could not be acceded to, but that under the Constitution of India he had the right to be defended by a lawyer and, in case he so wished, he would be given adequate legal representation. He argued that apart from the Constitutional and legal principles, the rules of natural justice demanded that the appellant be so informed.

494. We feel that Mr. Ramachandran is taking the matter to unacceptable extremes. It is seen above that the appellant was offered a lawyer at the time of his arrest by the police officer making the arrest. He declined the offer. He then wrote a letter to the Pakistani High Commission asking to be provided with a lawyer. He made a similar request in a second letter that was handed over to the Additional Chief Metropolitan Magistrate. In the second letter, there is an assertion that he did not want to be represented by an Indian lawyer. It is thus clear that, in his mind, the appellant was still at war with India, and he had no use for a lawyer from the enemy country. Moreover, the negative assertion that he did not want an Indian lawyer itself implies that he had received offers of legal counsel. But those offers were not acceptable to him.

495. The appellants refusal to accept the services of an Indian lawyer and his demand for a lawyer from his country cannot be anything but his own independent decision. The demand for a Pakistani lawyer in those circumstances, and especially when Pakistan was denying that the appellant was even a Pakistani citizen, might have been impractical, even foolish, but the man certainly did not need any advice from an Indian court or authority as to his rights under the Indian Constitution. He was acting quite independently and, in his mind, he was a patriotic Pakistani at war with this country.

496. On March 23, 2009, the appellant finally asked for a lawyer, apparently convinced by then that no help would come from Pakistan or anywhere else. He was then immediately provided with a set of two lawyers.

497. In the aforesaid facts we are firmly of the view that there is no question of any violation of any of the rights of the appellant under the Indian Constitution. He was offered the services of a lawyer at the time of his arrest and at all relevant stages in the proceedings. We are also clear in our view that the absence of a lawyer at the pre-trial stage was not only as per the wishes of the appellant himself, but that this absence also did not cause him any prejudice in the trial.

Too little time allowed to the lawyer for preparation:

498. Mr. Ramachandran submitted that after Mr. Kazmi was appointed by the court to represent the appellant, he filed an application on April 21, 2009, requesting for grant of four weeks time to prepare a reply to the submissions made by the Special PP under Section 226 CrPC. His application was only partly allowed and he was given only eight days time, till May 2, 2009, to prepare a reply to the address of the Special PP. On that date, Mr. Kazmi submitted an application raising the issue of the juvenility of the appellant, which was rejected by the court after it held an enquiry into the matter. Mr. Ramachandran submitted that the time of eight days given by the trial court to the court-appointed lawyer was unreasonably short, considering that Mr. Kazmi had made a reasonable request for four weeks time. The learned Counsel submitted that justice is not only to be done but also to be seen to be done, and the short time granted to the defence counsel fell foul of this principle and thus affected fair trial. He pointed out that while appointing Mr. Kazmi the court itself recognized that he was a lawyer of some standard and would be required to adjust his other commitments. Mr. Ramachandran, therefore, submitted that the trial procedure was also vitiated and that it cannot be said to be just, fair and reasonable because of the denial of sufficient time to the defence lawyer to prepare his case.

499. In support of the submission, Mr. Ramachandran relied upon an unreported decision of this Court in Owais Alam v. State of U.P.[97], in which this Court observed that an Amicus may feel hesitation in asking for time but the court itself must allow adequate time to him for preparing the case. He also relied upon the decision of this Court in Bashira v. State of U.P.[98]. In that case, the court had proceeded with the trial on the same day on which it appointed the Amicus to represent the accused. This Court held that the defence was not given sufficient time and, accordingly, set aside the judgments of the courts below and remanded the case for re- trial. Mr. Ramachandran relied upon yet another decision of this Court in Ranchod Mathur Wasawa v. State of Gujarat[99]. In this case, though this Court held that sufficient time was given to the counsel representing the accused, it observed that the courts should adopt a sensitive approach to see that the accused felt confident that the counsel chosen for him by the court has had adequate time and material to defend him properly.

500. Mr. Kazmi was appointed to represent the appellant on April 16, 2009, and he made an application for time on April 21, 2009. The court allowed him eight (8) days time, which cannot be said to be unreasonable. It is true that during those eight (8) days some very brief hearings were held on 2-3 days on the issue of the juvenility of the appellant. But that does not mean that the counsel for the appellant was not given sufficient time to prepare for the case.

501. Mr. Subramanium gave us a chart showing not only the day-to-day developments in the trial but also giving details of the hours of the court proceedings on each day, and from this chart we are satisfied that Mr. Kazmi was allowed ample time for preparation.

502. It would be pertinent to note here that Mr. Kazmi himself never complained about not being given sufficient time. We may further note that, from the record of proceedings of the trial court, Mr. Kazmi does not appear to be the non-complaining type, one who would suffer silently or take things lying down. In the later stages of the trial, Mr. Kazmi raised all kinds of objections and left no opportunity to

noisily protest against the procedural decisions of the trial court, yet he never complained that he was given insufficient time for preparation.

503. We further find that, in the course of the trial, when Mr. Kazmi requested for adjournment for cross-examination of some important witnesses, the court accommodated him on most occasions. We are, therefore, unable to agree with Mr. Ramachandran that the defence was not allowed sufficient time for preparation of the case and that denial of sufficient time vitiated the trial.

II. The charges not established

504. Mr. Ramachandran feebly submitted that the evidence adduced by the prosecution did not fully establish all the charges against the appellant. But finding us not inclined to even listen to this he moved on to his other submissions trying to chip away at the prosecution case in different ways.

III. Confession Not Voluntary and Liable to be Eschewed from Consideration

505. Mr. Raju Ramachandran submitted that the confession by the appellant was not voluntary but that it was a tutored statement to suit the prosecutions case. The very language, tone and tenor of the confession showed that it was not voluntary in nature. There were many indicators in the confession itself showing that it was made at the instance of the investigating agency. Mr. Ramachandran submitted that the confession was inordinately long and it was full of unnecessary details that were completely out of place, as those had no connection or relevance to the offences in regard to which the confession was being made. The learned Counsel pointed out that the confession started by giving the address of the village where the appellant was born and where he spent his childhood. The appellant then gave the names of his parents and the mobile phone number of his father; the names of his younger siblings who lived with his parents and those of his elder brother and sister who were married and lived at different places, along with their addresses. After the names of the immediate family, he went on to give the names and addresses of his uncles and aunts and cousins, both on the paternal and maternal sides. Those were people whom the appellant had left long before joining the Lashkar-e-Toiba and taking on the mantel of a Jihadi. Mr. Ramachandran submitted that there was no reason to mention all of them in a confession regarding the terrorist attack on Mumbai. He further pointed out that the appellant seems to exhibit a phenomenal memory in the confessional statement, naming a large number of persons with their aliases and their home towns, with street names as well as the names given to them by the Jihadi group, along with the Hindu names assigned to them for the purpose of the attack on Mumbai. In regard to his visits to the different offices of the Lashkar-e-Toiba at different places, the appellant would mention not only the mode of transport but also the time taken in travelling from one place to another. He would give the name of the person whom he met at the gate of the office and then of the person whom he met inside the office. He would say what was written on the slips of paper given by one office while sending him to the other office or training camp. According to Mr. Ramachandran, all those details were quite unnecessary in a confession and a person making a confession with regard to the Mumbai attack would normally not go into all those particulars on his own unless prompted by some external agency.

506. He further submitted that the confession as recorded by the magistrate was too tightly organized, well-structured and properly sequenced to be the true and honest narrative of the appellant, who was merely a semi-literate rustic. The confession started with the childhood days of the appellant at his village Faridkot, tehsil Dipalpur, district Okara, Punjab Province, Pakistan, and ended with his arrest at Vinoli Chowpaty in Mumbai, and all the intervening circumstances were detailed one after the other in a highly structured and properly sequenced manner. He submitted that a person of the appellants education, when making an oral confessional statement, was bound to slightly ramble and many parts in the narrative would be out of sequence, but that was not so in the appellants confessional statement as produced before the court.

507. Mr. Ramachandran next pointed out that there were certain words occurring in the confessional statement which could not possibly have been used by the appellant and which show that the confessional statement was not in his own words. For instance, he referred to the record of proceedings dated February 18, 2009, before the learned magistrate, Mrs. Sawant-Wagule (PW-218), who recorded his confessional statement. The magistrate asked (vide question number 14) him the offence about which he wanted to make a confessional statement. In reply, the appellant is shown to have said that he wanted to make the confessional statement in connection with the Fidayeen attack on Bombay by him along with his associates on November 26, 2008, as well as the Sahzish behind the attack. Mr. Ramachandran said that Sahzish is an Urdu word which would be roughly translated into English as conspiracy but that it has negative connotations. To the appellant, the preparation and the training for launching the attack on India were a patriotic duty and not Sahzish. He also referred to the passage in the confession about the training camp at Muzzaffarabad. In the confessional statement the appellant is shown to have described Muzaffarabad as being situated in POK. Mr. Ramachandran submitted that for the appellant, unlike for an Indian, this region was not POK (Pakistan Occupied Kashmir) but rather it was Azad Kashmir, and contended that the appellant could not have used the words Sahzish or POK and several other similar words that occur in his confessional statement.

508. Mr. Ramachandran further submitted that operations of the kind in which the appellant was involved work strictly on a need to know basis, such that individual operatives are given information limited to what is essential for execution of the role assigned to them. This is for their own safety and for the safety of the larger group, as also for the success of the conspiracy. But in this case it would appear that, in the course of his training, the appellant was being freely introduced to all and sundry in the organization and was also told about their respective positions in the hierarchy of the organization and their special skills. As an instance, Mr. Ramachandran referred to the passage in the confessional statement where the appellant is taken to the media room of the organization and Kafa tells him about Zarar Shah being the head of the media wing of the organization.

509. Mr. Ramachandran pointed out that the appellant describes a number of events in the course of his training in Pakistan in the minutest detail. He not only recalls what someone said at that time but actually reproduces long statements made by someone else in direct speech, which is recorded by the magistrate within inverted commas. The learned Counsel submitted that this feature of the confessional statement was itself sufficient to discredit it.

510. He further pointed out that, at several places, in course of some discussion in a group, the appellant asks a question to elicit an answer that would fit exactly into the prosecutions case. Mr. Ramachandran submitted that, if viewed objectively, those parts of the confession would appear quite out of place and contrived. He also referred to some other passages in the confessional statement, like the one where the members of the terrorist squad are told that the SIM cards for their mobile phones were procured from India by fooling some people there, and characterised these passages as quite contrived and out of place.

511. Mr. Ramachandran further submitted that the introduction of Fahim and Sabauddin (accused 2 and 3) with the maps allegedly prepared by them, in the confessional statement, was clearly fabricated. He said that the other two accused were mentioned in the confession at three places and at each place the reference appeared to be more incongruous than at the other.

512. Mr. Ramachandran submitted that, beginning from the Kuber right up to his being taken into custody at Vinoli Chowpaty, the appellant seems to be narrating events so as to confirm all the findings of the investigation. Mr. Ramachandran referred to the passage where Abu Ismail and the appellant proceed in the Skoda car, having snatched the vehicle from its owner at gun- point. At this point, the appellant asks Abu Ismail where they are going and Abu Ismail vaguely replies that they are going to Malabar Hill and, on being asked again, tells the appellant that he would tell him the exact destination only after

reaching Malabar Hill. And then, as they pass through the road by the sea, the appellant recalls that this was the same road as was shown in the maps prepared by the other two accused, as going towards Malabar Hill. Mr. Ramachandran said that if Malabar Hill was actually the area they were headed for, it is impossible to believe that he would not know their exact target there, or that Abu Ismail would hold it back from him till they reached there. The learned Counsel contended that the whole passage was clearly an untrue insertion for filling up the blanks in the prosecution case.

513. Mr. Ramachandran also referred to two other passages in the confession, one relating to the terrorists encounter with two persons as they came ashore at Badhwar Park, and the other regarding the appellants planting of an RDX bomb in the taxi by which the appellant and Abu Ismail came to CST. Mr. Ramachandran submitted that the first passage was intended to prop up the evidence of Bharat Dattatrya Tamore (PW-28), who was just a chance witness and whose credibility was otherwise wholly unsupported; and the other passage was to foist the killings in the taxi blast at Vile Parle on the appellant, for which also there was otherwise no evidence.

514. Mr. Ramachandran further submitted that the appellant had wanted to make a confession as soon as he was apprehended (see his answer to question no. 9 by the magistrate in the record of proceedings dated February 18, 2009, before Mrs. Sawant-Wagule, PW-218). Even Ramesh Padmanabh Mahale, the Chief Investigating Officer (PW-607), said in his deposition in court that he realised in the first week of December 2008 that the appellant was willing to give a confession before a magistrate (vide Paragraph 25 of his deposition before the court). And yet, he was brought before the magistrate for making the confession as late as February 17, 2009. That the appellant was produced before the magistrate only after the investigation was complete is evident from the fact that the recording of the confession was completed on February 21, 2009, and the chargesheet was filed on February 25, 2009. Mr. Ramachandran submitted that after the investigation was over, the police wanted the appellant to confirm all the findings made in course of the investigation and that the appellant was produced before the magistrate with that objective.

515. Mr. Ramachandran submitted that for the reasons pointed out by him, this Court should keep the appellants confessional statement completely out of consideration. And if the confessional statement is put aside then his conviction, at least for the murder committed on the Kuber and the killings in the Vile Parle taxi blast, cannot be sustained.

516. We have read the appellants confession a number of times in light of its denunciation by Mr. Ramachandran as not being a voluntary statement. But we find it impossible to hold that the confession is not voluntary and is liable to be thrown out for that reason. Indeed, some of the criticisms by Mr. Ramachandran appear, at first sight, quite convincing, but a little reflection would show that there is not much force in any of those criticisms. Before proceeding further, however, we may state that his censure regarding the mentions of the other two accused in the confessional statement is quite justified, and we too find the references to accused 2 and 3 at three (3) places in the confessional statement highly unsatisfactory. We are also of the view that the reference to their destination being Malabar Hills when Abu Ismail and the appellant were caught at Vinoli Chowpaty is equally vague, and that also is perhaps mentioned to establish a connection with the alleged maps prepared by accused 2 and 3. But so far as the rest of the very detailed confession is concerned, there is absolutely no reason to doubt that it was made voluntarily and without any influence or duress from any external agency.

517. Taking Mr. Ramachandrans criticisms one by one, the detailed references by the appellant to his parents and a larger number of his relatives, their addresses and the mobile phone numbers of some of them, and his references to the different places in Pakistan, appears to us to be directed against the Pakistani authorities. It is the appellants assertion, made consciously or subconsciously, of his Pakistani identity and nationality. It is noted above that, shortly after his arrest, he had sent two letters (one undated, handed over to Marde; the other dated December 26, 2008, and handed over to the

Additional Chief Metropolitan Magistrate; both addressed to the Pakistani High Commission asking for a Pakistani lawyer). Those two letters were not even acknowledged and, for all intents and purposes, he was disowned by the country to which he belongs. Thus, in the statement that he made before the magistrate on February 20, 2009, the appellant was making it clear that he was a Pakistani by birth and by citizenship, and was making assertions that no one could deny.

518. Proceeding to the structure of the statement the sequence of events narrated therein and the use of some words that prima facie seem unnatural in his mouth. It needs to be kept in mind that the appellant was making the statement after being in police custody for several months. The police, in the course of countless sessions of interrogations, would have turned him inside out, and he would have earlier made the very same statements in the same sequence before the police many a times. Under relentless police interrogations, he would have recalled the smallest details of his past life, specially relating to the preparation and training for the attack on Mumbai. (The statements made before the police were not, however, admissible in evidence as being barred by the various provisions of the CrPC and the Evidence Act, as discussed in detail above.) But when the appellant went to the magistrate to make his confession, everything would be completely fresh in his mind. He would also have unconsciously picked up those words pointed out by Mr. Ramachandran from his interrogators, and these would have become part of his own vocabulary. We, therefore, find nothing surprising in his uttering words like Sahzish or POK.

519. As to his knowing the names of many people in Lashkar-e-Toiba, their respective positions in the hierarchy and their roles in the organization, again there is nothing unusual about it. It is to be noted that the appellant was not a mercenary hired for the operation. He was a highly committed and devoted member of the organization and, therefore, there is nothing strange or wrong in his coming to know many people in the organization during the course of his training. Further, it is to be kept in mind that his being caught alive was not part of the plan of the handlers. According to the plan, he, like the other nine terrorists in the team, was supposed to die in the course of the attack, and with his death everything would have remained unknown.[100] It was only thanks to the fact of his being caught alive (which, as the phone transcripts indicate, made his handlers quite anxious) that the Indian authorities were able to learn the names of the other people in the organization, their specific roles and their positions in the organization. As to the recording of certain statements within quotes by the learned magistrate, that is only a manner of how the appellant spoke. The appellant would say a long sentence and then add that this was what so-and-so said. The magistrate would then record the statement within inverted commas even though the sentences would be made by the appellant himself, paraphrasing the words of others. Further, to say that the confessional statement was intended to confirm the findings of the police investigation is actually to blame the police for an excellent investigation. If the confessional statement confirms the findings of the investigation that should go to the credit of the investigation, and it cannot be said that the confessional statement was recorded to confirm the police investigation.

520. Finally, the production of the accused before the magistrate on February 17, 2009, even though he had expressed his willingness to make the confessional statement in early December, 2008, is equally legitimate and understandable. The police could not afford to lose custody of the appellant at that stage, as it was essential in connection with their investigation, which was still incomplete to a very large extent at that time. Once the appellant was produced for recording of the confession under Section 164 of the CrPC, the law ordained the magistrate to send him to judicial custody and not back on police remand. In those circumstances, the police was fully justified in producing the appellant for confession only after completing its own investigation, when it no longer needed the appellant in its custody.

521. Leaving aside Mr. Ramachandrans criticisms, the proof of the voluntariness and the truthfulness of the confessional statement comes directly from the appellants own statements. It is noted in the earlier part of the judgment that, on February 18, 2009, when the appellant was brought before the

magistrate, she asked him when he first felt like making a confession, to which he had replied that the thought of making the confession came to him when he was arrested by the police; he then added that he had absolutely no regret for whatever he had done. At another stage in the proceedings, the magistrate once again asked why he wished to make the confessional statement, to which he replied that he wanted to set an example for others to follow and to become Fidayeen like him. It is thus clear that he was not making a confessional statement from any position of weakness or resignation, or out of remorse. He was a hero in his own eyes, and in those circumstances it is not possible to hold that the confession was not voluntary. It may further be noted that, though Mr. Ramachandran questioned the voluntariness of the confession, he did not say that the statements made therein were untrue in any manner.

522. It needs to be noted here that, in the course of the trial, after fifty-eight (58) prosecution witnesses had been examined and the next witness, Police Sub-Inspector Chavan was about to enter the witness box on July 20, 2009, the appellant in the dock expressed a desire to have a word with his Counsel. After a brief consultation that lasted for about half a minute, Mr. Kazmi informed the court that the appellant wanted to say something to the court directly. On being asked to speak by the court, the appellant said that he was accepting his guilt. The Special Public Prosecutor objected to entertaining any plea of guilty at that stage, on the grounds that the stage of Section 229 CrPC was already over. The court, however, rightly overruling the objection, allowed the appellant to make a statement, which was recorded after giving him due caution.

523. This is once again a long statement but it does not have the organized structure that Mr. Ramachandran pointed out in respect of the confessional statement recorded by the magistrate. In his statement before the court the appellant began the story from CST station, where both he and Abu Ismail fired from AK-47 rifles and Abu Ismail threw hand grenades at a crowd of passengers. Starting from CST he went up to Vinoli Chowpaty, where he and Abu Ismail were finally caught. From there, he went back to the point when they had started their sea journey from Karachi for Mumbai, recounting their journey first on the small boat, then on the larger vessels Al-Hussaini and Kuber, until he came to the landing at Badhwar Park on the inflatable rubber boat. He then went back again to the various kinds of trainings that he had received at different places in Pakistan. However, what is of importance is that, though structurally and sequentially the statement made in the court is completely different from the confessional statement made before the magistrate, it has broadly the same contents. It is true that in the confessional statement he presents himself as the central figure in almost all the episodes while in the statement before the court he appears to be perceptibly retreating to the background. The lead role in and the overt acts are attributed to others rather than to himself. In all the offences that he committed in Mumbai along with Abu Ismail, it is now the latter who is in the lead and he himself is simply following behind him. The killing of Amarchand Solanki on the boat Kuber that he owned up to almost with pride before the magistrate is now assigned to Abu Soheb with Kasab not even present in the engine room. Significantly, however, as regards his joining of Lashkar-e-Toiba, the formation of the conspiracy, the preparation and training for the attack on Mumbai, as well as the identities of the men in the organisation, there is hardly any omission in the appellants statement made in the court.

524. Further, in the statement to the court, though there is mention of the hand-prepared maps, there is no mention of their source. There is no reference to Fahim and Sabauddin (accused nos. 2 and 3) as the maker and the deliverer (respectively) of those maps.

525. In the appellants statement before the court there is no reference at all to his family but the reason for this is not far to seek. In paragraph 40 of the statement recorded by the court the appellant said as follows:

I wanted to confess the offence. Since Pakistan had been disowning, I was not confessing. I have now learnt that Pakistan has accepted that I am Pakistani National and that they are ready to prosecute the

offenders. Therefore, I am voluntarily confessing to the charges framed against me. I have made the statement voluntarily without being influenced by any extraneous source or reason.

526. His Pakistani identity and nationality having been acknowledged[101] there was no need for the appellant to remind the Pakistani establishment of his nationality by giving details of his family and their addresses.

527. The court, of course, did not accept the statement that was sought to be made as the plea of guilty because it was a very diluted and partial admission of only some of the charges. It, accordingly, proceeded with the trial.

528. While dealing with the statements made by the appellant, it may also be noted that, finally, in the statement recorded under Section 313 of the CrPC, he denied the entire prosecution case and also retracted his two previous statements. It is evident that by the time the statement under Section 313 was recorded towards the end of December 2009, the Jihadi sheen had worn off and the desire to live was again exerting its pull on the appellant.

529. In light of the discussions made above, we are unable to accept Mr. Ramachandrans submission to eschew the appellants confessional statement made before the magistrate completely from consideration. We are clearly of the view that the confessional statement recorded by the magistrate is voluntary and truthful, except insofar as it relates to the other two accused, namely, Fahim and Sabauddin.

IV. Conspiracy

530. Mr. Ramachandran submitted that the charge of conspiracy cannot be said to have been fully established against the appellant. He pointed out that the appellant was charged with a larger conspiracy and he was alleged to have:-

1) Attempted to destabilize the Government of India by engineering violence in different parts in India;

2) Attempted to create instability in India by the aforesaid subversive activities;

3) Terrorized the people in different parts of India by indulging in wanton killings and destruction of properties through bomb attacks and use of fire-arms and lethal weapons;

4) Conspired to weaken Indias economic might;

5) Conspired to kill foreign nationals with a view to cause serious damage to tourism business of India;

6) Conspired to adversely affect harmony between various communities and religions in India.

531. The learned Counsel submitted that if the appellants confession is excluded from consideration there is not enough evidence brought by the prosecution to prove the aforesaid allegations beyond all reasonable doubts. He further submitted that the transcripts of the telephonic conversation which have been pressed by the prosecution to prove the charges relating to conspiracy cannot be used against the appellant.

532. We find no force in the submission. Earlier it is found that the confession by the appellant was quite voluntary and there was no violation of any Constitutional or legal right of the appellant in the recording of the confession. Hence, there is no reason for not taking the confession into consideration to judge the charges against the appellant. Moreover, in the earlier pages of this judgment we had examined the evidence of conspiracy in considerable detail, which may be broadly classified under three heads: (i) the confessional statement by the appellant; (ii) the objective findings in the vessel Kuber, the inflatable rubber dinghy, the different places of attack by the other groups of terrorists and the locations of bomb

explosion in the two taxis; and (iii) the transcripts of the phone conversations between the terrorists and their collaborators and handlers from across the border. In our view, evidence under any of these three heads is sufficient to bring home the charges relating to conspiracy against the appellant.

533. At this stage, however, we must address Mr. Ramachandrans point regarding the admissibility of the transcripts in evidence against the appellant. Mr. Ramachandran submitted that the transcripts begin from 01.04 AM on November 27, 2008, whereas the appellant was taken into custody at 00:30 hours on that date. In other words, the transcripts begin after the appellant was in police custody. He contended that with the arrest of the appellant his link with the other alleged conspirators was snapped, and it could no longer be said that he continued to be a part of the conspiracy. In that situation, the conversation among the alleged co-conspirators cannot be used against the appellant. In support of the submission, he placed reliance on a three-Judge Bench of this Court in State v. Nalini[102]. We find no force or substance in the submission, and the reliance placed on the decision in Nalini is quite misconceived. In Nalini, the Court was examining the question whether a confession made by an accused and recorded under Section 32 of TADA, though a substantive evidence against the maker thereof, could be used with the same force against a co-accused being tried in the same case. The Court considered the question first in light of the amendment of TADA by Act 43 of 1993, and came to hold and find that while a confession is substantive evidence against its maker, it cannot be used as substantive evidence against another person, even if the latter is a co-accused, and can only be used as a piece of corroborative material to support other substantive evidence. The State then fell back on Section 10 of the Evidence Act, arguing that the width of the provision is so large as to render any statement made by a conspirator as substantive evidence if it satisfies the other conditions of the Section. Rejecting the States submission, the Court pointed out that a confession can normally be made when an accused is under arrest and his contact with the other conspirators has snapped, and it was in that context that the Court held and observed in paragraph 111 of the judgment as under:-

Whether a particular accused had ceased to be a conspirator or not, at any point of time, is a matter which can be decided on the facts of that particular case. Normally a conspirators connection with the conspiracy would get snapped after he is nabbed by the police and kept in their custody because he would thereby cease to be the agent of the other conspirators. Of course we are not unmindful of rare cases in which a conspirator would continue to confabulate with the other conspirators and persist with the conspiracy even after his arrest. That is precisely the reason why we said that it may not be possible to lay down a proposition of law that one conspirators connection with the conspiracy would necessarily be cut off with his arrest.

534. In the case in hand the situation is entirely different. The phase of planning the attack and training for it, which form the core of the conspiracy, took place in Pakistan, and the terrorists, including the appellant, came to Mumbai in execution of the main objects of the conspiracy. The appellant was apprehended while he was on a killing spree in execution of the objects of the conspiracy and the transcripts of the phone conversation of the other terrorists, associates of the appellant and their foreign collaborators, relate to a time when the speakers were not only free but were actively involved in trying to fulfil the objects of the conspiracy. The transcripts are by no means any confessional statements made under arrest and they are fully covered by the provisions of Section 10 of the Indian Evidence Act. There is no reason not to take them into consideration in support of the charge of conspiracy against the appellant.

V. Waging War Against the Government of India

534. The appellant has been convicted on the charge of waging war against the Government of India and is awarded the death penalty under Section 121 of the Penal Code. In addition, he is separately convicted, under Section 121A, for conspiracy to commit offences punishable by Section 121 of the Code and Section 122 for collecting arms with intention of waging war against the Government of India, and given life sentences under these two Sections. Mr. Ramachandran stated that the conviction under

Section 121A pertains to the incidents at venues where the appellant was not present, and in that regard he has already made his submissions while dealing with the question of conspiracy. In regard to the conviction under Section 121, therefore, he would confine his submissions to the offences directly attributable to the appellant.

535. Mr. Ramachandran was anxious to somehow rescue the appellant from the grave charge of waging war against the Government of India. His anxiety in regard to this particular charge stems from the fact that the conviction for the offence of waging war has been viewed by the High Court as the most aggravating factor for awarding the death sentence to the appellant. Mr. Ramachandran evidently hoped that if he succeeded in getting the appellant acquitted of the charge of waging war he would be in a better position to plead before the Court for mitigation of the punishment and commutation of his sentence to life imprisonment.

536. Mr. Ramachandran argued that killing of people, even though in large numbers, within the precincts of CST, or the other offences committed by the appellant, earlier described under the heads Cama in, Cama out, Skoda robbery and Vinoli Chowpaty, by no means amount to waging war within the meaning of Section 121 of the Penal Code. To constitute the offence of waging war, there must be a challenge to the sovereign authority of the Government of India, which is completely absent in the present case. The learned Counsel submitted that the acts said to have been committed by the appellant may constitute a terrorist act within the meaning of Section 15 of the Unlawful Activities (Prevention) Act, 1967, but not waging war. He further submitted that if the views of the trial court and the High Court were to be upheld, it would amount to equating every terrorist act with waging war.

537. Mr. Ramachandran submitted that even assuming that the words Government of India in Section 121 of the Penal Code are to be read as synonymous with the Indian State, that would not make the attack on CST Station waging war within the meaning of that Section. The attack on CST was not an attack directly targeting any important symbol of the State or any vital establishment of the State or any important functionaries of the State. The intent to weaken or terrorize the State may render such an act a terrorist act but it would still not satisfy the ingredients of Section 121 of the Penal Code. The learned Counsel went on to contend that, in any event, after the enactment of the very comprehensive provisions in Chapter IV of the Unlawful Activities (Prevention) Act, 1967, the provisions of Section 121 of the Penal Code would cease to apply to terrorist attack on the Indian State on principles analogous to those governing the implied repeal of statute.

538. Mr. Ramachandran further submitted that, similarly, the mindless killing of persons in a public place would not constitute the offence of waging war against the Indian State. Any argument that an attack on a place which is no more than the hub of a public transportation system amounts to an attack on the State is, according to Mr. Ramachandran, quite fallacious in the context of a criminal statute. The learned Counsel submitted that to say that an attack on a very important and busy railway station or an attack on Indias financial capital or economic might would be an attack on the State would amount to giving a greatly extended, expansive and liberal meaning to a criminal statute, which is not permissible.

539. Mr. Ramachandran further submitted that on the question of waging war the present case was not comparable to the cases of Navjot Sandhu and Mohd. Arif v. State of Delhi[103]. In Navjot Sandhu and Mohd. Arif, the targets of attack were the Parliament building and the Red Fort, which this Court held were clearly symbols of the Indian State and its sovereignty. According to Mr. Ramachandran, the same could not be said of CST, which is only a public building.

540. The offences concerning waging war are in Chapter VI of the Penal Code under the heading of offences against the State. Section 121 uses the phrase Government of India and it provides as follows:-

121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India. Whoever, wages war against the Government of India, or attempts to wage such war, or abets the

waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

541. Section 121A makes a conspiracy to commit offences punishable by Section 121 per se an offence punishable with imprisonment for life or for a period that may extend to ten (10) years. The explanation to the Section makes it clear that the offence is complete even without any act or illegal omission occurring in pursuance of the conspiracy. This Section uses the expression the Central Government or any State Government. The Section reads as under:-

121A. Conspiracy to commit offences punishable by Section 121. Whoever within or without India conspires to commit any of the offences punishable by Section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation.- To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

542. Section 122 similarly makes collection of arms with intention of waging war per se an offence, regardless of whether or not the arms were put to actual use. This Section again uses the expression Government of India and it reads as under:-

122. Collecting arms, etc., with intention of waging war against the Government of India. Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

543. Section 123 deals with Concealing with intent to facilitate design to wage war against the Government of India. Section 125 deals with Waging war against any Asiatic Power in alliance with the Government of India, and Section 126 deals with Committing depredation on territories of Power at peace with the Government of India.

544. Here it may also be noted that Section 39 CrPC read with Section 176 of the Penal Code makes it an offence for any person who is aware of the commission of, or of the intention of any person to commit, an offence under Sections 121 to 126, both inclusive (that is, offences against the State specified in Chapter VI of the Code), to omit giving any notice or furnishing any information to any public servant. Moreover, Section 123 of the Penal Code makes it an offence to conceal, whether by act or omission, the existence of a design to wage war against the Government of India, when intending by such concealment to facilitate, or knowing it to be likely that such concealing will facilitate, the waging of such war.

545. The question that arises for consideration, therefore, is what is the true import of the expression Government of India? In its narrower sense, Government of India is only the executive limb of the State. It comprises a group of people, the administrative bureaucracy that controls the executive functions and powers of the State at a given time. Different governments, in continuous succession, serve the State and provide the means through which the executive power of the State is employed. The expression Government of India is surely not used in this narrow and restricted sense in Section 121. In our considered view, the expression Government of India is used in Section 121 to imply the Indian State, the juristic embodiment of the sovereignty of the country that derives its legitimacy from the collective will and consent of its people. The use of the phrase Government of India to signify the notion of sovereignty is consistent with the principles of Public International Law, wherein sovereignty of a territorial unit is deemed to vest in the people of the territory and exercised by a representative government.

546. It is important to note here that earlier the word used in Section 121 (as well as all the other Sections referred to above) was Queen. After the formation of the republic under the Constitution it was substituted by the expression Government of India by the Adaption of Laws Order of 1950. In a republic, sovereignty vests in the people of the country and the lawfully elected government is simply the representative and a manifestation of the sovereign, that is, the people. Thus, the expression Government of India, as appearing in Section 121, must be held to mean the State or interchangeably the people of the country as the repository of the sovereignty of India which is manifested and expressed through the elected Government.

547. An illuminating discussion on the issue of Waging war against the Government of India is to be found in this Courts decision in Navjot Sandhu. In paragraph 272 of the judgment P. Venkatarama Reddi, J., speaking for the Court, referred to the report of the Indian Law Commission that examined the draft Penal Code in 1847 and quoted the following passage from the report:

We conceive the term wages war against the Government naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous.

548. To us, the expression, in like manner and by like means as a foreign enemy (highlighted by us in the above quotation), is very significant to understand the nature of the violent acts that would amount to waging war. In waging war, the intent of the foreign enemy is not only to disturb public peace or law and order or to kill many people. A foreign enemy strikes at the sovereignty of the State, and his conspiracy and actions are motivated by that animus.

549. In Navjot Sandhu, the issue of waging war against the Government of India has also been considered in relation to terrorist acts and in that regard the Court observed and held as follows:

275. War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them

276. It has been aptly said by Sir J.F. Stephen:

Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquility of a civilized society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it.

277. To this list has to be added terrorist acts which are so conspicuous now-a-days. Though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two. Terrorist acts can manifest themselves into acts of war. According to the learned Senior Counsel for the State, terrorist acts prompted by an intention to strike at the sovereign authority of the State/Government, tantamount to waging war irrespective of the number involved or the force employed.

278. It is seen that the first limb of Section 3(1) of POTA-with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever.

and the acts of waging war have overlapping features. However, the degree of animus or intent and the magnitude of the acts done or attempted to be done would assume some relevance in order to consider whether the terrorist acts give rise to a state of war. Yet, the demarcating line is by no means clear, much less transparent. It is often a difference in degree. The distinction gets thinner if a comparison is

made of terrorist acts with the acts aimed at overawing the Government by means of criminal force. Conspiracy to commit the latter offence is covered by Section 121-A.

550. This answers Mr. Ramachandrans submissions to the effect that if an offence comes within the definition of terrorist act under Section 15 of the Unlawful Activities (Prevention) Act, it would automatically fall out of Section 121 of the Penal Code, as also his rather extreme submission that the incorporation of Chapter IV of the Unlawful Activities (Prevention) Act, 1967, should be viewed as deemed repeal of Section 121 of the Penal Code. As explained in Navjot Sandhu, a terrorist act and an act of waging war against the Government of India may have some overlapping features, but a terrorist act may not always be an act of waging war against the Government of India, and vice-versa. The provisions of Chapter IV of the Unlawful Activities (Prevention) Act and those of Chapter VI of the Penal Code, including Section 121, basically cover different areas.

551. Coming back to the facts of the case in hand, we find that the primary and the first offence that the appellant and his co-conspirators committed was the offence of waging war against the Government of India. It does not matter that the target assigned to the appellant and Abu Ismail was CST Station (according to Mr. Ramachandran, no more than a public building) where they killed a large number of people or that they killed many others on Badruddin Tayabji Marg and in Cama Hospital. What matters is that the attack was aimed at India and Indians. It was by foreign nationals. People were killed for no other reason than they were Indians; in case of foreigners, they were killed because their killing on Indian soil would embarrass India. The conspiracy, in furtherance of which the attack was made, was, inter alia, to hit at India; to hit at its financial centre; to try to give rise to communal tensions and create internal strife and insurgency; to demand that India should withdraw from Kashmir; and to dictate its relations with other countries. It was in furtherance of those objectives that the attack was made, causing the loss of a large number of people and injury to an even greater number of people. Nothing could have been more in like manner and by like means as a foreign enemy would do.

552. In this connection Mr. Gopal Subramanium has referred to the transcripts of the conversations between the terrorists and their collaborators across the border. The learned Counsel referred from the appellants confessional statement made before the magistrate to the passages where instructions are given by Amir Hafiz Sayeed (wanted accused no. 1), Zaki-ur-Rehman Lakhvi (wanted accused no. 2), and others in connection with the main purpose of the attack. He also referred to a number of passages from the transcripts of conversations between the terrorists and their collaborators across the border (which we have already referred to in the earlier part of the judgment), to show that the attack was clearly an enemy action. We are of the view that the submission of Mr. Subramanium is well-founded and fit to be accepted.

553. On a careful consideration of the submissions of the two sides and the materials on record we have no hesitation in holding that the appellant has been rightly held guilty of waging war against the Government of India and rightly convicted under Sections 121, 121A and 122 of the Penal Code.

VI. The Question of Sentence

554. The trial court has awarded five (5) death sentences to the appellant for the offences punishable under:

- **i)** Section 120B IPC read with Section 302 IPC for conspiracy to commit murder;
- **ii)** Section 121 IPC for waging war against the Government of India;
- **iii)** Section 16 of the Unlawful Activities (Prevention) Act, 1967;
- **iv)** Section 302 IPC for committing murder of 7 persons;
- **v)** Section 302 IPC read with Section 34 and Section 302 IPC read with Sections 109 and 120-B IPC.

555. The High Court confirmed the death sentences given to the appellant by the trial court.

556. Mr. Ramachandran, however, submitted that in no case should the appellant be given the death penalty. The learned Counsel submitted that no person can be deprived of his life except according to procedure established by law. It is now well-established that the procedure must be fair, just and reasonable, in other words following the due process of law. Hence, the Court must refrain from awarding the extreme penalty of death, irrevocable and irreversible in nature, in a case where there is the slightest doubt regarding the complete fairness of the trial. The learned Counsel submitted that the appellants trial was compromised on due process and, therefore, he should not be given the death sentence.

557. Mr. Ramachandrans contention that the trial of the appellant was less than completely fair is based on the same grounds that he earlier advanced to suggest that the trial was vitiated and nullified. He submitted that the appellants confession was recorded without adhering to the constitutional safeguards and that the lawyer nominated to represent him was not given a reasonable time to prepare the case. The learned Counsel submitted that an unhappy compromise was struck between the demands of speedy trial and the requirements of a fair trial in this case, and in that situation, prudence would demand that this Court should not confirm the death penalty given to the appellant but change it to life sentence.

558. In the earlier parts of the judgment we have already considered in detail both the submissions and found them not worthy of acceptance. We have held that there was no lowering of the standard of fairness and reasonableness in the appellants trial and it, therefore, follows that no mitigation in punishment can be asked for on that score.

559. Mr. Ramachandran next submitted that the High Court has committed a serious error in balancing the aggravating and the mitigating circumstances against the appellant. The High Court has viewed the appellants conviction for waging war as the most aggravating circumstance for awarding him the death penalty after wrongly holding him guilty of the charge relating to waging war against the Government of India. Further, the High Court wrongly held the appellant individually responsible for the murder of seven (7) persons, including Amarchand Solanki. The High Court erroneously relied upon the testimony of a single witness (PW-52) who said that while firing at the crowd of passengers at CST the appellant was in a joyous mood (a fact which the witness did not mention in his statement before the police)

560. As to the charge of waging war against the Government of India and the appellant being personally responsible for the killing of seven (7) people, including Amarchand Solanki, those are fully in accord with our own findings, arrived at independently, and hence, the High Court was quite justified in taking those facts into account for determining the punishment for the appellant. As regards the statement of PW-52 that the appellant was in joyous mood, nothing depends on that and we asked Mr. Ramachandran to address us on the issue of sentence keeping that statement by PW-52 completely aside.

561. Mr. Ramachandran submitted that the strongest reason for not giving the death penalty to the appellant was his young age; the appellant was barely twenty-one (21) years old at the time of the commission of the offences. And now he would be twenty-five (25) years of age. It is indeed correct that the appellant is quite young, but having said that one would think that nothing was left to be said for him. Mr. Ramachandran, however, thinks otherwise and he has many more things to say in the appellants favour. Mr. Ramachandran submitted that the Court cannot ignore the family and educational background and the economic circumstances of the appellant, and in determining the just punishment to him the Court must take those, too, into account. The learned Counsel submitted that here is a boy who, as a child, loved to watch Indian movies. But he hardly had a childhood like other children. He dropped out of school after class IV and was forced to start earning by hard manual labour. Soon thereafter, he had a quarrel with his father over his earnings and that led to his leaving his home. At that immature age, living away from home and family and earning his livelihood by manual labour, he was allured by a group of fanatic murderers seemingly engaged in social work. He thought that he too should contribute towards helping the Kashmiris, who he was led to believe were oppressed by the Indian Government. Mr. Ramachandran submitted that, seen from his point of view, the appellant may appear completely

and dangerously wayward but his motivation was good and patriotic. Mr. Ramachandran further submitted that once trapped by Lashkar-e-Toiba he was completely brain-washed and became a tool in their hand. While executing the attack on Mumbai, along with nine (9) other terrorists, the appellant was hardly in control of his own mind. He was almost like an automaton working under remote control, a mere extension of the deadly weapon in his hands.

562. Mr. Ramachandran submitted that, viewed thus, it would appear wholly unjust to give the death penalty to the appellant. The death penalty should be kept reserved for his handlers, who, unfortunately, are not before a court till now. If the submission of Mr. Ramachandran is taken one step further it would almost appear as if it was a conspiracy by destiny that pushed the appellant to commit all his terrible deeds, and all those who were killed or injured in Mumbai were predestined to be visited by his violence. We have no absolute belief in the philosophical doctrine of predetermination and, therefore, we are completely unable to accept Mr. Ramachandrans submission. In this proceeding before this Court we must judge the actions of the appellant and the offences committed by him as expressions of his free will, for which he alone is responsible and must face the punishment.

563. We are unable to accept the submission that the appellant was a mere tool in the hands of the Lashkar-e-Toiba. He joined the Lashkar-e-Toiba around December 2007 and continued as its member till the end, despite a number of opportunities to leave it. This shows his clear and unmistakable intention to be a part of the organization and participate in its designs. Even after his arrest he regarded himself as a watan parast, a patriotic Pakistani at war with this country. Where is the question of his being brain-washed or acting under remote control? We completely disagree that the appellant was acting like an automaton. During the past months while we lived through this case we have been able to make a fair assessment of the appellants personality. It is true that he is not educated but he is a very good and quick learner, has a tough mind and strong determination. He is also quite clever and shrewd.[104] Unfortunately, he is wholly remorseless and any feeling of pity is unknown to him. He kills without the slightest twinge of conscience. Leaving aside all the massacre, we may here refer only to the casualness with which the appellant and his associate Abu Ismail shot down Gupta Bhelwala and the shanty dwellers Thakur Waghela and Bhagan Shinde at Badruddin Tayabji Marg; the attempt to break into the wards of Cama Hospital to kill the women and children who were crying and wailing inside; and the nonchalance with which he and Abu Ismail gunned down the police officer Durgude on coming out of Cama Hospital.

564. The saddest and the most disturbing part of the case is that the appellant never showed any remorse for the terrible things he did. As seen earlier, in the initial weeks after his arrest he continued to regard himself as a watan parast, a patriotic Pakistani who considered himself to be at war with this country, who had no use for an Indian lawyer but needed a Pakistani lawyer to defend him in the court. He made the confessional statement before the magistrate on February 17, 2009, not out of any sense of guilt or sorrow or grief but to present himself as a hero. He told the magistrate that he had absolutely no regret for whatever he had done and he wanted to make the confession to set an example for others to become Fidayeen like him and follow him in his deeds. Even in the course of the trial he was never repentant and did not show any sign of contrition. The judge trying him had occasion to watch him closely and has repeatedly observed about the lack of any remorse on the part of the appellant. The High Court, too, has noticed that the appellant never showed any remorse for the large-scale murder committed by him. This, to our mind, forecloses the possibility of any reform or rehabilitation of the appellant. The alternative option of life sentence is thus unquestionably excluded in the case of the appellant and death remains the only punishment that can be given to him.

565. Coming back to the legalese of the matter:

The Constitutional validity of death penalty was tested in Bachan Singh v. State of Punjab[105] and in that case a Constitution Bench of this Court, while upholding the Constitutional validity of death

sentence, observed that the death penalty may be invoked only in the rarest of rare cases. This Court stated that:

209. .For persons convicted of murder life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through laws instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. (Emphasis Supplied)

566. The Bachan Singh principle of the rarest of rare cases came up for consideration and elaboration in Machhi Singh v. State of Punjab[106]. It was a case of extraordinary brutality (from normal standards but nothing compared to this case!). On account of a family feud Machhi Singh, the main accused in the case along with eleven (11) accomplices, in the course of a single night, conducted raids on a number of villages killing seventeen (17) people, men, women and children, for no reason other than they were related to one Amar Singh and his sister Piyaro Bai. The death sentence awarded to Machhi Singh and two other accused by the trial court and affirmed by the High Court was also confirmed by this Court.

567. In Machhi Singh this Court observed that though the community revered and protected life because the very humanistic edifice is constructed on the foundation of reverence for life principle it may yet withdraw the protection and demand death penalty. The kind of cases in which protection to life may be withdrawn and there may be the demand for death penalty were then enumerated in the following paragraphs:

32. It may do so in rarest of rare cases when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

1. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community, etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of bride burning and what are known as dowry deaths or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

568. The above principles are generally regarded by this Court as the broad guidelines for imposition of death sentence and have been followed by the Court in many subsequent decisions.

569. If we examine the present case in light of the Machhi Singh decision, it would not only satisfy all the conditions laid down in that decision for imposition of death sentence but also present several other features that could not have been conceived of by the Court in Machhi Singh. We can even say that every single reason that this Court might have assigned for confirming a death sentence in the past is to be found in this case in a more magnified way.

570. This case has the element of conspiracy as no other case. The appellant was part of a conspiracy hatched across the border to wage war against the Government of India and lethal arms and explosives were collected with the intention of waging war against the Government of India. The conspiracy was to launch a murderous attack on Mumbai regarding it as the financial centre of the country; to kill as many Indians and foreign nationals as possible; to take Indians and foreign nationals as hostages for using them as bargaining chips in regard to the terrorists demands; and to try to incite communal strife and insurgency; all with the intent to weaken the country from within.

571. The case presents the element of previous planning and preparation as no other case. For execution of the conspiracy, the appellant and the nine (9) other dead accused, his accomplices, were given rigorous and extensive training as combatants. The planning for the attack was meticulous and greatly detailed. The route from Karachi to Mumbai, the landing site at Mumbai, the different targets at Mumbai were all predetermined. The nature of the attack by the different teams of terrorists was planned and everyone was given clear instructions as to what they were supposed to do at their respective targets. All the terrorists, including the appellant, actually acted according to the previous planning. A channel of communication between the attacking terrorists and their handlers and collaborators from across the border, based on advanced computer technology and procured through deception, was already arranged and put in place before the attack was launched.

572. This case has the element of waging war against the Government of India and the magnitude of the war is of a degree as in no other case. And the appellant is convicted on the charge, among others, of waging war against the Government of India.

573. This case has shocked the collective conscience of the Indian people as few other cases have.

574. The number of persons killed and injured is not only staggeringly high but also as in no other or in extremely few cases. The terrorists killed one hundred and sixty-six (166) people and injured, often grievously, two hundred and thirty-eight (238) people. The dead included eighteen (18) policemen

and other security personnel and twenty-six (26) foreign nationals. The injured included thirty-seven (37) policemen and other security personnel and twenty-one (21) foreign nationals. Of those dead, at least seven (7) were killed by the appellant personally, about seventy-two (72) were killed by him in furtherance of the common intention he shared with one Abu Ismail (deceased accused no. 1), and the rest were victims of the conspiracy to which he was a party along with the nine (9) dead accused and thirty-five (35) other accused who remain to be apprehended and brought to court.

575. The number of policemen and members of security forces killed and injured in course of their duty by the appellant and his accomplice Abu Ismail and the eight (8) other co-conspirators would hardly find a match in any other cases. Tukaram Ombale was killed by the appellant personally at Vinoli Chowpaty. Durgude, Hemant Karkare, Ashok Kamte, Vijay Salaskar and the other policemen in the Qualis van were killed jointly by the appellant and Abu Ismail. The policemen at Cama Hospital were injured, several of them grievously, jointly by the appellant and Abu Ismail. The rest of the policemen and law enforcement officers, including the NSG Commando Major Sandeep Unnikrihsnan, were killed as part of the larger conspiracy to which the appellant was a party.

576. The loss of property caused by the attack is colossal, over Rupees one hundred and fifty crores (Rs. 150Cr.), again of a scale as in no other case.

577. The offences committed by the appellant show a degree of cruelty, brutality and depravity as in very few other cases.

578. The appellant, as also the other nine (9) terrorists, his co- conspirators, used highly lethal weapons such as AK-47 rifles, 9 mm pistols, and grenades and RDX bombs.

579. As to the personality of the victims, all the persons killed/injured at CST, Badruddin Tayabji Marg and Cama Hospital were harmless, defenceless people. What is more, they did not even know the appellant and the appellant too had no personal animus against them. He killed/injured them simply because they happened to be Indians.

580. It is already seen above that the appellant never showed any repentance or remorse, which is the first sign of any possibility of reform and rehabilitation.

581. In short, this is a case of terrorist attack from across the border. It has a magnitude of unprecedented enormity on all scales. The conspiracy behind the attack was as deep and large as it was vicious. The preparation and training for the execution was as thorough as the execution was ruthless. In terms of loss of life and property, and more importantly in its traumatizing effect, this case stands alone, or it is at least the very rarest of rare to come before this Court since the birth of the Republic. Therefore, it should also attract the rarest of rare punishment.

582. Against all this, the only mitigating factor is the appellants young age, but that is completely offset by the absence of any remorse on his part, and the resultant finding that in his case there is no possibility of any reformation or rehabilitation.

583. In the effort to have the appellant spared of the death penalty Mr. Ramachandran also relied upon several observations and remarks made by this Court in a number of judgments. He cited before the Court: (i) Mohd. Mannan V State of Bihar[107]; (ii) Swamy Shraddananda (2) v. State of Karnataka[108]; (iii) Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra[109]; (iv) Mohd. Farooq Abdul Gafur v. State of Maharashtra[110]; (v) Rameshbhai Chandubhai Rathod v. State of Gujarat[111]; (vi) Rameshbhai Chandubhai Rathod (2) v. State of Gujarat[112]; (vii) Mulla and another v. State of Uttar Pradesh[113]; (viii) Dilip Premnarayan Tiwari v. State of Maharashtra[114]; (ix) R S Budhwar v UOI[115]; and (x) State of Maharashtra v. Bharat Chaganlal Raghani[116].

584. The observations relied upon by Mr. Ramachandran were made in the facts of those cases. As a matter of fact, in some of the cases relied upon by Mr. Ramachandran, the Court actually confirmed the death

penalty given to the accused. Moreover, the facts of those cases are totally incomparable to the facts of the case in hand, and those decisions are of no help to the appellant.

585. Putting the matter once again quite simply, in this country death as a penalty has been held to be Constitutionally valid, though it is indeed to be awarded in the rarest of rare cases when the alternative option (of life sentence) is unquestionably foreclosed. Now, as long as the death penalty remains on the statute book as punishment for certain offences, including waging war and murder, it logically follows that there must be some cases, howsoever rare or one in a million, that would call for inflicting that penalty. That being the position we fail to see what case would attract the death penalty, if not the case of the appellant. To hold back the death penalty in this case would amount to obdurately declaring that this Court rejects death as lawful penalty even though it is on the statute book and held valid by Constitutional benches of this Court.

586. We are thus left with no option but to hold that in the facts of the case the death penalty is the only sentence that can be given to the appellant. We hold accordingly and affirm the convictions and sentences of the appellant passed by the trial court and affirmed by the High Court.

587. The appeals are accordingly dismissed. CRIMINAL APPEAL NO.1961 OF 2011

588. This appeal is filed at the instance of the State of Maharashtra against the acquittal of Fahim Ansari and Sabauddin Ahamed (accused Nos. 2 and 3 respectively) recorded by the trial court and affirmed by the High Court. As noted, in the judgment in Criminal Appeal Nos.1899-1900 of 2011, these two accused faced the trial along with and on the same charges as Kasab.

589. Their connection with the other accused in the case, according to the prosecution, was through conspiracy. Fahim Ansari is said to have prepared, by hand, maps of various places of Mumbai to facilitate the attack by the terrorists who landed in the city. One such map was recovered from the trouser pocket of Abu Ismail (deceased accused no.1) during inquest and was seized under the seizure panchnama (Ext. no. 99).

590. According to the prosecution case, Fahim Ansari handed over the maps prepared by him to Sabauddin Ahamed in Kathmandu, Nepal and the latter sent or delivered those maps to the perpetrators of the crime in Pakistan.

591. This part of the prosecution case is based on the testimony of Naruddin Shaikh (PW-160).

592. It is further alleged that in order to provide ancillary logistical support to the terrorists landing in Mumbai, Fahim Ansari had made arrangements for his stay in Colaba area of South Mumbai. In order to stay in close proximity to Badhwar Park he was searching for a place of residence in fishermens colony there and he had taken admission in a Computer Institute viz., Softpro Computer Education situated at Fort, Mumbai, as an excuse for staying in that area.

593. However, when the attack took place on November 26, 2008, neither Fahim Ansari nor Sabauddin Ahamed were present in Mumbai. They were in the custody of U.P. Police, having been arrested earlier in connection with a terrorist attack on the RPF Camp at Rampur.

594. In support of the second part of its case, the prosecution has examined a number of witnesses, namely, Police Inspector Prashant Marde (PW-48), Jivan Gulabkar (PW-35), Rajendra Bhosale (PW-38), Ms. Shantabai Bhosale (PW-40), Police Inspector Shripad Kale (PW-47), Jayant Bhosale (PW-146), Sharad Vichare (PW-265), Shivaji Shivekar (PW-14), API Subhash Warang (PW-27), Ashok Kumar Raghav (PW-213), Manpreet Vohra (PW-254), Krantikumar Varma (PW-61) and Dr. Shailesh Mohite (PW-23).

595. We have gone through the evidence of Naruddin Shaikh and the other witnesses very carefully. We are of the view that the evidence of Naruddin Shaikh is completely unacceptable. The evidences of the other witnesses also do not inspire confidence insofar as these two accused are concerned.

596. The trial court and the High Court have considered the evidences relating to these two accused in far greater detail. Both the courts have analysed the prosecution evidence in regard to the two accused at great length and have given very good reasons to hold the prosecution evidence unworthy of reliance to hold such grave charges against the two accused. We are in full agreement with the reasons assigned by the trial court and the High Court for acquitting the two accused of all the charges. The view taken by the trial court and the High Court is not only correct but on the facts of the case, that is the only possible view.

597. We find no merit in the appeal and it is, accordingly, dismissed. TRANSFER PETITION (CRIMINAL) NO.30 OF 2012

598. In view of the judgment in Criminal Appeal Nos. 1899-1900 of 2011, the Transfer Petition does not survive and it is, accordingly, dismissed.

THE POSTSCRIPT

599. The decision in the appeal is over. But there are still a few things for us to say before we finally close this matter.

600. At the beginning of the hearing of the appeal, Mr. Gopal Subramanium avowed that, though appearing for the prosecution, he would like the best for the appellant. He wished that the case of the appellant be presented before the Court at the highest level and that it should receive the most careful scrutiny by the Court. The solemnity and sincerity of his declaration set the tone for the proceedings before the Court. The discourses were luminous, warm and stimulating but completely free from heat, rancour or anger, leave alone any vengefulness. Mr. Subramanium, erudite and sensitive, was full of restraint; always down-playing the prosecution case a notch or two and never making a statement of fact unless absolutely certain of its correctness. Mr. Ramachandran, cool and clinical, gently tried to persuade the Court to his point of view. In the course of the hearing of the case, which was spread over 13 weeks, not once were the voices raised, not once was the Counsel of the other side interrupted and contradicted on a statement of fact. In my twenty years on the bench I have not heard a serious case debated in such a congenial atmosphere as created by Mr. Subramanium and Mr. Ramachandran in this case.

601. Mr. Ramachandran, appearing for the appellant, was assisted by Mr. Gaurav Agrawal and a small team of juniors. Mr. Subramanium, representing the State of Maharashtra, was assisted by Mr. Ujjawal Nikkam, the Spl. PP who conducted the trial and a team of juniors. The juniors teams also showed remarkable preparation and resourcefulness. Any query on facts was answered in no time with reference to volume number and page number from the records that appeared like a small mountain. We are indebted to Mr. Subramanium and Mr. Ramachandran and their respective teams and we put our gratitude on record.

602. In this case we came across heroes like Tukaram Ombale, Hemant Karkare, Ashok Kamte, Vijay Salaskar and Sandeep Unnikrishnan, who lost their lives in the fight against terrorism. We salute every policeman, every member of the security forces and others who laid down their lives saving others and helping to catch or neutralise the ten terrorists. We have great admiration for the courage and sense of duty shown by the policemen and the members of the security forces who received injuries in discharge of their duties and we extend our deepest sympathies to them for their injuries. We compliment all those who showed great presence of mind and professionalism and, caring little for their own safety, saved countless lives or photographed the terrorists on their killing spree thus providing unimpeachable evidence for the court. We mourn the death of 148 civilians, both Indians and foreign nationals, who fell victim to the orgy of terror unleashed on the city, and extend our heart-felt condolences to their families. We also extend our deepest sympathies to all the 238 people who suffered injuries at the hands of the terrorists. We also greatly complement the resilient spirit of Mumbai that, to all outward appearances, recovered from the blow very quickly and was back to business as usual in no time.

603. In the course of hearing of the appeal we also came to know the trial Judge Shri Tahiliani. From the records of the case he appears to be a stern, no-nonsense person. But he is a true flag bearer of the rule of law in this country. The manner in which he conducted the trial proceedings and maintained the record is exemplary. We seriously recommend that the trial court records of this case be included in the curriculum of the National Judicial Authority and the Judicial Authorities of the different States as a model for criminal trial proceedings.

604. We direct the Maharashtra Government to pay a sum of Rupees eleven lakh (Rs.11 Lakhs) to Mr. Raju Ramachandran and Rupees three lakh fifty thousand to Mr. Gaurav Agrawal (Rs 3.5 Lakhs) as token remuneration for their very valuable assistance to the Court. The payments should be made within two months from today.

605. With this we come to the close of the matter and we end here. J.

(Aftab Alam) J.

(Chandramauli Kr. Prasad) New Delhi, August 29, 2012 SCHEDULE I LIST OF PERSONS KILLED

|Sr. No. |NAME |POLICE/ |NATIONALITY | | | |SECURITY FORCE/ | | | | |CIVILIAN | | |KUBER | |1 |Amarchand Naran Solanki |Civilian |Indian | |CST | |2 |Shashank Chandrasen Shinde|Police |Indian | | | |(Inspector) | | |3 |Hamina Begum Hamid Shaikh |Civilian |Indian | |4 |Ashraf Ali Allahrakha |Civilian |Indian | | |Shaikh | | | |5 |Ajij Nabilal Rampure |Civilian |Indian | |6 |Aakash Akhilesh Yadav |Civilian |Indian | |7 |Mukesh Bhikaji Jadhav |Home Guard |Indian | |8 |Sitaram Mallapa Sakhare |Civilian |Indian | |9 |Rahamtulla Ibrahim |Civilian |Indian | |10 |Mishrilal Mourya Shri |Civilian |Indian | | |Garib Mourya | | | |11 |Vinod Madanlal Gupta |Civilian |Indian | |12 |Sunil Ashok Thackare |Civilian |Indian | |13 |Haji Ejaj Bhai Imamsaheb |Civilian |Indian | ||Dalal | | | |14 |Mira Narayan Chattarji |Civilian |Indian | |15 |Shirish Sawla Chari |Civilian |Indian| |16 |Sushilkumar Vishwambhar |Civilian |Indian | | |Sharma | | | |17 |Murlidhar Laxman Choudhary|Railway |Indian | | | |Protection Force | | | | |(Constable) | | |18 |Ambadas Ramchandra Pawar |Police |Indian | | | |(Constable) | | |19 |Jaikumar Durairaj Nadar |Civilian |Indian | |20|Deepali Janardhan Chitekar|Civilian |Indian | |21 |Raju Janardhan Chitekar |Civilian |Indian | |22 |Aditya Ashok Yadav |Civilian |Indian | |23 |Isibul Raheman Faizuddin |Civilian |Indian | ||Raheman Shaikh | | | |24 |Prakash Janath Mandal |Civilian |Indian | |25 |Harakha Lalji Solanki|Civilian |Indian | |26 |Mohamed Amanat Mohamad Ali|Civilian |Indian | |27 |Sarafraz SallauddinAnsari|Civilian |Indian | |28 |Ayub Yakub Qureshi |Civilian |Indian | |29 |Afarin Shahadab Qureshi|Civilian |Indian | |30 |Avadesh Sudama Pandit |Civilian |Indian | |31 |Chandulal Kashinath Tandel|Civilian |Indian | |32 |Manohar Sohani |Civilian |Indian | |33 |Mohamad Hussain Mohamad |Civilian |Indian | | |Alamgir Shaikh | | | |34 |Murtaza Ansari Sallauddin |Civilian|Indian | | |Ansari | | | |35 |Mohamad Arif Mohamed Islam|Civilian |Indian | | |Ansari | | | |36|Mohamad Mukhtar Malik |Civilian |Indian | |37 |Abbas Rajjab Ansari |Civilian |Indian | |38|Unknown Male person |Civilian |Indian | |39 |Mrs.Gangabai Baburao |Civilian |Indian | ||Kharatmol | | | |40 |Narul Islam Ajahar Mulla |Civilian |Indian | |41 |Murgan Palaniya Pillai|Civilian |Indian | |42 |Rakhila Abbas Ansari |Civilian |Indian | |43 |Nitesh Vijaykumar Sharma|Civilian |Indian | |44 |Fatmabi Rehaman Shaikh |Civilian |Indian | |45 |Meenu Arjun Ansari|Civilian |Indian | |46 |Mohamad Itihas Ansari |Civilian |Indian | |47 |Mastan Munir Qureshi|Civilian |Indian | |48 |M.V. Anish |Civilian |Indian | |49 |Upendra Birju Yadav |Civilian |Indian ||50 |Unknown Male person |Civilian |Indian | |51 |Poonam Bharat Navadia |Civilian |Indian | |52|Baichan Ramprasad Gupta |Civilian |Indian | |53 |Nathuni Parshuram Yadav |Civilian |Indian ||CAMA-IN | |54 |Prakash Pandurang More |Police |Indian | | | |(Sub-Inspector) | | |55 |VijayMadhukar Khandekar |Police |Indian | | | |(Constable) | | |56 |Baban Balu Ughade |Civilian |Indian| |57 |Bhanu Devu Narkar |Civilian |Indian | |58 |Thakur Budha Waghela |Civilian |Indian | |59|Bhagan Gangaram Shinde |Civilian |Indian | |60 |Shivashankar Nirant Gupta |Civilian |Indian ||CAMA-OUT | |61 |Hemant Kamlakar Karkare |Police

|Indian | | | |(Joint | | | | |Commissioner, | | || |ATS) | | |62 |Ashok Marutirao Kamate |Police |Indian | | | |(Additional | | | | |Commissioner | | || |East Region) | | |63 |Vijay Sahadev Salaskar |Police |Indian | | | |(Inspector) | | |64 |BapuraoSahebrao Durgude |Police |Indian | | | |(Sub-Inspector) | | |65 |Balasaheb @ Nana |Police |Indian | | |Chandrakant Bhosale |(Assistant | | | | |Sub-Inspector) | | |66 |Arun Raghunath Chite |Police|Indian | | | |(Constable) | | |67 |Jayawant Hanumant Patil |Police |Indian | | | |(Constable) | | |68|Yogesh Shivaji Patil |Police |Indian | | | |(Constable) | | |69 |Surendrakumar Bindu Rama |Civilian|Indian | |VINOLI CHOWPATY | |70 |Tukaram Gopal Ombale |Police |Indian | | | |(Assistant | | | | |Sub-Inspector) | | |VILE PARLE BLAST | |71 |Mohabbat Umer Abdul Khalid|Civilian |Indian | |72|Laxminarayan Goyal |Civilian |Indian | |LEOPOLD CAFÉ | |73 |Subhash Vanmali Vaghela|Civilian |Indian | |74 |Pirpashi Mehboobali Shaikh|Civilian |Indian | |75 |Shahabuddin Sirajuddin|Civilian |Indian | | |Khan | | | |76 |Harishbhai Durlabbhai |Civilian |Indian | | |Gohil | | | |77|Hidayatullah Anwarali Kazi|Civilian |Indian | |78 |Malyesh Manvendra Banarjee|Civilian |Indian | |79 |Gourav Balchand Jain |Civilian |Indian | |80 |P.K. Gopalkrishnan |Civilian |Indian | |81|Kamal Nanakram Motwani |Civilian |Indian | |82 |Jurgen Hienrich Rudolf |Civilian |German | |83|Daphne Hilary Schmidt |Civilian |German | |MAZGAON BLAST | |84 |Mrs. Jarina Samsuddin|Civilian |Indian | | |Shaikh | | | |85 |Fulchandra Ramchandra Bind|Civilian |Indian | |86 |Mrs. Reema Mohamad Rabiul |Civilian |Indian | |HOTEL TAJ | |87 |Major Sandip Unnikrishnan |Security Force |Indian | |88 |Rahul Subhash Shinde |Police |Indian | | | |(Constable) | | |89|Zaheen Sayyed Nisar Ali |Civilian |Indian | | |Jafary Mateen | | | |90 |Andres Don Livera |Civilian|British | |91 |Gunjan Vishandas Narang |Civilian |Indian | |92 |Vishandas Giridharidas |Civilian|Indian | | |Narang | | | |93 |Vijayrao Anandrao Banja |Civilian |Indian | |94 |Sadanand Ratan Patil|Civilian |Indian | |95 |Thomas Verghese |Civilian |Indian | |96 |Ravi Jagan Kunwar |Civilian|Indian | |97 |Boris Mario Do Rego |Civilian |Indian | |98 |Satpakkam Rahmatulla |Civilian |Indian| | |Shaukatali | | | |99 |Faustine Basil Martis |Civilian |Indian | |100 |Kaizad Naushir Kamdin|Civilian |Indian | |101 |Neelam Vishandas Narang |Civilian |Indian | |102 |Rupinder Devenersing|Civilian |Indian | | |Randhava | | | |103 |Eklak Ahmed Mustak Ahmed |Civilian |Indian | |104|Maksud Tabarakali Shaikh |Civilian |Indian | |105 |Feroz Jamil Ahmed Khan |Civilian |Indian | |106 |Teitelbaum Aryeh Levish |Civilian |Israeli | |107 |Duglas Justin Markell |Civilian |Australian | |108 |Chaitilal Gunish |Civilian |Mauritius | |109 |Willem Jan Berbaers |Civilian |Belgium | |110|Nitisingh Karamveer Kang |Civilian |Indian | |111 |Samarveer Singh Karamveer |Civilian |Indian | | |Singh Kang | | | |112 |Udaysingh Karamveer Singh |Civilian |Indian | | |Kang | | | |113 |Sabina Saigal Saikia |Civilian |Indian | |114 |Hemlata Kashi Pillai |Civilian |Malaysian | |115 |Rajiv Omprakash Sarswat |Civilian |Indian | |116 |Gutam Devsingh Gosai |Civilian |Indian | |117 |Rajan Eshwar Kamble |Civilian |Indian | |118 |Burki Ralph Rainer Jachim |Civilian |German | |119|Hemant Pravin Talim |Civilian |Indian | |120 |Shoeb Ahmed Shaikh |Civilian |Indian | |121|Michael Stuart Moss |Civilian |British | |122 |Elizabeth Russell |Civilian |Canadian | |NARIMAN HOUSE | |123 |Salim Hussain Harharwala |Civilian |Indian | |124 |Mehzabin @ Maria Salim|Civilian |Indian | | |Harharwala | | | |125 |Rivka Gavriel Holtzberg |Civilian |Israeli | |126 |RabbiGavriel Noach |Civilian |Israeli | | |Holtzberg | | | |127 |Gajendra Singh |Security Force |Indian | |128 |Ben Zion Chroman |Civilian |Israeli | |129 |Norma Shvarzblat |Civilian |Mexican | | |Robinovich | | | |130 |Rajendrakumar Baburam |Civilian |Indian | | |Sharma | | | |131 |Yokevet Mosho Orpaz |Civilian |Israeli | |HOTEL OBEROI | |132 |T. Suda Hisashi |Civilian |Japanese | |133 |Murad Amarsi |Civilian |French | |134 |Loumiya Hiridaji Amarsi |Civilian |French | |135 |Scherr Alan Michael |Civilian |American | |136 |Neomi Leiya Sher |Civilian |American | |137 |Sandeep Kisan Jeswani |Civilian |American | |138 |Lo Hawei Yen |Civilian |Singapore | |139 |Jhirachant Kanmani @ Jina |Civilian |Thailand | |140 |Altino D' Lorenjo |Civilian |Italian | |141 |Brett Gilbert Tailor |Civilian |Australian | |142 |Farukh Dinshaw |Civilian |Indian | |143 |Reshama Sunil Parikh |Civilian |Indian | |144 |Sunil Shevantilal Parekh |Civilian |Indian | |145 |Ajit Shrichand Chabriya |Civilian |Indian | |146 |Sanjay Vijay Agarwal |Civilian |Indian | |147 |Rita Sanjay Agarwal |Civilian |Indian | |148 |Mohit Kanhaiyalal Harjani |Civilian |Indian | |149 |Monika Ajit Chabriya |Civilian |Indian | |150 |Harsha Mohit Harjani |Civilian |Indian | |151 |Ravi Dara |Civilian |Indian | |152 |Uma Vinod Gark |Civilian |Indian | |153 |Pankaj Somchand Shah |Civilian |Indian | |154 |Ashok Kapoor |Civilian |Indian | |155 |Anand Suryadatta Bhatt |Civilian |Indian | |156 |Rohington Bajji Mallu |Civilian

|Indian | |157 |Kannubhai Zaverbhai Patel |Civilian |Indian | |158 |Ami Bipinichandra Thaker |Civilian |Indian | |159 |Jordan Geigy Fernandise |Civilian |Indian | |160 |Neeta Prakash Gaikwad |Civilian |Indian | |161 |Shaunak Jayawant |Civilian |Indian | | |Chemburkar | | | |162 |Wilson Baburao Mandalik |Civilian |Indian | |163 |Sarjerao Sadashiv Bhosale |Civilian |Indian | |164 |JasminMahendrasingh Burji |Civilian |Indian | |165 |Sanjy Sambhajirao Surve |Civilian |Indian | |166 |Bimolchand Maibam |Civilian |Indian | LIST OF INJURED PEOPLE |Sr. No.|NAME |POLICE/ |NATIONALITY | | | |SECURITY FORCE/ | | | | |CIVILIAN | | |CST | |1 |Mukesh Bhagwatprakash |Civilian |Indian | | |Agarwal | | | |2 |Nisha Anilkumar Yadav |Civilian |Indian | |3 |JangamVithalrao Bokade |Civilian |Indian | |4 |Parasnath Ramsoman Giri |Railway Protection |Indian | | | |Force | | | | |(Head Constable) | | |5 |Firoz Khan Khushnur Khan |Railway Protection |Indian | | |Ghouri |Force | | | | |(Constable) | | |6 |Raziyabegum Noor Qureshi |Civilian |Indian | |7 |Sarita Shantaram |Civilian |Indian | | |Harkulkar | | | |8 |Neeta Gajanan Kurhade |Civilian |Indian | |9 |Ajamat Ali Narhu Sha |Civilian |Indian | |10|Maltidevi Madan Gupta |Civilian |Indian | |11 |Sulochana Chandrakant |Civilian |Indian | ||Lokhande | | | |12 |Vijay Ramchandra Khote |Civilian |Indian | |13 |Mumtaz Mohd. Yusuf Khan|Civilian |Indian | |14 |Pappu Laldev Jawahar |Civilian |Indian | | |Laldev | | | |15 |Shabir Abdul Salam Dalal |Civilian |Indian | |16 |Laxman Shivaji Hundkeri |Civilian |Indian | |17 |Akshay Tanaji Supekar |Civilian |Indian | |18 |Nimba Shampuri Gosavi |Civilian |Indian | |19 |Mahadev Datta Petkar |Civilian |Indian | |20 |Santoshkumar Faujdarsing |Civilian |Indian | | |Yadav | | | |21 |Miraj Alam Ali Mulla |Civilian |Indian | | |Ansari | | | |22 |Abdul Rashid Abdul Aziz |Civilian |Indian | |23|Abdul Salam Shaikh S. |Civilian |Indian | | |Qureshi | | | |24 |Akhilesh Dyanu Yadav |Civilian|Indian | |25 |Ramzan Sahrif Kadar |Civilian |Indian | | |Sharif | | | |26 |Mohd. Siddiqu Mohd. Sagir|Civilian |Indian | | |Alam | | | |27 |Sachinkumar Singh |Civilian |Indian | | |Santoshkumar Singh | | | |28 |Tejas Arjungi |Civilian |Indian | |29 |Shamshad Dalal |Civilian |Indian | |30 |Baby Ashok Yadav |Civilian |Indian | |31 |Shital Upendra Yadav |Civilian |Indian | |32 |Asha Shridhar Borde |Civilian |Indian | |33 |Vatsala Sahadev Kurhade |Civilian |Indian | |34 |Chandrakant Ganpatirao |Civilian |Indian | | |Lokhande | | | |35 |Abdul Razak Farukh |Civilian |Indian | ||Nasiruddin | | | |36 |Afroz Abbas Ansari |Civilian |Indian | |37 |Dadarao Rambhoji Jadhav|Civilian |Indian | |38 |Suryabhan Sampat Gupta |Civilian |Indian | |39 |Jagendrakumar |Civilian|Indian | | |Kailashkumar Mishra | | | |40 |Gopal Julena Prajapati |Civilian |Indian | |41 |P. Nirmala |Civilian |Indian | |42 |P. Ponuraj |Civilian |Indian | |43 |Mohan Bharti |Civilian |Indian ||44 |Sushant Nityanand Panda |Civilian |Indian | |45 |Annasaheb Ambu Waghmode |Civilian |Indian | |46 |T. Thavasi Parnal |Civilian |Indian | |47 |Anand Bhimrao Arjun |Civilian |Indian ||48 |Kanhayya Kedarnath Sahani|Civilian |Indian | |49 |Vibha Ashokkumar Singh |Civilian |Indian| |50 |Beti Alfonso |Civilian |Indian | |51 |Indraraj Luise |Civilian |Indian | |52 |Jayram Harilal Chawan |Civilian |Indian | |53 |Sunita Upendra Yadav |Civilian |Indian | |54 |Sushama Akhilesh Yadav |Civilian |Indian | |55 |Raviranjan Shriram |Civilian |Indian | | |Virendra | | |56 |Priyanka Chitaranjan Giri|Civilian |Indian | |57 |Imran Shakur Bhagwan |Civilian |Indian | |58 |Rekha Shyam Rathod |Civilian |Indian | |59 |Barjrang Jaykaran |Civilian |Indian | | |Prajapati | | | |60|Satyanand Karunakaro |Civilian |Indian | | |Behra | | | |61 |Manoj Prafulchandra |Civilian |Indian | | |Kanojia | | | |62 |Balaji Baburao Kharatmol |Civilian |Indian | |63 |Mehboob Abbas Ansari|Civilian |Indian | |64 |Asif Abdul Rafik Shaikh |Civilian |Indian | |65 |Raghvendra Banvasi Singh|Civilian |Indian | |66 |Ashok Keshwanand Singh |Civilian |Indian | |67 |Radhadevi Bodhiram Sahani|Civilian |Indian | |68 |Tapasi Taramniggam Nadar |Civilian |Indian | |69 |Sayyed Shahnavaz Sayyed |Civilian |Indian | | |Salim Mujawar | | | |70 |Arvind Gopinath Bhalekar |Civilian|Indian | |71 |Shivram Vijay Sawant |Civilian |Indian | |72 |Ashok Shivram Patil |Civilian |Indian ||73 |Bharat Ramchandra Bhosale|Government Railway |Indian | | | |Police | | | | |(Assistant | | | ||Inspector) | | |74 |Devika Natvarlal Rotawan |Civilian |Indian | |75 |Farukh Nasiruddin |Civilian|Indian | | |Khaliluddin | | | |76 |Nafisa Sadaf Qureshi |Civilian |Indian | |77 |Kishor Vinayak Kale|Civilian |Indian | |78 |Sudama Aba Pandarkar |Government Railway |Indian | | | |Police | | | ||(Assistant | | | | |Sub-Inspector) | | |79 |Pandurang Subrao Patil |Government Railway |Indian | | ||Police | | | | |(Assistant | | | | |Sub-Inspector) | | |80 |Punamsingh Santosh Singh |Civilian |Indian| |81 |Vishal Prakash Kardak |Civilian |Indian | |82 |Sangita Niranjan Sardar |Civilian |Indian | |83|Niranjan Sadashiv Sardar |Civilian |Indian | |84 |Ansarallh Saudaarallh |Civilian |Indian | | |BakshMohd. Hanif | | | |85 |Harshada Suhas Salaskar

|Civilian |Indian | |86 |Pappusing Mannusingh|Civilian |Indian | |87 |Habibul Mohd. Sukurddin |Civilian |Indian | | |Khan | | | |88 |Anilkumar Rajendra Yadav |Civilian |Indian | |89 |Laji Jagganath Pandye |Civilian |Indian | |90 |Sanjay Nemchandra Yadav |Civilian |Indian | |91 |Ratankumarji |Civilian |Indian | | |Kanhayaprasad Yadav | | | |92 |Shambunath Munai Yadav |Civilian |Indian | |93 |Ganesh Sitaram Sakhare |Civilian |Indian | |94 |Ashok Bhimappa Renetala |Civilian |Indian | |95 |Alok Harilal Gupta |Civilian |Indian | |96 |Ganpat Gangaram Shigwan |Civilian |Indian | |97 |Fakir Mohd. Abdul Gafoor|Civilian |Indian | |98 |Murlidhar Chintu Jhole |Police |Indian | | | |(Head Constable) | | |99 |BaluBandu More |Police |Indian | | | |(Constable) | | |100 |Prakash Sohanlal Phalore |Civilian |Indian ||101 |Ramji Yabad Napit |Railway Protection |Indian | | | |Force | | | | |(Assistant | | | ||Sub-Inspector) | | |102 |Vishveshwar Shishupal |Home Guard |Indian | | |Pacharane | | | |103|Adhikrao Gyanu Kale |Government Railway |Indian | | | |Police | | | | |(Head Constable) | | |104|Uttam Vishnu Sasulkar |Home Guard |Indian | |105 |Vijaya Ramkomal Kushwah |Civilian |Indian| |106 |Bharat Shyam Nawadia |Civilian |Indian | |107 |Anilkumar Dyanoji |Civilian |Indian | ||Harkulkar | | | |108 |Sadahiv Chandrakant Kolke|Civilian |Indian | |109 |Prashant PurnachandraDas|Civilian |Indian | | | |CAMA-IN | |110 |Harischandra Sonu |Civilian |Indian | | |Shrivardhankar| | | |111 |Chandrakant Gyandev Tikhe|Civilian |Indian | |112 |Kailash Chandrabhan |Civilian|Indian | | |Ghegadmal | | | |113 |Vijay Abaji Shinde |Police |Indian | | | |(Assistant | | | | |Inspector)| | |114 |Sadanand Vasant Date |Police |Indian | | | |(Additional | | | | |Commissioner) | | |115 |VijayTukaram Powar |Police |Indian | | | |(Assistant | | | | |Inspector) | | |116 |Sachin Dadasaheb Tilekar|Police |Indian | | | |(Constable) | | |117 |Mohan Gyanoba Shinde |Police |Indian | | | |(HeadConstable) | | |118 |Hirabai Vilas Jadhav |Civilian |Indian | |119 |Vinayak Chintaman |Police |Indian | | |Dandgawhal |(Constable) | | |CAMA-OUT | |120 |Arun Dada Jadhav |Police |Indian | | ||(Naik) | | |121 |Maruti Mahdevrao Phad |Civilian |Indian | |122 |Anil Mahadev Nirmal |Civilian |Indian | |123 |Shankar Bhausaheb Vhande |Police |Indian | | | |(Constable) | | |124 |PrashantSadashiv Koshti |Civilian |Indian | |125 |Mohd. Asif Abdul Gani |Civilian |Indian | | |Memon | | ||126 |Kalpanth Jitai Singh |Civilian |Indian | |VINOLI CHOWPATY | |127 |Sanjay Yeshwant Govilkar |Police |Indian | | | |(Assistant | | | | |Inspector) | | |VILE PARLE BLAST | |128 |Roldan Glandson Ayman |Civilian |Indian | |129 |Shyam Sunder Choudhary |Civilian |Indian | |130|Balkrishna Ramchandra |Civilian |Indian | | |Bore | | | |LEOPOLD CAFÉ | |131 |Munira-ul Rayesi|Civilian |Oman | |132 |Faizal Miran Sabil-ul |Civilian |Oman | | |Gidgali | | | |133 |Asma-un Rayesi|Civilian |Oman | |134 |David John Kokar |Civilian |Australian | |135 |Harnish Patel |Civilian|British | |136 |Micheal Charles Murphy |Civilian |British | |137 |Riyan Michael Murphy |Civilian|British | |138 |Anamika Bholanath Gupta |Civilian |Indian | |139 |Minakshi Raghubhai |Civilian|Indian | | |Dattaji | | | |140 |Bhaskar Paddu Dewadiga |Civilian |Indian | |141 |Benjamin JeroldMethis |Civilian |German | |142 |Pravin Pandurang Sawant |Police |Indian | | | |(Naik) | | |143|Kunal Prakash Jaiswani |Civilian |Indian | |144 |Ransale Gilbert |Civilian |Indian | | |Santhumayor| | | |145 |Ijas Abdul Karupadan |Civilian |Indian | | |Kuddi | | | |146 |Nilesh Mahendra Gandhi|Civilian |Indian | |147 |Prakash Satan Bharwani |Civilian |Indian | |148 |Ramchandra Selumadhav|Civilian |Indian | | |Nair | | | |149 |Bharat Sasuprasad Gujar |Civilian |Indian | |150 |Rasika Krushna Sawant |Civilian |Indian | |151 |Mohd. Parvez Aslam Ansari|Civilian |Indian | |152 |Mohd. Ayub Mohd. Abdul |Civilian |Indian | | |Ansari | | | |153 |Manoj Bahadur Thakur |Civilian |Indian ||154 |Fanishang Misha Bhishum |Civilian |Indian | |155 |Naresh Mulchand Jumani |Civilian|Indian | |156 |Prashant Vasant Tambe |Civilian |Indian | |157 |Nivrutti Baburao Gavhane |Police|Indian | | | |(Naik) | | |158 |Katherin Austin |Civilian |Australian | |MAZGAON BLAST | |159|Rajendraprasad Ramchandra|Civilian |Indian | | |Maurya | | | |160 |Abdul Salim Shaikh |Civilian|Indian | |161 |Shahbaz Juber Khan |Civilian |Indian | |162 |Sabira Majid Khan |Civilian |Indian ||163 |Sohel Abdul Shaikh |Civilian |Indian | |164 |Kabir Bablu Shaikh |Civilian |Indian | |165|Kulsum Babu Shaikh |Civilian |Indian | |166 |Jasmin Babu Shaikh |Civilian |Indian | |167 |ImranMohd. Shafi Pathari|Civilian |Indian | |168 |Manoharabegum Ali Ahmed |Civilian |Indian | ||Shaikh | | | |169 |Hawa Abdul Salim Shaikh |Civilian |Indian | |170 |Sanju Kurshna Ghorpade|Civilian |Indian | |171 |Manorabagum Ali Akbar |Civilian |Indian | | |Shaikh | | | |172 |Saiddiqui Firoz Shaikh |Civilian |Indian | |173 |Shamin Rauf Shaikh |Civilian |Indian | |174 |Rahaman Ali Akbar Shaikh |Civilian |Indian | |175 |Heena China Shaikh |Civilian |Indian | |176

|Mukhtar Shriniwas Shaikh |Civilian |Indian | |177 |Kanhaikumar Harikishor |Civilian |Indian | | |Paswan | || |HOTEL TAJ | |178 |Deepak Narsu Dhole |Police |Indian | | | |(Inspector) | | |179 |Samadhan Shankar More |State Reserve |Indian | | | |Police Force | | |180 |Sanjay Uttam Gomase |State Reserve |Indian | | | |Police Force | | |181 |Rafal Godas |Civilian |Spanish | |182 |Maria Roza Romero |Civilian |Spanish | |183 |Simond Helis |Civilian |British | |184 |Eyujin Tan Jhonsi|Civilian |Philippines | |185 |Hanifa Bilakiya |Civilian |Indian | |186 |Anjum Gaful Bilakiya |Civilian|Indian | |187 |U.T Bernad |Civilian |German | |188 |Vinay Keshavaji Kuntawala|Civilian |Indian ||189 |Deepak Pramod Gupta |Civilian |Indian | |190 |Pragati Deepak Gupta |Civilian |Indian | |191|Mohanlal Pratap Taware |Civilian |Indian | |192 |Sunil Kumar Jodha |Security Force |Indian | |193|Vishvanath Maruti Gaikwad|State Reserve |Indian | | | |Police Force | | |194 |K.R. Rammurthi|Civilian |Indian | |195 |Adil Rohengtan Irani |Civilian |Indian | |196 |Ashish Ankush Patil |Civilian|Indian | |197 |Nitin Digamber Kakade |Police |Indian | | | |(Sub-Inspector) | | |198 |Naushir Firoz Sanjana |Civilian |Indian | |199 |Jagdish Waman Gujran |Civilian |Indian | |200 |Nitin Satishkumar Minocha|Civilian |Indian | |201 |Sajesh Narayan Nair |Civilian |Indian | |202 |Rakesh Harischandra |Civilian |Indian | | |Chawan | | | |203 |Amit Raghnuath Khetle |Police |Indian | | | |(Constable) | | |204 |Ashok Laxman Pawar |Police |Indian | | | |(Naik) | | |205 |Arun Sarjerao Mane |Police |Indian | | | |(Naik) | | |206 |Saudagar Nivrutti Shinde |Police |Indian | | | |(Constable) | | |207 |Shankar Shamrao Pawar |Police |Indian | | | |(Constable) | | |NARIMAN HOUSE | |208 |Prakash Rawji Surve |Civilian |Indian | |209 |Bablu Rajsing Yallam |Civilian |Indian | |210 |Sanjay Laxman Katar |Civilian |Indian | |211 |Vijay Ankush Falke |Civilian |Indian | |212 |Ashok Babu Sunnap |Civilian |Indian | |213 |Pradosh Prakash Perekar |Civilian |Indian | |214 |Anil Sakharam Varal |Civilian |Indian | |HOTEL OBEROI & HOTEL TRIDENT | |215 |Shabbir Tahirna Naruddin |Civilian |Indian | |216 |Amardeep Harkisan Sethi |Civilian |Indian | |217 |Sidharth Rajkumar Tyagi |Civilian |Indian | |218 |Drrissuz Sobizutski |Civilian |Poland | |219 |Linda Oricistala Rangsdel|Civilian |American | |220 |Alisa Micheal |Civilian |Canadian | |221 |Andolina Waokta |Civilian |American | |222 |Helan Connolly |Civilian |Canadian | |223 |Jahid Jibad Mebyar |Civilian |Jordanian | |224 |Shi Fung Chen |Civilian |Japanese | |225 |Reshma Sanjay Khiyani |Civilian |Indian | |226 |C.M. Puri |Civilian |Indian | |227 |Capt. A.K. Singh |Security Force |Indian | |228 |Camando Manish |Security Force |Indian | |229 |Apurva Natwarlal Parekh |Civilian |Indian | |230 |Dinaj Puranchand Sharma |Civilian |Indian | |231 |Chandresh Harjiwandas |Civilian |Indian | | |Vyas | | | |232 |Imran Jan Mohd. Merchant |Civilian |Indian | |233 |Appasaheb Maruti Patil |Civilian |Indian | |234 |Anil Bhaskar Kolhe |State Reserve |Indian | | | |Police Force | | |235 |Gangaram Suryabhan Borde |Civilian |Indian | |236 |Ranjit Jagganath Jadhav |State Reserve |Indian | | | |Police Force | | |237 |Joseph Joy Pultara |Civilian |Indian | |238 |Virendra Pitamber Semwal |Civilian |Indian | SCHEDULE II LIST OF ACCUSED PERSONS |SR. No. |NAME | |ACCUSED ON TRIAL | |1 |Mohammad Ajmal Mohammad Amir Kasab @ Abu Mujahid | |2 |Fahim Arshad Mohammad Yusuf Ansari @ Abu Jarar @ Sakib @ Sahil| | |Pawaskar @ Sameer Shaikh@ Ahmed Hasan | |3 |Sabauddin Ahmed Shabbir Ahmed Shaikh @ Saba @ Farhan @ | | |Mubbashir @ Babar @ Sameer Singh @ Sanjiv @ Abu-Al-Kasim @ | | |Iftikhar @ Murshad @ Mohammad Shafik@Ajmal Ali | |ACCUSED WHO DIED IN COMMISSION OF OFFENCE | |1 |Ismail Khan @Abu Ismail | |2 |Imran Babar @ Abu Aqsa | |3 |Nasir @ Abu Umar | |4 |Nazir @ Abu Omair | |5 |Hafiz Arshad @ Abdul Rehaman Bada @ Hayaji | |6 |Abadul Reheman Chhota @ Saqib | |7 |Fahad Ullah | |8 |Javed @ Abu Ali | |9 |Shoaib @ Abu Soheb | |WANTED ACCUSED | |1 |Hafeez Mohammad Saeed @ Hafiz @ Hafiz Saab | |2 |Zaki-Ur-Rehaman Lakhvi | |3 |Abu Hamza | |4 |Abu Al Kama @ Amjid | |5 |Abu Kaahfa | |6 |Mujjamil @ Yusuf | |7 |Zarar Shah | |8 |Abu Fahad Ullah | |9 |Abu Abdul Rehman | |10 |Abu Anas | |11 |Abu Bashir | |12 |Abu Imran | |13 |Abu Mufti Saeed | |14 |Hakim Saab | |15 |Yusuf | |16 |Mursheed | |17 |Aakib | |18 |Abu Umar Saeed | |19 |Usman | |20 |Major General Sahab Name not known | |21 |Kharak Singh | |22 |Mohammad Ishfak | |23 |Javid Iqbal | |24 |Sajid Iftikhar | |25 |Col. R. Saadat Ullah | |26 |Khurram Shahdad | |27 |Abu Abdur Rehaman | |28 |Abu Muavia | |29 |Abu Anis | |30 |Abu Bashir | |31 |Abu Hanjla Pathan | |32 |Abu Saria | |33 |Abu Saif Ur Rehman | |34 |Abu Imran | |35 |Hakim Saheb | SCHEDULE III DNA EVIDENCE |SR. NO. |NAME OF THE |FORWARDING LETTER |ARTICLES SEIZED DURING |OPINION | | |TERRORIST |TO FSL FOR DNA |INVESTIGATION IN M.V. | | | | |PROFILING |KUBER | | |1. |Kasab |Exhibit No. 658 |Jacket (Art. 186 Colly.)|The DNA profile from the control | | | | | |sample

matched with the DNA profile | | | | |from sweat detected in jacket | | | | |report is Exhibit No. 205-F | |2. |Abu Ismail |Exhibit No. 216 |Blanket (Art. 184 |The DNA profile from the control | | | |Colly.) |sample matched with the DNA profile | | | | |from sweat detected on blanket | | | | |report is Exhibit No. 205-B | |3. |Imran Babar |Exhibit No. 683 | | |4. |Abu Umar |Exhibit No. 683 |Monkey Cap (Art. 187 |The DNA profile from the control | | | |Colly.) |sample matched with the DNA profile | | | | |from sweat detected on Monkey cap | | | | |report is Exhibit No. 205-E | |5. |Abu Omair |Exhibit No. 671 |Jacket (Art. 186 Colly.)|The DNA profile from the control | | |Colly | |sample matched with the DNA profile | | | | |from sweat detected on jacket | | | | |report is Exhibit No. 205-G | |6. |Abdul Rehman Bada | | | |7. |Abdul Rehman |Exhibit No. 665 |Israeli Cap (Art. 187 |The DNA profile from the control | | |Chhota | |Colly.) |sample matched with the DNA profile | | | | |from sweat detected on Israeli cap | | | | |report is Exhibit No. 205-D | |8. |Fahadullah |Exhibit No. 666 | | |9. |Abu Ali |Exhibit No. 671 |Handkerchief (Art. 206) |The DNA profile from the control | | | |Colly. | |sample matched with the DNA profile | | | | |from sweat detected on handkerchief | | | | |report is Exhibit No. 205-C | |10. |Abu Soheb |Exhibit No. 671 | | | |Colly. | | | REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NOS.1899-1900 OF 2011 MOHAMMED AJMAL MOHAMMAD AMIR KASAB @ ABU MUJAHID .... APPELLANT VERSUS STATE OF MAHARASHTRA ... RESPONDENT WITH CRIMINAL APPEAL NO. 1961 OF 2011 STATE OF MAHARASHTRA .... APPELLANT VERSUS FAMHIM HARSHAD MOHAMMAD YUSUF ANSARI & ANOTHER ... RESPONDENTS WITH TRANSFER PETITION (CRIMINAL) NO. 30 OF 2012 RADHAKANT YADAV .... APPELLANT VERSUS UNION OF INDIA & OTHERS ... RESPONDENTS JUDGMENT CHANDRAMAULI KR. PRASAD,J.

I agree.

However, I wish to add few words of my own.

In all human affairs absolute certainty is myth. Prof. Brett puts it, all exactness is fake. Ordinarily, E.L.Dorado theory of absolute proof being unattainable, the law accepts for it probability as a working substitute.

Hardly one come across a case, where Court does not resort to certain probability as working substitute for proof beyond all reasonable doubt. However, in the case in hand, from the evidence, oral and documentary, reference of which have copiously been made in the judgment by my noble and learned Brother Aftab Alam, J. make me believe that absolute certainty may not necessarily be a myth or fake in all cases and can be a reality.

The present case is an exception. Here, I am more than certain that the planning and conspiracy to commit the crime were hatched in Pakistan, the perpetrators of crime were Pakistani trained at different centres in that country, and the devastation which took place at various places in the city of Mumbai, were executed by the appellant in furtherance thereof.

(CHANDRAMAULI KR. PRASAD) NEW DELHI, AUGUST 29,2012.

[1] A complete list of people killed and injured is appended at the bottom of the judgment as Schedule No. I, forming part of the judgment.

[2] A complete list of the accused in three categories, i.e., (i) the three who faced the trial, (ii) the nine who died in course of commission of the crimes and (iii) the thirty five (35) who remain to be apprehended is appended at the bottom of this judgment as Schedule No. II, forming part of the judgment.

[3] A term used by the appellant; vernacular adaptation of buddy.

[4] To reconstruct the events at the CST the prosecution has examine fifty-three (53) witnesses. Leaving aside the forensic experts and other witnesses of a formal nature such as panch witness, the number of eye witnesses who gave ocular accounts of the events is not less than twenty- five (25). Out of these, ten (10) are policemen and members of Railway Protection Force (RPF) and Home Guard; among them three (3) are injured witnesses. Of the remaining fifteen(15), nine (9) are passengers, of whom eight

(8) are injured witnesses. Of the remaining six (6), four (4) are railway employees, of whom two (2) are injured. The remaining two (2) are photographers from the Times of India, one of the prime English dailies of the country.

[5] According to the appellants confessional statement before the magistrate, before lobbing the hand grand at the crowd of passengers, Abu Ismail had placed the bag containing the RDX bomb, with the timer set for blast, among the passengers luggage. Fortunately, however, the bomb failed to explode. The bomb along with the bag was later seized after it was diffused by the bomb disposal squad, but that forms part of the forensic evidence to which we will advert in due course.

[6] The fake identity card with Hindu name given to each member of the group of terrorists by Abu Kafa before leaving for Mumbai [7] Independently established through mobile phone call records [8] As we shall see presently this was Assistant Sub-Inspector Sudama Aba Pandarkar (PW-62) [9] As we shall see presently this was Police Constable Ambadas Pawar (one of the policemen falling down to the terrorists bullets) [10] All the three pictures clearly show Kasab, carrying a haversack on his back and an AK-47 in his hands. In the first picture he is shown moving forward, with the left hand raised and the right hand holding the AK-47 with the barrel pointing downwards. In the second picture he is raising the gun with the right hand and the left hand is coming down towards the gun for providing support. In the third picture he is stepping forward with both hands holding AK-47 at waist level in firing position.

[11] As we shall see presently these two were Police Inspector Shashank Shinde and Police Constable Ambadas Pawar (who fell down to the terrorists bullets).

[12] Ext. nos. 410-A, 410-B and 410-C are pictures taken when Kasab and Abu Ismail were at CST. All the three pictures appear to be taken from the front. In the pictures they appear behind what appears to be the frames of a set of two metal detectors. In Ext. no. 410-A Kasab and Abu Ismail are standing about three ft. apart peering ahead; in Ext. no. 410-B they appear standing close together in the frame of the metal detector looking ahead. In Ext. no. 410-C Abu Ismail is hidden behind a pillar but Kasab is clearly shown carrying a haversack on his back and an AK-47 in both hands.

[13] Ext. no. 410-D clearly shows Kasab coming down form the foot-over- bridge. The picture was taken with a flash and, therefore, it shows Kasab both startled and angry with the haversack hanging from the shoulder and the AK-47 held in both hands ready to fire.

[14] PW-62, Injured: shown in photograph Ext. no. 245 [15] Ambadas Pawar, killed; shown lying down with Shashank Shinde in photograph Ext. no. 242 [16] PW-61, Dsouza [17] Though Devika was not examined by the police earlier and she was only a child aged 10 years, on an application made by the prosecution the trial court by order dated June 10, 2009 allowed her to be examined as one of the prosecution witnesses under oath after being satisfied that she was capable of understanding the meaning of oath. We feel that the trial court was quite justified in examining Devika as one of the witnesses of the occurrence.

[18] For this part of the case the prosecution examined thirty-two (32) witnesses. Leaving aside the doctors, forensic experts and other witnesses of a formal nature, such as panch witnesses, the number of eye witnesses who gave an ocular account of the events is not less than eleven (11). Of the eleven (11), two are policemen both of whom received injuries at the hands of Kasab and Abu Ismail, five (5) are from the public of whom one (1) is injured, and four (4) are hospital staff of whom two (2) are injured.

[19] The number relates to the persons killed and injured by Kasab and Abu Ismail both in the lane before they entered Cama hospital and inside the hospital.

[20] They were 1.Timesh Narsing Chinnekar (PW-123) whose wife Gracy was admitted in the hospital on November 22, 2008, for delivery; 2. Thomas Sidhappa Uledhar (PW-108), brother-in-law of Chinnekar; and 3. Soman, a friend of Uledhar [21] The only issue on which the two judges hearing the case were

unable to agree completely was what would be the witnesses feelings towards the saint. The author of these lines felt that he would never again go to the shrine holding him responsible for getting nearly killed on November 26. The other judge, on the other hand, maintained that the occurrence would have greatly enhanced his devotion for the saint, whom the witness would see as his savior.

[22] The New Hospital building of Cama Hospital had two lifts, apart from the stairs, for going to the upper floors. The lifts could take one up to the sixth floor but the stairs would go beyond, right up to the terrace of the building.

[23] For this part of the case the prosecution examined eighteen (18) witnesses. Leaving aside the doctor, forensic expert and other witnesses of a formal nature, such as panch witnesses, the number of eye witnesses who gave an ocular account of the events is not less than seven (7). Out of the seven (7), six (6) are policemen one (1) of whom received injuries at the hands of Kasab and Abu Ismail and one (1) is the driver of a car who received gunshot injuries when his car was fired upon by the terrorists.

[24] The number relates to the persons killed and injured by Kasab and Abu Ismail from the point they came out of Cama hospital and until they snatched the Skoda car.

[25] Thorawade (PW-128) was earlier examined on July 14, 2009, before Kadam (PW-138) who was examined on July 27, 2009. But on July 14, 2009, he only stated before the court that, from November 28, 2008, he was handling the investigation of Crime No.245-08 till it was taken over by DCB, CID, on December 2, 2008. Later, Kadam, in his deposition before the court, stated that Thorawade was also among the policemen stationed in front of the entrance to Cama Hospital when Kasab and Abu Ismail came out of the Hospital, and he too had witnessed the whole incident. Thereupon, the court recalled Thorawade and he was re-examined by the court on November 23, 2009.

[26] Peter Mobile is the name given to a vehicle fitted with a wireless system. One such Peter Mobile is provided to each police station under the direct control of the Sr. PI in charge of the police station.

[27] Abu Ismail was firing at the crowd assembled at the Metro junction while driving the Qualis police vehicle which the two terrorists had snatched after killing all but one of its occupants. Actually both the two persons, namely, police constable driver Chitte and a civilian Surendra Bindu Ram, were killed, vide PW-654 (Ashok Dattatraya Khedkar, Assistant Police Inspector) [28] Pydhonie Division Jeep was assigned to Shantilal Arjun Bhamre, Assistant Commissioner of Police, Pydhonie Division (PW-133) and he had come there on that Jeep.

[29] For this part of the case the prosecution examined six (6) witnesses. Of these three (3) are policemen. One of them is formal, the other recorded the statement of the person from whom the car was taken away at gun-point and, since he was not the jurisdictional policeman, he handed over the recorded statement to the jurisdictional policeman who is the third police witness. Of the remaining three (3), two (2) are the occupants of the car and the third is the person whom they were going to rescue after he was evacuated from Oberoi Hotel.

[30] For this part of the case the prosecution has examined ten (10) witnesses. Leaving aside two (2) panch witnesses and a formal police witness, there are seven (7) police witnesses of whom three (3) are members of the team that overpowered Kasab and Abu Ismail and took them in custody (one of them is injured), two (2) reached the spot after Kasab was apprehended and had taken him and Abu Ismail to hospital, one (1) maintained the police logs and the last secured the area after the incident.

[31] According to the Post-Mortem of Abu Ismai (Ext. no. 97) there were six (6) bullet wounds on his person; among the other parts of the body, he was hit on the right eye and on the rear side of head, the front portion of the arm of the right hand shoulder and also at a distance of seven (7) cm down from the right hand shoulder. It would thus appear that he was hit by shots fired by both, Kadam and Bavthankar.

[32] Their identity was established by DNA profiling of the remains of the bodies found in the destroyed taxi.

[33] All calls established through mobile call records.

[34] One (1) the Nakhva on the Kuber; fifty-two (52) at CST; seven (7), Cama in; nine (9), Cama out; one (1) at Vinoli Chowpaty; and two (2) in the Vile Parle taxi blast.

[35] One hundred and nine (109) at CST; ten (10), Cama in; seven (7), Cama out; one (1) at Vinoli Chowpaty; and three (3) at Vile Parle taxi blast.

[36] From the ballistic analysis of the AK-47 bullets recovered from dead bodies, (only such that were not fragmented and were capable of identification), it came to be established that at least six (6) persons, namely, Sitaram Sakhare, Rahamtulla Ibrahim, Vinod Madanlal Gupta, Ambadas Ramchandra Pawar, Abbas Rajab Ansari (at CST) and Tukaram Gopal Ombale (at Vinoli Chaupaty) were hit by shots from the AK-47 rifle, Article 10, held by the appellant. Ashok Kamte, according to the forensic evidence, was hit by shots fired from Article 427, the AK-47 rifle used by Abu Ismail.

[37] See letter dated January 5, 2009 from the Chief Investigating Officer to the Police Surgeon, Mumbai, Article 991 [38] See Wasim Ahmed Bashiruddin Shaikh (PW-225) and Mohammad Rabiul Mohammad Kiramal Shaikh (PW-176) [39] All this can be witnessed in the CCTV recordings of the Hotel.

[40] After having taken Ramamoorthy captive, the terrorists were talking with their handlers and collaborators from across the border on a mobile phone. The collaborators asked them to find out Ramamoorthys identity so as to ascertain whether he was sufficiently important to be used for any bargains or negotiations with the Indian authorities. Ramamoorthy first said that he was a teacher at which the terrorists mocked him, saying how could he stay at the Taj on a salary of Rupees twenty thousand a month. They sarcastically asked him whether he was a smuggler and whether he was teaching his pupils how to kill Muslims. Ramamoorthy finally disclosed his true identity.

Before he was able to escape, Ramamoorthy had a most harrowing time with his captors, and one may appreciate his plight by recalling a few verses from a contemporary poem reflecting the feelings of a person taken as one of the hostages by the terrorists.

I feel entrapped Just like you do. You by your acts and I by you.

You target me yet you are blind product of an imprisoned mind.

Your freedom comes with your last breath for me, when I escape from death.

No questions asked when you will die those mourning me will question why. (from Retaliate by Kapil Sibal, in My World Within) [41] On being questioned by the terrorists, Adil Rohinton Irani gave his name as Adil, and said that he was a Muslim, in the hope that this would endear him to his captors. On the contrary, it only provoked the ire of the terrorists, who were particularly rough with him, calling him a traitor Musalman.

[42] This was in all probability the explosion of the RDX bomb placed by the terrorists themselves on the fifth floor of the hotel.

[43] Both the bombs planted by the terrorists exploded causing considerable damage; see Rambuval Chandrapati Yadav (PW-202).

[44] See the evidence of Kazi Zakir Hussain (PW-239).

[45] It is reported that it was at the Taj Mahal Hotel ballroom that, on February 20, 1918, at her eighteenth birthday party, Ruttie had accepted Mr Jinnahs hand in marriage while the band was playing the Chopin tune, So Deep is the Night. It is also reported that both Mr. Jinnah, the creator of Pakistan, and Mrs. Sarojini Naidu, the President of the Indian National Congress, often held court at Taj Mahal Hotel.

Mr. Jinnah also had an intimate connection with Mazgaon, where the bomb planted by two terrorists in a taxi exploded, killing three (3) and wounding nineteen (19) people. It is reported that Mr. Jinnah devoted Thursday afternoons to visiting the grave of his wife Ruttie at the Khoja Shiite Isnaashri Cemetry, situated at Mazgaon, Mumbai.

One wonders what Quaied-e-Azam would have thought of the terrorist attack on his favourite city in the subcontinent and especially on Taj Mahal Hotel, with which he had a personal relationship of a very intimate kind.

[46] In conversations (Talks no.3 and 4) on mobile phones between the terrorists at Hotel Taj and their collaborators from across the border, the latter gleefully tell the former that a minister was trapped inside the hotel and that, on the orders of the Prime Minister, a helicopter was likely to come to his rescue, and further that the terrorists should find and catch him and not allow him to flee.

[47] See the evidence of Additional Commissioner of Police Saravanaswamy Jagannathan (PW-37) and Commandant Prabhdeep Singh Malhotra (PW-26), and Exhibits no. 172A and 140. [48] See Exhibit no. 160, the office copy of the original registration certificate.

[49] It may be stated here that the witness was giving the list of the articles from his memory. At this stage, in answer to a court question, he sought permission to refer to the Panchnama Ext. no. 182 and, on referring to the Panchnama, he said that there were fourteen (14) to fifteen (15) shirts.

[50] * A reference to the panchnama, Ext. no. 182 would show that each of these articles had markings/ writings that unmistakably indicated that all the articles originated in Pakistan.

[51] Vermicelli [52] It may be noted here that among the one hundred and sixty-six (166) persons killed in the terrorist attack, six (6) were US citizens. Consequently, FBI case no.LA252196 was instituted and investigations were also made in America. This facilitated some coordination between the investigating agencies in the two countries. The FBI rendered some forensic assistance to investigators in India and also responded to some letterogatories sent by the Indian court (See PW-153, Geoffrey Maron, Special Agent, FBI).

[53] The full description of the pink foam piece is given at Exhibit no. 32, in the Panchnama dated November 27, 2008, Ext. no. 486.

[54] See Ext. no. 182 and PW-41 Gorakh Nalawade (for seizure of the foam pieces on Kuber), Ext. no. 269 and PW-74 Pandharinath Yeram (for seizure of the foam pieces from CST), Ext. no. 486 and PW-115 Nazimuddin Sheikh (for seizure of the foam pieces from Cama Hospital) & Ext. no. 736 and PW-182 Prakash Bhoite (for seizure of the foam pieces from Hotel Taj): The foam pieces were numbered in the forensic science laboratory as Ext. no. 75 of DNA-443B-08 in Ext. no. 1011 (on Kuber), Ext. no. 1 M.494-08 in Ext. no. 1012 (from CST), Ext. no. 53 of BL No. 990/C/08 in Ext. no. 1009 (from Cama Hospital) and Ext. no. 1 of M.516-08 & Ext. no. 3 of M.516-08 in Ext. no. 1010 (from Hotel Taj): And finally see the deposition of the Forensic Examiner Ramchandra Mavle (PW-247) and his report Ext. no. 1013 [55] Described in the transcripts of intercepted calls from Hotel Taj: Talk no.2 [56] Nariman House, Talk No. 26 (Ext. no. 990) [57] Hotel Taj, Talk No. 4 (Ext. no. 971) [58] Hotel Taj, Talk No. 8 (Ext. No. 972) [59] Hotel Oberoi, Talk No. 4 (Ext. no. 979) [60] Hotel Taj, Talk No. 3 (Ext. No. 970) [61] (2006) 3 SCC 374 (paragraphs 33-39 with special reference to paragraph 38 [62] (2008) 5 SCC 633 (paragraph 8, page 636) [63] (2008) 16 SCC 417 (paragraphs 71, 113, 114) [64] (2008) 16 SCC 497 (paragraph 5, page 499) [65] (2009) 7 SCC 104 (paragraph 53, page 127) [66] (2009) 14 SCC 677 (paragraph 10, page 680) [67] (1955) 1 SCR 613 (page 653, 2nd paragraph, 654) [68] (1985) 3 SCC 545 (paragraph 28 and 29, page 569, 570) [69] This statement is factually inaccurate but in fairness to Mr. Ramachandran it must be stated that, as the facts unfolded and the correct picture emerged, he immediately corrected himself and adapted his submissions, as we shall see in due course, to the correct facts.

[70] (1978) 2 SCC 424 [71] 384 US 436 (1966) [72] (1981) 1 SCC 627 [73] (2005) 11 SCC 600 [74] (1994) 3 SCC 569 [75] (1997) 1 SCC 416 [76] (2010) 7 SCC 263 [77] [1962] 3 SCR 10 [78] 512 US 452 (1993) [79] 130 S.Ct. 2250 (2010) [State Compilation 1, pg. 138] [80] 130 S.Ct. 2250 at 2260 (2010) [State Compilation 1, pg. 151] [81] [1992] 177 CLR 292 [82] [2010] 2 S.C.R. 310 [83] (2009) 49 EHRR 19 [84] [2011] UKSC 43 [85] [2011] UKSC 54 [86] (1992) 3 SCC 259 [87] (2011) 12 SCC 362 [88] AIR 1957 SC 637 (644) [89] 309 US 227: 84 L Ed 716: 60 S Ct 472 (1940) [90] 384 US 436: 16 L Ed 2d 694 (1966) [91] 378 US 478: 12 L Ed 2d 977 (1964) [92] AIR 1952 SC 75 [93] (1980) 1 SCC 98 [94] Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, (1980) 1 SCC 98 [95] (1986) 2 SCC 401 [96] A detailed form prescribed after this Courts decision in D.K. Basu, which every police officer in Maharashtra is required to fill up at the time of making arrest in compliance with the directions of this Court.

[97] Criminal Appeal No.284 of 1968, decided on December 17, 1968 [98] (1969) 1 SCR 32 [99] (1974) 3 SCC 581 (para 1) [100] We may recall here the injunction by the collaborators to the terrorists against being caught alive as appearing in the transcripts of their phone calls.

[101] On an enquiry made by the court as to how the appellant, being under judicial remand, came to learn that Pakistan had acknowledged him to be his national, it came to light that the appellant learnt about the fact from the guards on duty.

Actually, on February 12, 2009, the Interior Minister of Pakistan acknowledged that the appellant is a citizen of Pakistan in a press conference. But the appellant came to know about it much later and used it as an excuse to make a statement before the court.

[102] (1999) 5 SCC 253 (para 111) [103] 2011 (8) SCALE 328 [104] Recall here the plea of guilty statement made by him in the midst of his trial. In this statement he artfully and very subtly changed his earlier statement, recorded under Section 164 CrPC, thus cleverly offering himself for conviction but trying to escape the extreme penalty.

[105] (1980) 2 SCC 684 [106] (1983) 3 SCC 470 [107] (2011) 5 SCC 317, paras 23-24 [108] (2008) 13 SCC 767, para 43, 48-53 [109] (2009) 6 SCC 498, para 64-66, 71-72, 80-89 [110] (2009) 11 SCALE 327, para 11-23: (2010) 14 SCC 641 [111] (2009) 5 SCC 740, para 83-84, 107-110 [112] (2011) 2 SCC 764 [113] (2010) 3 SCC 508, para 80 [114] (2010) 1 SCC 775, para 66-67 [115] (1996) 9 SCC 502, para 15 [116] (2001) 9 SCC 1, para 1, 63

❑❑❑

Supreme Court of India

State Of Madhya Pradesh vs Shobharam And Ors

Bench:
A.K. Sarkar, Cj, M. Hidayatullah, J.R. Mudholkar, R.S. Bachawat, J.M. Shelat

Petitioner: State of Madhya Pradesh
Vs.
Respondent: Shobharam And Ors.

Date of Judgment : 22/04/1966

ACT:

Madhyabharat Panchayat Act (58 of 1949), s. 63-If violates

Art. 22 of the Constitution.

Constitution of India, 1950, Art. 22(1)-Right of accused to be defended by counsel-If ensures in cases when accused cannot be sentenced to imprisonment.

HEADNOTE:

The respondents were arrested by the police for the offence of trespass and were released on bail. They were tried and sentenced to pay a fine by the Nyaya Panchayat, a court established under the Madhya Bharat Panchayat Act, 1949, with powers to impose only a sentence of fine. The conviction was set aside by the High Court on the ground that s. 63 of the Act, which provides that no legal practi- tioner shall appear on behalf of any party in a proceeding before the Nyaya Panchayat, violated Art. 22(1) of the Constitution and was therefore void.

HELD:(Per Sarkar C.J., and Mudholkar, J.): The High Court was in error in setting aside the conviction.

Under Art. 22(1) a person arrested has the constitutional right to consult a legal practitioner concerning his arrest; and, a person who has been arrested as well as one who though not arrested runs the risk of loss of personal liberty as a result of a trial, have the constitutional right to be defended by an advocate of their choice. But in a trial under a law which does not provide for an order resulting in the loss of his personal liberty, he is not entitled to the constitutional right, because, the Article is concerned only with giving protection to personal liberty. [241 H-242 C, 244 B-C].

The Act does not give any power to deprive any one of his personal liberty either by way of arrest before the trial or by way of sentence of imprisonment as a result of the trial;

nor does it deprive an arrested person of his constitutional right to take steps against the arrest or to defend himself at a trial which might occasion the loss of his personal liberty. The fact that the respondents were arrested under another statute, namely, the Criminal Procedure Code cannot make either the section or the Act void. [242 G-H; 243 C-D; 244 D-E]

State of Bombay v. Atma Ram Sridhar Vaidya, [1951] S.C.R. 167..204, followed.

QUAERE:...Whether respondents were not entitled to the constitutional right because, at the trial they were on bail. [244 E]

Per Bachawat and Shelat JJ.: Section 63 of the Act is violative of Art. 22(1) and is void to the extent that it denies any person who is arrested the right to be defended by a legal practitioner of his choice in any trial

for the crime for which he is arrested. but, the order of the High Court, quashing the conviction, should be set aside, because, the respondents did not claim that they should be defended at the trial by counsel, and the circumstances of the case, the existence of s. 63 on the statute book did not cause them any prejudice. [257 G; 258 B-C]

As soon as the respondents were arrested without warrants issued by a court, they acquired the rights guaranteed by Art. 22(1), and they continued to have those rights though they were released on bail at the time of trial. The rights include the right to be defended even in a trial in which they were in jeopardy of only being sentenced to a fine. because, the pronoun "he" in the second part of Art. 22(1) refers to "any person who is arrested'-. If in the exercise of the general powers under the Criminal Procedure Code, the police arrest a person on the accusation of a crime for which he is liable to be tried before a Special Criminal Court, the arrested person has the constitutional right to be defended by counsel at the trial before the Special Criminal Court in respect of the offence for which he was arrested. Even if the word "he" means "any person" there is no warrant for giving a restricted interpretation and limiting the right to be defended by counsel to a trial in which the arrested person is in jeopardy of being sentenced to death or to a term of imprisonment. [256 A-D, F-G; 257 A- B]

State of Punjab v. Ajaib Singh, [1953] S.C.R. 254, referred to.

QUAERE:Whether the tests of an arrest" laid down in Ajaib Singh's case are exhaustive. [257 C].

Per Hidayatullah J. (dissenting): The appeal should be dismissed.

Under Art. 22, a person who is arrested for whatever reason, gets three independent rights. The first is the right to be told the reasons for the arrest as soon as an arrest is made, the second is the right to be produced before a Magistrate within 24 hours and the third is the right to be defended by an advocate of his choice. When the Constitution lays down in absolute terms a right to be defended by one's own counsel, it cannot be taken away by ordinary law, and. it is not sufficient to say that the accused who was so deprived, of the right, did not stand in danger of losing his personal liberty. The words "nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice," in Art. 22(1), refer to a person who is arrested. Personal liberty is invaded by arrest and continues to be restrained during the, period a person is on bail and, it is not sufficient to say that the accused who was so deprived prisonment. Before his release on bail he defends himself against his arrest and the charge for which he is arrested, and after his release on bail, against the charge he is to answer and for answering which, the bail requires him to be present. Therefore. s. 63 of the Act, being inconsistent with the Article, is void. Though the contention was raised for the first time in the High Court, since it is a question of fundamental right it must be upheld. [248 H; 249 D-F; 251 A-B, F-H; 252 B].

State of Punjab v. Aiaib Singh. [1953] S.C.R. 254 and State of Uttar Pradesh v. Abdul Samad [1962]. S.C.R. 915. referred to.

JUDGMENT

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 20 of 1965.

Appeal from the Judgment and order dated July 9, 1964 of the Madhya Pradesh High Court in Criminal Revision No. 166 of 1963.

B.Sen and 1. N. Shroff, for the appellant. B.D. Sharma, for the respondents.

A.V. Rangam, for Intervener No. 1.

V.A. Seyid Muhammad, Advocate-General, Kerala, B. R. L. Iyengar, A. G. Pudessery and M. R. K. K. Pillai for Intervener No. 2.

The Judgment of SARKAR C.J. and MUDHOLKAR J. was delivered by SARKAR C.J. The Judgment of BACHAWAT and SHELAT JJ. was delivered by BACHAWAT J. HIDAYATULLAH J. delivered a dissenting Opinion.

Sarkar, C.J. On a complaint of trespass the police registered a case against the respondents under S. 447 of the Penal Code. The respondents were later arrested by the police and released on the execution of surety bonds whereby the sureties undertook to produce them as required by the police. The case against the respondents was thereafter put up before the Nyaya Panchayat, a court established under the Madhya Bharat Panchayat Act, 1949. In ,'hat court, fresh bonds were executed by sureties on behalf of the respondents to ensure their presence during the trial. The Nyaya Panchayat, after trial, convicted and sentenced the respondents to a fine of Rs. 75 each. The conviction was upheld by the Additional Sessions Judge, Barwani. The respondents then moved the High Court of Madhya Pradesh in revision which set aside the conviction. Hence the present appeal.

Section 63 of the Panchayat Act provides that no legal prac- titioner shall appear on behalf of or shall plead for or defend any party in any dispute, case or proceeding pending before the Nyaya Panchayat. The High Court observed that in view of the provisions of Art. 22(1) of the Constitution, the section was void in respect of persons who were arrested. As the respondents had been arrested, it set aside their conviction. The question in this appeal is, whether the section violated Art. 22(1). That provision has to be considered along with Art. 21 of the Constitution and both are set out below:

"Art. 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Art. 22(1). 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."

It seems to us fairly clear that a person arrested has the constitutional right to consult a legal practitioner concerning his arrest. It is also clear that a person arrested has the constitutional right to be defended by a legal practitioner. But, against what is he to be defended? We think that the right to be defended by a legal practitioner would include a right to take steps through a legal practitioner for release from the arrest. Now, s. 63 of the Act puts no ban on either of these rights. It cannot be said to be invalid as denying these rights. We may add that the Act is not concerned with arrest and gives no power to arrest. But, is the right to be defended by a legal practitioner conferred only on a person arrested? We do not think so. In our opinion, the right to be defended by a legal practitioner extends also to a case of defence in a trial which may result in the loss of personal liberty. On the other hand, in our view, where a person is subjected to a trial under a law which does not provide for an order resulting in the loss of his personal liberty, he is not entitled to the constitutional right to defend himself at the trial by a legal practitioner. The reason is that Arts. 21 and 22 of the Constitution are concerned only with giving protection to personal liberty. That is strongly indicated by the language used in these Articles and by the context in which they occur in the Constitution. That also appears to be the view which has been taken by this Court. Thus in State of Bombay v. Atma Ram Sridhar Vaidya(1) Das, J. (as he then was) observed:

"..... the implication of that article (Art. 2 1) was that a person could be deprived of his life or personal liberty provided such deprivation was brought about in accordance with procedure enacted by the appropriate Legislature. Having so provided in article 21, the framers of our Constitution proceeded to Jay down certain procedural requirements which, as a matter of constitutional necessity, must be adopted and included in any procedure that may be enacted by the Legislature and in accordance with which a person may be deprived of his life or personal liberty. Those requirements are set forth in article 22 of the Constitution."

It would follow that the requirement laid down in Art. 22(1) is not a constitutional necessity in any enactment which does not affect life or personal liberty.

Now we find that the Act expressly provides that the Nyaya Panchayat cannot inflict a sentence of imprisonment, not even one in default of payment of fine which it is authorised to impose. We also find that the Act does not give any power of arrest. The case against the respondents was one in which in the first

instance a summons and not a war.-ant could issue and therefore no arrest was inevitably necessary. The arrest, if any that could (1)..[1915]1 S.O.R. 167,204. be made if a warrant came to be issued, would have been under the Code of Criminal Procedure and not the Panchayat Act. The Act, does not lay down any procedure or law entailing or justifying an order depriving a person of his personal liberty. For such a law. the procedural requirement in Art.

22(1) is not a constitutional necessity. The Act does not violate Art. 22(1) and cannot be held to be invalid on that ground.

It is true that in this case the respondents had been arrested but they had been arrested not under the Act but under s. 54(1) of the Code of Criminal Procedure, the offence being cognizable. A cognizable offence when tried by any of the courts created by the Code is punishable with imprisonment. But the Code by s. 340 entitles an accused person to be defended by a lawyer. We are however not concerned in this case with a trial by a court created by the Code. The question in this appeal is, whether the Panchayat Act is invalid. The Act does not deprive any arrested person of his constitutional right to take steps against the arrest or to defend himself in a trial which might occasion the loss of his personal liberty. It takes away no constitutional right at all.

Can the fact that the respondents were arrested under an- other law and thereafter tried under the Act give them the constitutional right to be defended at the trial by a legal practitioner? We do not think so. We think it clear that it cannot be said that the fact of arrest gives the arrested man the constitutional right to defend himself in all actions brought against him. Take the case of these respondents. Suppose that after the arrest an action was started against them for recovery of damages for wrongful trespass. Could they say that in view of Art. 22(1) they had a constitutional right to appear by a legal practitioner in that action? Could they say that if the law under which the trial was held denied the right to be represented by a legal practitioner. it was invalid as offending Art. 22(1)? We suppose the answer must plainly be in the negative. It would follow that it is not the fact of the arrest itself that gives the right to be defended by a lawyer in all matters.

We may put the matter from a different point of view. Assume a case in which a law creating an offence provides that on conviction a person shall be sentenced to a certain term of imprisonment but states that it shall not be necessary to arrest the person accused of that offence before he is put up for his trial. We should suppose that in such a case the person would be entitled to the constitutional right of being defended at the trial by a legal practitioner and any provision that denies that right to him would be void as violating Art. 22(1). We think this would be in consonance with the decision of this Court in Atma Ram Sridhar Vaidya's case[1]. We do not think that the Constitution could have intended that a person who ran the risk of loss of personal liberty as a result of a trial, would not have the right to defend himself by a legal practitioner at the trial because he had not been arrested. There would be no principle to support such a view. Likewise, we do not think that the Constitution makers intended that a person arrested would have the right to be defended by a legal practitioner at a trial which would not result in the deprivation of his personal liberty. He, of course, had the right to seek relief against the arrest through a legal practitioner. We would interpret the words "nor shall he" in Art. 22 as not being confined to a person who has been presently arrested but also as including a person who though not arrested runs the risk of loss of personal liberty. It seems to us that we would thereby be carrying out the spirit of the Constitution.

The question before us is, whether the Nyaya Panchayat Act is void as offending Art. 22(1) because it contains S. 63. In our view, it is not void because it does not give any power to deprive anyone of his personal liberty either by way of arrest before the trial or by way of a sentence of imprisonment as a result of the trial. It would appear that the High Court took the same view when it said that the section was void "in the case of persons arrested". In our opinion, the High Court was in error. The validity of an Act cannot depend on the facts of a case but on its terms. The fact that the respondents were arrested under another statute, cannot, in our opinion. make the Act void. A question was mooted at the Bar that since at the trial the respondents

1 [1951] S.C.R. 167.

were not under arrest having been released on execution of bonds, they were no longer entitled to the constitutional right conferred by Art.

22(1). As at present advised, we are not inclined to accede to this view. We consider it unnecessary to pursue this matter further in the present case.

For the reasons earlier stated, in our view, the Act is per- fectly valid. No question therefore arises of the conviction being bad on the ground that the Act was invalid. In our view, the High Court was in error in setting aside the conviction.

We would, therefore, allow the appeal, set aside the judg- ment of the High Court and restore that of the courts below it.

Hidayatullah, J. In my opinion this appeal should fail. The short question in this appeal is whether s. 63 of the Madhya Bharat Panchayat Act is inapplicable to criminal trials owing to its inconsistency with Art. 22(1) of the Constitution. The Panchayat Act was passed on June 17, 1949 and under its provisions the Nyaya Panchayats are empowered to try certain offences including the offence of criminal trespass punishable under S. 447, Indian Penal Code. The Act, however, places a limitation on the powers of these courts by enacting that they can impose a sentence of fine but not imprisonment. The respondents were arrested by the Police without a warrant from a Magistrate, for an alleged offence under s. 447, Indian Penal Code and were released on bail. After investigation the case was sent for trial before the Nyaya Panchayat, Barwani. Fresh bail bonds were obtained from them by the Nyaya Panchayat. The respondents were fined Rs. 75 each. but no sentence of imprisonment in lieu of fine was imposed on them. The respondents were not defended by a lawyer at the trial pre- sumably because of s. 63 of the Act which reads:

"No legal practitioner shall appear on behalf of or shall plead for or defend any party in any dispute, case or proceedings pending before the Nyaya Panchayat".

The respondents filed an application for revision before the Additional Sessions Judge, Barwani but were unsuccessful. They then filed a second application for revision in the High Court of Madhya Pradesh and inter alia contended that the trial was vitiated because they were deprived of their right to be defended by counsel guaranteed under Art. 22(1) of the Constitution. They also submitted that S. 63 of the Act was rendered void by reason of Art. 13 in view of its inconsistency with this guaranteed right. A learned single Judge of the High Court referred the second point for con- sideration by a larger Bench but the Divisional Court declined to consider it because, in its opinion, the decision of this Court in the State of Punjab v. Ajaib Singh and Anr.(1) had distinctly laid down that Art. 22(1) was not applicable to persons held in custody or bail under an order of a court and, therefore, the point did not arise for decision. The case was remitted to the learned single Judge who, by the order under appeal, July 9, 1964 allowed the application for revision holding that the trial was vitiated as the respondents were deprived of their fundamental right to be defended by a counsel of their choice. He accordingly set aside their conviction but did not record an acquittal. The question thus arises whether s. 63 of the Panchayat Act (in the setting of the powers of the Nyaya Panchayat) can be said to offend Art. 22(1) and for that reason to be void in so far as it takes away the right of a person who is arrested to be defended by a legal practitioner of his choice in a trial before the Nyaya Panchayat. My brother Bachawat has held the section to be inapplicable to criminal trials before the Panchayat courts. He has, however, set aside the order of the High Court on the ground that the respondents did not seek to exercise their right at the trial and cannot, therefore, be said to have been deprived of it. I agree with him on the first point but in view of the importance of the question which affects some other statutes and involves a very valuable right, I consider it necessary to express my views upon it. (1)[1953] S.C.R. 254.

Article 22 is in Part III of the Constitution in a sub- chapter headed "Right to Freedom". It is one of three articles immediately following Art. 19. Under Art. 19 certain fundamental rights are protected subject to restrictions which may be imposed on those Tights by law. Those restrictions are specified in relation to each of the guaranteed right in the article itself. We are not concerned with the rights or the restrictions

because they do not touch the present matter. Article 20 which comes next consists of three clauses which are somewhat inadequately described by the marginal note "Protection in respect of conviction for offences". The first clause gives protection against retroactive penal laws. the second against double jeopardy and the third against testimonial compulsion. We are again not concerned with any of these rights. The next article is a general declaration relating to protection of life and personal liberty. It reads:

"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."

It will be noticed that there is no mention here of any particular, law. nor of the articles that follow. Article 22, with which we are concerned, deals with several matters which are compendiously described in the marginal note as "Protection against arrest and detention in certain cases". It consists of seven clauses of which cls. (4) to (7) deal with preventive detention and the special requirements of such cases. They need not be considered here. Clause (3) excludes the operation of the first two clauses in respect of alien enemies and persons detained under any law providing for preventive detention. They do not touch our case. This leaves cls. (1) and, (2) which may be quoted here:

"22. Protection against arrest and detention in certain cases.

(1)...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.

(2)...Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four 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 shall be detained in custody beyond the said period without the authority of a magistrate.

Articles 21 and 22 in a sense go together but, in my opinion, they cannot be treated as interrelated or interdependent. Article 21 prohibits arbitrary deprivation of life and personal liberty by laying down that these two possessions can only be taken away in accordance with procedure established by law. No authority ill India (legislative, executive or judicial) can deprive a person of his life or personal liberty unless it can justify its action under a procedure established by law. Article 21 does not indicate what that law must be nor does Art. 22 say this. Article 22, no doubt, advances in a way the purpose of Art. 21, when it specifies some guaranteed rights available to persons arrested or detained and lays down the manner in which persons detained preventively must ,be dealt with, But the force of the declaration in Art. 21 is much greater than that because it makes law as the sole basis of State action to deprive a person of his life and personal liberty.

We are not concerned in this case with arbitrary deprivation of life and personal liberty. The respondents were considered to have committed an offence of criminal trespass and were arrested and tried by procedure established by law. The only defect in that procedure was that they were unable to get assistance of counsel because of a provision of law which they claim to be void by reason of Art. 22(1). 1 proceed to examine the question.

Article 22(1) is in two parts and it gives to persons arrested it two-fold protection. The first is that an arrested person shall not be detained in custody without being told the grounds of such an arrest and the other is that he shall be entitled to consult and to be defended by a legal practitioner of his choice. Art. 22(2) gives a third protection and it is that every person arrested and detained in custody must be produced before the nearest Magistrate within 24 hours excluding the time necessary for the journey from the place of arrest to the court of the Magistrate. In Ajaib Singh's case(1) it was held that by "arrest" in the article is meant physical restraint put on a person as a result of an allegation or accusation that he has committed a crime or an offence of a quasi-criminal nature or that he has acted in a manner which is prejudicial to the State or public interest. It was further held that as arrests under warrants issued by courts almost always indicate the reasons for the arrest and require the person executing the warrant to produce the person arrested Wore the court, such arrests

are outside Art. 22(1) and (2). It was thus held that the article was designed to give protection against the act of the executive or other non-judicial authority. That case arose under the Abducted Persons (Recovery and Restoration) Act 1949 (65 of 1949) under which persons abducted from Pakistan were rescued. Such persons were taken in custody and delivered to the custody of an officer-in-charge of a camp for the purpose of return to Pakistan. In deciding that this (1) [1953] S.C.R. 254, was not the kind of arrest contemplated by Art. 22 the court examined what meaning could be given to the word arrest. But the Bench guarded itself by observing as follows:-

"..... it is not, however, our purpose, nor do we consider it desirable, to attempt a precise and meticulous enunciation of the scope and ambit of this fundamental right or to enumerate exhaustively the cases that come within its protection ".

The case cannot be treated as having laid down the law finally or exhaustively. Similarly, in State of Uttar Pradesh v. Abdul Sammad and Anr.(1) involving arrest and deportation of a person it was held by majority that it was not necessary to produce such a person before the Magistrate if he was produced before the High Court and the High Court remitted the person back to the same custody. Mr. Justice Subba Rao dissented with this view. Abdul Samad's case(1) was also not exhaustive because the majority observed:

"In view of the very limited question before us we do not feel called upon to deal with the scope of Art. 22(1) 22(2) or of the two clauses read together in relation to the taking into custody of a person for the purpose of executing a lawful order of deportation....."

I consider that there is room for further deliberation on the point. I do not see how we can differentiate between arrests of different kinds. Arrest is arrest, whatever the reason. In so far as the first part of Art. 22(1) is concerned it enacts a very simple safeguard for persons arrested. It merely says that an arrested person must be told the grounds of his arrest. In other words, a person's personal liberty cannot be curtailed by arrest without in- forming him, as soon as is possible, why he is arrested. Where the arrest is by warrant, the warrant itself must tell him, where it is by an order, the order must tell him and where there is no warrant or order the person making the arrest must give that information. However the arrest is made, this must be done and that is all that the first part of Art. 22(1) lays down. I find nothing in Art. 22(1) to limit this requirement to arrests of any particular kind. A warrant of a court and an order of any authority must show on their face the reason for arrest. Where there is no such warrant or order, the person making the arrest must inform the person the reason of his arrest. In other words, Art. 22(1) means what it says in its first part.

I now come to the latter part of Art. 22(1). Here again, the language is extremely clear. The words "nor shall be denied the right to consult, and to be defended by, a legal practitioner of his choice" refer to a person who is arrested. This is the sense of the (1)[162] Supp. 3 S.C.R. 915. matter and the grammatical construction of the words. It is contended by Mr. B. Sen that the article only affords a person to get released from arrest and the word 'defended' means that the person who is arrested has a right to consult a legal practitioner of his choice and to take his aid to get out of the arrest. He contends that if a person has already been released on bail either by the authority making the arrest or by an order of the court, the purpose of the article is served and occasion for the exercise of the guaranteed right is over. He argued, therefore, that in the present case the section cannot be characterized as unconstitutional because the respondents were not under arrest during their trial Lind they were not in danger of losing their personal liberty in any way since the Nyaya Panchayat had no power to impose a sentence of imprisonment. I do not agree.

As I have stated already a person who is arrested gets three rights which are guaranteed. The first is that he must be told why he is arrested. This requirement cannot be dispensed with by taking bail from him. The need to tell him why he is arrested, remains still. The next is that the person arrested must not be detained in custody more than 24 hours without being produced before a Magistrate. This requirement is dispensed with when the person arrested is admitted to bail. Otherwise it remains. The third is that he gets a right to consult and to be defended by a legal practitioner of his choice. This is. of course, so while the arrest continues but there are no words to show that the right is lost no sooner than lie is released on bail. The word 'defended'

clearly includes the exercise of the right so long as the effect of the arrest continues. Before his release on bail the person defends himself against his arrest and the charge for which he is arrested and after his release on bail, against the charge he is to answer and, for answering which, the bail requires him to remain present, The narrow meaning of the word "defended" cannot be accepted.

The framers of our Constitution must have been aware of the long struggle that took place in England before the right to be represented by counsel and to be told the grounds of arrest was established. No doubt the Crown was then concerned with traitors and other law-breakers and in a desire to put them down denied them these privileges. The system then was inquisitorial as against the accusatorial which we have adopted. Although the trial was open (which was better than the continental trial behind doors), defence as late as 1640 meant in the words of Sir Thomas Smith(1), a mixture of formality and informality which consisted of an altercation between the accused and the prosecutor and his witness. The prisoner was not told what charge he had to meet because lie was not informed why he was arrested and no copy of the indictment was handed to him[2]. He was closely questioned by the examining (1) De Repubica Anglorum Bk. 11 c. 23 quoted by Holdsworth, History of English Law Vol. IX, p. 225.

31. Magistrate and then by the Judge at the trial and the prosecuting counsel. Thus it was that Throckmorton, as an accused, was first subjected to lengthy cross-examination and had to argue even points of law in which at least he got the better of the Judge and the King's counsel and secured a verdict of not guilty from the jury. It is, of course, a matter of history, which is well-known, that the jury were themselves punished(1). Sir Walter Raleigh was also denied assistance of counsel and was cross-examined by Popham C.J. without being warned or confronted with witnesses whose statements were used against him(1). College had legal advice but he fared no better because. at the trial his papers containing instructions for his defence were taken away from him on the ground; that this would be tantamount to getting assistance from counsel(1). By an Act of 1695 only persons accused of high treason were given assistance of counsel and by 6 and 7 William IV, c. 114 (in the year 1837) the Prisoners' Counsel Act gave persons accused of felony the right to be defended by counsel. This history of English law makes it clear that the right to be defended by counsel and to be informed the reason for arrest is not an empty declaration coming to an end with release on bail. Nearer to our times we have the example of the United States of America. Right to counsel is considered so fundamental to a criminal trial that the Supreme Court of the United States ruled that there was a mistrial when Clarence Gideon could not afford a counsel and the State did not furnish one to him. Clarence Gideon was not charged with anything more serious than "the crime of breaking and entering with the intent to commit a misdemeanor, to wit, petty larceny". In the American Constitution there is no provision that an accused has a right to counsel but the Supreme Court stretched the due process clause to cover such a case. It is significant that at the retrial, with counsel, Gideon was acquitted of the charge on which he was first convicted. No doubt this was considered by the, Supreme Court of America from the point of legal aid to persons accused of crime and our laws view legal aid differently. Under our jurisdiction providing counsel to an accused who cannot afford one (,except in capital cases) is not a right. Our law in respect of legal aid is similar to that declared by the Lord Chief Justice of England in Reg. v. Howes[3] who pointed out that the right to be defended by counsel is (in all save murder and treason cases) one ultimately for the discretion of the court to confer or deny.

As we are not concerned with legal aid I need not say more but it is at least clear that when our Constitution lays down in absolute terms a right to be defended by one's own counsel it cannot be taken away by ordinary law and it is not sufficient to say that the accused who was so deprived of this right, did not stand in danger of losing his personal liberty. If he was exposed to penalty, he had a right to be defended by counsel. If this were not so then instead of providing for punishment of imprisonment, penal laws might provide for

2 Stephen: History of Criminal Law Vol. 1. pp. 325, 330-

3 State Trial 872-895. (2) [1603] 2 S.T. I. (3) 85 T.549-563. North C.J.after examining the papers said- "forthat which contains the names of the witnesses,that you have again for other matters, the instructions in point of law, if they had been written in the first person, in your own name, that we might believe it was your writing, it would have been something; but when it is written in the second person, you should do so and so, by which it appears to be written by another person, it is an ill precedent permit such things; that were to give you counsel in an indirect way, which the law gives you not directly". ibid p. 585. (4) [1964] 1 W.L.R. 576.

unlimited fines and it would be easy to leave the man free but a pauper, and, that too without a right to be defended by counsel[4]. If this proposition were accepted as true we might be in the Middle Ages. The Criminal Procedure Code allows the right to be defended by counsel but that is not a guaranteed right. The framers of the Constitution have well-thought of this right and by including the prescription in the Constitution have put it beyond the power of any authority to alter it without the Constitution being altered. A law which provides differently must necessarily be obnoxious to the guarantee of the Constitution. There is nothing in the words of the Constitution which permits any authority to alter this condition even on grounds of public interest as is the case with the guaranteed rights in Art. 19. Nor can we by a niggling argument lessen the force of the declaration so explicit in its terms or whittle down its meaning by a specious attempt at supposed harmony between rights which are not interdependent. There are three rights and each stands by itself. The first is the right to be told the reason of the arrest as soon as an arrest is made, the second is the right to be produced before a Magistrate within twenty-four hours and the third is the right to be defended by a lawyer of one's choice. In addition there is the declaration that no person shall be deprived of his personal liberty except by procedure established by law. The declaration is general and insists on legality of the action. The rights given by Art. 22(1) and (2) are absolute in themselves and do not depend on other laws. There is no force in the submission that if there is only a punishment of fine and there is no danger to personal liberty the protection of Art. 22(1) is not available. Personal liberty is invaded by arrest and continues to be restrained during the period a person is on bail and it matters not whether there is or is not a possibility of imprisonment. A person arrested and put on his defence against a criminal charge, which may result in penalty, is entitled to the right to defend himself with the aid of counsel and any law that takes away this right offend s against the Constitution. In my judgment, therefore, s. 63 of the Panchayat. Act being inconsistent with Art. 22(1) ,came void on the inauguration of the Constitution in so far as it took away the right of an arrested person to be defended by a legal practitioner,of his choice.

My brother Bachawat has reached the same conclusion but has reversed the order of the High Court and restored the conviction and penalty on the ground that no request was made at the trial for permission to be defended by counsel. I find it difficult to accept this result. It is true that the contention raised in the High Court has the appearance of an after-thought because no complaint was made before the Sessions Judge. But it is nevertheless a question of a fundamental right. Since a request to bring in counsel would have been doomed to failure, I feel I should not hold that the respondents go by default. As this objection is taken in the criminal case itself, albeit at a late stage, and not by a belated collateral proceeding, I would allow the High Court order to stand. After all the prosecution will be free to start the case again, if it is so desired, and the accused will have the opportunity to defend themselves with the assistance of counsel if they so care. I would, therefore, dismiss the appeal.

Bachawat, J On or about November 15, 1962, on receipt of a first information report charging the respondents with an offence under s. 447 of the Indian Penal Code, the Station Officer. Barwani registered the offence and arrested the respondents. The arrests were made without warrants issued by a magistrate. Subsequently, the respondents were released by the Station Officer on execution of bail bonds with sureties for appearance in the Court of Nyaya Panchayat, Barwani and other courts. On November 20, 1962, the Station Officer submitted to the Nyaya Panchayat, Bar- wani a charge-sheet against all the respondents. On the same day, the respondents appeared before the Nyaya Panchayat, and executed fresh bonds with sureties for appearance before the Nyaya Panchayat. The case was heard on several days, and on January 31, 1963, the Nyaya Panchayat convicted all the respondents under s. 447 and sentenced each of them to pay a fine of Rs. 75 / -. On April 9, 1963, the Additional Sessions Judge, Barwani dismissed a revision application filed by the respondents. The respondents filed a revision petition before the High Court of Madhya Pradesh, Indore Bench, and contended for the first time that s. 63 of the Madhya Bharat Panchayat Act, 1949 is violative of Art. 22(1) of the Constitution and their trials and convictions were illegal. The High Court accepted these contentions, and by its order dated July 9. 1964 declared that s. 63 is void to the extent that it denied the

4 [1964] IW.L.R. 576.

res- pondents the right to be defended by a legal practitioner of their choice in the trial before the Nyaya Panchayat, quashed the convictions and sentences and directed that they be dealt with in accordance with law. The State of Madhya Pradesh now appeals to this Court on a certificate granted by the High Court.

Mr. B. Sen appeared on behalf of the appellant. Mr. Sharma. who was appointed as amicus curiae by an order of this Court, argued the case of the respondents. In view of the constitutional questions raised in this case, notices were issued to the Advocates General of all the States. Mr. lengar appeared on behalf of the Advocate-General of Kerala, and he stated that there was no provision similar to s. 63 of the Madhya Bharat Panchayat Act in the State of Kerala. Mr. Rangam appeared on behalf of the Advocate, General of Madras, and he drew our attention to S. 76(5) of the Madras Village Courts Act (Act 1 of 1887).

The Madhya Bharat Panchayat Act was passed on June 17, 1949. By S. 75 of the Act, the Nyaya Panchayat is empowered to try certain offences committed within its jurisdiction including offences under s. 447. The Nyaya Panchayat has power to impose a fine not exceeding Rs. 100/-, but it has no power to inflict a substantive sentence of imprisonment nor a sentence of imprisonment in default of payment of fine. Section 79 provides that if at any time it appears to the Nyaya Panchayat (a) that it has no jurisdiction to try any case before it or (b) that the offence is one for which it cannot award adequate punishment or (c) that the complaint is such or that it is so complicated that it should be tried by a Court of Justice, the Nyaya Panchayat shall return the complaint to the complainant directing him to file it before a Sub-Divisional Magistrate having jurisdiction to try the case. By. s. 89, the decision of the Nyaya Panchayat in its criminal jurisdiction is final and not appealable except that it is subject to revision by the Sessions Judge. Section 87 provides that subject to the provisions of s. 63. any party may appear before a Nyaya Panchayat by a duly authorised 1, preventative. Section 63 provides:

"No legal practitioner shall appear on behalf of or shall plead for or defend any party in any dispute, case or proceedings pending before the Nyaya Panchayat."

The question is whether this section infringes Art. 22 of the Constitution. The second part of Art.

22(1) reads:

nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

Mr. Sen submitted that "he" means a person who is arrested and detained, and as the respondents were not detained at the time of the trial before the Nyaya Panchayat, the constitutional guarantee is not available to them. Alternatively, he submitted that "he" means "any parson". He argued that in the case of The State of Punjab v. Ajaib Singh and another(1), this Court has restricted the constitutional guarantee embodied in the first part of Art. 22(1) to persons arrested otherwise than under a warrant issued by a Court, and he submitted that this restricted interpretation should not be given to the second part, the two parts should be read independently of each other and the protection of the second part should be extended to all persons. But he also submitted that in the context of Art. 21 the right given by the second part of cl. (1) of Art. 22 (1) [1053] S.C.R. 254.

should be limited to trials in which any person is deprived of his life or personal liberty or is in jeopardy of being so deprived. He pointed out that the Nyaya Panchayat has no power to inflict a sentence of imprisonment and be, therefore, submitted that the constitutional guarantee embodied in the second part of Art. 22(1) did not apply to a trial before a Nyaya Panchayat.It will thus appear that Mr. Sen asked us on the one hand to give a liberal interpretation to the second part of Art. 22(1) by applying it to all persons, whether arrested or not and whether arrested under or without a warrant issued by a Court, and, on the other hand, he asked us to give it a restricted interpretation by limiting its operation to a trial in which the accused is in jeopardy of being deprived of life or liberty. Mr. lengar submitted that "he" means "any person who is arrested". He argued that the second part of Art. 22(1) is an injunction on the arresting and detaining authority not to prevent consultation and defence by a legal practitioner, and it gives no right to be defended at a trial. Mr. Rangam

adopted the arguments of Mr. lengar. Mr. Sharma submitted that "he" means any person who is arrested and that any person who is arrested has the right to be defended at the trial for the offer for which he is arrested.

Our duty is to listen to the clear words of the Constitution, understand its message and then interpret it. Article 22(1) 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.....

Every person is prima facie entitled to his personal liberty. If any person is arrested, he is entitled to know forthwith why he is being deprived of his liberty, so that he may take immediate steps to regain his freedom. Article 22(1) then continues:

" nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice." Who is this "he" in the second part of Art. 22(1)? The pronoun "he" must refer to the last antecedent. "He" therefore means "any person who is arrested". He has the right to consult his lawyer and to be defended by him, so that he may guard himself against the accusation for which he is arrested.

Both parts of cl. (1) of Art. 22 thus come into play as soon as any person is arrested. Clause (2) of Art. 22 then goes on to give every person who is arrested and detained the right to be produced before a magistrate within 24 hours and the right to freedom from detention beyond the said period without the authority of a magistrate. Das, J, therefore, observed in A. K. Gopalan v. The State[5]:

"Clauses (1) and (2) of article 22 lay down the procedure that has to be followed when a man is arrested. They ensure four things: (a) right to be informed regarding grounds of arrest, (b) right to consult, and to be defended by, a legal practitioner of his choice, (c) right to be produced before a magistrate within 24 hours and (d) freedom from detention beyond the said period except by order of the magistrate."

Clauses (1) and (2) of Art. 22 safeguard the rights of the person arrested. The arrest of any person on a criminal charge is a step in an intended criminal proceeding against him. Save where the magistrate dispenses with his personal attendance and permits him to appear by a pleader, the first step in a criminal proceeding is to bring the accused before the magistrate. The trial before the magistrate proceeds "when the accused appears or is brought before him." The attendance of the accused before the magistrate is secured by summons or by arrest under or without a warrant. Upon arrest, he may either be released on bail or be remanded into custody. If he is released on bail, the bail bond ensures his attendance at the trial. Summonses, warrants, arrests without warrant and bail bonds are all machinery for securing the attendance of the accused before the Court. The arrest of the accused on a criminal charge has thus an intimate connection with his eventual trial on the charge. It is at the trial in the criminal Court that the accused defends or is defended by counsel. Section 340 of the Code of Criminal Procedure, therefore, provides that any person accused of any offence before a criminal Court may, of right, be defended by a pleader. In this background, the right of defence by a legal practitioner given by Art. 22(1) must extend to defence in a trial in a criminal Court. Article 21 guarantees that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 guarantees the minimum rights which any person who is arrested shall enjoy. In support of his contention that the right of defence of the arrested person given by cl. (1) of Art. 22, should be restricted to trial of offences in which the accused is in jeopardy of being deprived of his life or liberty, Mr. Sen relied upon the observations of Das, J. in State of Bombay v. Atma Ram Sridhar Vaidya[6] that Art. 22 sets forth certain procedural requirements which, as a matter of constitutional necessity, must be adopted and included in any procedure that may be enacted by the legislature and it accordance with which a person may be deprived of his life or personal liberty. He also relied upon the following ob- servations of Das, J. in A. K. Gopalan v. The State(1) at p. 325 "Clauses (1) and (2) of Article 22 lay down the procedure that has to be followed when a man is arrested." For the purposes of this case, let us give these observations their full effect.

5 [1959] S.C.R. 88, 325.

6 [1950] S.C.R. 88.

When any person is arrested, he is deprived of his liberty, the procedure third down in cl. (1) of Art. 22 must then be followed, and he must be allowed the right to be defended by counsel of his choice. No (1) [1951] S.C.R. 167,204 law which permits deprivation of his personal liberty by arrest can deny him this right. Why should this right be limited to a trial in, which he may be sentenced to death or to a term of imprisonment? Why should this right be denied to him in a trial in which he is in jeopardy of being convicted and sentenced to a heavy fine? The clear words of Art. 22 furnish no basis for this limitation. On this branch of his argument, Mr. Sell submitted that "he" in the second part of cl. (1) should be read as "any person" in order that this part of cl. (1) may not suffer from the restricted interpretation of "arrest" given in Ajaib Singh's case[7]. It is impossible to accept this argument. The narrow interpretation of the expression "arrest" given in that case is not a ground for giving an unnatural meaning to the expression "he". The context of cl. (1) suggests that "he" refers to any person who is arrested. But let us assume that it is possible to give a more liberal interpretation to "he" and the operation of the second part of the clause should be extended to "any person". Even on this view, we find no warrant for giving a restricted interpretation to the second part of the clause by reference to Art. 21 and for saying that the right to be defended by counsel is limited to a trial in which the arrested person is in jeopardy of being sentenced to death or to a term of imprisonment.

It has been suggested that the right of defence by counsel given by Art. 22(1) does not extend to a trial of an offence before the Nyaya Panchayat because the Madhya Bharat Panchayat Act, 1949 does not authorise any arrest and, as a matter of fact. the respondents were arrested by the police in the exercise of its powers under s. 54 of the Code of Criminal Procedure. We are unable to accept this suggestion. Suppose a statute sets tip a special criminal Court for the trial of certain offences, and it gives no power to the police to arrest any person. Nevertheless, the police has under its general powers under the Code of Criminal Procedure authority to arrest any person concerned in any cogniscible offence. If in the exercise of these powers the police arrests some person on the accusation of a crime for which he is liable to be tried before the special criminal Court, the arrested person has the constitutional right to be defended by counsel at the trial before the special criminal Court in respect of the offence for which he was arrested. It has also been suggested that the trial of an offence before the Nyaya Panchayat is akin to an action for recovery of money and as an arrested person has no constitutional right to be defended by counsel in the action for recovery of money, so, also he has no such right in a trial of all offence before the Nyaya Panchayat We are unable to accept this line of reasoning. A person arrested on the accusation of a crime has the constitutional right to be defended by counsel at a subsequent trial of the crime for which he is arrested. He cannot, therefore. claim this right in a subsequent action against him for recovery of money, but he can claim this right in a subsequent trial of the offence before the Nyaya Panchayat.

As soon as the respondents were arrested without warrants issued by a Court, they acquired the rights guaranteed by cl. (1) of Art. 22. It is true that they were subsequently released on bail and at the time of the trial before the Nyaya Panchayat they were not being detained. But the right attaching to them on their arrest continued though they were not under detention at the time of the trial. The right was not lost because they were released on bail. The respondents were arrested otherwise than under a warrant issued by a Court on the accusation that they had committed crimes. Their arrests, therefore, satisfy the test laid down in Ajaib Singh's case[8], and are within the purview of cl. (1) of Art. 22. We express no opinion on the question whether the test of an arrest laid down in that case is exhaustive.

We may now briefly notice a few decisions under other Pan- chayat Acts. In Lal Bachan Singh v. Suraj.Bali[9], the Allababad High Court held that a provision of the U. P. Panchayat Raj Act (26 of 1947) under which no counsel was permitted to appear in the Court of the Panchayati Adalat did not infringe any right of an accused who had not been arrested. In Gurdial Singh v. The State[10], the Punjab High Court held that a provision of

7 19531 S.C.R. 254.

8 [1953] S.C.R. 254.

9 A.I.R. 1925 All 924.

10 A.T.R. 1957 Punjab. 149.

the Punjab Gram Panchayat Act (4 of 1953) under which the accused was not allowed to be defended by counsel of his choice did not infringe any right under Art. 22. In Digambar Aruk v. Nanda Aruk[11], the Orissa High Court held that no 'tight of the accused was infringed by s. 94 of the Orissa Gram Panchayat Act (15 of 1948), which prohibited any legal practitioner from appearing before an Adalti Panchayat, having power to award a sentence of imprisonment in lieu of fine. The reports of the two last cases do not set out full facts. Presumably, in both cases the accused were not arrested at all, and if so, there could be no infringement of any right under Art.

22. We do not approve of these decisions if and so far as they might have held that the right of an arrested person to be defended by a legal practitioner of his choice before the Panchayati Adalat was not infringed by the provisions precluding such defence.

We, therefore, hold that s. 63 of the Madhya Bharat Pan- chayat Act, 1949 is violative of Art. 22(1) and is void to the extent it denies any person who is arrested the right to be defended by a legal practitioner of his choice in any trial of the crime for which he is arrested. Most of the safeguards embodied in cls. (1) and (2) of Art. 22 are to be found in the Code of Criminal Procedure. But the Constitution makes the fundamental change that the rights guaranteed by cls. (1) and (2) of Art. 22 are no longer at the mercy of the legislature. No legislature can enact a law which is repugnant to the Constitution. A pre-Constitution law which is inconsistent with the provisions of Art. 22 is, to the extent of such inconsistency, void.

The next question is whether the trial and convictions were illegal. During the trial, the respondents never claimed that they should be defended by counsel. Had they wanted the assistance of counsel, the Nyaya Panchayat might have under s. 79(c) returned the complaint for being filed before a magistrate. They were happy and content to be tried before the Nyaya Panchayat without the assistance of counsel. There was no occasion for enforcing the provisions of s. 63 against them. Even if s. 63 were repealed or struck down before the trial, they would not have engaged any counsel for their defence. The existence of s. 63 on the statute book did not cause them any prejudice. In the circumstances, the High Court ought not to have quashed the trial and convictions.

In the result, we declare that s. 63 of the Madhya Bharat Panchayat Act is violative of Art. 22(1) of the Constitution, and is void to the extent that it denies any person who is arrested, the right to be defended by a legal practitioner of his choice in any trial of the crime for which he is arrested. Subject to this declaration, the appeal is allowed, the order of the High Court is set aside and the convictions and sentences passed by the Nyaya Panchayat, Barwani are restored.

ORDER In view of the majority, the Appeal is allowed, the judgment of the High Court is set aside and that of the Courts below is restored.

❑❑❑

11 A.T.R. 1957 Orissa 28.1.

Supreme Court of India

Sunil Batra Etc vs Delhi Administration And Ors. Etc

Equivalent citations: 1978 AIR 1675, 1979 SCR (1) 392

Bench:
Chandrachud, Y.V. (Cj), Krishnaiyer, V.R., Fazalali, Syed Murtaza, Shingal, P.N., Desai, D.A.

Petitioner: Sunil Batra Etc.
Vs.
Respondent: Delhi Administration and Ors. etc.

Date of Judgment : 30/08/1978

CITATION: 1978 AIR 1675 1979 SCR (1) 392 1978 SCC (4) 494

CITATOR		INFO :
RF	1979	SC 916 (82)
E	1980	SC 249 (4)
R	1980	SC 470 (10)
F	1980	SC1535 (2,11,20,21,23,30,38)
REL	1980	SC1579 (3)
RF	1980	SC1789 (112)
RF	1980	SC2147 (51)
R	1981	SC 625 (2,4,7,8,10,11,12,14)
RF	1981	SC 746 (3,4,6)
R	1981	SC 939 (3)
R	1981	SC1767 (11,22)
MV	1982	SC1325 (75)
F	1982	SC1413 (45)
R	1983	SC 361 ((2)1,12,14,17)
RF	1983	SC 465 (3,5,12,16,17)
R	1983	SC 473 (6)
RF	1985	SC 231 (2,3)
R	1986	SC 180 (39)
F	1989	SC1375 (20,71)
RF	1991	SC 101 (30,70,115,227,278)
RF	1991	SC 345 (6)
RF	1991	SC2176 (39)

ACT:

Prisons Act 1894-Section 30-Scope of-Solitary confinement-Imposition of bar-fetters under. s. 56 on a prisoner-Whether violates Articles 14, 19, 21 of the Constitution 1950.

Practice and Procedure-Necessity of social welfare organisation to intervene in the litigative process.

Prisons Act 1894 and Punjab Jail Manual-Need for revision to reflect the deeper meaning in the behavioural norms correctional attitudes and luimane orientation for the prison staff and prisoners alike.

Words & Phrases-Under sentence of Death and 'apart from all other prisoner's-Meaning of

HEADNOTE:

Section 30(2) of the Prisons Act provides that every prisoner under sentence of death shall be confined in a cell apart from all other prisoners and shall be placed by day and by night under the charge of a guard.

The petitioner in W.P. No. 2202 of 1977 who was a convict under sentence of death challenged his solitary confinement. It was contended on his behalf that s. 30(2) does not authorise placing a prisoner under sentence of death in solitary confinement and that the jail authority could not arrogate to itself the power to impose such punishment under the garb of giving effect to s. 30(2). On the other hand it was contended on behalf of the State that the section merely permits statutory segregation for safety of the prisoner in the prisoner's own interest and that instead of striking down the provision, the Court should adopt a course of so reading down the section as to denude it of its ugly inhuman features.

The petitioner in W.P. 565 of 1977 contended that s. 56 of the Prisons Act which confers unguided, uncanalised, and arbitrary powers on the Superintendent to confine a prisoner in irons is ultra vires Arts. 14 and 21 of the Constitution.

Dismissing the petitions.

1. Section 30(2) does not empower the prison authority to impose solitary confinement upon a prisoner under sentence of death. Even jail discipline inhibits solitary confinement as a measure of jail punishment [499H]

2. It has been well established that convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess. For example a man of profession who is convicted would stand stripped of his right to hold consultations while serving out his sentence; but the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment. Likewise even a convict is entitled to the precious right guaranteed by Art. 21 that he shall not be deprived of his life or personal liberty except according to the procedure established by law. [495G-H] Procunier v. Martiney 40 L. Ed. 2d. 224 at 248; Wolff v. Mcdonnel 41 L. Ed 409 at 501; D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh & Ors. [1975] 2 SCR 24 referred to.

3. Sections 73 and 74 of the Indian Penal Code leave no room for doubt that solitary confinement is by itself a substantive punishment which can be imposed by a court of law. It cannot be left to the whim and caprice of prison authorities. The limit of solitary confinement that can be imposed under Court`s order is strictly prescribed by the Penal Code. [498 B-C]

4. Solitary confinement is so revolting to the modern sociologist and law reformer that the Law Commission recommended that the punishment of solitary confinement is out of tune with modern thinking and should not find a place in the Penal Code as a punishment to be ordered by any criminal court even though it may be necessary as a measure of jail discipline. [498 F-G]

5. The explanation to s. 44(8) of the Prisons Act makes it clear that a person is not wholly segregated from other prisoners in that he is not removed from the sight of other prisoners and he is entitled to have his

meals in association with one or more other prisoners. Even such separate confinement cannot exceed three months. Para 847 of the Punjab Jail Manual, if literally enforced would keep a prisoner totally out of bounds, that is, beyond sight and sound. Neither separate confinement nor cellular confinement of a condemned prisoner would be as tortuous or horrendous as solitary confinement of a condemned prisoner. Section 30(2) merely provides for confinement of a prisoner under sentence of death in a cell apart from other prisoners. Such confinement can neither be cellular confinement nor separate confinement and in any event it cannot be solitary confinement [499E-H]

6. A "prisoner under sentence of death" in the context of s. 30(2) can only mean a prisoner whose sentence of death has become final, conclusive and indefeasible which cannot be annulled or avoided by any judicial or constitutional procedure. Till then a person who is awarded capital punishment can be said to be a prisoner under sentence of death. There is an inordinate time lag between the sentence of death passed by the Sessions Judge and the final disposal of appeal by the High Court or Supreme Court depending on the circumstances of each case or the rejection of an application for mercy by the President or the Governor. It cannot be said that under s. 30(2) such prisoner, from the time the death sentence is awarded by the Sessions Judge has to be confined to a call apart from other prisoners. [501F, 502C, 501C, 501E]

7. Jail custody is something different from custody of a convict suffering simple or rigorous imprisonment. The purpose behind enactinsg. 366(2) of the Code of Criminal Procedure is to make the prisoner available when the sentence is required to be executed. Unless special circumstances exist, even in cases where a person is kept in a cell apart from other prisoners with day and night watch, he must be within the sight an sound of other prisoners and be able to take food in their company. [502 E-G] 394

8. Section 30(2) as interpreted is not violative of Art. 20. When a prisoner is committed under a warrant for jail custody under s. 366(2), Cr. P.C. and if he is detained in solitary confinement which is a punishment prescribed by s. 73, I.P.C. it will amount to imposing punishment for the same offence more than once, which would be violative of Art. 20(2). But as the prisoner is not to be kept in solitary confinement and the custody in which he is kept under s. 30(2) would prelude detention in solitary confinement, there is no chance of imposing a second punishment upon him and, therefore, s. 30(2) is not violative of Art. 20. [502H; 503 A-B]

9. Personal liberty of the person who is incarcerated is to a great extent curtailed by plaintive detention. It is even curtailed in preventive detention. The liberty to move, mix, mingle, talk, share company with co-prisoners, if substantially curtailed, would be violative of Art. 21 unless the curtailment has the backing of law. Section 30(2) establishes the procedure by which it can be curtailed but it must be read subject to the interpretation placed in this judgment. Once s. 30(2) is read down, its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law. [504E-F] t

10. Classification according to sentence for security purposes is valid and therefore s. 30(2) does not violate Art. 14. The restriction imposed by s. 30(2) is not unreasonable. It is imposed keeping in view the safety of the prisoner and the prison security and does not violate Art. 19. [505F]

11. There is no warrant for an implicit belief that every prisoner under sentence of death is necessarily violent or dangerous requiring his segregation. The rationale underlying s. 30(2) is that the very nature of the position and predicament of a prisoner under sentence of death leads to a certain situation and present problems peculiar to such persons and warrant their separate classification and treatment as a measure of jail administration and prison discipline. It can hardly be questioned that prisoners under sentence of death form a separate class and their separate classification has to be recognised. [505 A-C]

12. Section 30(2) as interpreted does not mean that the prisoner is to be completely segregated except in extreme cases of necessity which must be specifically made out and that too after he become a prisoner under sentence of death. [505F]

13. Section 56 is not violative of Arts. 14 and 21. [511C] The power under s. 56 can be exercised only for reasons and considerations which are germane to the objective of the statute, viz.: safe custody of the prisoner, which takes in considerations regarding the character and propensities of the prisoner. These and similar considerations bear direct nexus with the safe custody of prisoners as they are aimed primarily at preventing their escape. The determination of the necessity to put a prisoner in bar fetters has to be made after application of mind to the peculiar and special characteristics of each individual prisoner. The nature and length of sentence or the magnitude of the crime committed by the prisoner are not relevant for the purpose of determining that question. [509A-C]

14. There are sufficient guideiines in s. 56. It contains a number of safe guards against misuse of bar fetters by the Superintendent. Such circumscribed peripheral discretion with duty to give reasons which are revisable by the higher authority cannot be described as arbitrary so as to be violative of Art. 14. The A Superintendent can put the prisoner in bar fetters only after taking into consideration the peculiar and special characteristics of each individual prisoner. No ordinary routine reasons can be sufficient. Duty to record reasons in the Superintendent`s journal as well as the prisoner`s history ticket will narrow the discretionary power conferred on him. The reasons must be recorded in the language intelligible and understandable by the prisoner. A further obligation is that the fetters imposed for the security, shall be removed by the Superintendent as soon as he is of opinion that this can be done with safety. The Superintendent will have to review the case at regular and frequent intervals for ascertaining whether the fetters can be removed. [510-A-B, 509E-H]

15. Moreover the section 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 a secure cell from where escape is somewhat inconceivable. [511B] C

Per Krishna Iyer J. concurring

1. The vires of section 30 and section 56 of the Prisons Act upheld. These and other provisions, being somewhat out of tune with current penelogical values, to be revised by fresh legislation. Prison Manuals are mostly callous colonial compilations and even their copies are mostly beyond the prisoner's ken. Punishments. in civilized societies, must not degrade human dignity or would flesh and spirit. The cardinal sentencing goal is occupational, changing the consciousness of the criminal to ensure social defence. Where prison treatment abandons the reformatory purpose and practises dehumanizing techniques it is wasteful, counter-productive and irrational hovering on the hostile brink of unreasonableness (Article 19). [488B-C]

(2) Solitary confinement, even if mollified marginally, is not sanctioned by s. 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. The special watch, day and night. Of such sentences by guards upheld. Infraction of privacy may be inevitable, but guards must concede minimum human privacy in practice. [488E]

(3) 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. Section 30 is no substitute for sentence of imprisonment and merely prescribes the manner of organizing safe jail custody authorised by s. 366, Cr. P. C. [488F]

(4) 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 terrestial farewell his soul may be passing through, the compassion society owes to him whose life it takes. [488H]

(5) The crucial holding under s. 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, s. 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. Of course, once rejected by the Governor or 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 s. 30(2). To be 'under sentence of death` means 'to be under a finally executable death sentence'. [48H, 489A-C]

(6) Further restraint on such a condemned prisoner is not ruled out, if clear and present danger of violence or with due regard to the rules of fair play implied in natural justice. Minimal hearing shall be accorded to the affected prisoner if he is subjected to further severity. [489D]

(7) On the necessity for prison reform and revision of Jail Manuals held:-

Section 56 must be tamed and trimmed by the rule of law and shall not turn dangerous by making prison 'brass' an imperium in imperio. The superintendent's power shall be pruned and his discretion, bridled for the purpose. [489 E]

(b) 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. [489E]

(c) 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. Reckless handcuffing and chaining in public degrades, puts to shame finer sensibilities and is a slur on our culture. [489F]

(d) Where an under trial 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. [489G]

(e) The 'iron' regimen shall in no case go beyond the intervals, conditions and maxima killed down for punitive 'irons'. They shall be for short spells, light and never applied if sores exist. [489H]

(f) The discretion to impose 'irons' is subject to quasi-judicial oversight, even if purportedly imposed for reasons of security. [490A]

(g) A previous hearing. minimal may be, shall be afforded to the victims. In exceptional cases, the hearing may be soon after. [490 B]

(h) The gourmands for 'fetters' shall be given to the victim. ,2nd when the decision to fetter is made, the reasons shall be recorded in the n journal and in the history ticket of the prisoner in the State language. If he is a stranger to that language it shall be his language. This applies to cases as much of prison punishment as of 'safety fetters. [490 B-C]

(i) Absent provision for independent review of preventive and punitive A 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 prisoners. 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. [490C-D]

(j) 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. If lawyer's services are not given, the decisional process becomes unfair and unreasonable, especially because the rule of law perishes for a disabled prisoner if counsel is unapproachable and beyond purchase. By and large, prisoners are poor, lacking legal literacy, under the trembling control of the jailor, at his mercy as it were, and unable to meet relation or friends to take legal action. Where a remedy is all but dead the right lives only in print.

Article 19 will be violated in such a case as the process will be unreasAorntaibcllee. 21 will be infringed since the procedure is unfair and is arbitrary. [490E-F]

(k) No 'fetters' shall continue beyond day time as noctural fetters on locked-in detenus are ordinarily uncalled for, viewed from cons derations of safety. [490G]

(I) 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. [490G]

(m) The Inspector-General of Prisons shall, with quick despatch consider revision petitions, by fettered prisoners and direct the continuance or discontinuance of the irons. In the absence of such prompt decision, the fetters shall be deemed to have been negatived and shall be removed. [490H-491A]

(8) The Jurisdictional reach and range of this Court's scheme, Prison Power must bow before Judge Power is fundamental freedom are in jeopardy. Activist legal aid as a pipeline to carry to the court the breaches of prisoners' basic rights is a radical humanist concomitant of the rule of prison law. And 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 parmountcy of the Constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons. If judicial realism is not to be jettisoned, judicial activism must censor the argument of unaccountable prison autonomy. [409H, 410A, 412G-413B]

(9) Class actions, community litigations, representative suits, test cases and public interest proceedings are in advance on our traditional court processes and foster people's vicarious involvement in our justice system with a broad based concept of locus standi so necessary in a democracy where the masses are in many senses weak. The intervention of social welfare organisations in litigative processes pregnant with wider implications is a healthy mediation between the people and the rule of law. Wisely. permitted, participative justice, promoted through mass based organizations and public bodies with special concern seeking to intervene, has a democratic potential for the little men and law. [414H, 415B]

(10) Rehabilitation effort as a necessary component of incarceration is part of the Indian criminal justice system as also of the United States. 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. The important proposition is that it is a crime of punishment to further torture a person under going 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 defence, which is one of the primary ends of imprisonment. [416H, 416C, 417F]

Mohammed Giasuddin v. State of Andhra Pradesh 1977(3) SCC 287, Shelton v. Tucker 364 US 476 (1950) at p.468 referred to.

(11) The Court does not 'rush in' to demolish provisions where judicial endeavor, ameliorative interpretational, may achieve both constitutionality and compassionate resurrection. The semantic technique of country like ours, the corpus juris is in some measure a Raj hang over. Courts must, with intelligent imagination, inform themselves of the values of the Constitution and, with functional flexibility, explore the meaning of meanings to adopt that Constitution which humanly constitutionalises the statute in question. The jurisprudence of statutory construction, especially when a vigorous break with the past and smooth reconciliation with a radical constitutional value-set are the object, uses the art of reading down and reading wide, as part of interpretational engineering; [419D-E, 420E, 422B]

Weems v. United States 54 L. ed. p. 801, Harvard Law Review Vol. 24 (1970-71) p. 54-55. R. L. Arora v. State of Uttar Pradesh (1964) 6 SCR 784 referred to.

(12) 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 upon or frozen by the prison authority. Is a person under death sentence, or under trial unilaterally dubbed dangerous liable to suffer extra torment too deep for fears? Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Art. 19) become chimerical constitutional clap trap. The operation of Articles 14,19 and 21 may be pared down for a prisoner but not puffed out altogether. The necessary sequitur is that even a prisoner, standing trial has basic liberties which cannot be bartered away. [428H-429B. 429E]

(13) So the law is that for a prisoner all fundamental rights are an enforce able reality though restricted by the fact of imprisonment. When human rights are hashed behind bars, constitutional justice impeaches such law. [430 C-B]

A. K. Gopalan v. State of Madras 1950 SCR 88; R. C. Cooper v. Union of lndia (1971) SCR 512; Kharak Singh v. State of U.P. (1964) SCR 232; Maneka Gandhi v. Union of India (1978) 1 SCR 218, referred to.

(14) Is solitary confinement or similar stressful alternative, putting the prisoner beyond the zone of sight and speech and society and wrecking his psyche without deceive prophylactic or penological gains, too discriminating to he 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' sentence, 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 the tragic gap between the first judgment and the fall of the pall, under guise of a prison regulation, beyond(l prison power ? [431F-G] has invited that fate by one murder and is striving to save himself from the allows by frantic forensic proceedings and mercy petitions is not likely to make his hanging certain by committing any murder within the prison. [434B]

(16) A mere administrative officer's deposition about the behavioral may be of men under contingent sentence of death cannot weigh with us when the limited liberties expression and locomotion of prisoners are sought to be unreasonably pared down or virtually wiped out by oppressive cell insulation. Where total deprivation to the truncated liberty of prisoner locomotion is challenged the validatory burden is on the State. [436C-D]

(17) Criminological specialists have consistently viewed with consternation the imposition of solitary confinement punitively and, obviously, preventive segregation stands on a worse footing since it does not have even a disciplinary veneer. Our human order. must reject 'solitary confinement' as horrendous. [444H, 445 A-B]

In re Ramanjulu Naidu AIR 1947 Mad 381 approved. James C. Colemen-Abnormal Psychology and Modern Life p. 105: Royal Commission on Capital Punishment 1949-1953 Report pp. 216-217. Law Commission to India-42nd Report. Referred to.

(18) Petitioner is under 'statutory confinement' under the authority of section 30(2) of the Prisons Act read with section 366(2) Cr. P.C. 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. Held Petitioner shall not be solitarily confined. [447B]

(19) 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, marked as safe custody, sans maximum, sans intermission, sans judicial oversight or natural justice, would be sanctioned. [447D-E]

(20) Section 30 of the Prisons Act can be applied only to a prisoner "under sentence of death". Section 30(2) which speaks of "such" prisoners necessarily relates to prisoners under sentence of death. We have to discover when we can designate a prisoner as one under sentence of death. Confinement inside prison does not necessarily impart 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 subversion of this statuary provision (Section 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. [448B, 448D]

(21) "Apart from all other prisoners" used in Section 30(2) is also a phrase of flexible import, segregation into an isolated cell is not warranted by the word. All that it connotes is that in a cell where there are a plurality of inmates, the death sentence 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 way and by night. [448-F-G]

(22) Prison offences are listed in section 45 and section 46 deals with punishment for such offences. Even if a grave prison offence has been committed. the punishment does not carry segregated cellular existence and permits life in association in mess and exercise in view and voice but not in communication with other prisoners. Punitive separate confinement shall not exceed there months and section 47 interdicts the combination of cellular confinement and "separate confinement" "Cellular confinement" is a stricter punishment than separate confinement and it cannot exceed 14 days because of its rigor. Less severe is cellular confinement under section 46(10) of the Prisons Act and under section 46(8). Obviously, disciplinary needs of keeping apart a prisoner do not involve any harsh element of punishment at all. An analysis of the provision of the Penal Code and of the Prisons Act yields the clear inference that section 30(2) relates to separation without isolation, keeping apart without close confinement. [449B, 450B-C, 450F, 450H]

(23) The Court awards only a single sentence viz. death. But it cannot be instantly executed because its excitability is possible only on confirmation by the High Court. In the meanwhile, the sentence cannot be let loose for he must be available for decapitation when the judicial processes are exhausted. So it is that section 365(2) takes care of this awesome interregnum by commissing the convict to jail custody. Form 40 authorities safe keeping. The '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. The inference is inevitable that if the 'condemned' man were harmed by physical or mental torture the law would not tolerate the doing, since injury and safety are obvious

enemies. To distort safe-keeping into a hidden opportunity to cage the ward and to traumatize him is to betray the custody of the law. Safekeeping means keeping his body and mind in fair condition. To torture his mind is unsafe keeping. Injury to his personality is not safe keeping. To preserve his flesh and crush his spirit is not safe keeping. 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. [451 D-H, 452B, D.F]

(24) A convict is under sentence of death when, and only when? the capital penalty inexorably operates by the automatic process of the law.

Abdul Azeez v. Karnataka [1977] 3 SCR 393: D. K. Sharma v. M. P. State A [1976] 2 SCR 289 referred to. [454G]

(25) 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. Assuming that the High Court has confirmed that death sentence or has de novo imposed death sentence, even then, there is quite a likelihood of an appeal to the Supreme Court and when an appeal pends against a conviction and sentence in regard to an offence punishable with death sentence such death sentence even if confirmed by the High Court shall not work itself, until the Supreme Court has pronounced judgment Articles 72 and 161 provide for commutation of death sentence even lsiekcetions 433, 434 and 435 Cr. P.C. Rules 547 and 548 made under the Prison Act, provide for a petition for commutation by the prisoner. It follows that during the Pendency of a petition for mercy before the State Governor or the President of India the death sentence shall not be executed. 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 and he becomes subject to it only when the clemency application by the prisoner stands rejected. [455BD, 456B, H 457A]

(26) The goals of prison keeping, especially if it is mere safe keeping, come be attained without requiring a prisoner to live in the exacerbated conditions 1) of bare- floor solitude. Functionally speaking, the court has a distinctive duty to reform prison practices and to inject constitutional consciousness into the system. Sastre v. Rockefeller 312F. Suppl. 863 (1970). Wolfe v. Mc Donnell 41 I. rd. 2d p. 935. [465 B-C]

(27) The great problems of law are the grave crises of life and both can be solved not by the literal instructions of printed enactments but by the interpretative sensitization of the heart-to 'one still, sad music of humanity. [471 G]

(28) The humane thread of jail jurisprudence that runs right through is that no prison authority enjoys amnesty for unconstitutionality and forced farewell to fundamental right is an institutional outrage in our system where stone walls and iron bars shall bow before- the rule of law. [471H-472A]

(29) Many states like Tamil Nadu, Kerala etc. have abandoned the disciplinary barbarity of bar fetters. 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. Therefore, an outside agency, in the sense of an official. higher than the Superintendent or external to the prison department, must be given the power to review the older of 'irons'. Rule 423 speaks of the Inspector General of Prisons having to be informed of the circumstances necessitating fetters and belchains. Rule 426 has a similar import. 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 v are implicit in the provision. [477D. 477F-478A]

(30) one of the paramount requirements of a valid law is that it must be within the cognizance of the community if a competent search for it were made. Legislative tyranny may be unconstitutional if the State by devious methods like pricing legal publication monopolised by government too high denies

the equal protection of the laws and imposes unreasonable restrictions on exercise of fundamental rights [485G. 486B] Bhuvan Mohan Patnaik v. State of A.P. [1975] 3 SCC 185, 189.

(31) The roots of our Constitution lie deep in the finer. spiritual sources of social justice, beyond the melting pot of bad politicking feudal crudities and sublimated sadism, sustaining itself by profound faith in Man and his latent divinity, and so it is that the Prisons Act provisions and the Jail Manual itself must be revised to reflect this deeper meaning in the behavioral norms, correctional attitudes and humane orientation for the prison staff and prisoners alike. [492E] ARGUMENTS

For the Petitioner in Writ petition No. 2202 of 1977.

1. Section 30 by its language docs not enjoin the jail authorities to confine a prisoner under sentence of death to solitary confinement. It provides that a prisoner under sentence of death should be confined in a cell apart from all other prisoners and shall be placed day and night under the charge of a guard. Such a prisoner is entitled to participate in all the recreational and rehabilitation activities of the jail and is also entitled to the company of other prisoners.

2. Section 30 requires that a prisoner "under sentence of death" shall be confined in the manner prescribed by sub-section (2). The expression 'under sentence of death' also occurs in s. 303 I.P.C.. In [1976] 2 'SCR 289 the Supreme Court held that the expression 'must be restricted to a sentence which is final, conclusive and ultimate so far as judicial remedies are concerned`r As far as death sentence is concerned the trial does not end in the Sessions Court and confirmation proceedings in the High Court are a continuation of the trial, [1975] 3 SCR. 574. In other words until the High Court confirms a sentence of death, there is no operative executable sentence of death. Article 134 of the Constitution also provides for an appeal to the Supreme Court in certain cases where the High Court has awarded death penalty.

3. The conditions of solitary confinement have the tendency of depriving a prisoner of his normal faculties and may have the tendency to destroy a prisoner's mentallity. Justice, Punishment, Treatment by Leonard orland 1973 Edn. 297, 307-308: Havelock Ellis,-The Criminal p. 327; History of solitary confinement and its effects-134 US 160.

4. Solitary confinement is imposed as a punishment under sections 73 and 74 I.P.C. and under the Prisons Manual as a matter of prison discipline. It does not exceed 14 days at a time. In the case of prisoner who is under a sentence of death, as construed by the jail authorities, however, such confinement continues over long periods.

5. The Law Commission of India in its 42nd Reports at p. 78 has recommended the abolition of solitary confinement. Courts have also condemned it. A.l.R. 1947 Mad. 386; 134 US 160, 167. 168.

6. There are compelling reasons that a narrow construction should be put on Sec. 30 which will reduce the extreme rigour and penalty of the law. Only a court has the authority to inflict a punishment. The jail authorities do not have a right to inflict any punishment except as a matter of jail discipline. As s. 30 empowers the jail authorities to impose an additional punishment of solitary A confinement, it is submitted that it is violative of Art. 20(l) of the Constitution.

7. The expression under 'sentence of death' should be construed to mean 'under a final executable, operative sentence of death'. There is legislative injunction against the execution of a sentence of death in Ss. 366, 413, 414, 415, 432 and 433 Cr. P. C. A sentence of death cannot be executed till the appeal, if any, has been finally disposed of by the Court. A prisoner has also the right to make mercy petitions to the Governor or the president as the case may be. Para 548 of the Prison Rules provides that in no case is the sentence of death to be carried out before the Government s reply to the mercy petition is received. Till this time arrives, a prisoner under sentence of death is entitled to be treated as

a human being with a hope for the future, entitled to struggle for rehabilitation. Till the final stage has arrived such a prisoner cannot be treated as a lost, condemned human being.

8. Section 30 is violative of Au t 14 of the Constitution. It imposes the penalty or solitary confinement on condemned prisoners without any distinction. The Prison Manual does contain provision for dangerous prisoners who may, as a matter of prison discipline, be kept in solitary confinement. Failure to make a distinction between a safe prisoner under sentence of death and a hostile and dangerous prisoner introduces arbitrariness in the treatment accorded to prisoners under sentence of death and thus is violative of Article 14.

9. A prisoner is not deprived of his personal liberties [1975]2 SCR 24. Article 21 is subject to Article 14. [19781 1 S.C.C. 248 The expression 'life' as used in Article 21 means something more than mere animal existence and the inhibition against is deprivation extends to all those limits and faculties by which life is enjoyed.

For the Respondent in W.P. 2202/77

1. Criminal law of India recognises capital punishment. It is awarded in very few cases. It is not the rule but rather the exception, [1974] 3 S.C.R. 340.

2. Death penalty has been upheld as constitutional in [1973] 2 S.C.R. 541. Section 354 (3) Cr. P.C. Of 1973 requires the recording of reasons for infliction of death penalty.

3. there is no provision for substantive due process in the Indian Constitution. 11950] S.C.R. 88, [1973] 2 S.C.R. 541/548.

4. A prisoner is not a slave of the State and is not denuded of all fundamental rights. Lawful incarceration brings about the necessary withdrawal or limitation of many rights and makes them unavailable to prisoners. Prisoners have less than the full panoply of freedoms which private persons would have in non-prison situation. Prison regulations and prison discipline and considerations underlying our penal system necessitate restrictions being imposed. 92L, ed. 1356. 224 T. ed. 224. 238-24: 411 ed. 935. 950, 954, 957. [1975] 2 S.C.R. 24.

5. Solitary confinement is complete isolation of the prisoner from all human society and confinement in a cell so arranged that he has no direct intercourse or right of any human being or no employment or instruction. Webster's Third New International Dictionary Vol. III p. 2170, 33L ed. 835, 839.

6. lt is a misnomer to characterise confinement in a cell as provided in Section JO(2) read with Chapter 31 of the Jail Manual as solitary confinement.

7. There is a fundamental distinction between solitary confinement imposed I punishment or an additional punishment and confinement of prisoner under sentence of death in a separate cell, for the purpose of preventing his suicide or escape and for ensuring the presence of the prisoner on the day appointed for execution.

8. The expression "under sentence of death" in section which is finally conclusive and ultimate so far as judicial remedies are concerned. [1976] 2 S.C.R 289, [1977] 3 S.C.R. 393. Section 30(2) should be so construed and its implications worked out having regard to Sections 413-415 Cr. P.C`.

9. The rational underlying section 30(2) and Chapter 31 of the Manual is that prisoners under sentence of death, present problems peculiar to such persons which warrants their separate classification and treatment as a measure of jail administration and jail discipline. Prisoners under sentence of death are in a class by themselves and their separate classification has been recognised over the years in India and other civilized countries. Even in countries where solitary confinement as a norm of punishment has been abolished, confinement of prisoners under sentence of death continues. [Halsbury's Laws of England Vol. 30 p. 601. para 1151. U.K. Prison Rules 1964 (r.r. 74-76].

10. The fundamental distinction between imposing solitary confinement as a punishment and as a necessary measure of jail discipline is recognised in the 42nd Report of the law Commission. (para 380).

11. Section 30(2) so construed is not violative of Article 14. The failure to sub-classify does not involve breach of Article 14.

12. In the United States solitary confinement even as a punishment by itself has been consistently held to be not violative of the VIII Amendment. What the Courts have struck down is the particular system of solitary confinement if it is implemented and maintained in an inhuman or barbarous manner. Conditions in jail may not be perfect or ideal but the same cannot be said to be sub-human or violative of human dignity of prisoners. Certain matters may urgently call for reform but that does not brand the Regulations as unconstitutional .

For the Petitioner in Writ Petition No. 565/77

1. **(a)** The petitioner who is an under-trial prisoner is a French National and not being a citizen of India certain fundamental rights like Article 19 are not available to him. But as a human being he is entitled on the basic rights which are enshrined in Articles 14 20 21 and 22 of the Constitution.

(b) The petitioner who was arrested on 6th July 1976 alongwith four other foreigners has been kept under bar fetters 24 hours a day auld they are welded on him ever since his arurest.

2. The petitioner seeks to challenge Paragraph 399(3) of the Punjab laid Manual and Section 56 of the Prison Act, as violative of the petitioner's fundamental right under Articles 14 and 21 of the Constitution. The following facts indicate the brutality inflicted by the respondents on the Petitioner.

(a) By continuous wearing of bar fetters? there were wounds on his ankles A and he represented to the jail authority to remove them. As no relier was obtained, the petitioner. filed a writ petition in the Delhi High Court challenging the conditions of his detention but the High Court dismissed the same as not maintainable on February 2, 1977 relying on 1972(2) S.C.R. 719. A s such despite his wounds the petitioner had to suffer.

(b) The Jailor ordered removal of bar fetters in February 9, 1977 for 15 days but jail authorities in violation of medical advice put bar fetters after 9 days i.e. 18th February 1977. The respondents thereby violated the mandatory provisions of the Act.

(c) The Punjab Jail Manual is totally an out-dated enactment inasmuch as even after 30 years of Independence, paragraph 576(d)(1) makes the wearing of Gandhi Cap by prisoners a jail offence an pargraph 63010) permits inhuman punishment like beating, besides putting bar fetters under paragraph 399 read with section 56 of the Prison Act.

LEGAL SUBMISSIONS

1. A person in jail is already subject to enormous curtailment of his liberties. The protection of whatever liberties are left inside the jail demand that they cannot be taken away arbitrarily and without the procedure established by laws. The greater the restriction, stricter should be the security of the Court, so that the prisoner is not subjected to unnecessary and arbitrary loss of his remaining liberties.

2. Paragraphs 399 and 435 of the Punjab Jail Manual are not laws under Article 13(3) of the Constitution of India and are void as they restrict personal liberty without the authority of law under Article 21 of the Constitution. These provisions bar which bar fetters can be put on a prisoner, severely curtailing his liberty of movement of limbs, on the ground that he is dangerous and as long as the jail authorities consider it necessary are void as they do not have authority of law (1964) 1 SCR 332, 338, 339, 345.

3. (a) Section 56 of the Prison Act is arbitrary inasmuch as it allows the jail authorities to choose any type of irons to be put on any prisoner. in paras 425 and 614 of the Punjab Jail Manual, 3 types of irons are mentioned; handcuffs weighing 2 Ibs., link fetters weighing 2 Ibs and bar fetters

weighing 5 IbsS.ection 56 does not give any guide-line as to which fetters are to be put on a prisons- who is considered dangerous Thus similarly situated prisoners can has discriminate under. the section.

(b) Sincesection 56 which allows the Prison Authority to put irons on prisoner depending upon the state of the prison it is violative of Article 14 as well 15 Article 21. because if the prisoner is fortunate to be imprisoned in a well-guarded modern Jail he would not be put under irons, while a similarly situated prisons who is unfortunate to be put in a dilapidated jail, he would be made to suffer by being put under irons.

(c) Section 56 is ultra vires of Articles 14 and 21 because it allows the Jail authorities to put irons on the personal assessments as "to the character of prisoners" The section thereby gives complete power to pick and choose prisoners for. being confined in irons.

(d) Section 56 of the Prison Act and paragraph 399 of the Jail Manual, which restrict personal liberty, in so far as they abridge and take away fundamental rights under Article 14, will have to meet the challenge of that Article otherwise it is not a valid law. [1967] 3 S.C.R. 28/46; [19701 3 S.C.R. 530/546 and [1978] I S.C.R. 248/323.

4. Paragraph 399(3) of the Manual and section 56 of the Prison ACT which impose inhuman and cruel restrictions and subjects the petitioner to Torture more than those who are punished for jail offences are not laws when judged from the evolving standards of decency and present concept of civilization. When bar fetters are to be used as punishment they cannot be put continuously for more than 3 months vide paragraphs 616 and 617, while under impugned paragraph 399 and under section 56 of the Prison Act they can be put indefinitely.

5. When a prisons is subject to cruel and inhuman treatment the Court has the power and jurisdiction to interfere because of its sentencing function, since the prisoner is behind bars by the order of the Court. Hence the condition of his confinement is the continuing, responsibility of the Court

6. In view of the Preamble and Article 51 of the Constitution, which obligate the State to respect human dignity and foster respect for international law and obligations, the Courts have a constitutional duty in interpreting provisions of domestic laws to give due regard to international law and country's inter national obligations.

7. This is also because the judicial process is a part of the State activity vide Article 12 of the Constitution, and the directive principles are addressed as much to the Executive and the Legislature as they are to the judiciary.

8. When domestic law is applied to a foreigner. there is a presumption that the legislature intends to respect rules of international law and country's inter national obligations. 70 ER 712/716; [1960] 3 All. E. R. 814/821; 1891 (1) Q.B.D. 108/112.

9. In interpreting statutes particularly ancient penal statutes, it is the duty of the court to interpret it in a broad and liberal sense in the light of prevailing conditions and prefer a construction which is favorable to the individual. [1953] S.C.R. 825/847; A.I.R.]961 S.C. 1494, 1968 S.C.R. 62.

For the Respondent in Writ Petition No. 565/77

1. Challenge to Sec. 56 of the Prisons Act 1894 must be judged in the context of the subject matter of the legislation viz. "Prisons".

2. Maintenance of penal institution (Prison) is an essential function of government for preservation of social order through enforcement of criminal law.

3. One of the primary and legitimate goals of any penal institution is the maintenance of institutional security against escape of the prisoner from the care and custody of the penal institution to which he has been lawfully committed 40 I. ed. 2nd 234, 235, 239; 41 L. ed. 2nd 495, 501. 502.

4. There must be mutual accommodation between institutional needs and constitutional provisions. Not unwisdom but unconstitutionality is the touch stone. 41 L. ed. 2d. 935, 951. 954.

5. Several features of prison administration may be undesirable or ill-advised but that cannot result in condemnation of the statute as unconstitutional, [1975] 2 S.C.R. 24, 28; 40 L. ed. 2d 224, 235. Courts are ill- equipped to deal with the increasingly urgent problem of prison administration and reform.

6. Power under section 56 can be exercised for reasons and considerations which are germane to and carry out the objective of the statute, namely, "safe custody of prisoners The following conditions must be fulfilled before power under section 56 is exercised:-

(a) Existence of necessity, as opposed to mere expediency or convenience, for confining prisoners in irons, 11 Guj. L. R. 403, 413.

(b) The determination of necessity to confine prisoners in irons is to be made with reference to definite criteria namely, state of the prison or the character of the prisoners.

(c) The expression "character of the prisoners" in the context and on a true construction is referable to past our present characteristics or attributes of a prisoner which have a rational and proximate nexus with and are germane to considerations regarding safe custody of prisoners and preventing their escape.

(d) The determination must be made after application of mind to the peculiar and special characteristics of each individual prisoner.

(e) The expressions, "dangerous prisoners" or 'unsafe prisoners" has a definite and well recognised connotation in the context of prison legislation prison literature.

(f) Under para 399 (3)(e), special reasons for having recourse to fetters are required to be fully recorded in the Superintendent's journal and noted in the prisoner s history ticket. Decisions regarding imposition of fetters have to be reviewed from time to time, in order to determine whether their continued imposition is warranted by consideration of security (vide para 435).

(g) Para 69 of the Jail Manual provides for a revision to the Inspector General the order of the Superintendent.

(h) Prisoner can also avail of redress under para 49 read with para 53B of the Manual.

(i) Determination of the Superintendent is open to judicial review on the principles laid down in [1966] Supp. S.C.R. 311 and [1969] 3 S.C.R. 108.

(j) Power undesrection 56 is not punitive in nature but precautionary in character.

8. If the legislative policy is clear and definite, discretion vested in a body of administrators or officers to make selective application of the law does not infringe Article 14. A guiding principle has been laid down by section 56 which has the effect of limiting the application of the provision to a particular category of persons, [1975] I S.C.R. 1, 21, 22, 23, 48-53.

9. There is a presumption in favour of constitutionality of statutes, [1959] S.C.R. 279, 297. This presumption applies with greater force when the statute under consideration is one dealing with prisons and maintenance of internal security in penal institutions

10. It is not open to the petitioner to challenge section 56 on the ground that power can be exercised with reference to "the state of prison", inasmuch as no action based on that part of the provisions is taken against the petitioner [1955] I S.C.R. 1284, 1295.

11. There is no provision in our Constitution corresponding to VIII Amendment of the U.S. Constitution, [1973] 2 S.C.R. 541, 548.

12. There is also no provision for substantive due process in the Indian Constitution. [1950] S.C.R. 88; [1973] 2 S.C. R. 541. 548.

❑❑❑

Supreme Court of India

Sunil Batra vs Delhi Administration

Equivalent citations: 1980 AIR 1579, 1980 SCR (2) 557

Bench:
Krishnaiyer, V.R. Pathak, R.S. Reddy, O. Chinnappa (J)

Petitioner: Sunil Batra
Vs.
Respondent: Delhi Administration

Date of Judgment : 20/12/1979

Citation: 1980 AIR 1579 1980 SCR (2) 557 1980 SCC (3) 488

CITATOR INFO :

R	1981 SC 625	(7,8,11,12,14) R 1981 SC 746		(3,4)
R	1981	SC1767 (11,13,21,23)		
R	1982	SC	149	(16)
R	1982	SC	710	(108,109)
R	1986	SC	180	(39)

ACT:

Constitution of India 1950, Article 32- Tortune inflicted on prisoner in jail-factum of forture brought to notice of court-power and responsibility of court to intervene and protect prisoner.

Prisons Act 1894, Ss 27, 29 and 61 & Punjab Prison Manual, Paras 41, 47, 49 and 53-Solitary confinement, denial of privileges, amenities to prisoners-to be imposed with judicial appraisal of Sessions Judge-Prison Manual to be ready reach of prisoners-visits to jails by visitors, official and non-official-keeping of grievance boxes in prisons and remedial action on grievances by Sessions judges-Periodical reports to be forwarded to the High Court- reforms suggested in prison management and procedure.

Legal Aid-provision of free legal aid to prisoners- necessity of.

HEADNOTE:

The petitioner, a convict under death sentence, through a letter to one of the Judges of this Court alleged that torture was practised upon another prisoner by a jail warder, to extract money from the victim through his visiting relations. The letter was converted into a habeas corpus proceeding. The Court issued notice to the State and the concerned officials. It also appointed amicus curiae and authorised them to visit the prison, meet the prisoner, see relevant documents and interview necessary witnesses so as to enable them to inform them selves about the surrounding circumstances and the scenario of events.

The amicus curiae after visiting the jail and examining witnesses reported that the prisoner sustained serious anal injury because a rod was driven into that aperture to inflict inhuman torture and that as the bleeding had not stopped, he was removed to the jail hospital and later to the Irvin Hospital. It was also reported that the prisoner's explanation for the anal rupture was an unfulfilled demand of the warder for money, and that attempts were made by the departmental officers to hush up the crime by overawing the

prisoner and the jail doctor and offering a story that the injury was either due to a fall of self-inflication or due to piles.

Allowing the writ petition.

HELD:

(Per Krishna Iyer and Chinnappa Reddy, JJ.)

1. **(a)** Prem Chand the prisoner, has been tortured illegally and the Superintendent cannot absolve himself from responsibility even though he may not be directly a party. Lack of vigilance is limited guilt. The primary guilt cannot be fixed because a criminal case is pending or is in the offing. The State shall take action against the investigating police for collusive dilatoriness and deviousness. [599 F]

(b) The Superintendent is directed to ensure that no corporal punishment or personal violence on Prem Chand shall be inflicted. No irons shall be forced on the person in vindictive spirit. [599 H]

(c) Lawyers nominated by the District Magistrate, Sessions Judge, High Court or the Supreme Court will be given all facilities for interviews, visits and confidential communication with prisoners subject to discipline and security considerations. The lawyers so designated shall be bound to make periodical visits and record and report to the concerned courts, results which have relevance to legal grievances. [600 A-B]

(d) Within the next three months, Grievance Deposit Boxes shall be maintained by or under the orders of the District Magistrate and the Sessions Judge which will be opened as frequently as is deemed fit and suitable action taken on complaints made. Access to such boxes shall be afforded to all prisoners. [600 C]

(e) District Magistrates and Sessions Judges shall, personally or through surrogates, visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances, shall make expeditious enquiries there into and take suitable remedial action. In appropriate cases reports shall be made to the High Court for the latter to initiate, if found necessary, habeas action. [600 D]

(f) No solitary or punitive cell, no hard labour or dietary change as painful additive, no other punishment or denial of privileges and amenities, no transfer to other prisons with penal consequences, shall be imposed without judicial appraisal of the Sessions Judge and where such intimation, an account of emergency is difficult such information shall be given within two days of the action. [601 B-C]

2. 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. [563 E]

3. Protection of the prisoner within his rights is part of the office of Article 32. [564 C]

4. It behoves the court to insist that, in the eye of law, prisoners are persons not animals, and to punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority'. when Part III is invoked by a convict. When a prisoner is traumatized, the Constitution suffers a shock. [564 D-E]

5. The courts in America have, through the decisional process, brought the rule of law into the prison system pushing back, pro-tanto, the 'hands-off' doctrine. The content of our constitutional liberties being no less, the dynamics of habeas writs there developed help the judicial process here. The full potential of Arts. 21, 19 & 14 after Maneka Gandhi has been unfolded by this Court in Hoskot and Batra. Today, human rights jurisprudence in India has a constitutional status and sweep. [573 A, 574 D]

6. Rulings of this Court have highlighted the fact that the framers of the Constitution have freed the powers under Art. 32 from the rigid restraints of the traditional English writs. Flexible directives, even affirmative action moulded to grant relief, may realistically be issued and fall within its fertile width. [575 F]

Dwarkanath v. income Tax officer [1965] 3 SCR 536 referred to.

7. Where injustice, verging on inhumanity, emerges from hacking human rights guaranteed in Part III and the victim beseeches the Court to intervene and relieve, the Court will be a functional futility as a constitutional instrumentality if it does not go into action until the wrong is righted. The Court is not a distant abstraction omnipotent in the books but an activist institution which is the cynosure of public hope. The court can issue writs to meet the new challenges. [576 D]

8. Affirmed in unmistakables terms that the court has jurisdiction under Art. 32 and so too under Art. 226, a clear power and, therefore, a public duty to give relief to sentence in prison setting. [576 F]

9. In Sunil Batra v. Delhi Administration (1978) 4 SCC 409 this Court rejected the 'hands-off' doctrine and ruled that fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration. Our Constitutional culture has now crystallised in favour of prison justice and judicial jurisdiction. [576 H-577 A]

10. Where the rights of a prisoner, either under the Constitution or under other law, are violated the writ power of the court can and should run to his rescue. There is a warrant for this vigil. The court process casts the convict into the prison system and the deprivation of his freedom is not a blind penitentiary affliction but a belighted institutionalisation geared to a social good. The court has a continuing responsibility to ensure that the constitutional purpose of the deprivation is not defeated by the prison administration. [577 E-F]

11. Whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods 'right, just and fair'. [578 E]

12. A prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through 'writ' aid. The Indian human has a constant companion-the court armed with the Constitution. [578 H]

Maneka Gandhi v. Union of India [1979] 1 SCC 248: N. H. Hoskot v. Maharashtra, [1979] 1 SCR 192, referred to.

13. Implicit in the power to deprive the sentence of his personal liberty, the Court has to ensure that no more and no less than is warranted by the sentence happens. If the prisoner breaks down because of mental torture, psychic pressure or physical infliction beyond the licit limits of lawful imprisonment the Prison Administration shall be liable for the excess. On the contrary, if an influential convict is able to buy advantages and liberties to avoid or water down the deprivation implied in the sentence the Prison Establishment will be called to order for such adulteration or dilution of court sentences by executive palliation, if unwarranted by law. [579 B-C]

14. The court has power and responsibility to intervene and protect the prisoner against mayhem, crude or subtle, and may use habeas corpus for enforcing in-prison humanism and forbiddance of harsher restraints and heavier severities than the sentence carries. [579 E]

15. Law in the books and in the courts is of no help unless it reaches the prisoner in understandable language and available form. There is therefore need to get ready a Prisoners' Handbook in the regional language and make them freely available to the inmates. To know the law is the first step to be free from fear of unlaw. [582 C]

16 **(i)** The most important right of a prisoner is to integrity of his physical person and mental personality. No prisoner can be personally subjected to deprivations not necessitated by the fact of incarceration and the sentence of court. [584 D, 583 C]

(ii) Inflictions may take many protean forms, apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and more dreadful sometimes, transfer to a distant prison where visits or society of friends or relatives may be snapped, allotment of degrading labour, assignment to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgement is an infraction of liberty or life in its wider sense and cannot be sustained unless Art. 21 is satisfied. There must be a corrective legal procedure, fair and reasonable and effective. Such infraction will be arbitrary under Article 14, if it is dependent on unguided discretion, unreasonable under Art. 19 if it is irremediable and unappealable and unfair under Art. 21 if it violates natural justice. Some prisoners, for their own safety, may desire segregation. In such cases, written consent and immediate report to higher authority are the least, if abuse is to be tabooed. [584 F-H, 586 G]

(iii) Visit to prisoners by family and friends are a solace in insulation: and only a dehumanised system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow- men, parents and other family members cannot be denied in the light of Art. 19 and its sweep., [586 H]

17. Prison power, absent judicial watch tower, may tend towards torture. The judges are guardians of prisoners' rights because they have a duty to secure the execution of the sentences without excesses and to sustain the personal liberties of prisoners without violence on or violation of the inmates' personality. [588 D, 590 C]

18. In a democracy, a wrong to some one is a wrong to every one and an unpunished criminal makes society vicariously guilty. [596 D]

19. When offences are alleged to have taken place within the prison, there should be no tinge or trace of departmental collusion or league between the police and the prison staff. [605 A]

[Directives for which no specific time limit fixed except the urgency of their implementation:

1(i) The State shall take early steps to prepare in Hindi, a Prisoner's Handbook and circulate copies to bring legal awareness home to the inmates. Periodical jail bulletins stating how improvements and habilitative programmes are brought into the prison may create a fellowship which will ease tensions.

A prisoners' wall paper, which will freely ventilate grievances will also reduce stress. All these are implementary of s. 61 of the Prisons Act. [601 D,E]

(ii) The State shall take steps to keep up to the Standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contact and correctional strategies. [601 F]

(iii) The Prisons Act needs rehabilitation and the Prison Manual total over-haul. A correctional-cum- orientation course is necessitous for the prison staff inculcating the constitutional values, therapeutic approaches and tension-free management. [601 H]

(iv) The prisoners' rights shall be protected by the court by its writ jurisdiction plus contempt power. To make this jurisdiction viable, free legal services to the prisoner programmes shall be promoted by professional organisations recognised by the court such as for e.g. Free Legal Aid (Supreme Court) Society. The District Bar shall, we recommend, keep 2 cell for prisoner relief. [602 A]

(Per Pathak J. concurring)

1. The prisoner Prem Chand has been tortured while in custody in the Tihar Jail. [605 D]
2. The Superintendent of the jail to ensure that no punishment or personal violence is inflicted on Prem Chand by reason of the complaint made in regard to the torture. [605 F]
3. Pressing need for prison reform and provision for adequate facilities to prisoners, to enable them not only to be acquainted with their legal riots but also to record their complaints and grievances and to have confidential interviews periodically with lawyers nominated for the purpose by the District Magistrate or the court having jurisdiction. [605 G]
4. Imperative that District Magistrates and Sessions Judges should visit the prisons in their jurisdiction and afford effective opportunity to the prisoners for ventilating their grievances and where the matter lies within their powers, make expeditious enquiry and take suitable remedial action. [605 H]
5. Sessions Judge should be informed by the jail authorities of any punitive action taken against a prisoner within two days of such action. [606 A]
6. A statement by the Sessions Judge in regard to his visits, enquiries made and action then thereon shall be submitted periodically to the High Court to acquaint it with the conditions prevailing in the prisons within its jurisdiction. [606 B]

❑❑❑

Supreme Court of India

Hussainara Khantoon & Ors vs Home Secretary, State Of Bihar

Equivalent citations: 1979 AIR 1377, 1979 SCR (3) 760

Bench:
Bhagwati, P.N.Reddy, O. Chinnappa (J) Sen, A.P. (J)

Petitioner: Hussainara Khantoon & Ors.
Vs.
Respondent: Home Secretary, State Of Bihar, Patna

Date Of Judgment : 19/04/1979

CITATION: 1979 AIR 1377 1979 SCR (3) 760 1980 SCC (1) 108

CITATOR INFO :

RF 1986 SC2130 (26,37)

ACT:

Legal Aid to Poor-Administration of Criminal Justice-Constitutional obligation of State Government-Free legal services-Absence of-Vitiation of trial-Art. 21 Constitution of India.

Criminal Procedure Code, 1973-S. 167(2)(a)-Right of under-trial prisoner-Release on bail-Entitlement to counsel an State expense.

HEADNOTE:

On further hearing the petition for release of under- trials in the State of Bihar.

HELD :

1. The State Governments do not seem to be alive to their constitutional responsibility in the matter of provision of free legal services in the field of administration of criminal justice. If law is not only to speak justice but also deliver justice, legal aid is an absolute imperative. Legal aid is really nothing also but equal justice in action It is in fact the delivery system of social justice. [765D]

2. Every State Government will have to carry out its constitutional obligation to provide free legal services to every accused person who is in peril of losing his liberty and who is unable to defend himself through a lawyer by reason of his poverty or indigence in cases where the needs of justice so require. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Art. 21 and every State Government should try to avoid such a possible eventuality. [765F-G]

3. When an under-trial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days as the case may be, the Magistrate must, before making an order of further remand to judicial custody, point out to the under-trial prisoner that he is entitled to be released on bail. [762H, 763A]

4. The Magistrate must take care to see that the right of the under-trial prisoner to the assistance of a lawyer provided at State cost is secured to him with a view to enable him to apply for bail in exercise of his right under proviso (a) to sub-section (2) of s. 167 Criminal Procedure Code. [763B]

5. The Magistrate must deal with the application for bail in accordance with the guidelines laid down in the Court's order dated February 12, 1979. [763C]

JUDGMENT

ORIGINAL JURISDICTION : Writ Petition No. 57 of 1979. Mrs. K. Hingorani for the Petitioner U. P. Singh and S. N. Jha for the Respondent.

The Order of the Court was delivered by BHAGWATI, J. This writ petition has again come up before us for further directions. Mr. U.P. Singh, learned Advocate on behalf of the State of Bihar, has intimated to us that pursuant to the directions given by us in our order dated 9th March, 1979(1), the State of Bihar has already released 70 undertrial prisoners whose names were set out in the chart filed by Mrs. Hingorani on 9th March, 1979. It is highly regrettable that these undertrial prisoners should have remained in jail without trial for periods longer than the maximum term for which they could have been sentenced if convicted. We fail to see what moral or ethical justification could the State have to detain these unfortunate persons for such unreasonably long periods of time without trial. We feel a sense of relief that they should once again be able to breathe the air of freedom. But we find that there are still many more undertrial prisoners who fall within this category of persons who have been in detention for periods longer than the maximum term without their trial having been commenced. Mrs. Hingorani has filed before us at the hearing of the writ petition on 16th April, 1979 a second chart giving the names and particulars of some of these under trial prisoners who have not yet got the benefit of the earlier order made by us. There are 59 undertrial prisoners whose names and particulars are set out in this chart and we direct that they should be released forthwith as their continued detention is clearly illegal and in violation of their fundamental right under Art. 21 of the Constitution. There are also several other undertrial prisoners who are accused multiple offences and even if we were to proceed on the assumption that the State would be able to secure their conviction and maximum sentences would be imposed on them and such sentences would not be concurrent in accordance with the usual practice followed by the courts but would be consecutive, they have already suffered the aggregate imprisonment which could be inflicted on them, and there is no reason why they should be subjected to any further detention. It may be pointed out that ordinarily the sentences imposed on conviction for multiple offences are concurrent and if we proceed on that assumption which is more realistic, it would be found that there are many undertrial prisoners who have already been in jail for periods exceeding the maximum term which could be imposed on them even if they were convicted of the multiple offences with which they are charged. We have requested Mrs. Hingorani to prepare a chart showing separately the above two categories of undertrial prisoners so that we can pass appropriate orders in regard to them at the next hearing of the writ petition. Mr. U.P. Singh, appearing on behalf of the State Government, will help Mrs. Hingorani in preparing this chart since Mrs. Hingorani has undertaken this public interest litigation as a matter of public duty and her resources are therefore, bound to be limited.

We are informed that amongst the undertrial prisoners there are some who are lunatics or persons of unsound mind. It is difficult to understand how such persons could possibly be kept in the same jail along with other undertrial prisoners. We should like to know from the State Government, in an affidavit to be filed before the next hearing of the writ petition, as to what are the circumstances in which these persons have been kept as undertrial prisoners in the ordinary jails and what the State Government proposes to do in regard to them. Mrs. Hingorani will prepare a list showing the names and particulars of these persons and Mr. U. P. Singh on behalf of the State Government will render the necessary help in this connection. The list may be filed by Mrs. Hingorani at the next hearing of the writ petition so that we may be able to pass final orders in regard to this category of undertrial prisoners.

We find that pursuant to the directions given by us in our order dated 9th March, 1979, Bageshwari Prasad Pandey, Superintendent of the Patna Central Jail has filed an affidavit dated 4th April, 1979 along with a chart showing the dates on which petitioners Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 17 confined in the Patna Central Jail prior to their release on personal bond, were produced before the Magistrates in compliance

with the proviso to section 167(2) of the Code of Criminal Procedure. A similar affidavit dated 4th April, 1979 has also been filed by Pradeep Kumar Gangoli, Superintendent of Muzaffarpur Jail along with a chart showing the dates on which petitioners Nos. 10, 11, 12, 13, 15, 16 and 18 who were previously confined in the Muzaffarpur Central Jail prior to their release on personal bond, were produced before the Magistrates in compliance with the requirement of the proviso to section 167(2). Bhuvan Mohan Munda, Superintendent of the Ranchi Central Jail has also filed an affidavit dated 12th April, 1979 together with a chart showing the dates on which some of the undertrial prisoners referred to in our Order dated 9th March, 1979 were produced before the Magistrates in compliance with the requirement of the proviso to section 167(2). It is apparent from these charts that some of the petitioners and other undertrial prisoners referred to in these charts have been produced numerous times before the Magistrates and the

Magistrates have been continually making orders of remand to judicial custody. It is difficult to believe that on each of the countless occasions on which these undertrial prisoners were produced before the Magistrates and the Magistrates made orders of remand, they must have applied their mind to the necessity of remanding those undertrial prisoners to judicial custody. We are also very doubtful whether on the expiry of 90 days or 60 days, as the case may be, from the date of arrest, the attention of the undertial prisoners was drawn to the fact that they were entitled to be released on ball under proviso (a) of sub-section (2) of section 167. When an undertrial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may be, the Magistrate must, before making an order of further remand to judicial custody, point out to the undertrial prisoner that he is entitled to be released on bail. The State Government must also provide at its own cost a lawyer to the undertrial prisoner with a view to enable him to apply for bail in exercise of his right under proviso (a) to sub-section (2) of section 167 and the Magistrate must take care to see that the right of the undertrial prisoner to the assistance of a lawyer provided at State cost is secured to him and he must deal with the application for bail in accordance with the guidelines laid down by us in our Order dated 12th February, 1979.(1) We hope and trust that every Magistrate in the country and every State Government will act in accordance with this mandate of the Court. This is the constitutional obligation of the State Government and the Magistrate and we have no doubt that if this is strictly carried out, there will be considerable improvement in the situation in regard to undertrial prisoners and there will be proper observance of the rule of law.

The State Government has also filed an affidavit of B. Srinivasan, Superintendent of Police (C.I.D.), Government of Bihar, giving in Annexure (I) particulars regarding number of cases pending investigation by the police in each sub- division of the State as on 31st December, 1978 and in Annexure (II), particulars regarding number of cases pending investigation for more than six months. These annexures show that a total number of 10,339 cases relating to major offences and 17,687 cases relating to minor offences were pending investigation in the State of Bihar on 31st December, 1978 and out of these, 5835 cases relating to major offences and 7228 cases relating to minor offences were pending investigation for a period of more than six months. It is a matter of great regret that such a large number of cases should be pending investigation for a period of more than six months and the number of such cases in relation to minor offences should be over seven thousand. It is difficult to understand why as many as seven thousand and odd cases relating to minor offences should remain pending investigation for more than six months. It is no doubt true that reasons have been attempted to be given by B. Srinivasan in a statement annexed to his affidavit, but we are not at all satisfied about the validity of these reasons, particularly in so far as investigation in relation to minor offences is concerned. One of the reasons given by B. Srinivasan in his statement is that in 10 per cent of the cases investigation is held up because of delay in receipt of opinions from experts. We find it difficult to appreciate this reason. We fail to see why the State Government cannot employ more experts or set up a larger number of testing laboratories or establish more forensic laboratories. It is also necessary to have more than one serologists in the State. This is a situation which the State Government can certainly remedy by taking prompt action. There are also many other measures which can be taken by the

State Government for the purpose of accelerating the pace of the investigating machinery but it would not be proper for this Court to suggest or recommend any such measures because this Court has not the requisite expertise of material for doing so and moreover the National Police Commission appointed by the Government of India is seized of this question and it is considering what steps and measures should be taken for the purpose of expediting the investigative process and making qualitative improvement in it. But we would be failing in our duty if we do not express our sense of amazement and horror at the leisurely and almost lethargic manner in which investigation into offences seems to be carried on in the State of Bihar. It is high time that the State of Bihar took steps to overhaul and streamline its investigative machinery so that no investigation may take more than the bare minimum time required for it and the judicial process may be set in motion without any unnecessary delay.

We directed by our Order dated 9th March, 1979 that on the next date when the undertrial prisoners, charged with bailable offences, are produced before the Magistrates, the State Government should provide them with a lawyer at its own cost for the purpose of making application for bail and if any application for bail is made, the Magistrates should dispose of the same in accordance with the broad guidelines set out by us in our Judgment dated 12th February, 1979. We are told by Mr. U. P. Singh that the necessary instructions to this effect have been issued by the State Government to the District Magistrate, but we do not know whether and to what extent these instructions have been carried out and lawyers at State expense have been provided to the undertrial prisoners accused of bailable offences for the purpose of making application for bail on their behalf. We should like the State Government to file an affidavit stating how many undertrial accused of bailable offences who have been in jail for a period of more than 18 months as on 1st February, 1979 have been provided lawyers at State expenses and whether or not they have been released on bail in accordance with the directions given by us. The State Government will also file an affidavit giving similar information in regard to those undertrial prisoners who have been in jail for periods longer than half the maximum term of imprisonment for which they could, if convicted, be sentenced, because we had given direction of a like nature also in regard to these undertrial prisoners in our judgment dated 9th March, 1979.

We may point out that according to the law as laid down by us in our judgment dated 9th March, 1979, it is the 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, to have free legal services provided to him by the State and the State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require. We do not know whether the State Government has set up any machinery for the purpose of providing free legal services to persons who are accused of offences involving possible deprivation of liberty and who are unable to engage a lawyer on account of poverty or indigence. This constitutional obligation cannot wait any longer for its fulfilment, since more than 30 years have passed from the date of enactment of the Constitution and no State Government can possibly have any alibi for not carrying out this command of the Constitution. We are repeating this observation once again in the present judgment because we find that barring a few, many of the State Government do not seem to be alive to their constitutional responsibility in the matter of provision of free legal services in the field of 'administration of criminal justice'. Let it not be forgotten that if law is not only to speak justice but also deliver justice, legal aid is an absolute imperative. Legal aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. It is intended to reach justice to the common man who, as the poet song:

"Bowed by the weight of centuries he leans Upon his hoe and gazes on the ground, The emptiness of ages on his face, And on his back the burden of the World."

We hope and trust that every State Government will take prompt steps to carry out its constitutional obligation to provide free legal services to every accused person who is in peril of losing his liberty and who is unable to defend himself through a lawyer by reason of his poverty or indigence in cases where the needs of justice so require. If free legal services are not provided to such an accused the trial itself may run the risk

of being vitiated as contravening Article 21 and we have no doubt that every State Government would try to avoid such a possible eventuality.

We have no report from the State Government as to whether women under "protective custody" in jails have been transferred to remand or welfare homes conducted by the social welfare department as directed by us by our Order dated 26th February, 1979. Mr. U.P. Singh on behalf of the State of Bihar stated before us that this direction has been carried out by the State Government, but we should like to have an affidavit of some responsible officer of the State Government stating that women who were confined in jail under the label of "protective custody" have been transferred to welfare homes and that necessary instructions have been issued by the State Government to the effect that women or children who are victims of offence or whose presence is required for giving evidence should not be kept in jail under so called "protective custody". This affidavit may be filed by the State Government within ten days from today.

We had given direction by our Order dated 26th February, 1979 that the State Government should enquire into cases where the offence charged against undertrial prisoners are triable as summons cases, for the purpose of ascertaining whether there has been compliance with the provision enacted in section 167, sub-section (5) of the Code of Criminal Procedure. It is clear from this provision that if in any case tried by a Magistrate as a summons case the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate must make an order stopping further investigation into the offence, unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice, the continuation of the investigation beyond the period of six months is necessary. With a view to securing compliance with this provision we directed that if, in a case triable by a Magistrate as a summons case, it is found that investigation has been going on for a period of more than six months without satisfying the Magistrate that, for special reasons and in the interest of justice, the continuation of the investigation beyond the period of six months is necessary, the State Government will release the undertrial prisoner, unless the necessary orders of the Magistrate are obtained within a period of one month. The reason for giving this direction was that in such a case the Magistrate is bound to make an order stopping further investigation and in that event, only two courses would be open: either the police must immediately proceed to file a chargesheet, if the investigation conducted till then warrants such a course, or if no case for proceeding against the undertrial prisoner is disclosed by the investigation, the undertrial prisoner must be released forthwith from detention. The State Government has not filed before us any report of compliance with this direction and we would, therefore, require the State Government to do so within a period of ten days from today. We would also request the High Court to draw the attention of the Magistrates to the provision in section 167, sub- section (5) and ensure compliance with the requirement of this provision by the Magistrate.

We find that pursuant to the direction given by us in our Order dated 9th March, 1979, the High Court of Patna has forwarded to us a compilation containing particulars giving the location of courts of Magistrates and courts of Sessions in the State of Bihar together with the total number of cases pending in each of these courts as on 31st December, 1978 with yearwise break up of such pending cases and briefly explaining the reasons why it has not been possible to dispose of these cases within a reasonable period of time. The figures of pending cases given in the compilation are staggering and it is distressing to find that quite a few of these cases have been pending for more than five years, sometimes extending even to seven or nine or ten years. We shall examine the position arising from the pendency of such a large number of cases for such long periods of time at the next hearing of the writ petition, with a view to considering what directions are necessary to be given to the State Government by way of taking positive action for the purpose of securing enforcement of the fundamental right of the accused to speedy trial. We would, however, require for this purpose information from the High Court of Patna as to the norms of disposals fixed by the High Court for the different categories of Magistrates and Sessions Judges in the State of Bihar, since without this information, it would not be possible for us to decide whether the existing strength of courts and judges in the State of Bihar is adequate for the purpose of ensuring speedy trial to the accused or it is necessary to have additional courts

and judges. We would request the High Court to furnish this additional information to us at the next hearing of the writ petition.

We will proceed with the further hearing of the writ petition on 24th April, 1979. N.V.K.

❑❑❑

Supreme Court of India

Prem Shankar Shukla vs Delhi Administration

Equivalent citations: 1980 AIR 1535, 1980 SCR (3) 855

Bench:
Krishnaiyer, V.R. Pathak, R.S. Reddy, O. Chinnappa (J)

Petitioner: Prem Shankar Shukla
Vs.
Respondent: Delhi Administration

Date of Judgment29/04/1980

CITATION: 1980 AIR 1535 1980 SCR (3) 855 1980 SCC (3) 526

CITATOR INFO :

F 1988 SC1768 (2)

A 1991 SC2176 (41)

ACT:

Human justice vis-a-vis Detention Jurisprudence-Manacling a man accused at an offence, constitutional validity of-Constitution of India Articles 14, 19 and 21- Issuance of Writ of Habeas Corpus for human Justice under Article 32 of the Constitution-Universal Declaration of Human Rights, 1948 Articles 5 and 10 read with norms in part III and the provisions in the Prisoners (Attendance in Courts) Act, 1955-Punjab Police Rules, 1934, Vol. III Chap. 25. Rule 26: 22, 23.

HEADNOTE:

Allowing the petition the Court

HELD: Per Iyer J. (on behalf of Chinnappa Reddy J. and himself).

1. **The guarantee of human dignity forms part of an Constitutional culture and the positive provisions of Articles 14, 19 and 21 spring into action to disshackle any man since 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. Even a prisoner is a person not an animal, and an under-trial prisoner is a fortiori so. Our nations founding document admits of no exception. Therefore, all measures authorised by the law must be taken by the Court to keep the stream of prison justice unsullied. [862 D-F, 863 E-F]**

   Sunil Batra v. Delhi Administration and ors. [1978] 4 S.C.C. 494; followed .

2. **The Supreme Court 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-the Supreme 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. [864 A-B]**

3. 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 judicial process. [864 F-G]

4. There cannot be a quasi-caste system among prisoners in the egalitarian context of Article 14. In plain language, to say that the "better class under-trial be not handcuffed without recording the reasons in the daily diary for considering the necessity of the use on such a prisoner while escort to and from court" means that ordinary Indian under-trials shall be rentively handcuffed during transit between jail and court auld the better class prisoner shall be so confined only if reasonably apprehended to be violent or rescued and is against the express provisions of Article 21. [863 D-E, 865 G-H]

Maneka Gandhi v. Union of India [1978] 2 SCR 621 @ 647; applied.

Vishwanath v. State Crl. Misc. Main No. 430 of 1978 decided on 6-4-79 (Delhi High Court), overruled.

5. 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. 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. [868 A-B, 867 G-H]

6. The collection of handcuff law, namely, Prisoners (Attendance in Courts) Act, 1955; Punjab Police Rules, 1934, (Vol. III) Rules 26: 22(i) (a) to (f); 26.21A, 27.12, Standing order 44, Instruction on handcuffs of November, 1977, and orders of April 1979, must meet the demands of Articles 14, 19 and 21. 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. [872 B-D]

The Preamble sets the human 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 interests of the general public. Article 21 is the sanctuary of human values, prescribes fair procedure and forbids barbarities, punitive or procedural. such is the apercu. [872 C-E]

Maneka Gandhi v. Union of India, [1978] 2 SCR 621 @ 647; Sunil Batra v. Delhi Administration, [1978] 4 S.C.C. 494 @ 545; reiterated.

7. Handcuffing is prima facie inhuman and, therefore, unreasonable, is over harsh And at the first blush, arbitrary. Absent fair procedure and objective monitoring to inflict "irons" is to resort to zoological strategies repugnant to Article 21. 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, vulgarise society and foul the soul of our Constitutional culture. [872 F-G]

8. Insurance against escape does not compulsorily required 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 In contraptions. Indeed, binding together either the hands or 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 three components of "irons" forced on the human person are: to handcuff i.e., to hoop harshly to punish humiliatingly and to vulgarise the viewers also. Iron straps are insult and pain writ large,

animalising victim and keepers. Since there are other ways of ensuring safety as a rule handcuffs or other fetters shall not be forced on the person of an under-trial prisoner ordinarily. As necessarily implicit in Articles 14 and 19, 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 slapAsrticle 14 on the face.

The animal freedom of movement, which even a detained is entitled to under Article 19, cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable 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. [872 G-H, 873 A-E]

9. Once the Supreme Court make it a constitutional mandate and law that no prisoner shall be handcuffed or fettered routinely or merely for the convenience of the custodian or escort, the distinction between classes of prisoners become constitutionally obsolete. Apart from the fact that economic an i social importance cannot be the basis for classifying prisoners for purposes of handcuffs or otherwise, a rich criminal or under-trial is in no way 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. Therefore, 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 differential as the law heats 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. [873 E-H]

10. 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 Arts. 14 an(l 19 handcuffs must be the last refuge, not the routine regimen. If a 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. [874 A-C]

Functional compulsions of security must reach that dismal degree that no alternative will work except manacles. Our Fundamental Rights are heavily loaded in favour or 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. [874 D-E]

Therefore, 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. [874 F-H]

11. 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. 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 basic 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. [875 A-C]

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 and must fall as unlawful. Tangible testimony, documentary or other, or desperate behaviour, geared to making good his escape, along 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-protested vans. And increase in the number of escorts, arming them if necessary special training for escorts police, transport of prisoners in protected vehicles, are easily available alternatives. [875 C-E]

12. 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 Art. 21 the procedure will be unfair and bad in law. Nor will mere recording of 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 Art. 21 which insists upon fairness, reasonableness and justice in the very procedure which authorises stringent deprivation of life and liberty. [875 G-H, 876 A]

Maneka Gandhi v. Union of India [1978] 2 SCR 621, and Sunil Batra v. Delhi Administration [1978] 4 SCC 494; applied.

13. Punjab Police Manual, in so far as it puts the ordinary Indian beneath the better class breed (paragraphs 26.21A and 26.22 of Chapter XXVI) is untenable and arbitrary and Indian humans shall not be dischotomised and the common run discriminated against regarding handcuffs. The provisions in para 26.22 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 Arts. 14, 19 and 21. So also para 26.22 (b) and (c). The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinant. And for this there must be clear material not qlib assumption record of reasons and judicial oversight and summary hearing and direction by the Court where the victim is produced. Para 26, 22(1)(d), (e) and (f) also hover perilously near unconstitutionality unless read down 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 extraguards can make up exceptional needs. In very special situations, the application of irons cannot be ruled out. The prisoner cannot be tortured because others will demonstrate or attempt his rescue. The plain law of under trial custody is thus contrary to unedifying escort practice. [876 C-G]

14. 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 ruling 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. "Human rights" seriousness loses it valence where administrator's convenience prevails over cultural values. 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 hand-cuffing prisoner who may be a patient even in the hospital bed and tie him up with ropes to the legs of the cot. [877 A-D, 878 A-C]

15. 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 will be restraints with irons to be justified before or after. The judicial officers, before whom the prisoner is Produced shall 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 he asked to explain the action forthwith. [879 G-H, 880 A-B]

Per Pathak J. (Concurring)

1. It is an axiom of criminal law that a person alleged to have committed an offence is liable to arrest. Sections 46 and 49 of the Code of Criminal Procedure define the parameters of the power envisaged in the Code in the matter of arrest. And s. 46, 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 Administration and ors., [1978] 4 SCC 494; that a person in custody is not wholly denuded of his fundamental rights, the limitations flowing from that principle acquire a profound significance. [880 C-F]

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 s. 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 by handcuffing hum or otherwise there is a simultaneous restraint by the law on the police officer as to the exercise of that power. [880 F-G]

2. Whether a person should be physically restrained and, if so, what should be the degree of restraint, is a matter which affects 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 at once defines that power. [880 H, 881 A]

3. Section 9(2)(e) of the Prisoners (Attendance in Court) 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 hand-cuffs may be applied. The classification has been attempted somewhat broadly. But the classification attempted by some of

the clauses of Rule 26.22, particularly (a) to (c) which presume that in every instance covered by any of these clauses the accused will attempt to escape cannot be sustained. [881 C-E]

The rule 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. [881 E-G]

4. 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. The social status of a person, his education and habit of life associated with a superior mode of living is 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. Even Standing order 44 and the instructions on handcuffs of November 1977 operate some what in excess of the object to be observed by the imposition of handcuffs, having regard to the central principle that only he should be handcuffed who can be reasonably apprehended to attempt from escape or become violent. [881 G-H. 882 A-D]

5. 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. The primary decision should not 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. The prior decision of an external authority can not be reasonably imposed on the exercise of that power. But there is room for imposing a supervisory regime over the exercise of that power. One sector of superviory 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 882 E-G]

6. In the present case, the question whether the petitioner should be handcuffed should be left to be dealt with by the Magistrate concerned before whom he is brought for trial in the cases instituted against him. [882 H, 883 A]

❑❑❑

Supreme Court of India

Rudul Sah vs State Of Bihar And Another

Equivalent citations: 1983 AIR 1086, 1983 SCR (3) 508

Bench:
Chandrachud, Y.V. ((CJ) Sen, Amarendra Nath (J) Misra Rangnath

Petitioner: Rudul Sah
Vs.
Respondent: State Of Bihar And Another

Date Of Judgment : 01/08/1983

CITATION: 1983 AIR 1086 1983 SCR (3) 508 1983 SCC (4) 141 1983 SCALE (2)103

CITATOR INFO :

F **1986 SC 494 (3) RF 1987 SC1086 (7)**

ACT:

Constitution of India-Art. 32-Scope of-Whether in a habeas corpus petition under Art. 32 Supreme Court can grant compensation for deprivation of a fundamental right.

Constitution of India-Art. 21-Scope of-whether covers right to compensation for its violation.

HEADNOTE:

The petitioner who was detained in prison for over 14 years after his acquittal filed a habeas corpus petition under Art. 32 of the Constitution praying for his release on the ground that his detention in the jail was unlawful. He also asked for certain other reliefs including compensation for his illegal detention. When the petition came up for hearing the Court was informed by the respondent State that the petitioner had already been released from the jail.

Allowing the petition,

HELD: The petitioner's detention in the prison after his acquittal was wholly unjustified.

Article 32 confers power on the Supreme Court to issue directions or orders or appropriate writs for the enforcement of any of the rights conferred by Part III of the Constitution. 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 a violators in the payment of monetary compensation. 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. Respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to their rights. [513 A-C, 514 B-E]

In the circumstances of the instant case the refusal 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. Therefore, as an interim measure the State must pay to the petitioner a further sum of Rs. 30,000 in addition to the sum of Rs 5,000 already paid by it. This order will not preclude the petitioner from bringing a suit to recover appropriate damages from the State and its erring officials. [514 B,F,H]

JUDGMENT

ORIGINAL JURISDICTION: Writ Petition (Criminal) No. 1987 of 1982.

(Under Article 32 of the Constitution of India) Mrs. K. Hingorani for the Petitioner. D. Goburdhan for the Respondent.

The Judgment of the Court was delivered by CHANDRACHUD, C.J.: This Writ Petition discloses a sordid and disturbing state of affairs. Though the petitioner was acquitted by the Court of Sessions, Muzaffarpur, Bihar, on June 3, 1968 he was released from the jail on October 16, 1982, that is to say, more than 14 years after he was acquitted. By this Habeas Corpus petition, the petitioner asks for his release on the ground that his detention in the jail is unlawful. He has also asked for certain ancillary reliefs like rehabilitation, reimbursements of expenses which he may incur for medical treatment and compensation for the illegal incarceration.

This petition came up before us on November 22, 1982 when we were informed by Shri Goburdhan, counsel for the State of Bihar, that the petitioner was already released from the jail. The relief sought by the petitioner for his release thus became infructuous but despite that, we directed that a Notice to show cause be issued to the State of Bihar regarding prayers 2, 3 and 4 of the petition. By prayer No. 2 the petitioner asks for medical treatment at Government expense, by prayer No. 3 he asks for an ex gratia payment for his rehabilitation, while by prayer No 4 he asks for compensation for his illegal detention in the jail for over 14 years.

We expected a prompt response to the Show Cause Notice from the Bihar Government at least at this late stage, but they H offered no explanation for over four months. The Writ Petition was listed before us on March 31, 1983 when Shri Goburdhan restated that the petitioner had been already released from the jail.

We passed a specific order on that date to the effect that the release of the petitioner cannot be the end of the matter and we called upon the Government of Bihar to submit a written explanation supported by an affidavit as to why the petitioner was kept in the jail for over 14 years after his acquittal. On April 16, 1983, Shri Alakh Deo Singh, Jailor, Muzaffarpur Central Jail, filed an affidavit in pursuance of that order. Shorn of its formal recitals, the affidavit reads thus:

"2. That the petitioner was received on 25.3.67 from Hazaribagh Central Jail and was being produced regularly before the Additional Sessions Judge, Muzaffarpur and on 30.8.68 the learned Judge passed the following order:

"The accused is acquitted but he should be detained in prison till further order of the State Government and I.G. (Prisons), Bihar."

(A true copy of the same is attached as Annexure I).

3. That accused Rudul Sah was of unsound mind at the time of passing the above order. This information was sent to the Law Department in letter No. 1838 dated 10.5.74 of the Superintendent, Central Jail, Muzaffarpur through District Magistrate, Muzaffarpur.

4. That the Civil Surgeon, Muzaffarpur, reported on 18.2.77 that accused Rudul Sah was normal and this information was communicated to the Law Department on 21.2.77.

5. That the petitioner, Rudul Shah was treated well in accordance with the rules in the Jail Manual, Bihar, during the period of his detention.

6. That the petitioner was released on 16.10.82 in compliance with the letter No. 11637 dated 14.10 82 of the Law Department."

The Writ Petition came up before us on April 26, 1983 when we adjourned it to the first week of August 1983 since it was not clear either from the affidavit filed by the Jailor or from the order of the learned

Additional Sessions Judge, Muzaffarpur, which is annexed to the affidavit as Annexure I, as to what was the basis on which it was stated in the affidavit that the petitioner was of unsound mind or the reason why the learned Additional Sessions Judge directed the detention of the petitioner in jail, until further orders of the State Government and the Inspector General of Prisons.

The writ petition has come up for hearing once again before us today. If past experience is any guide, no useful purpose is likely to be served by adjourning the petition in the hope that the State authorities will place before us satisfactory material to explain the continued detention of the petitioner in jail after his aquittal. We apprehend that the present state of affairs, in which we are left to guess whether the petitioner was not released from the prison for the benign reason that he was insane, is not likely to improve in the near future.

The Jailor s affidavit leaves much to be desired. It narrates with an air of candidness what is notorious, for example, that the petitioner was not released from the jail upon his acquittal and that he was reported to be insane. But it discloses no data on the basis of which he was adjudged insane, the specific measures taken to cure him of that affliction and, what is most important, whether it took 14 years to set right his mental imbalance. No medical opinion is produced in support of the diagnosis that he was insane nor indeed is any jail record produced to show what kind of medical treatment was prescribed for and administered to him and for how long. The letter (No. 1838) dated May 10, 1974 which, according to paragraph 3 of the affidavit, was sent to the Law Department by the Superintendent of the Central Jail, Muzaffarpur, is not produced before us. There is nothing to show that the petitioner was found insane on the very date of his acquittal. And, if he was insane on the date of acquittal, he could not have been tried at all for the simple reason that an insane person cannot enter upon his defence Under the Code of Criminal Procedure, insane persons have certain statutory rights in regard to the procedure governing their trial. According to paragraph 4 of the affidavit, the Civil Surgeon, Muzaffarpur, reported on February 18, 1977 that the petitioner was normal and that this information was communicated to the Law Department on February 21, 1977. Why was the petitioner not released for over 5&1/2 years thereafter ? It was on october 14, 1982 that the Law Department of the Government of Bihar directed that the petitioner should be released. Why was the Law Department so insensitive to justice ? We are inclined to believe that the story of the petitioner's insanity is an afterthought and is exaggerated out of proportion. If indeed he was insane, at least a skeletal medical record could have been produced to show that he was being treated for insanity. In these circumstances, we are driven to the conclusion that, if at all the petitioner was found insane at any point of time, the insanity must have supervened as a consequence of his unlawful detention in jail. A sense of helplessness and frustration can create despondency and persistent despondency can lead to a kind of mental imbalance.

The concerned Department of the Government of Bihar could have afforded to show a little more courtesy to this Court and to display a greater awareness of its responsibilities by asking one of its senior officers to file an affidavit in order to explain the callousness which pervades this case. Instead, the Jailor has been made a scapegoat to own up vicariously the dereliction of duty on the part of the higher officers who ought to have known better. This is not an isolated case of its kind and we feel concerned that there is darkness all around in the prison administration of the State of Bihar. The Bhagalpur blindings should have opened the eyes of the Prison Administration of the State. But that bizarre episode has taught no lesson and has failed to evoke any response in the Augean Stables. Perhaps, a Hercules heas to be found who will clean them by diverting two rivers through them, not the holy Ganga though. We hope (and pray) that the higher officials of the State will find time to devote their personal attention to the breakdown of Prison Administration in the State and rectify the grave injustice which is being perpetrated on helpless persons. The High Court of Patna should itself examine this matter and call for statistical data from the Home Department of the Government of Bihar on the question of unlawful detentions in the State Jails A tabular statement from each jail should be called for, disclosing how many convicts have been in jail for more than 10 years, 12 years, 14 years and for over 16 years. The High Court will then be in a position to release prisoners who are in unlawful detention

in the jails and to ask the State Government to take steps for their rehabilitation by payment of adequate compensation wherever necessary.

That takes us to the question as to how the grave injustice which has been perpetrated upon the petitioner can be rectified, in so far 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.

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 fourteen 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 appropriate order for the payment of compensation in this Habeas Corpus petition itself.

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 to 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 violaters 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 civilization 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.

Taking into consideration the great harm done to the petitioner by the Government of Bihar, we are of the opinion that, as an interim measure, the State must pay to the petitioner a further sum of Rs. 30,000 (Rupees thirty- thousand) in addition to the sum of Rs. 5,000 (Rupees five thousand) already paid by it. The amount shall be paid within two weeks from today. The Government of Bihar agrees to make the payment though, we must clarify, our order is not based on their consent.

This order will not preclude the petitioner from bringing a suit to recover appropriate damages from the state and its erring officials. The order of compensation passed by us is, as we said above, in the nature of a palliative. We cannot leave the petitioner penniless until the end of his suit, the many appeals and the execution proceedings. A full-dressed debate on the nice points of fact and law which takes place leisurely in compensation suits will have to await the filing of such a suit by the poor Rudul Sah. The Leviathan will have liberty to raise those points in that suit. Until then, we hope, there will be no more Rudul Sahs in Bihar or elsewhere.

H.L.C. Petition allowed.

❑❑❑

Supreme Court of India

Sheela Barse vs State of Maharashtra

Equivalent citations: 1983 AIR 378, 1983 SCR (2) 337

Bench:
Bhagwati, P.N. Pathak, R.S. Sen, Amarendra Nath (J)

Petitioner: Sheela Barse
Vs.
Respondent: State Of Maharashtra

Date of Judgment : 15/02/1983

CITATION: 1983 AIR 378 1983 SCR (2) 337 1983 SCC (2) 96 1983 SCALE (1)140

ACT:

Legal Aid to the poor-Importance of legal aid to the poor explained-Directions given to Prison authorities and police on providing Legal aid to the poor prisoners.

HEADNOTE:

The petitioner, a journalist, in her letter addressed to this Court stated that Five out of fifteen women prisoners interviewed by her in the Bombay Central Jail alleged that they had been assaulted by the police in the police lock up and two of them in particular alleged that they had been assaulted and tortured in the lock up. Treating the letter as a writ petition the Court issued notices to all concerned to show cause why the writ petition should not be allowed In the meanwhile the Director of the College of Social Work, Nirmala Niketan, Bombay was directed to interview the women prisoners without any one else being present and ascertain whether the allegations made to the petitioner were correct. The Director, in her report, stated among other things that there was no adequate arrangement for providing legal assistance to women prisoners and that two prisoners who were foreign nationals complained that a lawyer duped and defrauded them and misappropriated almost half of their belongings and jewellery on the plea that he was retaining them for payment of his fees.

Disposing of the petition the court gave the following directions:

Legal assistance to a poor or indigent accused, arrested and put in jeopardy of his life or personal liberty, is a constitutional imperative mandated not only by Art. 39A but also by Articles 14 and 21 of the Constitution. It is a Necessary sine qua non of justice and where it is not provided, injustice is likely to result and every act of injustice corrodes the foundations of democracy and rule of law. It is possible that a prisoner lodged in a jail does not know to whom he can turn for help to indicate his innocence or defend his constitutional G or legal rights or to protect himself against torture and ill-treatment, oppression and harassment at the hands of his custodians. It is also possible that he or the members of his family may have other problems where legal assistance is required but by reason of his being incarcerate. it may be difficult if not impossible for him or the members of his family to obtain proper legal advice or aid. It is therefore essential that legal assistance must be made available to prisoners in jails whether they be under-trials or convicted prisoners.

The Inspector General of Prisons in Maharashtra should issue a circular to all Superintendents of Jails in Maharashtra requiring them to send to the Legal Aid Committee of each district in which the jail is situated:

(i) a list of all under-trial prisoners giving the date of entry, the nature of the offence showing separately male and female prisoners and (ii) a list giving the particulars of persons arrested on suspicion under s. 41 of the Code of Criminal Procedure who have been in jail beyond a period of 15 days. The Circular should also contain directions: (i) to provide facilities to 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; (ii) to furnish to the lawyers nominated by tho Legal Aid Committee whatever information is required by them in regard to the prisoners in jail; (iii) 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 arid that prisoners who wanted their assistance could avail of their counselling services; (iv) to allow any prisoner to meet such lawyers. Such interview should be within, sight but out of hearing of any jail official. [343 D-E, G-H, 344 A-D]

The Maharashtra State Board of Legal Aid should advise and instruct the District Legal Aid Committees to nominate a few selected lawyers to visit the jail or jails in the district once in a fortnight to ascertain whether the law laid down by this Court and the High Court in this respect is being properly and effectively implemented and to interview the prisoners who express their desire to obtain legal assistance. The State Board should call for periodic reports from the district legal aid committees to ensure that these directions are being properly carried out. [344 E-H]

The Court has given the following further directions: (i) 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. [345 E-F]

(ii) Interrogation of females should be carried out only in the presence of female police officers/ constables. [345 G]

(iii) A person arrested must be immediately informed of the grounds of his 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 should forthwith get a pamphlets prepared setting out the legal rights of an arrested person. The pamphlets should be in Marathi, Hindi and English. Printed copies of the pamphlets in all these languages should be affixed in each cell in every police lock up. As soon as the arrested person is brought to the police station, the pamphlet should be read out to him in any of the languages which he understands. [345 H, 346 A C]

(iv) Whenever a person is arrested by the police and taken to the police lock up, the police should immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee which should take immediate steps to provide legal assistance to him at State cost provided he is willing to accept such A legal assistance. [346 D-E]

(v) In the city of Bombay, a City Sessions Judge, 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 for ascertaining the conditions in the police lock up, whether the requisite facilities are being provided, whether the provisions of law are being observed and that these directions are being carried out. If it is found 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. If even this approach fails, then the City Sessions Judge may draw the attention of the Chief Justice of the High Court of Maharashra to such lapses. This direction in

regard to police lock up at the district headquarters shall be carried out by the Sessions Judge of the district concerned. [346 F-H, 347 A]

(vi) 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. [347 B-C]

(vii) The magistrate before whom an arrested person is produced shall enquire from him whether he has any complaint of torture or maltreatment in police custody and inform him that he has a right under section 54 of the Code of Criminal Procedure 1973 to be medically examined. [347 C-D]

The Court made the following observations:

The profession of law is a noble profession. A lawyer owes a duty to the society to help people in distress more so when those in distress are women 2nd in jail. Lawyers must positively reach up to those sections of humanity who are poor, illiterate and ignorant and who, when they are placed in a crisis such as an accusation of crime or arrest or imprisonment, do not know what to do or where to go or to whom to turn. If lawyers, instead of coming to the rescue of persons in distress, exploit and prey upon them, the legal profession will come into disrepute and The large masses of people in the country would lose faith in lawyers and that would be destructive of democracy and the rule of law. [342 F-H, 343 A-B]

JUDGMENT

ORIGINAL JURISDICTION; Writ Petition (Crl.) Nos. 1053- 1054 of 1982.

(Under Article 32 of the Constitution of India. Khursheed Ahmed for the Petitioner. K.G. Bhagat Addl. Sol. General, V.B. Joshi and M.N. Shroff for the Respondent.

The Judgment of the Court was delivered by BHAGWATI, J. This writ petition is based on a letter addressed by Sheela Barse, a journalist, complaining of custodial violence to women prisoners whilst confined in the police lock up in the city of Bombay. The petitioner stated in her letter that she interviewed fifteen women prisoners in the Bombay Central Jail with the permission of the Inspector General of Prisons between 11 and 17th May, 1982 and five out of them told her that they had been assaulted by the police in the police lock up. Of these five who complained of having been assaulted by the police, the petitioner particularly mentioned the cases of two, namely, Devamma and Pushpa Paeen who were allegedly assaulted and tortured whilst they were in the police lock up. It is not necessary for the purpose of this writ petition to go into the various allegations in regard to the ill-treatment meted out to the women prisoners in the police lock up and particularly the torture and beating to which Devamma and Pushpa Paeen were said to have been subjected because we do not propose to investigate into the correctness of these allegations which have been disputed on behalf of the State of Maharashtra. But, since these allegations were made by the women prisoners interviewed by the petitioner and particularly by Devamma and Pushpa Paeen and there was no reason to believe that a journalist like the petitioner would invent or fabricate such allegations if they were not made to her by the women prisoners, this Court treated the letter of the petitioner as a writ petition and issued notice to the State of Maharashtra, Inspector General of Prisons, Maharashtra, Superintendent, Bombay Central Jail and the Inspector General of Police, Maharashtra calling upon them to show cause why the writ petition should not be allowed. It appears that on the returnable date of the show cause notice no affidavit was filed on behalf of any of the parties to whom show cause notice was issued and this Court therefore adjourned the hearing of the writ petition to enable the State of Maharashtra and other parties to file an affidavit in reply to the averments made in the letter of the petitioner. This Court also directed that in the meanwhile Dr. (Miss) A.R. Desai, Director of College of Social Work, Nirmala Niketan, Bombay will visit the Bombay Central Jail and interview women prisoners lodged there including Devamma and Pushpa Paeen without any one else being present at the time of interview v and ascertain whether they had been subjected to any torture or ill- treatment and submit a report to this Court on or before 30th August, 1982. The State Government and the Inspector General of Prisons were directed to provide all facilities to Dr. Miss A.R. Desai to carry

out this assignment entrusted to her. The object of assigning this commission to Dr. Miss A.R. Desai was to ascertain whether allegations of torture and ill-treatment as set out in the letter of the petitioner were, in fact, made by the women prisoners including Devamma and Pushpa Paeen to the petitioner and what was the truth in regard to such allegations. Pursuant to the order made by this Court, Dr. Miss A.R. Desai visited Bombay Central prison and after interviewing women prisoners lodged there, made a detailed report to this Court. The Report is a highly interesting and instructive socio-legal document Which provides an insight into the problems and difficulties facing women prisoners and we must express our sense of gratitude to Dr. Miss A.R. Desai for the trouble taken by her in submitting such a wonderfully thorough and perceptive report. We are not concerned here directly with the conditions prevailing in the Bombay Central Jail or other jails in the State of Maharashtra because the primary question which is raised in the letter of the petitioner relates to the safety and security of women prisoners in police lock up and their protection against torture and ill-treatment. But even so we would strongly recommend to the Inspector General of Prisons, Maharashtra that he may have a look at this Report made by Dr. Miss A.R. Deasai and consider what further steps are necessary to be taken in order to improve the conditions in the Bombay Central Jail and other jails in the State of Maharashtra and to make life for the women prisoners more easily bearable by them. There is only one matter about which we would like to give directions in this writ petition and that is in regard to the need to provide legal assistance not only to women prisoners but to all prisoners lodged in the jails in the State of Maharashtra. We have p already had occasion to point out in several decisions given by this Court that legal assistance to a poor or indigent accused who is arrested and put in jeopardy of his life or personal liberty is a constitutional imperative mandated not only by Article 39 but also by Articles 14 and 21 of the Constitution. It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and rule of law are merely slogans or myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests. Imagine the helpless condition of a prisoner who is lodged in a jail who does not know to whom he can turn for help in order to vindicate his innocence or defend his constitutional or legal rights or to protect himself against torture and ill-treatment or oppression and harassment at the hands of his custodians. It is also possible that he or the members of his family may have other problems where legal assistance is required but by reason of his being incarcerated, it may be difficult if not impossible for him or the members of his family to obtain proper legal advice or aid. It is therefore absolutely essential that legal assistance must be made available to prisoners in C: jails whether they be under-trial or convicted prisoners.

The Report of Dr. Miss A.R. Desai shows that there is no adequate arrangement for providing legal assistance to women prisoners and we dare say the situation which prevails in the matter of providing legal assistance in the case of women prisoners must also be the same m regard to male prisoners. It is pointed out in the Report of Dr. Miss A.R. Desai that two prisoners in the Bombay Central Jail, one a German national and the other a Thai national were duped and defrauded by a lawyer, named Mohan Ajwani who misappropriated almost half the belongings of the German national and the jewellery of the Thai national on the plea that he was retaining such belongings and jewellery for payment of his fees. We do not know whether this allegation made by these two German and Thai women prisoners is true or not but, if true, it is a matter of great shame for the legal profession and it needs to be thoroughly. investigated. The profession of law is-a noble profession which has always regarded itself as a branch of social service and a lawyer owes a duty to the society to help people in distress and more so when those in distress are women and in jail. Lawyers must realise that law is not a pleasant retreat where we are concerned merely with mechanical interpretation of rules made by the legislature but it is a teeming open ended avenue through which most of the traffic of human existence passes. There are many casualities of this traffic and it is the function of the legal profession to help these casualities in a spirit of dedication and service. It is for the lawyers to minimise the numbers of those casualities who still go without legal assistance. The lawyers must positively reach out to those sections of

humanity who are poor, illiterate and ignorant and who, when they are placed in a crisis such as an accusation of crime or arrest or imprisonment, do not know what to do or where to go or to whom to turn. If lawyers, instead of A coming to the rescue of persons in distress, exploit and prey upon them, the legal profession will come into disrepute and large masses of people in the country would lose faith in lawyers and that would be destructive of democracy and rule of law. If it is true-that these two German and Thai women prisoners were treated by Mohan Ajwani in the manner alleged by them-and this is a question on which we do not wish to express any opinion ex parte-it deserves the strongest condemnation. We would therefore direct that the allegations made by the two German and Thai women prisoners as set out in paragraph 9.2 of the Report of Dr. Miss A.R. Desai be referred to the Maharashtra State Bar Council for taking such action as may be deemed fit.

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 organisation 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 situate 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 aud avail of their counselling 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 sight but out of hearing of and 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 situate to nominate a couple of selected lawyers practising in the district court to visit the jail or jails in the district atleast 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 & 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 in so far 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 & Advice Board.

We may DOW take up the question as to how protection can be accorded to the 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 co-operation 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 as 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 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.

(ii) Whenever a person is arrested by the police without warrant, he must be immediately informed of the 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 & 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 an intimation of the fact of such arrest to the nearest Legal Aid Committee and such Legal Aid Committee will take immediate steps far 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 Mahrashtra to such lapses. This direc tion in

regard to police lock ups at the districts head quarters, 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 malterated 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 mal-treatment in police custody. We have no doubt that if these directions which are being given by us are carried out both in letter and 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.

❑❑❑

Supreme Court of India

Shri D.K. Basu, Ashok K. Johri vs State of West Bengal, State Of U.P

Bench:
Kuldip Singh, A.S. Anand

Petitioner: Shri D.K. Basu, Ashok K. Johri
Vs.
Respondent: State of West Bengal, State of U.P.

Date of Judgment : 18/12/1996

With Writ Petition (Crl) No. 592 Of 1987

JUDGMENT

Dr. Anand, J.

The Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, on 26th August, 1986 addressed a letter to the Chief Justice of India drawing his attention to certain news items published in the Telegraph dated 20, 21 and 22 of July, 1986 and in the Statesman and India express dated 17th August, 1986 regarding deaths in police lock-ups and custody. The Executive Chairman after reproducing the new items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for attrocities and death caused in police custody and to provide for accountability of the efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". It was requested that the letter alongwith the new items be treated as a writ petition under "public interest litigation" category.

Considering the importance of the issue raised in the letter being concerned by frequent complaints regarding custodial violence and deaths in police lock up, the letter was treated as a writ petition and notice was issued on 9.2.1987 to the respondents.

In response to the notice, the State of West Bengal filed a counter. It was maintained that the police was no hushing up any matter of lock-up death and that whereever police personnel were found to be responsible for such death, action was being initiated against them. The respondents characterised the writ petition as misconceived, misleading and untenable in law.

While the writ petition was under consideration a letter addressed by Shri Ashok Kumar Johri on 29.7.87 to the Hon'ble Chief Justice of India drawing the attention of this Court to the death of one Mahesh Bihari of Pilkhana, Aligarh in police custody was received. That letter was also treated as a writ petition and was directed to be listed alongwith the writ petition filed by Shri D.K. Basu. On 14.8.1987 this Court made the following order :

"In almost every states there are allegations and these allegations are now increasing in frequency of deaths in custody described generally by newspapers as lock-up deaths. At present there does not appear to be any machinery to effectively deal with such allegations. Since this is an all India question concerning all States, it is desirable to issues notices to all the State Governments to find out whether they are desire

to say anything in the matter. Let notices issue to all the State Governments. Let notice also issue to the Law Commission of India with a request that suitable suggestions may be returnable in two months from today."

In response to the notice, affidavits have been filed on behalf of the States of West Bengal, Orissa, Assam Himachal Pradesh, Madhya Pradesh, Harayana, Tamil Nadu, Meghalaya , Maharashtra and Manipur. Affidavits have also been filed on behalf of Union Territory of Chandigarh and the Law Commission of India.

During the course of hearing of the writ petitions, the Court felt necessity of having assistance from the Bar and Dr. A.M. Singhvi, senior advocate was requested to assist the Court as amicus curiae.

Learned counsel appearing for different States and Dr. Singhvi, as a friend of the court. presented the case ably and though the effort on the part of the States initially was to show that "everything was well" within their respective States, learned counsel for the parties, as was expected of them in view of the importance of the issue involved, rose above their respective briefs and rendered useful assistance to this Court in examining various facets of the issue and made certain suggestions for formulation of guidelines by this court to minimise, if not prevent, custodial violence and kith and kin of those who die in custody on account of torture.

The Law Commission of India also in response to the notice issued by this Court forwarded a copy of the 113th Report regarding "injuries in police custody and suggested incorporation of Section 114-B in the India Evidence Act."

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.

"Torture" has not been defined in 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 wit 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 not 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

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 inspite of the commitments made to eliminate torture, the fact remains that torture is more widespread not that ever before, "Custodial torture" is a naked violation of human dignity and degradation with 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.

In all custodial crimes that 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.

"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 1984, which market the emergency of 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 curel, 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.

In England, torture was once regarded as a normal practice to ger 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 though 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 - Paper 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.

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 a offence should continue only on one or more of the following criteria :

(a) the person`s`s unwillingness to identify himself so that 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`s 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`s failing to appear at court to answer anycharge 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 finger printed 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...."

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.

Fundamental rights occupy a place of pride in the India Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty expect according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life of 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 the 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 safeguard provided to a person with a view to protect his personal liberty against and unjustified assault by the State, In tune with the constitutional guarantee a number statutory provisions also seek to project personal liberty, dignity and basic human rights of the citizens. Chapter V. of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguard which are required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P.C. 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 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 Constituion of India. There are some other provisions also like Section 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 and enquiry into the cause of death.

However, inspite 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 creditibility of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

The Third Report of the National Police Commission in India expressed its deep concern with custodial demoralising effect with 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 :-

(1) 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.

This Court in Joginder Kumar Vs. State [1994 (4) SCC, 260] (to which one of us, namely, Anand, J. was a party) considered the dynamics of misuse of police power of arrest and opined :

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another...No. arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bonafides 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 person his liberty is a serious matter."

Joginder Kumar's case (supra) involved arrest of a practising lawyer who had bee called to the police station in connection with a case under inquiry on 7.1.94. On not receiving any satisfactory account of his whereabouts, the family member of the detained lawyer preferred a petition in the nature of habeas corpus before this Court on 11.1.94 and in compliance with the notice, the lawyer was produced on 14.1.94 before this court the police version was that during 7.1.94 and 14.1.94 the lawyer was not in detention at all but was only assisting the police to detect some cases. The detenue asserted otherwise. This Court was not satisfied with the police version. It was noticed that though as on that day the relief in habeas corpus petition could not be granted but the questions whether there had been any need to detain the lawyer for 5 days and if at all he was not in detention then why was this Court not informed. Were important questions which required an answer. Besides, if there was detention for 5 days, for what reason was he detained. The Court' therefore, directed the District Judge, Ghaziabad to make a detailed enquiry and submit his report within 4 weeks. The Court voiced its concern regarding complaints of violations of human rights during and after arrest. It said:

"The horizon of human rights is expanding. at the same time, the crime rate is also increasing, Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

..... A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations weighing and balancing the rights, liberties and privileges of he single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding with comes first-the criminal or society, the law violator or the abider....."

This Court then set down certain procedural "requirements" in cases of arrest.

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 required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture of 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 tp 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 court 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 convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

In Neelabati Bahera Vs. State of Orissa [1993 (2) SCC, 746], (to which Anand, J. was a party) this Court pointed out that prisoners and detenues 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 of the arrestees and detenues. It was observed :

"It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and its 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 o 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, expect 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 responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

Instances have come to out notice were the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrest 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 sometime resulted into 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 into death as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either police men or co- prisoners who are highly reluctant to appear as prosecution witness due to fear of letaliation 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 incharge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. State of Madhya Pradesh Vs. Shyamsunder Trivedi & Ors. [1995 (3) Scale, 343 =] is an apt case illustrative of the observations made by us above. In that case, Nathu Bnjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nathu Banjara had been released from police custody at about 10.30 p.m. after interrogation 13.10.1986 itself vide entry EX. P/22A in the Roznamcha and that at about 7.00 a.m. on 14.10.1981, a death report Ex. P/9 was recorded at the police station, Rampura, at the instance of Ramesh respondent No. 6, to the effect that he had found "one unknown person" near a tree by the side of the tank riggling with pain in his chest and that as a soon as respondent No. 6 reached near him, the said person died. The further case set up by SI Trivedi, respondent No. 1, incharge of the police station was that after making a Roznamcha entry at 7.00 a.m. about his departure from the police station he (respondent No. 1- Shyamsunder Trivedi) and Constable Rajaram respondent proceeded to the spot where the dead body was stated to be lying for conducting investigation under Section 174 Cr.P.C. He summoned Ramesh Chandra and Goverdhan respondents to the spot and in their presence prepared a

panchnama EX. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.

The First Additional Sessions Judge acquitted all the respondents of all the charges holding that there was no direct evidence to connect the respondents with the crime. The State of Madhya Pradesh went up in appeal against the order of acquittal and the High Court maintained the acquittal of respondents 2 to 7 but set aside the acquittal of respondent No. 1, Shyamsunder Trivedi for offences under Section 218, 201 and 342 IPC. His acquittal for the offences under Section 302/149 and 147 IPC was, however, maintained. The State filed an appeal in this court by special leave. This Court found that the following circumstances have been established by the prosecution beyond every reasonable doubt and coupled with the direct evidence of PWs 1, 3, 4, 8 and 18 those circumstances were consistent only with the hypothesis of the quilt of the respondents and were inconsistent with their innocence :

(a) that the deceased had been brought alive to the police station ad was last seen alive there on 13.10.81;

(b) That the dead body of the deceased was taken out of the police station on 14.1.81 at about 2 p.m. for being removed to the hospital;

(c) that SI Trivedi respondent No. 1, Ram Naresh shukla, Respondent and Ganiuddin respondent No. 5 were present at the police station and had all joined hands to dispose of the dead body of Nathu-Banjara:

(d) That SI Trivedi, respondent No. 1 created false evidence and fabricated false clues in the shape of documentary evidence with a view to screen the offence and for that matter, the offender:

(e) SI Trivedi respondent in connivance with some of his subordinates, respondents herein had taken steps to cremate the dead body in haste describing the deceased as a 'lavaris' though the identity of the deceased, when they had interrogated for a sufficient long time was well known to them. and opined that:

"The observations of the High Court that the presence and participation of these respondents in the crime is doubtful are not borne out from the evidence on the record and appear to be an unrealistic over simplification of the tell tale circumstances established by the prosecution."

One of us (namely, Anand, J.) speaking for the Court went on to observe :

"The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a 'could not careless' attitude in appreciating the evidence on the record and thereby condoning the barbarous there 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 and evidence available to the prosecution to directly implicate them with the torture. The Courts, must not loose sight of the fact that death in police custody is perhaps on of the worst kind of crime in a a civilised society, governed by the rule of law and poses a serious thereat to an orderly civilised society."

This Court then suggested : "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 case of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of crime has the satisfaction that ultimately the Majesty of Law has prevailed."

The State appeal was allowed and the acquittal of respondents 1, 3, 4 and 5 was set aside. The respondents were convicted for various offences including the offence under Section 304 Part II/34 IPC and sentenced to various terms of imprisonment and fine ranging from Rs. 20,000/- to Rs.. 50,000/-. The fine was directed to be paid to the heirs of Nathu Banjara by way of compensation. It was furthr directed :

"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 nationalised Bank or post office on such terms as the Trial Court may in consultation with the heirs for the deceased consider fit and proper."

It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt for law develops. It was considering these aspects that the Law Commission in its 113th Report recommended the insertion of Section 114B in the Indian Evidence Act. The Law Commission recommended in its 113th Report that in prosecution of a police officer for an alleged offence of having caused bodily injury to a person, if there was evidence that the injury was caused during the period when the person was in the custody of the police, the Court may presume that the injury was caused by the police officer having the custody of the person during that period. The Commission further recommended that the court, while considering the question of presumption, should have regard to all relevant circumstances including the period of custody statement made by the victim, medical evidence and the evidence with the Magistrate may have recorded. Change of burden of proof was, thus, advocated. In sham Sunder Trivedi's case (supra) this Court also expressed the hope that the Government and the legislature would give serious thought to the recommendation of the Law Commission. Unfortunately, the suggested amendment, has not been incorporated in the statute so far. The need of amendment requires no emphasis - sharp rise i custodial violence, torture and death in custody, justifies the urgency for the amendment and we invite Parliament's attention to it.

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of a 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 that view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purpose full to make the investigation effective. By torturing a person and using their degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No. society can permit it.

How do we check the abuse of police power? Transparency of action and accountability perhaps are tow possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of 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 personal handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable form 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.

Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Costal 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, R.A.W, Central Bureau of Investigation (CBI) , CID, Tariff Police, Mounted Police and ITBP which have the power to detain a person and to interrogated 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, In re Death of Sawinder Singh Grover [1995 Supp (4) SCC, 450], (to which Kuldip Singh, j. was a party) this Court took suo moto 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 a FIR and initiate criminal proceeding 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 sum of Rs. 2 lacs to the widow of the deceased by was of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

There is one other aspect also which needs out 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 hard core criminals like extremist, the 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 to much of emphasis on protection of their fundamental rights and human rights such criminals may go scot-free without exposing any element or iota or 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 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.

The response of the American supreme Court to such an issue in Miranda Vs. Arizona, 384 US 436 is instructive. The Court said :

"A recurrent argument, made in these cases is that society's need for interrogation out-weighs the privilege. This argument is not unfamiliar to this Court. See. e.g. Chambers v. Florida, 309 US 227, 240-41, 84 L ed 716, 724, 60 S Ct 472 (1940). The whose thrust of out 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. "

(Emphasis ours) There can be no gain saying 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 statures has been upheld by the Courts. The right to interrogate the detenues, 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 est supreme lex (the safety of the people is the supreme law) and salus republicae est suprema lex (safety of the state is the supreme law) co-exist an dare 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 eleminated with a view to elicit information, extract confession or drive 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 methods of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met wit innovative ideas and approach. State terrorism is not answer to combat terrorism. 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 for punishment but it cannot justify the violation of this human rights expect 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.

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 on 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 counter signed by The arrestee.

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 togs 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 a such memo shall be attested by atleast one witness. who may be either 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 counter signed 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 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 he next friend of the person who has been informed of the arrest an 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 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 concerned Stare or Union Territory. Director, Health Services should prepare such a penal 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 illaga 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.

Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render his 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.

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.

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.

The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every Stare/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 conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on the All India Radio besides being shown on the National network of Doordarshan and 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 out 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 UBI JUS IBI REMEDIUM - There is no wrong without a remedy. The law will that in every case where man is wronged and undamaged 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.

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. Section 330 and 331 provide for punishment of those who inflict injury of grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustration (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 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, nor 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.

Article 9(5) of the International convent 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 as the time of its ratification (of ICCPR) in 1979 had 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 party to the Convent. That reservation, however, has now lost its relevance in view of the law laid down by this Court in number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. (See with advantage Rudal Shah Vs. State of Bihar [1983 (4) SCC, 141]: Sebastian M. Hongrey Vs. Union of India [1984 (3) SCC, 339] and 1984 (3) SCC, 82]; Bhim Singh Vs State of J & K [1984 (Supp) SCC, 504 and 1985 (4) SCC, 677] Saheli Vs. Commissioner of Police. Delhi [1990 (1) SCC 422]}. 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 o compensation in cases of established unconstitutional deprivation of person liberty or life. [See : Nilabati Bahara Vs. State (Supra)] Till about tow decades ago the liability of the government for tortious act of its public servants as 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 act of the public servants and for the established violation of the rights guaranteed by Article 21 of the Constitution of India. In Nilabati Behera Vs. State (supra) the decision of this Court in Kasturi Lal Ralia Ram Jain Vs. State of U.P. [1965 (1) SCR, 375] wherein the plea of sovereign immunity had been upheld in a case of vicarious liability of the State for the tort committed by its employees was explained thus:

"In this Context, it is sufficient to say that the decision of this Court in Kasturilal upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this court in Rudul Sah and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy upon Articles 32 and 226 of the Constitution, On the other hand, Kasturilal related to the value of goods seized and not returned to the owner due to the fault of government Servants, the claim being of damages of the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, inapplicable in this context and distinguishable."

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 of 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 Constitutions is 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 226 of the Constitution of India for the established violation or the fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrong door 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.

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 court 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 damage is a long drawn and cumber some 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 times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim. Who may have been the bread winner of the family.

In Nilabati Bahera's case (supra), it was held: "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. While concluding his first Hamlyn Lecture in 1949 under the title "freedom under the Law" Lord Denning in his own style warned :

No one ca suppose that the executive will never be guilty the of the sins that are common to all of us. Your may be sure that they will sometimes to things which they ought to do : and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, out procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and actions on the case are not suitable for the winning or freedom in the new age. They must be replaced by new and up-to date machinery by declarations, injunctions and actions for negligence... This is not the task of Parliament... the courts must do this. Of all the great tasks that lie ahead this is the greatest.

Properly exercised the new powers of the executive lead to the welfare state : but abused they lead to a totalitarian state. None such must ever be allowed in this country."

A similar approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental rights of the citizen has been adopted by the Courts of Ireland, which has a written constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy for the infringement of those rights. That has, however, not prevented the Court in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but against the State itself.

The informative and educative observations of O' Dalaigh CJ in The State (At the Prosecution of Quinn) v. Ryan [1965] IR 70 (122) deserve special notice. The Learned Chief Justice said:

"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substances were being assured to the individual and that the Courts were the custodians of those rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought of circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution require."

(Emphasis supplied) In Byrne v. Ireland [1972] IR 241, Walsh J opined at p 264:

"In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed toe have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State. It is against the State that the remedy must be sought it there has been a failure to discharge the constitutional obligation impose" (Emphasis supplied) In Maharaj Vs. Attorney General of Trinidad and Tobago [(1978) 2 All E.R. 670]. The Privy

Council while interpreting Section 6 of the Constitution of Trinidad and Tobago held that though not expressly provided therein, it permitted an order for monetary compensation, by way of 'redress' for contravention of the basic human rights and fundamental freedoms. Lord Diplock speaking for the majority said:

"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. 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 of 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 any 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 here and determine any application made by any person in pursuance of sub-section (1) of this section'. The very wide power to make orders, issue writs and give directions are ancillary to this."

Lord diplock then went on to observe (at page 680) : "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 that 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."

In Simpson was, Attorney General [Baigent's case] (1994 NZLR, 667) the Court of Appeal in NewZealand dealt with the issue in a very elaborate manner by reference to a catena of authorities from different jurisdictions. It considered the applicability of the doctrine of vicarious liability for torts, like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act, 1990. While dealing with the enforcement of rights and freedoms as guaranteed by the Bill of Rights for which no specific remedy was provided. Hardie Boys, J. observed :

"The New Zealand Bill of Rights Act, unless it is to be no more that an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights hat the Bill affirms. it is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate ad effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. the reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred (and they are but a sample) is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning." (Emphasis supplied) The Court of appeal relied upon the judgment of the Irish Courts, the Privy Council and referred to the law laid down in Nilabati Behera Vs. State (supra) thus:

"Another valuable authority comes from India, Where the constitution empowers the Supreme Court to enforce rights guaranteed under it. In Nilabati Bahera V. State of Orissa (1993) Cri. LJ 2899, the Supreme Court awarded damages against the Stare to the mother of a young man beaten to death in police custody. The Court held that its power of enforcement imposed a duty to "forge new tools", of which compensation was an appropriate on where that was the only mode of redress available. This Was not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply. These observations of Anand, J. at P 2912 may be noted.

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. The purpose of public law is not only to civilize public that they live under a legal system which aims to protect their interest and preserve their rights."

Each the five members of the Court of Appeal in Simpson's case (supra) delivered a separate judgment but there was unanimity of opinion regarding the grant of pecuniary compensation to the victim, for the contravention of his rights guaranteed under the Bill of Rights Act, notwithstanding the absence of an express provision in that behalf in the Bill of Rights Act.

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 nor available and the citizen must revive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. 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 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, That 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 he public law jurisdiction is, in addition to the traditional remedies and not it derrogation 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.

Before parting with this judgment we wish to place on record our appreciation for the learned counsel appearing for the States in general and Dr. A.M. Singhvi, learned senior counsel who assisted the Court amicus curiae in particular for the valuable assistances rendered by them.

❑❑❑

Supreme Court of India

State of Andhra Pradesh vs Challa Ramkrishna Reddy & Ors

Bench:
D.P.Wadhwa, S.S.Ahmad

Petitioner: State of Andhra Pradesh
Vs.
Respondent: Challa Ramkrishna Reddy & Ors.

Date of Judgment: 26/04/2000

JUDGMENT

S.SAGHIR AHMAD, J. Challa Chinnappa Reddy and his son Challa Ramkrishna Reddy were involved in Criminal Case No.18/1997 of Owk Police Station in Baganapalle Taluk of Kurnool District. They were arrested on 25th of April, 1977 and on being remanded to judicial custody on 26th of April, 1977, they were lodged in Cell No.7 of Sub-jail, Koilkuntla. In the night between 5th and 6th of May, 1977, at about 3.30 A.M., some persons entered the premises of Sub-jail and hurled bombs into Cell No.7 as a result of which Challa Chinnappa Reddy sustained grievous injuries and died subsequently in Government hospital, Kurnool. His son Challa Ramakrishna Reddy who was also lodged in Cell No.7, however, escaped with some injuries. Challa Ramakrishna Reddy and his four other brothers as also his mother filed a suit against the State of Andhra Pradesh claiming a sum of Rs.10 lacs as damages on account of the negligence of the defendant which had resulted in the death of Challa Chinnappa Reddy. The suit was contested by the State of Andhra Pradesh on two principal grounds, namely, that the suit was barred by limitation and that no damages could be awarded in respect of sovereign functions as the establishment and maintenance of jail was part of the sovereign functions of the State and, therefore, even if there was any negligence on the part of the Officers of the State, the State would not be liable in damages as it was immune from any legal action in respect of its sovereign acts. Both the contentions were accepted by the trial court and the suit was dismissed. On appeal, the suit was decreed by the High Court for a sum of Rs.1,44,000/- with interest at the rate of 6 per cent per annum from the date of the suit till realisation. It is this judgment which is challenged in this appeal. Ms. K.Amreshwari, learned Senior Counsel appearing on behalf of the State of Andhra Pradesh has contended that the suit was barred by time as the period of limitation, as provided by Article 72 of the Limitation Act, 1963, was only one year and since the act complained of took place in the night intervening 5th and 6th of May, 1977, the suit which was instituted on 9th of June, 1980, was barred by time. Learned counsel appearing on behalf of the respondents has, on the other hand, contended that the period of limitation would be governed by Article 113 of the Limitation Act, 1963 which prescribed a period of three years from the date on which the right to sue accrued. It is contended that Article 113 was the residuary Article and since the nature of the present suit was not covered by any other Article of the Limitation Act, it would be governed by the residuary Article, namely, Article 113 and, therefore, the suit, as held by the High Court, was within limitation. The other question which was argued by the learned counsel for the parties with all the vehemence at their command was the question relating to the immunity of the State from legal action in respect of their sovereign acts. It was contended by the learned counsel for the appellant that the prisons all over the country are established and maintained either by the Central Government or by the State Government as part of their sovereign functions in maintaining law and order in the country and, therefore, the suit for compensation was not maintainable. Learned counsel for the respondents, on the contrary, has contended that the theory of immunity, professed by the appellant in respect of sovereign acts, has since been exploded by several decisions of this Court and damages have been awarded against the State even in respect of custodial deaths. We will first take up the question of

limitation. Article 72 of the Limitation Act, 1963 is quoted below:- "Description of suit Period of Time from which limitation period begins to run _____ For compensation for One year When the act or doing or for omitting omission takes to do an act alleged place. to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.

_____" The above Article corresponds to Article 2 of the Limitation Act, 1908 which is quoted below:-

"For compensation for Ninety days When the act or doing or for omitting omission takes to do an act alleged place. to be in pursuance of any enactment in force for the time being in India."

_____" Article 113 of the Limitation Act, 1963, upon which reliance has been placed by the respondents, is quoted below:- "Description of suit Period of Time from which limitation period begins to run _____ _____ Any suit for which no three When the right period of limitation years. to sue accrues. is provided elsewhere in this Schedule."

"These Articles, namely, Article 72 and 113 are applicable to different situations. In order to attract Article 72, it is necessary that the suit must be for compensation for doing or for omitting to do an act in pursuance of any enactment in force at the relevant time. That is to say, the doing of an act or omission to do an act for which compensation is claimed must be the act or omission which is required by the statute to be done. If the act or omission complained of is not alleged to be in pursuance of the statutory authority, this Article would not apply. This Article would be attracted to meet the situation where the public officer or public authority or, for that matter, a private person does an act under power conferred or deemed to be conferred by an Act of the Legislature by which injury is caused to another person who invokes the jurisdiction of the court to claim compensation for that act. Thus, where a public officer acting bona fide under or in pursuance of an Act of the Legislature commits a "tort", the action complained of would be governed by this Article which, however, would not protect a public officer acting mala fide under colour of his office. The Article, as worded, does not speak of "bona fide" or "mala fide" but it is obvious that the shorter peiod of limitation, provided by this Article, cannot be claimed in respect of an act which was malicious in nature and which the public officer or authority could not have committed in the belief that the act was justifiable under any enactment. In State of Punjab vs. M/s Modern Cultivators, 1964 (8) SCR 273 = AIR 1965 SC 17, Hidayatullah, J. (as he then was) while approving the earlier decisions in Mohammad Sadat Ali Khan vs. Administrator, Corporation of City of Lahore, ILR (1945) Lahore 523 (FB) = AIR 1945 Lahore 324 and Secretary of State vs. Lodna Colliery Col. Ltd., ILR 15 Patna 510 = AIR 1936 Patna 513, observed as under:- "(25) This subject was elaborately discussed in ILR (1945) Lah 523: (AIR 1945 Lah 324)(FB) where all ruling on the subject were noticed. Mahajan, J. (as he then was) pointed out that "the act or omission must be those which are honestly believed to be justified by a statute." The same opinion was expressed by Courtney Terrell C.J. in Secretary of State v. Lodna Colliery Co. Ltd., ILR 15 Pat 510: (AIR 1936 Pat 513) in these words:- "The object of the article is the protection of public officials, who, while bona fide purporting to act in the exercise of a staturory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act compalined of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute, secondly the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection." (26) These cases have rightly decided that Art.2 cannot apply to cases where the act or omission complained of is not alleged to be in pursuance of statutory authority." In Jailal vs. The Punjab State & Anr., AIR 1967 Delhi 118, it was held by the Delhi High Court that protection under Article 72 could be claimed only when the act was done under the colour of statutory duty but if the person acted with the full knowledge that it was not done under the authority of law, he could not claim the benefit of the shorter period of limitation prescribed under this Article. In Jaques &

Ors. vs. Narendra Lal Das, AIR 1936 Calcutta 653, it was held that this Article would not protect the public officer acting mala fide under the colour of his office. To the same effect is the decision of the Punjab High Court in The State of Punjab & Ors. vs. Lalchand Sabharwal, AIR 1975 Punjab 294 = 77 Punjab LR 396. In Punjab Cotton Press Co. Ltd. vs. Secretary of State AIR 1927 PC 72, where the canal authorities cut the bank of a canal to avoid accident to the adjoining railway track and not to the canal and plaintiff's adjacent mills were damaged, it was held that Article 2 was not applicable as the act alleged was not done in pursuance of any enactment. A Full Bench of the Allahabad High Court in Pt. Shiam Lal vs. Abdul Raof AIR 1935 Allahabad 538 held that if a police officer concocts and reports a false story, he is not protected by Article 2 of the Limitation Act, which would apply only where a person honestly believing that he is acting under some enactment does an act in respect of which compensation is claimed. But where the officer pretends that he is so acting and knows that he should not act, Article 2 would not apply. Keeping these principles in view, let us examine the facts of this case. On being lodged in jail, the deceased Challa Chinnappa Reddy and Challa Ramkrishna Reddy (P.W.1) both informed the Inspector of Police that there was a conspiracy to kill them and their lives were in danger. They sent a representation to that effect to the Collector and the Home Minister. On 5th of May, 1977 they told the Circle Inspector that they had positive information that an attack on their lives would be made on that very night. But the Circle Inspector did not treat the matter seriously and said that no incident would happen inside the jail and that they need not worry. In spite of the representation made by the deceased and Challa Ramkrishna Reddy, adequate protection was not provided to them and extra guards were not put on duty. The deceased, therefore, asked his followers to sleep that night near the jail itself. As pointed out earlier, that night, which incidentally was the night between 5th and 6th of May, 1977, a bomb was hurled in Cell No.7 where the deceased and Challa Ramkrishna Reddy (P.W.1) were lodged and as a result of the bomb explosion, Challa Chinnappa Reddy died but before his death, his dying declaration was recorded by the Judicial Magistrate in which it was stated by the deceased that they had received information that a conspiracy was hatched to kill them in the jail itself and that the Sub-Inspector of Police (who was examined as D.W.1 in the trial court) was a party to that conspiracy. The Magistrate also recorded the statement of Challa Ramkrishna Reddy who stated that though the deceased and he himself had requested the police to provide protection to them as their lives were in danger, their requests were not heeded to. The High Court while examining the evidence on record came to the following conclusion:- "It is thus clear that though 9 members of the police party must stay in the sub-jail premises during the night, only two were there on that night. The witness did not produce his General Diary maintained in the Police Station to establish that 9 members of the guardian party were staying in the Sub-jail on that night. The learned Magistrate who visited the jail immediately after receiving the information and on learning of the incident, stated in his report, Ex.A-9, submitted to the Addl. District & Sessions Judge, Kurnool, that only two Constables were guarding the jail that night. He opined "I am inclined to think that the alleged explosion in Cell No.7 is on the first-floor, and that the culprits put up a ladder, tied with a rope to the wooden parapet, went up to the first-floor and threw the bomb into Cell No.7. He also reported that while going away, when they were challenged by three persons sleeping outside the jail (kept there by the deceased and P.W.1 as an additional precaution) they threw bombs at them, killing one of them and injuring the other two. It is also evident from Ex.A-14 that both the said Constables were suspended on 23.5.1977. The report of the learned Magistrate and his notes inspection (Ex.A-9) clearly show that the Police Constables guarding the jail were not vigilant, and the P.C.483, whose duty it was to guard the cell, was probably sleeping at that time. The learned Magistrate has observed in his report "if P.C. 483 was more vigilant, perhaps the untoward incident would not have occurred..." The very manner in which the culprits gained entry into the jail shows that it could not have happened but for the negligence on the part of the police to guard the jail property and to ensure the safety of prisoners, as required by Rule 48 of the Madras Rules aforesaid. It may be noted that Kurnool District is one of the districts in Rayalaseema area of the State, notorious for factions and blood-feuds. Use of bombs is not a rare occurrence in that area. In such a situation, and more so when a specific request was made for additional precautions, the failure not only to provide additional precautions, but the failure to provide even the normal guard duty cannot but be termed as gross negligence. It is an omission to perform the statutory responsibility placed

upon them by Rule 48 of the Madras Prisons Rules. It is a failure to take reasonable care. On the issue two we disagree with the learned trial Judge." It would thus be seen from the above that the deceased as also Challa Ramkrishna Reddy who apprehended danger to their lives, complained to the police and requested for adequate police guards being deployed at the jail, but their requests were not heeded to and true to their apprehension, a bomb was thrown at them which caused the death of Challa Chinnappa Reddy and injuries to Challa Ramkrishna Reddy (P.W.1). In this process, one of the three persons, who was sleeping near the jail, was also killed. The Police Sub-Inspector was also in conspiracy and it was for this reason that in spite of their requests, adequate security guards were not provided. Even the normal strength of the guards who should be on duty at night was not provided and only two Constables, instead of nine, were put on duty. Since the Sub-Inspector of Police himself was in conspiracy, the act in not providing adequate security at the jail cannot be treated to be an act or omission in pursuance of a statutory duty, namely, Rule 48 of the Madras Prison Rules, referred to by the High Court. Moreover, the action was wholly mala fide and, therefore, there was no question of the provisions of Article 72 being invoked to defeat the claim of the respondents as the protection of shorter period of limitation, contemplated by that Article, is available only in respect of bona fide acts. In our opinion, the High Court in the circumstances of this case, was justified in not applying the provisions of Article 72 and invoking the provisions of Article 113 (the residuary Article) to hold that the suit was within limitation. We may now consider the next question relating to the immunity of the State Government in respect of its sovereign acts. The trial court relying upon the decision of this Court in Kasturi Lal Ralia Ram Jain vs. State of U.P.. AIR 1965 SC 1039 = 1965 (1) SCR 375, dismissed the suit on the ground that establishment and maintenance of jail being a part of the sovereign activity of the Government, a suit for damages would not lie as the State was immune from being proceeded against in a court of law on that account. The High Court also relied upon the decision in Kasturi Lal's case (supra) but it did not dismiss the appeal on that ground. It went a step further and considered the provisions contained in Article 21 of the Constitution and came to the conclusion that since the Right to Life was part of the Fundamental Rights of a person and that person cannot be deprived of his life and liberty except in accordance with the procedure established by law, the suit was liable to be decreed as the officers of the State in not providing adequate security to the deceased, who was lodged with his son in the jail, had acted negligently. Immunity of State for its sovereign acts is claimed on the basis of the old English Maxim that the King can do no wrong. But even in England, the law relating to immunity has undergone a change with the enactment of Crown Proceedings Act, 1947. Considering the effect of this Act, it is stated in Rattan Lal's "Law of Torts" (23rd Edition) as under:- "The Act provides that the Crown shall be subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject (1) in respect of torts committed by its servants or agents, provided that the act or omission of the servant or agent would, apart from the Act, have given rise to a cause of action in tort against that servant or agent or against his estate; (2) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; (3) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property. Liability in tort also extends to breach by the Crown of a statutory duty. It is also no defence for the Crown that the tort was committed by its servants in the course of performing or purporting to perform functions entrusted to them by any rule of the common law or by statute. The law as to indemnity and contribution as between joint tort-feasors shall be enforceable by or against the Crown and the Law Reform (Contributory Negligence) Act, 1945 binds the Crown. Although the Crown Proceedings Act preserves the immunity of the Sovereign in person and contains savings in respect of the Crown's prerogative and statutory powers, the effect of the Act in other respects, speaking generally, is to abolish the immunity of the Crown in tort and to equate the Crown with a private citizen in matters of tortious liability." Thus, the Crown in England does not now enjoy absolute immunity and may be held vicariously liable for the tortious acts of its officers and servants. The Maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof. Right to Life is one of the basic human rights. It is guaranteed to every person by Article 21

of the Constitution and not even the State has the authority to violate that Right. A prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his Fundamental Rights including the Right to Life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights. "Prison" has been defined in Section 3(1) of the Prisons Act, 1894 as any jail or place used permanently or temporarily under the general or special orders of State Government for the detention of prisoners. Section 3 contemplates three kinds of prisoners. Sub- clause (2) of Section 3 defines "criminal prisoner" as a prisoner duly committed to custody under the writ, warrant or order of any court or authority exercising criminal jurisdiction or by order of a court martial. "Convicted criminal prisoner" has been defined in Section 3(3) as a prisoner under sentence of a court or court martial and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1882 or under the Prisoners Act, 1871. The corresponding provision in the new Code of Criminal Procedure is not being indicated as it is not necessary for pruposes of this case. "Civil prisoner" has been defined in Section 3(4) as a prisoner who is not a "criminal prisoner". Thus, according to the definition under the Prisoners Act, there is a convict, there is an under- trial and there is a civil prisoner who may be a detenu under preventive detention law. None of the three categories of prisoners lose their Fundamental Rights on being placed inside a prison. The restriction placed on their right to movement is the result of their conviction or involvement in crime. Thus, a person (prisoner) is deprived of his personal liberty in accordance with the procedure established by law which, as pointed out in Maneka Gandhi vs. Union of India, (1978) 1 SCC 248 = 1978 (2) SCR 621 = AIR 1978 SC 597, must be reasonable, fair and just. The rights of prisoners, including their Fundamental Rights have been culled out by this Court in a large number of decisions, all of which may not be referred to here. In State of Maharashtra vs. Prabhakar Pandurang Sanzgiri, AIR 1966 SC 424 = 1966 (1) SCR 702, it was held that conditions of detention cannot be extended to deprivation of other Fundamental Rights and the detenu, who had written a book in `Marathi', could not be prohibited from sending the book outside the jail for its publication. In D.Bhuvan Mohan Patnaik vs. State of Andhra Pradesh, AIR 1974 SC 2092 = (1975) 3 SCC 185 = 1975 (2) SCR 24, it was laid down that convicts are not denuded of all the Fundamental Rights they possess. Chandrachud, J. (as he then was) held : "The security of one's person against an arbitrary encroachment by the police is basic to a free society and prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crimes. Such intrusions are against the very essence of a scheme of ordered liberty." [See: (1975) 3 SCC Page 188 Para 9] In Charles Shobraj vs. Superintendent, Central Jail, Tihar AIR 1978 SC 1514, Krishna Iyer, J. observed as under : "True, confronted with cruel conditions of confinement, the court has an expanded role. True, the right to life is more than mere animal existence, or vegetable subsistence. True, the worth of the human person and dignity and divinity of every individual inform articles 19 and 21 even in a prison setting. True constitutional provisions and municipal laws must be interpreted in the light of the normative laws of nations, wherever possible and a prisoner does not forfeit his part III rights." (See: AIR 1978 Page 1517 Para 14) In Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi, (1981) 1 SCC 608 = AIR 1981 SC 746 = 1981 (2) SCR 516, the Court held that Right to Life means the right to live with basic human dignity. In this case, the petitioner, who was a British national and was detained in the Central Jail, Tihar, had approached this Court through a petition of habeas corpus in which it was stated that she experienced considerable difficulty in having interview with her lawyer and the members of her family. She stated that her daughter, who was 5 years of age, and her sister who was looking after the daughter, were permitted to have interview with her only once in a month. Considering the petition, Bhagwati, J. (as he then was) observed at Page 753 in Para 8 as under : "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's case (AIR 1978 SC 597) (supra) 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 Arts. 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." (See also :Sunil Batra (I) vs. Delhi Administration, AIR 1978 SC 1675 = (1978) 4 SCC 494 = 1979 (1) SCR 392 ; Sunil Batra (II) vs. Delhi Administration, AIR 1980 SC 1579 = (1980) 3 SCC 488 = 1980 (2) SCR 557). Thus, the Fundamental Rights, which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by this Court. In N. Nagendra Rao & Co. vs. State of A.P., AIR 1994 SC 2663 = (1994) 6 SCC 205, it was observed:- "But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is soverign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalisation of the functions of the State as "soverign and non-sovereign" or "governmental or non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of soverignty found it place either because of the `financial instability of the infant American States rather than to the stability of the doctrine theoretical foundation', or because of `logical and practical ground', or that `there could be no legal right as against the State which made the law gradually gave way to the movement from, `State irresponsibility to State responsibility.' In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulaing and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between soverign and non-soverign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity." The whole question was again examined by this Court in Common Cause, A Registered Society vs. Union of India & Ors., (1999) 6 SCC 667 = AIR 1999 SC 2979, in which the entire history relating to the institution of suits by or against the State or, to be precise, against Government of India, beginning from the time of East India Company right up to the stage of Constitution, was considered and the theory of immunity was rejected. In this process of judicial advancement, Kasturi Lal`s case (supra) has paled into insignificance and is no longer of any binding value. This Court, through a stream of cases, has already awarded compensation to the persons who suffered personal injuries at the hands of the officers of the Government including Police Officers & personnel for their to tortious act. Though most of these cases were decided under Public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as a fact. Moreover, these decisions, as for example, Nilabti Behera vs. State of Orissa, (1993) 2 SCC 746 = 1993 (2) SCR 581 = AIR 1993 SC 1960; In Re: Death of Sawinder Singh Grower, (1995) Supp. (4) SCC 450 = JT 1992 (6) SC 271 = 1992 (3) Scale 34; and D.K. Basu vs. State of West Bengal, (1997) 1 SCC 416 = AIR 1997 SC 610, would indicate that so far as Fundamental Rights and human rights or

human dignity are concerned, the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail. For the reasons stated above, we do not find any merit in this appeal which is dismissed.

❑❑❑

Supreme Court of India

R.D. Upadhyay vs State Of A.P. & Ors

Bench:
Y.K. Sabharwal, C.K. Thakker, P.K. Balasubramanyan

Writ Petition (Civil) 559 of 1994

Petitioner: R.D. Upadhyay
Vs.
Respondent: State of A.P. & Ors.

Dateof Judgment : 13/04/2006

JUDGMENT

Concerned by the plight of the undertrial prisoners languishing in various jails in the country, various directions were issued by this Court from time to time. Presently, we are considering mainly the issue of directions for the development of children who are in jail with their mothers, who are in jail either as undertrial prisoners or convicts. Children, for none of their fault, but per force, have to stay in jail with their mothers. In some cases, it may be because of the tender age of the child, while in other cases, it may be because there is no one at home to look after them or to take care of them in absence of the mother. The jail environment are certainly not congenial for development of the children.

For the care, welfare and development of the children, special and specific provisions have been made both in Part III and IV of the Constitution of India, besides other provisions in these parts which are also significant. The best interest of the child has been regarded as a primary consideration in our Constitution. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 15(3) provides that this shall not prevent the State from making any special provision for women and children. Article 21A inserted by 86th Constitutional Amendment provides for free and compulsory education to all children of the age of six to fourteen years. Article 24 prohibits employment of children below the age of fourteen years in any factory or mine or engagement in other hazardous employment. The other provisions of Part III that may be noted are Articles 14, 21 and 23. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 23 prohibits trafficking in human beings and forced labour. We may also note some provisions of Part IV of the Constitution. Article 39(e) directs the State to ensure that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 39(f) directs the State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 42 provides that the State shall make provision for securing just and humane conditions of work and maternity relief. Article 45 stipulates that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. Article 46 provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Article 47 provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its

primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Apart from the aforesaid constitutional provisions, there are wide range of existing laws on the issues concerning children, such as, the Guardians and Wards Act, 1890, Child Marriage Restraint Act, 1929, the Factories Act, 1948, Hindu Adoptions and Maintenance Act, 1956, Probation of Offenders Act, 1958, Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960, the Child Labour (Prohibition and Regulation) Act, 1986, Juvenile Justice (Care and Protection of Children) Act, 2000, the Infant Milk Substitutes, Feeding Bottles and Infant Foods, (Regulation of Production, Supply and Distribution) Act, 1992, Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Immoral Traffic (Prevention) Act, 1986.

The Juvenile Justice Act, 2000 replaced the Juvenile Justice Act, 1986 to comply with the provisions of the Convention on the rights of the child which has been acceded to by India in 1992.

In addition to above, the national policy for children was adopted on 22nd August, 1974. This policy, inter alia, lays down that State shall provide adequate services for children both before and after birth, and during the growing stages for their full physical, mental and social development. The measures suggested include amongst others a comprehensive health programme, supplementary nutrition for mothers and children, promotion of physical education and recreational activities, special consideration for children of weaker sections and prevention of exploitation of children.

India acceded to the UN Convention on the rights of the child in December 1992 to reiterate its commitment to the cause of the children. The objective of the Convention is to give every child the right to survival and development in a healthy and congenial environment.

The UN General Assembly Special Session on children held in New York in May 2002 was attended by an Indian delegation led by Minister of Human Resource Development and consisted of Parliamentarians, NGOs and officials. It was a follow up to the world summit held in 1990. The summit adopted the declaration on the survival, protection and development of children and endorsed a plan of action for its implementation.

The Government of India is implementing various schemes and programmes for the benefit of the children. Further, a National Charter for children 2003 has been adopted to reiterate the commitment of the Government to the cause of the children in order to see that no child remains hungry, illiterate or sick. By the said Charter, the Government has affirmed that the best interests of children must be protected through combined action of the State, civil society and families and their obligation in fulfilling children's basic needs. National Charter has been announced with a view to securing for every child inherent right to enjoy happy childhood, to address the root causes that negate the health, growth and development of children and to awake the conscience of the community in the wider societal context to protect children from all forms of abuse, by strengthening the society and the nation. The National Charter provides for survival, life and liberty of all children, promoting high standards of health and nutrition, assailing basic needs and security, play and leisure, early childhood care for survival, growth and development, protection from economic exploitation and all forms of abuse, protection of children in distress for the welfare and providing opportunity for all round development of their personality including expression of creativity etc. The National Institute of Criminology and Forensic Sciences conducted a research study of children of women prisoners in Indian jails. The salient features of the study brought to the notice of all Governments in February 2002, are :

(i) The general impression gathered was the most of these children were living in really difficult conditions and suffering from diverse deprivations relating to food, healthcare, accommodation, education, recreation, etc.

(ii) No appropriate programmes were found to be in place in any jail, for their proper bio-psycho-social development. Their looking after was mostly left to their mothers. No trained staff was found in any jail to take care of these children.

(iii) It was observed that in many jails, women inmates with children were not given any special or extra meals. In some cases, occasionally, some extra food, mostly in the form of a glass of milk, was available to children. In some jails, separate food was being provided only to grown up children, over the age of five years. But the quality of food would be same as supplied to adult prisoners.

(iv) No special consideration was reported to be given to child bearing women inmates, in matters of good or other facilities. The same food and the same facilities were given to all women inmates, irrespective of the fact whether their children were also living with them or not.

(v) No separate or specialised medical facilities for children were available in jails.

(vi) Barring a few, most mother prisoners considered that their stay in jails would have a negative impact on the physical as well as mental development of their children.

(vii) Crowded environment, lack of appropriate food, shelter and above all, deprivation of affection of other members of the family, particularly the father was generally perceived by the mothers as big stumbling blocks for the proper development of their children in the formative years of life.

(viii) Mother prisoners identified six areas where urgent improvement was necessary for proper upkeep of their children. They related to food, medical facilities, accommodation, education, recreation and separation of their children from habitual offenders.

(ix) No prison office was deployed on the exclusive duty of looking after these children or their mothers. They had to perform this duty alongside many other duties including administrative work, discipline maintenance, security-related jobs etc. None of them was reported to have undergone any special training in looking after the children in jails.

Some of the important suggestions emanating from the study are :

(i) In many States, small children were living in sub-jails which were not at all equipped to keep children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conductive environment there, for proper bio-psycho-social growth of children.

(ii) Before sending a woman in stage of pregnancy, to a jail, the concerned authorities must ensure that particular jail has got the basic minimum facilities for child delivery as well as for providing pre-natal and post-natal care for both to the mother and the child.

(iii) The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crime including violent crimes, is certainly harmful for such children in their personality development. Children are, therefore, required to be separated from such an environment on priority basis, in all such jails.

(iv) A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children to them on regular basis.

(v) Children of women prisoner should be provided with clothes, bed sheets, etc. in multiple sets. Separate utensils of suitable size and material should also be provided to each mother-prisoner for giving food to her child.

(vi) Medical care for every child living in a jail has to be fully ensured. Also, in the event of a women prisoner falling ill herself, alternative arrangements for looking after the child should be made by the jail staff.

(vii) Adequate arrangements should be available in all jails to impart education, both formal and informal, to every child of the women inmates. Diversified recreational programmes/facilities should also be made available to the children of different age groups.

(viii) A child living in a jail along with her incarcerated mother is not desirable at all. In fact, this should be as only the last resort when all other possibilities of keeping the child under safe custody elsewhere have been tried and have failed. In any case, it should be a continuous endeavour of all the sectors of the criminal justice system that the least number of children are following their mothers to live in jails.

The State Governments and Union Territories were requested to consider the aforesaid suggestions for implementation.

By filing IA Nos.1 and 7, the attention of this Court has been drawn to the plight of little children on account of the arrest of their mothers for certain criminal offences. I.A. No. 1 was filed by Women's Action Research and Legal Action for Women (WARLAW), through its program coordinator, Ms. Babita Verma stating that more than 70% of the women prisoners are married and have children. At the time of arrest of the women prisoners having children, indiscriminate arrest is not confined only to women/mother prisoners but such arrest is automatically extended to these children who are of tender age and there is no one to look after the child and take care of the child without their mother. Such children are perforce subjected to a kind of arrest for no offence committed by them. Further, the atmosphere in jail is not congenial for a healthy upbringing of such children. There are two non-Governmental organizations (NGO's), namely Mahila Pratiraksha Mandal and Navjyothi who are counsellors. Adjoining the jail premises at Delhi there is Nari Niketan which is a women's reform home. Some of the children who are detained in jail are sent to Kirti Nagar Children's home for their studies. The arrangement pertaining to the education and looking after of these children is not adequate. To the best of the information of the applicant, there is no specific provision or regulation in Jail Manual for facilitating the mother prisoners to meet the children. It is for the family protection of these women prisoners including their minor children that the trial period of undertrials shall be minimised and a period of two years shall be fixed.

It was suggested that arrest of women suspects be made only by lady police. Such arrests should be sparingly made as it adversely affects innocent children who are taken into custody with their mother. To avoid arrest of innocent children the care and custody of such children may be handed over to voluntary organizations which can assist in the growth of children in a congenial and healthy atmosphere. Periodic meeting rights should be available to the women/mother prisoners in order to mother the healthy upkeep of the children.

A letter dated 8th March, 2000 written by a 6 years old girl child, studying in upper KG in a school at Bangalore, to Chief Justice of India enclosing an article 'Dogged by Death in Jail' in a women's magazine dated 20th January, 2000 narrating plight of children in jail with their mothers, was registered as IA No.7. The article, inter alia, notes that the fate of the women undertrials is more pitiable because some of them live with their tiny tots whether born at home or inside the jail and that a visitor to jail is sure to see a series of moving scenes.

The order dated 20th March, 2001 notes that the learned Solicitor General shares the concern of the Court regarding the plight of the children in jail and the submission that with a view to frame some guidelines and issue instructions, it would be necessary to first ascertain the number of female prisoners in each of the jails, in each of the States/union Territories, the offences for which they have been arrested; the duration of their detention and whether children with any of those female prisoners are also lodged in jail. The Court directed the States and Union Territories to disclose on affidavit the following :

(i) The number of female prisoners (undertrial) together with the nature of offence for which they have been detained;

(ii) Period of their detention;

(iii) Children, if any, who are with the mothers lodged in the jail;

(iv) Number of convicted female prisoners and whether any children are also lodged with such convicts in the jails;

(v) Whether any facilities are available in the jail concerned for taking care of such children and, if so, the type of facilities."

Various State Governments and Union Territories submitted reports which provided detailed answers to the aforestated questions. The following is a brief conspectus of the reports filed :

In the Andaman & Nicobar Islands, children are allowed to live with their mothers up to the age of 5 years. A special diet is prescribed for children by the Medical Officer including proper vitamins and minerals. As far as the future of the children is concerned, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself.

In Andhra Pradesh, milk is provided to the children every day with a protein diet for elder kids. Special medical facilities are available as prescribed by the Medical Officer. Vaccines like Polio etc are provided at regular intervals. Education is also provided.

In Assam, children are allowed to live with their mothers up to the age of 6 years. Literary training is provided to small children who are lodged with their prisoner mothers. Lady teachers are also present. Instructions have been issued to provide sufficient study material to the children, as also adequate playing material. As for their future, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself.

In Bihar, children are allowed to live with their mothers up to the age of 2 years and up to 5 years in special cases where there is no other caretaker for child. Provision is made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of one year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months, and from 18-24 months or as specified by the Medical Officer. Health and clothing facilities are provided by the Government. Toys and other forms of entertainment are also available in some jails.

In Chandigarh, a special diet is provided for. Medical facilities are also present.

In Chhattisgarh, children are allowed to live with their mothers up to the age of 6 years. Normal food and additional milk is provided. Polio drops are provided on pulse polio day. Medical treatment is done by full time and part time doctors present in the jail. Children are sent outside for expert medical treatment and advice if required. NGO's have provided for clothes. Inside the jail, a child education centre is being run so that they develop interest in education and may learn to read and write. TV and fans for the female prisoners and their kids have been provided by some social service organizations, as also sports and recreation material, swings and cycles. Children are taken to public parks and for public functions to get acquainted with the outside world. After the age of six, these children are sent to the local 'children's home', where their primary education starts. Female children are sent to the Rajkumari Children's Home at Jabalpur where there is adequate arrangement of education In Delhi, children are allowed to live with their mothers up to the age of 6 years. A special diet inclusive of 750 gm milk and one egg each is provided to children in jail. Proper diets and vaccine for popular diseases are adequately provided for the children. Clothing is also provided for. Children above 4 years are taught to read and write. They are prepared for admission to outside schools. Sponsorships for the funding of the children education is provided for by the CASP (Community Aid Sponsorship Programme). Two NGO's by the name of Mahila Pratikraksha mandal and Navjyoti Delhi Police Foundation run crhches. Picnics are arranged by NGO's to take them to the Zoo and parks and museums to make them familiar with the outside world. Admission of the children above 5 years of age to Government cottage homes and to residential schools is facilitated through NGO's.

In Goa, the report states that dietary facilities for children are provided by the Government. The Medical Officer of the primary Health Centre, Candolim visits prisoners and children twice a week. If required, they are sent for better treatment to Government Hospitals. In Gujarat, a special diet and special medical facilities as prescribed by the Medical Officer are available for children. Cradle facilities are provided for infants. In Haryana, a standard diet of rice, flour, milk and dal is provided with a special diet provided on the advice of Medical Officer. Health issues are looked after as per the advice of Medical Officer. Regular literacy classes are taken by two lady teachers on deputation from the State Education Dept. at Borstal Jail, Hissar. Books and toys are provided.

In Himachal Pradesh, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. Children under the age of 1 year are provided with milk, sugar and salt. Provision is also made for ration for children from 12- 18 months and from 18-24 months. Extras may be ordered by the Medical Officer. Female prisoners and their children are in a separate ward, with its own toilets. This ensures that there is no mixing between the children and the male prisoners.

In Jammu & Kashmir, a special diet is available, as prescribed by the Medical Officer. Supplements are also provided to breast feeding mothers.

In Jharkhand, children are allowed to live with their mothers up to the age of 5 years. Provisions are made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of 1 year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months.

Health and clothing are taken care of by the Jail superintendent. Toys and items of entertainment have been provided in some jails.

In Karnataka, children are allowed to live with their mothers up to the age of 6 years. Education is looked after for by various NGO's. When the children are to leave the jail, they are handed over to the relatives or to some trustworthy person, Agency or school.

In Kerala, a special diet and medical facilities are made available as prescribed by the Medical Officer. Special clothing can also be so prescribed.

In Lakshadweep, it was reported that there is no undertrial prisoner lodged in jail along with her child and, therefore, need for making arrangements for children along with mothers is not felt necessary.

In Madhya Pradesh, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. There is provision for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of 1 year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months. For children who are leaving the jail, in consultation with the District Magistrate the children are handed over to the relatives or to some trustworthy person as selected by the District Magistrate himself. In Maharashtra, children are allowed to live with their mothers up to the age of 4 years. They are to be weaned away from their mothers between the ages of 3 to 4 years. A special diet is prescribed under the Maharashtra Prison Rules. Changes can be recommended by the Medical Officer. Specific amounts of jail-made carbolic soap and coconut oil are to be provided for by the authorities. Garments are to be provided as per the Maharashtra Prisons Rules. Two coloured cotton frocks, undergarments and chaddies per child have been prescribed per year. A nursery school is conducted by 'Sathi', an NGO in the female jail on a regular basis. Primary education is provided for by 'Prayas', a voluntary organization in Mumbai Central Prisons. A small nursery with cradles and other reasonable equipments is provided in each women's ward. Toys are also provided for by the authorities. On leaving the jail, children are handed over to the nearest relative, in whose absence to the officer- in-charge of the nearest Government remand home, or institution set up for the care of the destitute children under the Bombay Children Act, 1948.

In Manipur, provision is made for special ration above and beyond the normal labouring ration for nursing mother and for supplementary cow's milk for children under the age of one year not receiving sufficient milk from the mother. Provision is also made for ration for children from 12-18 months and from 18-24 months. The Superintendent is entrusted with the responsibility of providing clothing for children who are allowed to reside with their mothers. In Meghalaya, children are allowed to live with their mothers up to the age of 6 years. All aspects of the children's welfare are taken care of according to the Rules under the State Jail Manual.

In Mizoram, children are allowed to live with their mothers up to the age of 6 years. A special diet is prescribed under the Rules of the Jail Manual. However, no proper facilities for education or recreation exist. In Nagaland, the provisions of the Assam Jail Manual have been adopted vis-`-vis facilities for women and for children living with their mothers.

In Orissa, children are allowed to live with their mothers up to the age of 4 years or in special cases up to 6 years by the approval of the Superintendent. A special diet is available, as prescribed by the Medical Officer. Children are provided with suitable clothing. On leaving the jail, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself. In Pondicherry, a special diet is available as prescribed by the Medical Officer. Play things, toys etc. are provided to the children at Government cost or through NGOs.

In Punjab, children under the age of one year are provided with milk and sugar. Provision is also made for ration for children from 12-18 months and from 18-24 months. Extra diet is available on the advice of the Medical Officer. There is a play way nursery and one aaya or attendant who looks after the children from time to time. In Rajasthan, a special diet is available under the rules of the Jail Manual. Special medical facilities are also provided for as prescribed in the manual. Clothing and toys are provided for by NGOs.

In Tamil Nadu, children are allowed to live with their mothers up to the age of 6 years. A special diet and special clothing are available as prescribed by the Medical Officer. Children under 3 years of age are treated in the crhche and those upto the age of 6 years are treated in the nursery. Oil, soap and hot water are available for children. On leaving the jail, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself.

In Tripura, the diet of children is as per the instructions of the Medical Officer. Medical care and nursing facilities are available. Mothers accompanied by children are kept separately.

In Uttar Pradesh, children are allowed to live with their mothers up to the age of 6 years. A special diet is available under the Rules of the Jail Manual. On leaving prison, in consultation with the District Magistrate, the children are handed over to the relatives or to some trustworthy person, as selected by the District Magistrate himself.

In Uttaranchal, food is provided as under the Rules of the Jail manual. Education provided for by the Government, which also makes arrangement for extra-curricular activities such as sports.

In West Bengal, normal facilities are available and in addition to that Inner Wheel club also runs a Homeopathic clinic for children. A non-formal school is run by an NGO for rendering elementary education to the children. From the various affidavits submitted, it seems that there were 6496 undertrial women with 1053 children and 1873 convicted women with 206 children. On 23rd January, 2002, it was noted that three matters were required to be dealt with by the Court: (1) Creation of sufficient number of subordinate courts as well as providing adequate infrastructure and filling up of the existing vacancies; (2) necessary direction with regard to dealing with the children of women undertrial prisoners/women convicts inside jail; and (3) arrangement required to be made for mentally unsound people who are either undertrial prisoners or have been convicted. It was then directed that the question of dealing with the children of women undertrial prisoners and women convicts be taken up first. That is how we have taken up this issue for consideration, perused various reports, heard Mr. Ranjit Kumar, Senior Counsel, who assisted this Court as Amicus Curiae,

Mr. Sanjay Parikh and other learned counsel appearing for Union of India and State Governments. We place on record our appreciation for the able assistance rendered by learned Amicus and other learned counsel. It may be noted that on 29th August, 2002, a field action project prepared by the Tata Institute of Social Science on situation of children of prisoners was placed before this Court. Responses thereto have been filed by the Union of India as well as the State Governments. The report puts forward five grounds that form the basis for the suggestion to provide facilities for minors accompanying their mothers in the prison :

a) The prison environment is not conducive to the normal growth and development of children;

b) Many children are born in prison and have never experienced a normal family life, sometimes till the age permitted to stay inside (four to five years);

c) Socialization patters get severely affected due to their stay in prison. Their only image of male authority figures is that of police and prison officials. They are unaware of the concept of a home, as we know it. Boys may sometimes be found talking in the female gender, having grown up only among women confined in the female ward. Unusual sights, like animals on the road (seen on the way to Court with the mother) are frightening.

d) Children get transferred with their mothers from one prison to another, frequently (due to overcrowding), thus unsettling them; and

e) Such children sometimes display violent and aggressive, or alternatively, withdrawn behavior in prison.

Specific suggestions have been put forward vis-`-vis children once they reach the confines of the prison. The minimum is the existence of a Balwadi for such children, and a crhche for those under the age of two. The Balwadi should be manned by a trained Balwadi teacher and should have the facilities of a visiting psychiatrist and pediatrician. A full-time nurse could also be made available. Immunization should take place on a regular basis. If the child is sick and needs to be taken outside the prison, the mother should be allowed to accompany the child. The Balwadi would provide free space, toys and games for children. It can also organize programmes on mother and child care, hygiene and family life for mothers. It has also been suggested that these facilities should be located outside, but attached to the prison. This would combat the negative psychological impact of the prison environment and expose the children to 'normal' figures not found in the women's barracks. It is also suggested that specialized clothing including winter-wear and bedding including plastic sheets should be provided to children. Concerns have also been raised regarding the issuance of a birth certificate that mentions the prison as the place of birth of a child born in prison. It is suggested that child's residence should be mentioned as the place of birth and not the prison.

Emphasis has been placed on the diet of such children. It recommends that a special diet be prescribed, as per the norms suggested by a nutrition or child development expert body such as the National Institute of Public Cooperation and Child Development. The diet should be standardized according to the age of the child and not prescribed as uniform irrespective of the age of the child. The special needs of the child should be kept in mind, for instance, milk needs to be kept fresh which will not be the case if it is handed out only once in the morning. Toned milk may be required or boiled water may need to be provided. For satisfying these needs and providing a satisfactory diet may even require the creation of a separate kitchen unit for children.

Several suggestions have been made vis-`-vis the judiciary, legal aid authorities, the Department of Women and Child Development/Welfare and the Juvenile Justice Administration (under the Juvenile Justice Act) and the Probation Department in relation to the welfare measures that can be taken for children of undertrial and incarcerated prisoners, both living within and outside the jail premises. The Union of India, in its affidavit, has pointed out that it has taken several measures for the benefit of children in general, including children of women prisoners in this larger group. These measures include 'Sarva Shiksha Yojna', Reproductive and Child Health Programme, and Integrated Child Development Projects and passing of the Juvenile Justice (Care and Protection of Children) Act, 2000 for the welfare of children in general.

Union of India also pointed out that the Swadhar scheme has been launched by the Department of Woman and Child Development with the objective of providing for the primary needs of shelter, food, clothing, care, emotional support and counselling to the women convicts and their children, when these women are released from jail and do not have any family support, among other groups of disadvantaged women.

Reference has already been made to the report of the National Institute of Criminology and Forensic Sciences which was forwarded to various States and Union Territories in 2002.

Union of India also brought to the notice of the Court that a Jail Manual Bill ("The Prison Management Bill, 1998") had been prepared which, inter alia, deals with the plight of women prisoners, under Chapters XIV and XVI. This Bill was prepared with the laudable aim of bringing uniformity to jail management across the country. It is important to note that Chapter II of the Bill delineates various rights and duties of prisoners. The rights include the right to live with human dignity; adequate diet, health and medical care, clean hygienic living conditions and proper clothing; the right to communication which includes contact with family members and other persons; and the right to access to a court of law and fair and speedy justice. Clearly, the rights of children of women prisoners living in jail are broader than this categorization, since the children are not prisoners as such but are merely victims of unfortunate circumstances. It is also important to note that Section 33 of the Bill mandates the provision of a Fair Price Shop in all prisons accommodating more than 200 prisoners. This shop should also offer essential items for children of prisoners. In addition, Section 60 (1)(d) provides for temporary or special leave being granted to a prisoner who shows sufficient cause to the State Government or the concerned authority. This can be utilized to grant parole to pregnant women. It may also be noted that Chapter IV of the Bill relates to release and after care and Chapter XVI deals with special categories of prisoners. Both these chapters have a special significance when considering the rights of Children of Women prisoners.

The Union of India noted that the "National Expert Committee on Women Prisoners", headed by Justice V.R. Krishnaiyer, framed a draft Model Prison Manual. Chapter XXIII of this manual makes special provision for children of women prisoners. This manual was circulated to the States and Union Territories for incorporation into the existing jail manuals. It is significant to note that this committee has made important suggestions regarding the rights of women prisoners who are pregnant, as also regarding child birth in prison. It has also made suggestions regarding the age up to which children of women prisoners can reside in prison, their welfare through a crhche and nursery, provision of adequate clothes suiting the climatic conditions, regular medical examination, education and recreation, nutrition for children and pregnant and nursing mothers. Various provisions of the Constitution and statutes have been noticed earlier which cast an obligation on the State to look after the welfare of children and provide for social, educational and cultural development of the child with its dignity intact and protected from any kind of exploitation. Children are to be given opportunities and facilities to develop in a healthy manner and in a condition of freedom and dignity. We have also noted U.N. conventions to which India is a signatory on the Rights of the Child.

This Court has, in several cases, accepted International Conventions as enforceable when these Conventions elucidate and effectuate the fundamental rights under the Constitution. They have also been read as part of domestic law, as long as there is no inconsistency between the Convention and domestic law (See Vishaka v. State of Rajasthan [(1997) 6 SCC 241]). In Sheela Barse v. Secretary, Children's Aid Society [(1987) 3 SCC 50] which dealt with the working of an Observation Home that was maintained and managed by the Children's Aid Society, Bombay, it was said:

"5. Children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizens depends the future of the country. In recent years, this position has been well realised. In 1959, the Declaration of all the rights of the child was adopted by the General Assembly of the United Nations and in Article 24 of the International Covenant on Civil and Political Rights, 1966. The importance of the child has been appropriately recognised. India as a party to these

International Charters having ratified the Declaration, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way. The Children's Act, 1948 has made elaborate provisions to cover this and if these provisions are properly translated into action and the authorities created under the Act become cognizant of their role, duties and obligation in the performance of the statutory mechanism created under the Act and they are properly motivated to meet the situations that arise in handing the problems, the situation would certainly be very much eased."

True, several legislative and policy measures, as aforenoted, have been taken over the years in furtherance of the rights of the child. We may again refer to the Juvenile Justice Act which provides for the care and rehabilitation of neglected and delinquent children, under specially constituted Juvenile welfare boards/courts. It provides for institutionalization of such children, if necessary. Juvenile children's homes have been set up both by the State as well as by NGO's to house such children. In some states, Social Welfare and Women and Child Development/Welfare Departments have specific schemes for welfare and financial assistance to released prisoners, dependants of prisoners and families of released prisoners. Some States have appointed Prison Welfare Officers to look after the problems of prisoners and their families. In some other States, Probation Officers are performing this task, apart from their role under the P.O. Act, 1958.

However, on the basis of various affidavits submitted by various State Governments and Union Territories, as well as the Union of India, it becomes apparent that children of women prisoners who are living in jail require additional protection. In many respects, they suffer the consequences of neglect. While some States have taken certain positive measures to look after the interests of these children, but a lot more is required to be done in the States and Union Territories for looking after the interest of the children. It is in this light that it becomes necessary to issue directions so as to ensure that the minimum standards are met by all States and Union Territories vis-`-vis the children of women prisoners living in prison.

In light of various reports referred to above, affidavits of various State Governments, Union Territories, Union of India and submissions made, we issue the following guidelines :

1. A child shall not be treated as an undertrial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.

2. Pregnancy:

- **a.** Before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre-natal and post-natal care for both, the mother and the child.
- **b.** When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on.
- **c.** Gynaecological examination of female prisoners shall be performed in the District Government Hospital. Proper pre-natal and post-natal care shall be provided to the prisoner as per medical advice.

3. Child birth in prison:

- **a.** As far as possible and provided she has a suitable option, arrangements for temporary release/ parole (or suspended sentence in case of minor and casual offender) should be made to enable

an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.

b. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.

c. As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

4. Female prisoners and their children:

a. Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.

b. No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to physical distance.

c. Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.

d. Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.

e. When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the concerned relative(s) be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.

5. Food, clothing, medical care and shelter:

a. Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales.

b. State/U.T. Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.

c. A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis.

d. Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.

e. Clean drinking water must be provided to the children. This water must be periodically checked.

f. Children shall be regularly examined by the Lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.

g. In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.

h. Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.

i. Children of prisoners shall have the right of visitation.

j. The Prison Superintendent shall be empowered in special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.

6. Education and recreation for children of female prisoners:

a. The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crhches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.

b. There shall be a crhche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crhche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crhche and nursery outside the prison premises.

7. In many states, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.

8. The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crimes including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.

9. Diet :

Dietary scale for institutionalized infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Paediatrics) and Fellowship in Neonatology (USA) has been submitted by Mr. Sanjay Parikh. The document submitted recommends exclusive breastfeeding on the demand of the baby day and night. If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby. It is emphasized that "dilution is not recommended; especially for low socio-economic groups who are also illiterate, ignorant, their children are already malnourished and are prone to gastroenteritis and other infections due to poor living conditions and unhygienic food habits. Also, where the drinking water is not safe/reliable since source of drinking water is a question mark. Over-dilution will provide more water than milk to the child and hence will lead to malnutrition and infections. This in turn will lead to growth retardation and developmental delay both physically and mentally." It is noted that since an average Indian mother produces approximately 600 D800 ml. milk per day (depending on her own nutritional state), the child should be provided at least 600 ml. of undiluted fresh milk over 24 hours if the breast milk is not available. The report also refers to the "Dietary Guidelines for Indians DA Manual," published in 1998 by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children ranging from 6 months to 6 years of age. It recommends the following portions for children from the ages of 6-12 months, 1-3 years and 4-6 years, respectively: Cereals and Millets D45, 60-120 and 150-210 grams respectively; Pulses D15, 30 and 45 grams respectively; Milk D500 ml (unless breast fed, in which case 200 ml); Roots and Tubers D50, 50 and 100 grams respectively; Green Leafy Vegetables D25, 50 and 50 grams respectively; Other Vegetables D25, 50 and 50 grams respectively; Fruits D100 grams; Sugar D25, 25 and 30 grams

respectively; and Fats/Oils (Visible) D10, 20 and 25 grams respectively. One portion of pulse may be exchanged with one portion (50 grams) of egg/meat/ chicken/fish. It is essential that the above food groups to be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

10. Jail Manual and/or other relevant Rules, Regulations, instructions etc. shall be suitably amended within three months so as to comply with the above directions. If in some jails, better facilities are being provided, same shall continue.

11. Schemes and laws relating to welfare and development of such children shall be implemented in letter and spirit. State Legislatures may consider passing of necessary legislations, wherever necessary, having regard to what is noticed in this judgment.

12. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mother are complied with in letter and spirit.

13. The Courts dealing with cases of women prisoners whose children are in prison with their mothers are directed to give priority to such cases and decide their cases expeditiously.

14. Copy of the judgment shall be sent to Union of India, all State Governments/Union Territories, High Courts.

15. Compliance report stating steps taken by Union of India, State Governments, Union territories and State Legal Services Authorities shall be filed in four months whereafter matter shall be listed for directions.

In view of above, Writ Petition (Civil) No.133 of 2002 is disposed of.

❑❑❑

Supreme Court of India

Ramraj @ Nanhoo @ Bihnun vs State of Chhattisgarh

SPECIAL LEAVE PETITION (CRL.)NO.4614 OF 2006

Bench:
Altamas Kabir, B.S. Chauhan

IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION

Ramraj @ Nanhoo @ Bihnu ... Petitioner
Vs.
State of Chhattisgarh ... Respondent

JUDGMENT

ALTAMAS KABIR, J.

1. This Jail Petition at the instance of Ramraj @ Nanhoo @ Bihnu, since numbered as SLP(Crl.)No.4614 of 2006, is directed against the judgment and order dated 8th December, 2005, passed by the Division Bench of the Chhattisgarh High Court at Bilaspur in Criminal Appeal No.361 of 1995, affirming the judgment of conviction and sentence under Sections 302 and 201 of the Indian Penal Code of the Second Additional Sessions Judge, Ambikapur, in Sessions Trial No.27 of 1994.

2. From the judgment impugned in the Special Leave Petition, it appears that Bigani Bai was married to the accused/petitioner Ramraj from 6-7 years prior to the date of the incident, namely, the intervening night of 28th and 29th October, 1993. According to the prosecution, Bigani Bai (the victim) and the accused-petitioner had quarrelled in the evening and in the night on hearing the cries of the child, when Ramraj tried to wake up Bigani Bai and she did not wake up, Ramraj assaulted Bigani Bai with a stick causing severe internal and external injuries as a result of which Bigani Bai died. It was also the prosecution case that the petitioner informed the villagers that Bigani Bai had died on account of pain in her stomach. Information was accordingly sent to the parents of the deceased and on receiving the same, the father of the deceased, Somarsai (PW-1), came and saw that the face of the deceased was in swollen condition and clotted blood was present on her mouth. Somarsai is alleged to have asked the petitioner to report the matter to the police before burying the dead body. However, in disregard of such direction, the petitioner buried the body of the deceased. Since this gave rise to suspicion, the body of the deceased was exhumed on the report of Somarsai and on post-mortem examination thereof, it was found that the mandible bone was fractured and on opening the body, the liver was also found ruptured. According to the doctor, the cause of death was internal haemorrhage due to rupture of the liver which is homicidal in nature. Incidentally, the weapon of assault is also said to have been recovered at the instance of the petitioner.

3. The High Court noted the fact that there was no direct and ocular evidence in the case, but the fact that the deceased was found dead and the petitioner informed the villagers that she had died of pain in her stomach, confirms the fact that he was with her at the time of her death. Furthermore, the conduct of the petitioner in not reporting the matter to the petitioner and, on the other hand, burying the body of the victim in an attempt to shield himself of the offence, does enure to the benefit of the petitioner. Had it not been for the insistence of PW-1 Somarsai, such evidence may have gone completely unnoticed. It is only on account of his insistence that the body of the victim was exhumed, and, thereafter, subjected to post mortem examination which, ultimately, revealed the fact that it was not simply a stomach pain

which caused the death of the victim but the several injuries which had been caused to her. The very fact that he tried to hide the evidence, resulted in his conviction also under Section 201 IPC.

4. In such circumstances, we see no reason to interfere with the judgment and order of the High Court as far as conviction and sentence is concerned. However, during the hearing of the Special Leave Petition, learned counsel for the State very fairly pointed out that the petitioner had already undergone 14 years of actual imprisonment, which with remission would amount to about 17 years. This information has caused us to consider the petitioner's release on the basis of the period of sentence already undergone by him, despite having confirmed the conviction and sentence of the petitioner, on the basis of the view taken by this Court in interpreting the meaning of the expression "life imprisonment" and "imprisonment for life" used both in the Criminal Procedure Code and in the Indian Penal Code in various cases.

5. The aforesaid question came up for consideration before this Court as far back as in 1960 in a writ petition filed by one Gopal Vinayak Godse under Article 32 of the Constitution, Gopal Vinayak Godse vs. State of Maharashtra & Ors. [1961 (3) SCR 440], wherein while considering the question as to whether the petitioner, who had been convicted in 1949 and sentenced to transportation for life, would, having earned remission of 2893 days and adding the same to the term of imprisonment actually served by him, so as to exceed 20 years, be entitled to be released immediately. According to the petitioner therein, his further detention in jail was illegal and he was entitled to be set at liberty immediately. Rejecting the petitioner's contention, Subba Rao, J. (as His Lordship then was) speaking for the Constitution Bench, observed that the petitioner had not yet acquired any right to be released since a sentence of transportation for life had to be undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. It was further observed that Section 53A IPC, introduced by the Code of Criminal Procedure (Amendment) Act, 1955, provided that any person sentenced to transportation for life before the Amendment Act, would be treated as sentenced to rigorous imprisonment for life. The prisoner sentenced to life imprisonment was bound to serve the remainder of sentence in prison unless the sentence was commuted or remitted by the appropriate authority. Such a sentence could not be equated with any fixed term. Regarding remissions which a person was entitled to earn in accordance with the Rules framed under the Prison Act, it was observed that the same could normally be taken into account only towards the end of the term and the said question was exclusively within the province of the appropriate Government. In the said case, although certain remissions were made, the entire sentence had not been remitted.

6. In Dalbir Singh and others vs. State of Punjab [(1979) 3 SCC 745], three Judges of this Court had occasion to consider the awarding of death penalty. Following the decision in the case of Rajendra Prasad vs. State of U.P. [(1979) 3 SCC 646], V.R. Krishna Iyer and D.A. Desai, JJ, observed that life imprisonment strictly means imprisonment for the whole of the man's life, but in practice amounts to incarceration for a period between 10 and 14 years which may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large.

7. In State of Punjab and others vs. Joginder Singh and others [(1990) 2 SCC 661], which was heard along with three other matters, this Court was called upon to consider the relevant provisions of the Manual for Superintendence and Management of Jails in Punjab. Considering the grant of remissions and commutations granted in exercise of power under Sections 432 and 433 Cr.P.C., this Court held that such schemes have been introduced to ensure prison discipline and good behaviour and not to upset sentences. If the sentence is of imprisonment for life, ordinarily the convict has to pass the remainder of his life in person, but for remission and commutations granted in exercise of the aforesaid powers. Even in such cases, Section 433-A of the Code or the executive instructions of 1976 do not insist that

the convict pass the remainder of his life in prison but merely insists that he shall have served time for at least 14 years.

8. The next decision to which we may refer in this regard is that of the Constitution Bench in the celebrated case of Maru Ram vs. Union of India & Ors.{(1981) 1 SCC 107}, which was a writ petition under Article 32 of the Constitution and was heard along with several other writ petitions on the same issue, namely, the length of imprisonment of a convict in respect of an offence carrying a life sentence, in view of the amended provisions of Section 433-A Cr.P.C., which was introduced into the Code by the Amendment Act of 1978. By the said Amendment, a full 14 year term of imprisonment was made mandatory for prisoners sentenced to life imprisonment and those who were sentenced to death, but the sentence was commuted to life imprisonment under Section 433 Cr.P.C. The Constitution Bench held that Section 302 IPC or other like offence fixes the sentence to be life imprisonment and 14 years' imprisonment under Section 433A is never heavier than the life term. Remission vests no right to release when sentence is life imprisonment. No greater punishment is inflicted by Section 433A than the law applicable to the crime. Nor is there any vested right to remission cancelled by compulsory 14 year jail life since a life sentence is a sentence for life. The Constitution Bench repelled the challenge to the vires of Section 433A and, inter alia, affirmed its supremacy over the remission rules and short sentencing statement made by the various States. Following Godse's case (supra), the Constitution Bench held that imprisonment for life lasts until the last breath and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by the Government. One other important observation that was made is that Section 433A does not forbid parole or other release within the 14 year span.

9. In the case of Ashok Kumar vs. Union of India [(1991) 3 SCC 498], together with the interpretation of Section 433-A of the Code, a Three Judge Bench of this Court also had occasion to consider the provisions of Sections 45 and 57 of the Indian Penal Code. The Hon'ble Judges were of the view that the provisions of Section 57 were to be reckoned as 20 years only for the purpose of working out the fraction of the terms of imprisonment the convict had already undergone. Their Lordships also held that the expression "imprisonment for life" would have to be read in the context of Section 45 IPC. Read in the light of Section 45, the aforesaid expression would ordinarily mean imprisonment for the full or complete span of life. In that context it was mentioned in Godse's case (supra) that Section 57 of the Indian Penal Code has no real bearing on the question raised and only for the purpose of calculating fractions of terms of punishment, the Section provides that transportation for life shall be for 20 years for all purposes.

10. The question of premature release cropped up in the case of Laxman Naskar vs. Union of India [(2000) 2 SCC 595], which was heard with several other writ petitions. It was held that although there was no right of premature release in the convict when rules or guidelines have been framed in that behalf, the convict has a right to have his case put up before the prison authorities for considering the same in exercise of powers under Article 161 in accordance with those rules, schemes or guidelines. In that case, Their Lordships were dealing with a situation where all the "life convicts" were claiming premature release under the relevant provisions of the West Bengal Jail Code. Their Lordships were not only dealing with Articles 161, 21 and 32 of the Constitution, but even the provisions of paragraphs 591(4) and 591(2) of the West Bengal Jail Code. Applying the provisions of the West Bengal Jail Code relating to grant of premature release, this Court was of the view that all the life convicts in the said case had completed continued detention of 20 years including remission earned. On receipt of the said report, it was observed that life sentence is nothing less than life-long imprisonment and by earning remissions a life convict could not pray for premature release before completing 20 years of imprisonment, including remission earned. Having held as above, this Court went on further to hold that if according to the Government policy/ instructions in force at the relevant time the life convict had already undergone the sentence for the period mentioned in the policy/instructions, then the only

right which a life convict could be said to have acquired is the right to have his case put up by the prison authorities in time before the authorities concerned for exercise of power under Article 161 of the Constitution. That will have to be done consistent with the legal position and the Government policies/ instructions prevalent at that time.

11. In the case of Subash Chander vs. Krishan Lal and others [(2001) 4 SCC 458], along with the awarding of the death sentence, the period of imprisonment in case of a life sentence or a death sentence commuted to a life sentence also came to be considered. It was observed that when two views were possible about the quantum of sentence, the view which favoured the grant of life in comparison with death is generally accepted for the exercise of the powers by the High Court in commuting the death sentence. It was further observed that a "life imprisonment" means imprisonment for whole of the remaining period of the convicted person's natural life, unless the appropriate Government chose to exercise its discretion to remit either the whole or a part of the sentence under Section 401 Cr.P.C.

12. A slightly different view was expressed by this Court in the case of Shri Bhagwan vs. State of Rajasthan [(2001) 6 SCC 296]. This Court, after considering the facts and circumstances of the case, reiterated that ordinarily "imprisonment for life" means sentence of imprisonment for whole of the remaining period of the convicted person's natural life and that the rules framed under the Prisons Rules do not substitute a lesser sentence for a sentence for life.

13. The debate as to what would constitute "life imprisonment" once again surfaced in the case in the case of Mohd. Munna vs. Union of India [(2005) 7 SCC 417], which was disposed of along with another writ petition filed by one Kartick Biswas, where it was reiterated that life imprisonment was not equivalent to imprisonment for 14 years or 20 years. Life imprisonment means imprisonment for the whole of the remaining period of the convicted person's natural life. This Court observed that there was no provision either in the Indian Penal Code or in the Criminal Procedure Code, whereby life imprisonment could be treated as either 14 years or 20 years without there being a formal remission by the appropriate Government. The contention that having regard to the provisions of Section 57 of the Code of Criminal Procedure a prisoner was entitled to be released on completing 20 years of imprisonment under the West Bengal Correctional Services Act, 1992, and the West Bengal Jail Code, was rejected following the decision in Godse's case (supra).

14. In a more recent case, Swamy Shraddananda vs. State of Karnataka [(2008) 13 SCC 767], this Court was called upon to consider as to what would constitute "life imprisonment" in a case where death sentence was commuted to life sentence. Swamy Shraddananda was convicted under Section 302 and 201 IPC and was sentenced to death for the offence under Section 302 IPC. In appeal the High Court affirmed the conviction and the death sentence awarded to the appellant by the learned 25th City Sessions Judge, Bangalore City and accepted the reference made by the trial Court without any modification in the conviction or sentence. The matter then travelled to this Court and again came up for disposal before a Bench of three Judges. While one of the learned Judges took the view that the appellant deserved nothing but death, the others made it clear that life imprisonment, rather than death, would serve the ends of justice. But the Hon'ble Judges also made it clear that the appellant would not be released from prison till the end of his life. Having examined various decisions on the point which have also been referred to hereinabove, the Hon'ble Judges substituted the death sentence given to the appellant by the Trial Court and confirmed by the High Court with imprisonment for life with a direction that the convict would not be released from prison for the rest of his life.

15. What ultimately emerges from all the aforesaid decisions is that life imprisonment is not to be interpreted as being imprisonment for the whole of a convict's natural life within the scope of Section 45 of the aforesaid Code. The decision in Swamy Shraddananda's case (supra) was taken in the special facts of that case where on account of a very brutal murder, the appellant had been sentenced to death by the Trial Court and the reference had been accepted by the High Court. However, while agreeing with

the conviction and confirming the same, the Hon'ble Judges were of the view that however heinous the crime may have been, it did not come within the definition of "rarest of rare cases" so as to merit a death sentence. Nevertheless, having regard to the nature of the offence, Their Lordships were of the view that in the facts of the case the claim of the petitioner for premature release after a minimum incarceration for a period of 14 years, as envisaged under Section 433-A Cr.P.C., could not be acceded to, since the sentence of death had been stepped down to that of life imprisonment, which was a lesser punishment.

16. On a conjoint reading of Sections 45 and 47 of the Indian Penal Code and Sections 432, 433 and 433A Cr.P.C., it is now well established that a convict awarded life sentence has to undergo imprisonment for at least 14 years. While Sections 432 and 433 empowers the appropriate Government to suspend, remit or commute sentences, including a sentence of death and life imprisonment, a fetter has been imposed by the legislature on such powers by the introduction of Section 433A into the Code of Criminal Procedure by the Amending Act of 1978, which came into effect on and from 18th December, 1978. By virtue of the non-obstante clause used in Section 433A, the minimum term of imprisonment in respect of an offence where death is one of the punishments provided by laws or where a death sentence has been commuted to life sentence, has been prescribed as 14 years. In the various decisions rendered after the decision in Godse's case (supra), "imprisonment for life" has been repeatedly held to mean imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned. But in no case, with the possible exception of the powers vested in the President under Article 72 of the Constitution and the power vested in the Governor under Article 161 of the Constitution, even with remissions earned, can a sentence of imprisonment for life be reduced to below 14 years. It is thereafter left to the discretion of the concerned authorities to determine the actual length of imprisonment having regard to the gravity and intensity of the offence. Section 433A Cr.P.C., which is relevant for the purpose of this case, reads as follows :-

"433A. Restriction on powers of remission or commutation in certain cases.- Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by laws or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

17. In the present case, the facts are such that the petitioner is fortunate to have escaped the death penalty. We do not think that this is a fit case where the petitioner should be released on completion of 14 years imprisonment. The petitioner's case for premature release may be taken up by the concerned authorities after he completes 20 years imprisonment, including remissions earned.

18. The Special Leave Petition is, accordingly, dismissed.

(ALTAMAS KABIR)

(B.S. CHAUHAN)

New Delhi Dated: December 10, 2009.

❑❑❑

Supreme Court of India

Siddharam Satlingappa Mhetre vs State of Maharashtra And Ors

Bench:
Dalveer Bhandari, K.S. Panicker Radhakrishnan

IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2271 of 2010.
(Arising out of SLP (Crl.) No.7615 of 2009)

Siddharam Satlingappa Mhetre .....Appellant
Versus
State of Maharashtra and Others .....Respondents

JUDGMENT

Dalveer Bhandari, J.

1. Leave granted.

2. This appeal involves issues of great public importance pertaining to the importance of individual's personal liberty and the society's interest.

3. The 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 the 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 of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under:

The appellant, who belongs to the Indian National Congress party (for short `Congress party') is the alleged accused in this case. The case of the prosecution, as disclosed in the First Information Report (for short `FIR'), is that Sidramappa Patil was contesting election of the State assembly on behalf of the Bhartiya Janata Party (for short `BJP'). In the FIR, it is incorporated that Baburao Patil, Prakash Patil, Mahadev Patil, Mallikarjun Patil, Apparao Patil, Yeshwant Patil were supporters of the Congress and so also the supporters of the appellant Siddharam Mhetre and opposed to the BJP candidate.

5. On 26.9.2009, around 6.00 p.m. in the evening, Sidramappa Patil of BJP came to the village to meet his party workers. At that juncture, Shrimant Ishwarappa Kore, Bhimashankar Ishwarappa Kore, Kallapa Gaddi, Sangappa Gaddi, Gafur Patil, Layappa Gaddi, Mahadev Kore, Suresh Gaddi, Suresh Zhalaki, Ankalgi, Sarpanch of village Shivmurti Vijapure met Sidramappa Patil and thereafter went to worship and pray at Layavva Devi's temple. After worshipping the Goddess when they came out to the assembly hall of the temple, these aforementioned political opponents namely, Baburao Patil, Prakash Patil, Gurunath Patil, Shrishail Patil, Mahadev Patil, Mallikarjun Patil, Annarao @ Pintu Patil, Hanumant Patil, Tammarao Bassappa Patil, Apparao Patil, Mallaya Swami, Sidhappa Patil, Shankar Mhetre, Usman Sheikh, Jagdev Patil, Omsiddha Pujari, Panchappa Patil, Mahesh Hattargi, Siddhappa Birajdar, Santosh Arwat, Sangayya Swami, Anandappa Birajdar, Sharanappa Birajdar, Shailesh Chougule, Ravi Patil,

Amrutling Koshti, Ramesh Patil and Chandrakant Hattargi suddenly came rushing in their direction and loudly shouted, "why have you come to our village? Have you come here to oppose our Mhetre Saheb? They asked them to go away and shouted Mhetre Saheb Ki Jai."

6. Baburao Patil and Prakash Patil from the aforementioned group fired from their pistols in order to kill Sidramappa Patil and the other workers of the BJP. Bhima Shankar Kore was hit by the bullet on his head and died on the spot. Sangappa Gaddi, Shivmurti Vjapure, Jagdev Patil, Layappa Patil, Tammaro Patil were also assaulted. It is further mentioned in the FIR that about eight days ago, the appellant Siddharam Mhetre and his brother Shankar Mhetre had gone to the village and talked to the abovementioned party workers and told them that, "if anybody says anything to you, then you tell me. I will send my men within five minutes. You beat anybody. Do whatever."

7. According to the prosecution, the appellant along with his brother instigated their party workers which led to killing of Bhima Shanker Kora. It may be relevant to mention that the alleged incident took place after eight days of the alleged incident of instigation.

8. The law relating to bail is contained in sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973. Section 436 deals with situation, in what kind of cases bail should be granted. Section 436 deals with the situation when bail may be granted in case of a bailable offence. Section 439 deals with the special powers of the High Court or the Court of Sessions regarding grant of bail. Under sections 437 and 439 bail is granted when the accused or the detenu is in jail or under detention.

9. The provision of anticipatory bail was introduced for the first time in the Code of Criminal Procedure in 1973.

10. Section 438 of the Code of Criminal Procedure, 1973 reads as under:

"438. Direction for grant of bail to person apprehending arrest.- (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he 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; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including -

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly,-make 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 any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)."

Why was the provision of anticipatory bail introduced? - Historical perspective

11. The Code of Criminal Procedure, 1898 did not contain any specific provision of anticipatory bail. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether the courts had an inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power.

12. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Sessions to grant "anticipatory bail". It observed in para 39.9 of its report (Volume I) and the same is set out as under:

"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."

The Law commission recommended acceptance of the suggestion.

13. The Law Commission in para 31 of its 48th Report (July, 1972) made the following comments on the aforesaid clause:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor.

The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

14. Police custody is an inevitable concomitant of arrest for non-bailable offences. The concept of anticipatory bail is that a person who apprehends his arrest in a non-bailable case can apply for grant of bail to the Court of Sessions or to the High Court before the arrest.

Scope and ambit of Section 438 Cr.P.C.

15. It is apparent from the Statement of Objects and Reasons for introducing section 438 in the Code of Criminal Procedure, 1973 that it was felt imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace at the instance of influential people who try to implicate their rivals in false cases.

16. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present section 438 Cr.P.C. The only two clear provisions of law by which bail could be granted were sections 437 and 439 of the Code. Section 438 was incorporated in the Code of Criminal Procedure, 1973 for the first time.

17. It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 in the Cr.P.C. was to recognize the importance of personal liberty and freedom in a free and democratic country. When we carefully analyze 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. The High Court in the impugned judgment has declined to grant anticipatory bail to the appellant and aggrieved by the said order, the appellant has approached this Court by filing this appeal.

19. Mr. Shanti Bhushan, learned senior counsel appearing for the appellant submitted that the High Court has gravely erred in declining the anticipatory bail to the appellant. He submitted that section 438 Cr.P.C. was incorporated because sometime influential people 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. He pointed out that in recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase.

20. Mr. Bhushan submitted that the appellant has been implicated in a false case and apart from that he has already joined the investigation and he is not likely to abscond, or otherwise misuse the liberty while on bail, therefore, there was no justification to decline anticipatory bail to the appellant.

21. Mr. Bhushan also submitted that the FIR in this case refers to an incident which had taken place on the instigation of the appellant about eight days ago. According to him, proper analysis of the averments in the FIR leads to irresistible conclusion that the entire prosecution story seems to be a cock and bull story and no reliance can be placed on such a concocted version.

22. Mr. Bhushan 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 Cr.P.C. 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.

23. 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. In the instant case, when the appellant has already joined the investigation and is fully cooperating with the investigating agency then it is difficult to comprehend why the respondent is insistent for custodial interrogation of the appellant? According to the appellant, in the instant case, the investigating agency should not have a slightest doubt that the appellant would not be available to the investigating agency for further investigation particularly when he has already joined investigation and is fully cooperating with the investigating agency.

24. Mr. Bhushan also submitted that according to the General Clauses Act, 1897 the court which grants the bail also has the power to cancel it. The grant of bail is an interim order. The court can always review its decision according to the subsequent facts, circumstances and new material. Mr. Bhushan also submitted that the exercise of grant, refusal and cancellation of bail can be undertaken by the court either at the instance of the accused or a public prosecutor or a complainant on finding fresh material and new circumstances at any point of time. Even the appellant's reluctance in not fully cooperating with the investigation could be a ground for cancellation of bail.

25. Mr. Bhushan submitted that a plain reading of the section 438 Cr.P.C. clearly reveals that the legislature has not placed any fetters on the court. In other words, the legislature has not circumscribed 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 Cr.P.C., 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.

26. 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 courts' 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 visualize 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

27. The Constitution Bench of this Court in Gurbaksh Singh Sibbia and Others v. State of Punjab (1980) 2 SCC 565 had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail. Section 438 Cr.P.C. 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:

".....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 hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail".

28. Mr. Bhushan referred to a Constitution Bench judgment in Sibbia's case (supra) to strengthen his argument that no such embargo has been placed by the said judgment of the Constitution Bench. He placed heavy reliance on para 15 of Sibbia's case (supra), which reads as under:

"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."

29. Mr. Bhushan submitted that the Constitution Bench in Sibbia's case (supra) also mentioned 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 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".

30. 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 Cr.P.C. is neither envisaged by the provisions of the Act nor is in consonance with the law declared by a Constitution Bench in Sibbia's case (supra) nor it is in conformity with the fundamental principles of criminal jurisprudence that accused is considered to be innocent till he is found guilty nor in consonance with the provisions of the Constitution where individual's liberty in a democratic society is considered sacrosanct.

31. Mr. Mahesh Jethmalani, learned senior counsel appearing for respondent no. 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 rarest of rare cases where the nature of offence is not very serious. He placed reliance on the case of Pokar Ram v. State of Rajasthan and Others (1985) 2 SCC 597 and submitted that in murder cases custodial interrogation is of paramount importance particularly when no eye witness account is available.

32. 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's case (supra). The decisions of this Court in Salauddin Abdulsamad Shaikh v. State of Maharashtra (1996) 1 SCC 667, K. L. Verma v. State and Another (1998) 9 SCC 348, Adri Dharan Das v. State of West Bengal (2005) 4 SCC 303 and Sunita Devi v. State of Bihar and Another (2005) 1 SCC 608 are in conflict with the above decision of the Constitution Bench in Sibbia's case (supra). He submitted that all these orders which are contrary to the clear legislative intention of law laid down in Sibbia's case (supra) 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.

33. He placed reliance on N. Meera Rani v. Government of Tamil Nadu and Another (1989) 4 SCC 418 wherein it was perceived that there was a clear conflict between the judgment of the Constitution Bench and subsequent decisions of Benches of lesser strength. The Court ruled that the dictum in the judgment of the Constitution Bench has to be preferred over the subsequent decisions of the Bench of lesser strength. The Court observed thus:

".....All subsequent decisions which are cited have to be read in the light of the Constitution Bench decision since they are decisions by Benches comprising of lesser number of judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution bench in Rameshwar Shaw's case (1964) 4 SCR 921"

34. He placed reliance on another judgment of this Court in Vijayalaxmi Cashew Company and Others v. Dy. Commercial Tax Officer and Another (1996) 1 SCC 468. This Court held as under:

".....It is not possible to uphold the contention that perception of the Supreme Court, as will appear from the later judgments, has changed in this regard. A judgment of a Five Judge Bench, which has not been doubted by any later judgment of the Supreme Court cannot be treated as overruled by implication."

35. He also placed reliance on Union of India and Others v. K. S. Subramanian (1976) 3 SCC 677 and State of U.P. v. Ram Chandra Trivedi (1976) 4 SCC 52 and submitted that in case of conflict, the High Court has to prefer the decision of a larger Bench to that of a smaller Bench.

36. Mr. Jethmalani submitted that not only the decision in Sibbia's case (supra) must be followed on account of the larger strength of the Bench that delivered it but the subsequent decisions must be held to be per incuriam and hence not binding since they have not taken into account the ratio of the judgment of the Constitution Bench.

37. He further submitted that as per the doctrine of `per incuriam', any judgment which has been passed in ignorance of or without considering a statutory provision or a binding precedent is not good law and the same ought to be ignored. A perusal of the judgments in Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma v. State and Another, Adri Dharan Das v. State of West Bengal and Sunita Devi v. State of Bihar and Another (supra) indicates that none of these judgments have considered para 42 of Sibbia's case (supra) in proper perspective. According to Mr. Jethmalani, all subsequent decisions which have been cited above have to be read in the light of the Constitution Bench's decision in Sibbia's case (supra) since they are decisions of Benches comprised of lesser number of judges. According to him, none of these subsequent decisions could be intended taking a view contrary to that of the Constitution Bench in Sibbia's case (supra).

38. Thus, the law laid down in para 42 by the Constitution Bench that the normal rule is not to limit operation of the order of anticipatory bail, was not taken into account by the courts passing the subsequent judgments. The observations made by the courts in the subsequent judgments have been made in ignorance of and without considering the law laid down in para 42 which was binding on them. In these circumstances, the observations made in the subsequent judgments to the effect that anticipatory bail should be for a limited period of time, must be construed to be per incuriam and the decision of the Constitution Bench preferred.

39. He further submitted that the said issue came up for consideration before the Madras High Court reported in Palanikumar and Another v. State 2007 (4) CTC 1 wherein after discussing all the judgments of this court on the issue, the court held that the subsequent judgments were in conflict with the decision of the Constitution Bench in Sibbia's case (supra) and in accordance with the law of precedents, the judgment of the Constitution Bench is biding on all courts and the ratio of that judgment has to be applicable for all judgments decided by the Benches of same or smaller combinations. In the said

judgment of Sibbia's case (supra) it was directed that the anticipatory bail should not be limited in period of time.

40. We have heard the learned counsel for the parties at great length and perused the written submissions filed by the learned counsel for the parties.

Relevance and importance of personal liberty

41. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty.

42. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilized existence.

43. Origin of "liberty"' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realization of the people.

44. Chambers' Twentieth Century Dictionary defines "liberty" as "Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility".

45. It is very difficult to define the "liberty". It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist any interpretation. The term "liberty" may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three factors, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and thirdly, organization of opportunities for the exercise of a continuous initiative.

46. "Liberty" may be defined as a power of acting according to the determinations of the will. According to Harold Laski, liberty was essentially an absence of restraints and John Stuard Mill viewed that "all restraint", qua restraint is an evil". In the words of Jonathon Edwards, the meaning of "liberty" and freedom is:

"Power, opportunity or advantage that any one has to do as he pleases, or, in other words, his being free from hindrance or impediment in the way of doing, or conducting in any respect, as he wills."

47. It can be found that "liberty" generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute discretion, which when used in this manner brings an end to "liberty" and freedom is lost. At the same time "liberty" without restraints would mean liberty won by one and lost by another. So "liberty" means doing of anything one desires but subject to the desire of others.

48. As John E.E.D. in his monograph Action on "Essays on Freedom and Power" wrote that Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization.

49. A distinguished former Attorney General for India, M.C. Setalvad in his treatise "War and Civil Liberties" observed that the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty.

50. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the state. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the state can reach their goal of perfection. In brief, according to this doctrine, the state exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The state exists for the benefit of the individual.

51. Mr. Setalvad in the same treatise further observed that it is also true that the individual cannot attain the highest in him unless he is in possession of certain essential liberties which leave him free as it were to breathe and expand. According to Justice Holmes, these liberties are the indispensable conditions of a free society. The justification of the existence of such a state can only be the advancement of the interests of the individuals who compose it and who are its members. Therefore, in a properly constituted democratic state, there cannot be a conflict between the interests of the citizens and those of the state. The harmony, if not the identity, of the interests of the state and the individual, is the fundamental basis of the modern Democratic National State. And, yet the existence of the state and all government and even all law must mean in a measure the curtailment of the liberty of the individual. But such a surrender and curtailment of his liberty is essential in the interests of the citizens of the State. The individuals composing the state must, in their own interests and in order that they may be assured the existence of conditions in which they can, with a reasonable amount of freedom, carry on their other activities, endow those in authority over them to make laws and regulations and adopt measures which impose certain restrictions on the activities of the individuals.

52. Harold J. Laski in his monumental work in "Liberty in the Modern State" observed that liberty always demands a limitation on political authority. Power as such when uncontrolled is always the natural enemy of freedom.

53. Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book "The Development of Constitutional Guarantee of Liberty" that whatever, `liberty' may mean today, the liberty is guaranteed by our bills of rights, "is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals."

54. Blackstone in "Commentaries on the Laws of England", Vol.I, p.134 aptly observed that "Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".

55. According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, "Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." [Dicey on Constitutional Law, 9th Edn., pp.207-08]. According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

56. Eminent English Judge Lord Alfred Denning observed:

"By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person.... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live."

57. Eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol.18 (1978), p.133 observed that "liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body".

Right to life and personal liberty under the Constitution

58. We deem it appropriate to deal with the concept of personal liberty under the Indian and other Constitutions.

59. The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes.

60. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India. American Constitution provides that no person shall be deprived of his life, liberty, or property without due process of law. The due process clause not only protects the property but also life and liberty, similarly Article 21 of the Indian Constitution asserts the importance of life and liberty. The said Article reads as under:-

"no person shall be deprived for his life or personal liberty except according to procedure established by law"

the right secured by Article 21 is available to every citizen or non-citizen, according to this article, two rights are secured.

1. Right to life

2 Right to personal liberty.

61. Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

62. This court defined the term "personal liberty" immediately after the Constitution came in force in India in the case of A. K. Gopalan v. The State of Madras, AIR 1950 SC 27. The expression `personal liberty' has wider as well narrow meaning. In the wider sense it includes not only immunity from arrest and detention but also freedom of speech, association etc. In the narrow sense, it means immunity from arrest and detention. The juristic conception of `personal liberty', when used the latter sense, is that it consists freedom of movement and locomotion.

63. Mukherjea, J. in the said judgment observed that `Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion. `Personal Liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitutes the essence of personal liberty. Patanjali Shastri, J. however, said that whatever may be the

generally accepted connotation of the expression `personal liberty', it was used in Article 21 in a sense which excludes the freedom dealt with in Article 19. Thus, the Court gave a narrow interpretation to `personal liberty'. This court excluded certain varieties of rights, as separately mentioned in Article 19, from the purview of `personal liberty' guaranteed by Art. 21.

64. In Kharak Singh v. State of U.P. and Others AIR 1963 SC 1295, Subba Rao, J. defined `personal liberty, as a right of an individual to be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure. The court held that `personal liberty' in Article 21 includes all varieties of freedoms except those included in Article 19.

65. In Maneka Gandhi v. Union of India and Another (1978) 1 SCC 248, this court expanded the scope of the expression `personal liberty' as used in Article 21 of the Constitution of India. The court rejected the argument that the expression `personal liberty' must be so interpreted as to avoid overlapping between Article 21 and Article 19(1). It was observed: "The expression `personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19." So, the phrase `personal liberty' is very wide and includes all possible rights which go to constitute personal liberty, including those which are mentioned in Article 19.

66. Right to life is one of the basic human right and not even the State has the authority to violate that right. [State of A.P. v. Challa Ramakrishna Reddy and Others (2000) 5 SCC 712].

67. Article 21 is a declaration of deep faith and belief in human rights. In this pattern of guarantee woven in Chapter III of this Constitution, personal liberty of man is at root of Article 21 and each expression used in this Article enhances human dignity and values. It lays foundation for a society where rule of law has primary and not arbitrary or capricious exercise of power. [Kartar Singh v. State of Punjab and Others (1994) 3 SCC 569].

68. While examining the ambit, scope and content of the expression "personal liberty" in the said case, it was held that the term is used in this Article as a compendious term to include within itself all varieties of rights which goes to make up the "personal liberties" or man other than those dealt within several clauses of Article 19(1). While Article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes on and comprises the residue.

69. The early approach to Article 21 which guarantees right to life and personal liberty was circumscribed by literal interpretation in A.K. Gopalan (supra). But in course of time, the scope of this application of the Article against arbitrary encroachment by the executives has been expanded by liberal interpretation of the components of the Article in tune with the relevant international understanding. Thus protection against arbitrary privation of "life" no longer means mere protection of death, or physical injury, but also an invasion of the right to "live" with human dignity and would include all these aspects of life which would go to make a man's life meaningful and worth living, such as his tradition, culture and heritage. [Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others (1981) 1 SCC 608]

70. Article 21 has received very liberal interpretation by this court. It was held: "The right to live with human dignity and same does not connote continued drudging. It takes within its fold some process of civilization which makes life worth living and expanded concept of life would mean the tradition, culture, and heritage of the person concerned." [P. Rathinam/Nagbhusan Patnaik v. Union of India and Another (1994) 3 SCC 394.]

71. The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. While invoking

the provisions of Article 21, and by referring to the oft-quoted statement of Joseph Addision, "Better to die ten thousand deaths than wound my honour", the Apex court in Khedat Mazdoor Chetana Sangath v. State of M.P. and Others (1994) 6 SCC 260 posed to itself a question "If dignity or honour vanishes what remains of life"? This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its third part.

72. This court in Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly and Another (1986) 3 SCC 156 observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and justice, and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly.

73. This court remarked that an undertrial prisoner should not be put in fetters while he is being taken from prison to Court or back to prison from Court. Steps other than putting him in fetters will have to be taken to prevent his escape.

74. In Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526, this court has made following observations:

"..... The Punjab Police Manual, in so far as it puts the ordinary Indian beneath the better class breed (para 26.21A and 26.22 of Chapter XXVI) is untenable and arbitrary. Indian humans shall not be dichotomised and the common run discriminated against regarding handcuffs. The provisions in para 26.22 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. The nature of the accusation is not the criterion. The clear and present danger of escape 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. ... 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, the application of irons is not ruled out. 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. (Para 31) Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reason for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. 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 authorities stringent deprivation of life and liberty. (Para 30) It is 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 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable 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 safekeeping. (Para 23) Whether handcuffs or other restraint should be imposed on a prisoner is a matter for the decision of the authority responsible for his custody. But there is room for imposing 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."

75. After dealing with the concept of life and liberty under the Indian Constitution, we would like to have the brief survey of other countries to ascertain how life and liberty has been protected in other countries.

UNITED KINGDOM

76. Life and personal liberty has been given prime importance in the United Kingdom. It was in 1215 that the people of England revolted against King John and enforced their rights, first time the King had acknowledged that there were certain rights of the subject could be called Magna Carta 1215. In 1628 the petition of rights was presented to King Charles-I which was the 1st step in the transfer of Sovereignty from the King to Parliament. It was passed as the Bill of Rights 1689.

77. In the Magna Carta, it is stated "no free man shall be taken, or imprisoned or disseised or outlawed or banished or any ways destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land".

78. Right to life is the most fundamental of all human rights and any decision affecting human right or which may put an individual's life at risk must call for the most anxious scrutiny. See: Bugdaycay v. Secretary of State for the Home Department (1987) 1 All ER 940. The sanctity of human life is probably the most fundamental of the human social values. It is recognized in all civilized societies and their legal system and by the internationally recognized statements of human rights. See: R on the application of Pretty v. Director of Public Prosecutions (2002) 1 All ER 1.

U.S.A.

79. The importance of personal liberty is reflected in the Fifth Amendment to the Constitution of U.S.A. (1791) which declares as under :-

"No person shall be.....deprived of his life, liberty or property, without due process of law." (The `due process' clause was adopted in s.1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by `the principles of fundamental justice' [s.7].

80. The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the `due process clauses'. Under the above clauses the American Judiciary claims to declare a law as bad, if it is not in accordance with `due process', even though the legislation may be within the competence of the Legislature concerned. Due process is conveniently understood means procedural regularity and fairness. (Constitutional Interpretation by Craig R. Ducat, 8 th Edn. 2002 p.475.).

WEST GERMANY

81. Article 2(2) of the West German Constitution (1948) declares:

"Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order."

Though the freedom of life and liberty guaranteed by the above Article may be restricted, such restriction will be valid only if it is in conformity with the `legal order' (or `pursuant to a law, according to official translation). Being a basic right, the freedom guaranteed by Article 2(2) is binding on the legislative, administrative and judicial organs of the State [Article 1(3)]. This gives the individual the rights to challenge the validity of a law or an executive act violative the freedom of the person by a constitutional complaint to the Federal Constitutional Court, under Article 93. Procedural guarantee is given by Articles 103(1) and 104. Article 104(1)-2(2) provides:

"(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein.....

(2) Only the Judge shall decide on the admissibility and continued deprivation of liberty."

82. These provisions correspond to Article 21 of our Constitution and the court is empowered to set a man to liberty if it appears that he has been imprisoned without the authority of a formal law or in contravention of the procedure prescribed there.

JAPAN

83. Article XXXI of the Japanese Constitution of 1946 says :

"No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law."

This article is similar to Article 21 of our Constitution save that it includes other criminal penalties, such as fine or forfeiture within its ambit.

CANADA

84. S. 1(1) of the Canadian Bill of Rights Act, 1960, adopted the `Due Process' Clause from the American Constitution. But the difference in the Canadian set-up was due to the fact that this Act was not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian status, which, again, could be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian Parliament itself (s.2). The result was obvious : The Canadian Supreme Court in R. v. Curr (1972) S.C.R. 889 held that the Canadian Court would not import `substantive reasonableness' into s.1(a), because of the unsalutary experience of substantive due process in the U.S.A.; and that as to `procedural reasonableness', s.1(a) of the Bill of Rights Act only referred to `the legal processes recognized by Parliament and the Courts in Canada'. The result was that in Canada, the `due process clause' lost its utility as an instrument of judicial review of legislation and it came to mean practically the same thing as whatever the Legislature prescribes, - much the same as `procedure established by law' in Article 21 of the Constitution of India, as interpreted in A.K. Gopalan (supra). BANGADESH

85. Article 32 of the Constitution of Bangladesh, 1972 [3 SCW 385] reads as under: "No person shall be deprived of life or personal liberty save in accordance with law."

This provision is similar to Article 21 of the Indian Constitution. Consequently, unless controlled by some other provision, it should be interpreted as in India.

PAKISTAN

86. Article 9 Right to life and Liberty. - "Security of Person : No person shall be deprived of life and liberty save in accordance with law."

NEPAL

87. In the 1962 - Constitution of Nepal, there is Article 11(1) which deals with right to life and liberty which is identical with Article 21 of the Indian Constitution.

INTERNATIONAL CHARTERS

88. Universal Declaration, 1948. - Article 3 of the Universal Declaration says: "Everyone has the right to life, liberty and security of person."

Article 9 provides:

"No one shall be subjected to arbitrary arrest, detention or exile." Cl.10 says:

"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." [As to its legal effect, see M. v. Organisation Belge, (1972) 45 Inter, LR 446 (447, 451, et. Sq.)]

89. Covenant on Civil and Political Rights - Article 9(1) of the U.N. 1966, 1966 says: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

90. European Convention on Human Rights, 1950. - This Convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion.

91. In every civilized democratic country, liberty is considered to be the most precious human right of every person. The Law Commission of India in its 177th Report under the heading `Introduction to the doctrine of "arrest" has described as follows:

"Liberty is the most precious of all the human rights". It has been the founding faith of the human race for more than 200 years. Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The universal declaration of human rights adopted by the general assembly on United Nations on December 10, 1948 contains several articles designed to protect and promote the liberty of individual. So does the international covenant on civil and political rights, 1996. Above all, Article 21 of the Constitution of India proclaims that no one shall be deprived of his right to personal liberty except in accordance with the procedure prescribed by law. Even Article 20(1) & (2) and Article 22 are born out of a concern for human liberty. As it is often said, "one realizes the value of liberty only when he is deprived of it." Liberty, along with equality is the most fundamental of human rights and the fundamental freedoms guaranteed by the Constitution. Of equal importance is the maintenance of peace, law and order in the society. Unless, there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in the scientific and technological spheres."

92. Just as the Liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important.

93. 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 Cr.P.C. has not been allowed its full play. The Constitution Bench in Sibbia's case (supra) clearly mentioned that section 438 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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's case (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest vis-`-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused that the accused is presumed to be innocent till he is found guilty by the competent court.

94. The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant

and the investigating officer is established then action be taken against the investigating officer in accordance with law.

95. The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

96. 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.

97. 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 Cr.P.C. are subject to limitation of section 437 Cr.P.C.?

98. The question which arises for consideration is whether the powers under section 438 Cr.P.C. are unguided or uncanalised or are subject to all the limitations of section 437 Cr.P.C.? The Constitution Bench in Sibbia's case (supra) has clearly observed that there is no justification for reading into section 438 Cr.P.C. and the limitations mentioned in section 437 Cr.P.C. 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 Cr.P.C. to a dead letter. The Court observed that "We do not see why the provisions of Section 438 Cr.P.C. should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable."

99. As aptly observed in Sibbia's case (supra) that 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.

100. 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 enlarged on bail.

101. 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 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.

102. The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in Sibbia's case (supra).

103. 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.

104. 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's case (supra) 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:

"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 recognized 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 grounds 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:

105. 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.

106. The judgment in Salauddin Abdulsamad Shaikh (supra) is contrary to 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.

107. The restriction on the provision of anticipatory bail under section 438 Cr.P.C. 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's case (supra) in which the court observed 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.

108. Section 438 Cr.P.C. 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 concerned court would be fully justified in imposing conditions including direction of joining investigation.

109. 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 Sessions in the event of arrest. According to the

aforesaid judgment of Salauddin's case, 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.

110. In pursuance to the order of the Court of Sessions 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.

111. 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 or concerned agency 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 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's case (supra).

112. 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 Cr.P.C. 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.

113. It is a settled legal position crystallized by the Constitution Bench of this court in Sibbia's case (supra) that the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.

114. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this court in the Sibbia's case (supra).

"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.

xxx xxx xxx 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."

xxx xxx xxx "I desire in the first instance to point out that the discretion given by the section is very wide. . . Now it seems to me that when the Act is so expressed to provide a wide discretion, ... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

xxx xxx xxx "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."

115. The Apex Court in Salauddin's case (supra) 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 reasons 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.

116. The said reason would not be right as the restriction is not seen in the enactment and bail orders by the High Court and Sessions Court are granted under sections 437 and 439 also at such stages and they are granted till the trial.

117. The view expressed by this Court in all the above referred 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.

SCOPE AND AMBIT OF ANTICIPATORY BAIL:

118. A good deal of misunderstanding with regard to the ambit and scope of section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this court in Sibbia's case (supra) was correctly understood, appreciated and applied.

119. This Court in the Sibbia's case (supra) laid down the following principles with regard to anticipatory bail:

a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

b) Filing of FIR is not a condition precedent to exercise of power under section 438.

c) Order under section 438 would not affect the right of police to conduct investigation.

d) Conditions mentioned in section 437 cannot be read into section 438.

e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re- examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

120. The Law Commission in July 2002 has severely criticized the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the police department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this Article to the 41st Report of the Law Commission wherein the Commission saw `no justification' to require a person to submit to custody, remain in prison for some days and then apply for bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised keeping in mind these sentiments and spirit of the judgments of this court in Sibbia's case (supra) and Joginder Kumar v. State of U.P. and Others (1994) 4 SCC 260.

Relevant consideration for exercise of the power

121. 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 visualized 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 facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. 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.

122. 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 the 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 accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication 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.

123. The 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.

124. 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.

125. 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 visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of 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 Sessions or the High Court is always available.

126. Irrational and Indiscriminate arrest are gross violation of human rights. In Joginder Kumar's case (supra), a three Judge Bench of this Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

127. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case. 128 In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

3) Direct the accused to execute bonds;

4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

6) Bank accounts be frozen for small duration during investigation.

129) In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

130. Exercise of jurisdiction under section 438 of Cr.P.C. is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

131. It is imperative for the High Courts through its judicial academies to periodically organize workshops, symposiums, seminars and lectures by the experts to sensitize judicial officers, police officers and investigating officers so that they can properly comprehend the importance of personal liberty vis-`-vis social interests. They must learn to maintain fine balance between the personal liberty and the social interests.

132. The performance of the judicial officers must be periodically evaluated on the basis of the cases decided by them. In case, they have not been able to maintain balance between personal liberty and societal interests, the lacunae must be pointed out to them and they may be asked to take corrective measures in future. Ultimately, the entire discretion of grant or refusal of bail has to be left to the judicial officers and all concerned must ensure that grant or refusal of bail is considered basically on the facts and circumstances of each case.

133. In our considered view, the Constitution Bench in Sibbia's case (supra) has comprehensively dealt with almost all aspects of the concept of anticipatory bail under section 438 Cr.P.C. 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's case (supra). In the preceding paragraphs, it is clearly spelt out that no limitation has been envisaged by the Legislature under section 438 Cr.P.C. 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".

134. In view of the clear declaration of law laid down by the Constitution Bench in Sibbia's case (supra), 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 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in Sibbia's case (supra) clearly observed that it is not necessary to re-write section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under section 438 Cr.P.C. granting bail cannot be curtailed.

135. The ratio of the judgment of the Constitution Bench in Sibbia's case (supra) perhaps was not brought to the notice of their Lordships who had decided the cases of Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma v. State and Another, Adri Dharan Das v. State of West Bengal and Sunita Devi v. State of Bihar and Another (supra).

136. In Naresh Kumar Yadav v. Ravindra Kumar (2008) 1 SCC 632, a two-Judge Bench of this Court observed "the power exercisable under section 438 Cr.P.C. 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's case (supra).

137. 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 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject to the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

138. The judgments and orders mentioned in paras 135 and 136 are clearly contrary to the law declared by the Constitution Bench of this Court in Sibbia's case (supra). These judgments and orders are also contrary to the legislative intention. The Court would not be justified in re-writing section 438 Cr.P.C.

139. Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In Young v. Bristol Aeroplane Company Limited (1994) All ER 293 the House of Lords observed that `Incuria' literally means `carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The `quotable in law' is avoided and ignored if it is rendered, `in ignoratium of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

"..... In Halsbury's Laws of England (4th Edn.) Vol. 26: Judgment and Orders: Judicial Decisions as Authorities (pp. 297-98, para 578) per incuriam has been elucidated as under:

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aeroplane Co. Ltd., 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300.

In Huddersfield Police Authority v. Watson, 1947 KB 842 : (1947) 2 All ER 193.); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

140. Lord Godard, C.J. in Huddersfield Police Authority v. Watson (1947) 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.

141. This court in Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others (2000) 4 SCC 262 observed as under:

"The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

142. In a Constitution Bench judgment of this Court in Union of India v. Raghubir Singh (1989) 2 SCC 754, Chief Justice Pathak observed as under:

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

143. In Thota Sesharathamma and another v. Thota Manikyamma (Dead) by LRs. and others (1991) 4 SCC 312 a two Judge Bench of this Court held that the three Judge Bench decision in the case of Mst. Karmi v. Amru (1972) 4 SCC 86 was per incuriam and observed as under:

"...It is a short judgment without adverting to any provisions of Section 14 (1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in Badri Pershad v. Smt. Kanso Devi. The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act."

144. In R. Thiruvirkolam v. Presiding Officer and Another (1997) 1 SCC 9 a two Judge Bench of this Court observed that the question is whether it was bound to accept the decision rendered in Gujarat Steel Tubes Ltd. v. Mazdoor Sabha (1980) 2 SCC 593, which was not in conformity with the decision of a Constitution Bench in P.H. Kalyani v. Air France (1964) 2 SCR 104. J.S. Verma, J. speaking for the court observed as under:

"With great respect, we must say that the above-quoted observations in Gujarat Steel at P. 215 are not in line with the decision in Kalyani which was binding or with D.C. Roy to which the learned Judge, Krishna Iyer, J. was a party. It also does not match with the underlying juristic principle discussed in Wade. For the reasons, we are bound to follow the Constitution Bench decision in Kalyani, which is the binding authority on the point."

145. In Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and others (2001) 4 SCC 448 a Constitution Bench of this Court ruled that a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness.

146. A Constitution Bench of this Court in Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673 has observed that the law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

147. A three-Judge Bench of this court in Official Liquidator v. Dayanand and Others (2008) 10 SCC 1 again reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in State of Karnataka and Others v. Umadevi (3) and Others (2006) 4 SCC 1 is binding on all courts including this court till the same is overruled by a larger Bench. The ratio of the Constitution Bench has to be followed by Benches of lesser strength. In para 90, the court observed as under:-

"We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed."

148. In Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others (2009) 15 SCC 458, this court again reiterated the settled legal position that Benches of lesser strength are bound by the judgments of the Constitution Bench and any Bench of smaller strength taking contrary view is per incuriam. The court in para 110 observed as under:-

"Should we consider S. Pushpa v. Sivachanmugavelu (2005) 3 SCC 1 to be an obiter following the said decision is the question which arises herein. We think we should. The decisions referred to hereinbefore clearly suggest that we are bound by a Constitution Bench decision. We have referred to two Constitution Bench decisions, namely, Marri Chandra Shekhar Rao v. Seth G.S. Medical College (1990) 3 SCC 139 and E.V. Chinnaiah v. State of A.P. (2005) 1 SCC 394.

Marri Chandra Shekhar Rao (supra) had been followed by this Court in a large number of decisions including the three-Judge Bench decisions. S. Pushpa (supra) therefore, could not have ignored either Marri Chandra Shekhar Rao (supra) or other decisions following the same only on the basis of an administrative circular issued or otherwise and more so when the constitutional scheme as contained in clause (1) of Articles 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket. Following Official Liquidator v. Dayanand and Others (2008) 10 SCC 1 therefore, we are of the opinion that the dicta in S. Pushpa (supra) is an obiter and does not lay down any binding ratio."

149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of this court. These judgments have clearly ignored a Constitution Bench judgment of this court in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under section 438 of Cr.P.C.. Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam.

150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength.

151. In the instant case there is a direct judgment of the Constitution Bench of this court in Sibbia's case (supra) dealing with exactly the same issue regarding ambit, scope and object of the concept of anticipatory bail enumerated under section 438 Cr.P.C. 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.

152. In our considered view the impugned judgment and order of the High Court declining anticipatory bail to the appellant cannot be sustained and is consequently set aside.

153. We direct the appellant to join the investigation and fully cooperate with the investigating agency. In the event of arrest the appellant shall be released on bail on his furnishing a personal bond in the sum of Rs.50,000/- with two sureties in the like amount to the satisfaction of the arresting officer.

154. Consequently, this appeal is allowed and disposed of in terms of the aforementioned observations.

(Dalveer Bhandari)

(K.S. Panicker Radhakrishnan)

New Delhi; December 2, 2010

❑❑❑

Supreme Court of India

Arnesh Kumar vs State of Bihar & Anr

Bench:
Chandramauli Kr. Prasad, Pinaki Chandra Ghose

CRIMINAL APPEAL NO. 1277 OF 2014
(@SPECIAL LEAVE PETITION (CRL.) No.9127 of 2013)

Arnesh Kumar ..... Appellant
Versus
State of Bihar & Anr. .... Respondents

Date of Judgment : 02nd July, 2014

JUDGMENT

Chandramauli Kr. Prasad The petitioner apprehends his arrest in a case under Section 498-A of the Indian Penal Code, 1860 (hereinafter called as IPC) and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided under Section 498-A IPC is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided under Section 4 of the Dowry Prohibition Act is two years and with fine.

Petitioner happens to be the husband of respondent no.2 Sweta Kiran. The marriage between them was solemnized on 1st July, 2007. His attempt to secure anticipatory bail has failed and hence he has knocked the door of this Court by way of this Special Leave Petition. Leave granted.

In sum and substance, allegation levelled by the wife against the appellant is that demand of Rupees eight lacs, a maruti car, an air-conditioner, television set etc. was made by her mother-in-law and father-in-law and when this fact was brought to the appellant's notice, he supported his mother and threatened to marry another woman. It has been alleged that she was driven out of the matrimonial home due to non-fulfilment of the demand of dowry.

Denying these allegations, the appellant preferred an application for anticipatory bail which was earlier rejected by the learned Sessions Judge and thereafter by the High Court.

There is phenomenal increase in matrimonial disputes in recent years. The institution of marriage is greatly revered in this country. Section 498-A of the IPC was introduced with avowed object to combat the menace of harassment to a woman at the hands of her husband and his relatives. The fact that Section 498-A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested. "Crime in India 2012 Statistics" published by National Crime Records Bureau, Ministry of Home Affairs shows arrest of 1,97,762 persons all over India during the year 2012 for offence under Section 498-A of the IPC, 9.4% more than the year 2011. Nearly a quarter of those arrested under this provision in 2012 were women i.e. 47,951 which depicts that mothers and sisters of the husbands were liberally included in their arrest net. Its share is 6% out of the total persons arrested under the crimes committed under Indian Penal Code. It accounts for 4.5% of total crimes committed under different sections of penal code, more than any other crimes excepting theft and hurt. The rate of charge-sheeting in cases under Section 498A, IPC is as high as 93.6%, while the conviction rate is

only 15%, which is lowest across all heads. As many as 3,72,706 cases are pending trial of which on current estimate, nearly 3,17,000 are likely to result in acquittal.

Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.PC. 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 emphasized time and again by 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.

Law Commissions, Police Commissions and this Court in a large number of judgments emphasized 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 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, the 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 'Cr.PC), 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. 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), Cr.PC 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) x x x x x x

(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) x x x x x

(ii) the police officer is satisfied that such arrest is necessary – to prevent such person from committing any further offence; or for proper investigation of the offence; or to prevent such person 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 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 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.

X x x x x x

From a plain reading of the aforesaid provision, it is evident that a person accused of 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 its satisfaction that such person had committed the offence punishable as aforesaid. 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. 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. Law further requires the police officers to record the reasons in writing for not making the arrest. In pith and core, the police office 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 of Cr.PC.

An accused arrested without warrant by the police has the constitutional right under Article 22(2)of the Constitution of India and Section 57, Cr.PC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. 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 underSection 167 Cr.PC. 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. Before a Magistrate authorises detention under Section 167, Cr.PC, 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 is 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 condition precedent for arrest under Section 41 Cr.PC has been satisfied and it is only thereafter that he will authorise the detention of an accused. The Magistrate before authorising detention will record its own satisfaction, may be in brief but the said satisfaction must reflect from its 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 its satisfaction in writing that the Magistrate will authorise the detention of the accused. 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.

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

"41A. 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." Aforesaid provision makes it clear that in all cases where the arrest of a person is not required underSection 41(1), Cr.PC, 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 office is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41Cr.PC has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

We are of the opinion that if the provisions of Section 41, Cr.PC 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 Cr.PC for effecting arrest be discouraged and discontinued.

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

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

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

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

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;

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;

Notice of appearance in terms of Section 41A of Cr.PC 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;

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 High Court having territorial jurisdiction.

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

We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A of the I.P.C. 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.

We direct that a copy of this judgment be forwarded to the Chief Secretaries as also the Director Generals of Police of all the State Governments and the Union Territories and the Registrar General of all the High Courts for onward transmission and ensuring its compliance.

By order dated 31st of October, 2013, this Court had granted provisional bail to the appellant on certain conditions. We make this order absolute.

In the result, we allow this appeal, making our aforesaid order dated 31st October, 2013 absolute; with the directions aforesaid.

(CHANDRAMAULI KR. PRASAD)

(PINAKI CHANDRA GHOSE)

NEW DELHI, July 2, 2014.

❑❑❑

Supreme Court of India

Dr.Mehmood Nayyar Azam vs State of Chattisgarh and Ors

Bench:
K.S. Radhakrishnan, Dipak Misra

CIVIL APPEAL No. 5703/2012
(Arising out of SLP (C) No. 34702 of 2010)

Dr. Mehmood Nayyar Azam .. Appellant
Versus
State of Chattisgarh and Ors. Respondents

Decided on 3 August, 2012

JUDGMENT

Dipak Misra, J.—Leave granted.

2. Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, the reverence of life offers me my fundamental principle on morality. The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is insegragably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, a brief candle, or a hollow bubble. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of creative intelligence. When a dent is created in the reputation, humanism is paralysed. There are some megalomaniac officers who conceive the perverse notion that they are the `Law forgetting that law is the science of what is good and just and, in very nature of things, protective of a civilized society. Reverence for the nobility of a human being has to be the corner stone of a body polity that believes in orderly progress. But, some, the incurable ones, become totally oblivious of the fact that living with dignity has been enshrined in our Constitutional philosophy and it has its ubiquitous presence, and the majesty and sacrosanctity dignity cannot be allowed to be crucified in the name of some kind of police action.

3. The aforesaid prologue gains signification since in the case at hand, a doctor, humiliated in custody, sought public law remedy for grant of compensation and the High Court, despite no factual dispute, has required him to submit a representation to the State Government for adequate relief pertaining to grant of compensation after expiry of 19 years with a further stipulation that if he is aggrieved by it, he can take recourse to requisite proceedings available to him under law. We are pained to say that this is not only asking a man to prefer an appeal from Caesar to Caesars wife but it also compels him like a cursed Sisyphus to carry the stone to the top of the mountain wherefrom the stone rolls down and he is obliged to repeatedly perform that futile exercise.

4. The factual matrix as uncurtained is that the appellant, an Ayurvedic Doctor with B.A.M.S. degree, while practising in West Chirmiri Colliery, Pondi area in the State of Chhattisgarh, used to raise agitations and

spread awareness against exploitation of people belonging to weaker and marginalized sections of the society. As a social activist, he ushered in immense awareness among the down-trodden people which caused discomfort to the people who had vested interest in the coal mine area. The powerful coal mafia, trade union leaders, police officers and other persons who had fiscal interest felt disturbed and threatened him with dire consequences and pressurized him to refrain from such activities. Embedded to his committed stance, the petitioner declined to succumb to such pressure and continued the activities. When the endeavor failed to silence and stifle the agitation that was gaining strength and momentum, a consorted maladroit effort was made to rope him in certain criminal offences.

5. As the factual narration further unfolds, in the initial stage, cases under Section 110/116 of the Criminal Procedure Code were initiated and thereafter crime No. 15/92 under Section 420 of the Indian Penal Code (for short the IPC) and crime No. 41/92 under Sections 427 and 379 of the IPC were registered. As the activities gathered further drive and became more pronounced, crime No. 62/90 was registered for an offence punishable under Section 379 of the IPC for alleged theft of electricity. In the said case, the appellant was taken into custody.

6. Though he was produced before the Magistrate on 22.9.1992 for judicial remand and was required to be taken to Baikunthpur Jail, yet by the time the order was passed, as it was evening, he was kept in the lock up at Manendragarh Police Station. On 24.9.1992, he was required to be taken to jail but instead of being taken to the jail, he was taken to Pondi Police Station at 9.00 a.m. At the police station, he was abused and assaulted. As asseverated, the physical assault was the beginning of ill- treatment. Thereafter, the SHO and ASI, the respondent Nos. 3 and 4, took his photograph compelling him to hold a placard on which it was written :-

Main Dr. M.N. Azam Chhal Kapti Evam Chor Badmash Hoon. (I, Dr. M. N. Azam, am a cheat, fraud, thief and rascal).

7. Subsequently, the said photograph was circulated in general public and even in the revenue proceeding, the respondent No. 5 produced the same. The said atrocities and the torture of the police caused tremendous mental agony and humiliation and, hence, the petitioner submitted a complaint to the National Human Rights Commission who, in turn, asked the Superintendant of Police, District Koria to submit a report. As there was no response from the 2nd respondent the Commission again required him to look into the grievances and take proper action. When no action was taken by the respondent or the police, the petitioner was compelled to invoke the extraordinary jurisdiction of the High Court of Judicature at Bilaspur, Chattisgarh with a prayer for punishing the respondent Nos. 4, 5 & 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.

8. After the return was filed, the learned single Judge passed a detailed order on 3.1.2003 that the Chief Secretary and the Director General of Police should take appropriate steps for issue of direction to the concerned authorities to take appropriate action in respect of the erring officers. Thereafter, some developments took place and on 24.3.2005, the Court recorded that the writ petitioner was arrested on 22.9.1992 and his photograph was taken at the police station. The learned single Judge referred to Rule 1 of Regulation 92 of Chhattisgarh Police Regulations which lays down that no Magistrate shall order photograph of a convict or other person to be taken by the police for the purpose of Identification under Prisoners Act, 1920, unless he is satisfied that such photograph is required for circulation to different places or for showing it for the purpose of identification to a witness who cannot easily be brought to a test identification at the place where the investigation is conducted or that photograph is required to be preserved as a permanent record. Thereafter, the learned single Judge proceeded to record that not only the photograph of the writ petitioner had been taken with the placard but had

also been circulated which had caused great mental agony and trauma to his school going children. Thereafter, he referred to Regulation 737 of the Chhattisgarh Police Regulations which relates to action to be taken by the superior officer in respect of an erring officer who ill-treats an accused.

9. After referring to various provisions, the learned single Judge called for a report from the Chief Secretary. On 18.11.2005, the Court was apprised that despite several communications, the Chief Secretary had not yet sent the report. Eventually, the report was filed stating that the appellant was involved in certain cases including grant of bogus medical certificate and regard being had to the directions issued in 1992 that the photograph of the offender should be kept on record, the same was taken and affixed against his name and after 7.9.1992, it was removed from the records. It was also stated that the Sub-Inspector had been imposed punishment of censure by the Superintendent of Police on 19.11.2001. It was also set forth that on 3.5.2003, a charge-sheet was served on all the erring officers and a departmental enquiry was held and in the ultimate eventuate, they had been imposed major penalty of withholding of one annual increment with cumulative effect for one year commencing 27.5.2004. That apart, on 19.7.2005, a case had been registered under Section 29 of the Police Act against the erring officers.

10. It is apt to note here that when the matter was listed for final hearing for grant of compensation, the learned single Judge referred the matter to be heard by a Division Bench.

11. The Division Bench referred to the prayer clause and various orders passed by the learned single Judge and eventually directed the appellant to submit a representation to the Chief Secretary for grant of compensation. We think it appropriate to reproduce the relevant paragraphs of the order passed by the Division Bench: -

> **4.** Learned counsel for the petitioner submits that during the pendency of the writ petition, Relief Clause No. 7.3 was fulfilled under the directions of this court and now only the compensation part, as claimed in Relief Clause No. 7.5A, remained there.
>
> **5.** In the instant case, it is an admitted position that the respondent State authorities have taken cognizance of the harassment meted out to the petitioner by the erring personnel of the police department and initiated departmental enquiry against them in which they were found guilty and punishment has also been awarded to them.

12. After issuing notice, this Court, on 17.2.2012, thought it apposite that the appellant should submit a representation within a week which shall be considered by the respondents within four weeks therefrom.

13. In pursuance of the aforesaid order, the appellant submitted a representation which has been rejected on 19.3.2012 by the OSD/Secretary, Government of Chhattisgarh, Home (Police) Department. In the rejection order, it has been stated as follows: -

> In the aforesaid cases, the arrest and the action regarding submission of chargesheet in the Honble Court was in accordance with law.
>
> **(2)** On 24.9.92 the police officers taking your photograph and writing objectionable words thereon was against the legal procedure. Considering this, action was taken against the concerned guilty police officers in accordance with law and two police officers were punished.
>
> **(3)** In your representation, compensation has been demanded on the following two grounds:
>
> **A.** Defamation was caused due to the police officers taking photograph. B. Your wife became unwell mentally. She is still unwell.
>
> **C.** Difficulty in marriage of daughter.

Regarding the aforesaid grounds, the actual position is as follows:

A. Defamation is such a subject, the decision on which is within jurisdiction of the competent court. No decision pertaining to defamation has been received from the court of competent jurisdiction. Therefore, it would not be proper for the State Government to take a decision in this regard.

B. Regarding mental ailment of your wife, no such basis has been submitted by you, on the basis of which any conclusion may be drawn.

C. On the point of there being no marriage of children also no such document or evidence has been produced by you before the Government along with the representation, on the basis of which any decision may be taken.

Therefore, in the light of the above, the State Government hereby rejects your representation and accordingly decides your representation.

14. 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. It is canvassed by him that it would not only reflect the non-concern for a citizen who has been humiliated at the police station, but, the manner in which the representation has been rejected clearly exhibits the imprudent perception and heart of stone of the State. It is argued that the reasons ascribed by the State authority that defamation is such a subject that the issue of compensation has to be decided by the competent court and in the absence of such a decision, the Government cannot take a decision as regards the compensation clearly reflects the deliberate insensitive approach to the entire fact situation inasmuch as the High Court, in categorical terms, had found that the allegations were true and the appellant was harassed and thereby it did tantamount to custodial torture and there was no justification to adopt a hyper-technical mode to treat it as a case of defamation in the ordinary sense of the term and requiring the appellant to take recourse to further adjudicatory process and obtain a decree from the civil court.

15. Mr. Atul Jha, learned counsel appearing for the State, has supported the order of the High Court as well as the order passed by the competent authority of the State who has rejected the representation on the foundation that when the appellant puts forth a claim for compensation on the ground of defamation, he has to take recourse to the civil court and, therefore, no fault can be found with the decision taken either by the High Court or the subsequent rejection of the representation by the authority of the State.

16. The learned counsel appearing for the private respondents has submitted that they have already been punished in a disciplinary proceeding and, therefore, the question of grant of compensation does not arise and even if it emerges, the same has to be determined by the civil court on the base of evidence adduced to establish defamation.

17. At the very outset, we are obliged to state that five aspects are clear as day and do not remotely admit of any doubt. First, the appellant was arrested in respect of the alleged offence under Indian Penal Code, 1860 and the Electricity Act, 2003; second, there was a direction by the Magistrate for judicial remand and thereafter instead of taking him to jail the next day he was brought to the police station; third, self-humiliating words were written on the placard and he was asked to hold it and photographs were taken; and fourth, the photographs were circulated in general public and were also filed by one

of the respondents in a revenue proceeding; and five, the High Court, in categorical terms, has found that the appellant was harassed.

18. In the aforesaid backdrop, the singular question required to be posed is that whether the appellant should be asked to initiate a civil action for grant of damages on the foundation that he has been defamed or this Court should grant compensation on the bedrock that he has been harassed in police custody.

19. At this juncture, it is condign to refer to certain authorities in the field. In D.K. Basu v. State of W.B.[1] it has been held thus: -

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 civilization.

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, civilization 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.

20. We have referred to the aforesaid paragraphs to highlight that this Court has emphasized 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. It is worthy to note that in the case of D.K. Basu (supra), the concern shown by this Court in Joginder Kumar v. State of U.P.[2] was taken note of. In Joginder Kumars case, this Court voiced its concern regarding complaints of violation of human rights during and after arrest. It is apt to quote a passage from the same: -

The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first the criminal or society, the law violator or the law abider

22. After referring to the case of Joginder Kumar (supra), A.S. Anand, J. (as his Lordship then was), dealing with the various facets of Article 21, 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 civilized 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 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.

23. At this juncture, it becomes absolutely necessary to appreciate what is meant by the term harassment. In P. Ramanatha Aiyars Law Lexicon, Second Edition, 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.

24. At this juncture, we may refer with profit to a two-Judge Bench decision in Sunil Gupta and others v. State of Madhya Pradesh and others[3]. The said case pertained to handcuffing where the accused while in judicial custody were being escorted to court from jail and bound in fetters. In that context, the Court stated that the escort party should record reasons for doing so in writing and intimate the court so that the court, considering the circumstances may either approve or disapprove the action of the escort party and issue necessary directions. The Court further observed that when the petitioners who had staged 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, such act of the escort party is against all norms of decency and is in utter violation of the principle underlying Article 21 of the Constitution of India. The said act was condemned by this Court to be arbitrary and unreasonably humiliating towards the citizens of this country with the obvious motive of pleasing someone.

25. In Bhim Singh, MLA v. State of J & K[4], this Court expressed the view that the police officers should have greatest regard for personal liberty of citizens as they are the custodians of law and order and, hence, they should not flout the law by stooping to bizarre acts of lawlessness. It was observed that custodians of law and order should not become depredators of civil liberties, for their duty is to protect and not to abduct.

26. It needs no special emphasis to state that when an accused is in custody, his Fundamental Rights are not abrogated in toto. His dignity cannot be allowed to be comatosed. The right to life is enshrined in Article 21 of the Constitution and a fortiorari, it includes the right to live with human dignity and all that goes along with it. It has been so stated in Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others[5] and D.K. Basu (supra).

27. In Kharak Singh v. State of U. P.,[6] this court approved the observations of Field, J. in Munn v. Illinois[7]:-

By the term life as here [Article 21] 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.

28. It is apposite to note that inhuman treatment has many a facet. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. It would also include a treatment that is inflicted that causes humiliation and compels a person to act against his will or conscience.

29. In Arvinder Singh Bagga v. State of U.P. and others[8], 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.

30. At this stage, it is seemly to refer to the decisions of some of the authorities relating to a mans reputation which forms a facet of right to life as engrafted under Article 21 of the Constitution.

31. In Smt. Kiran Bedi v. Committee of Inquiry and another[9], this Court reproduced an observation from the decision in D. F. Marion v. Davis[10]:-

The right to enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property.

32. In Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and others[11], it has been ruled that right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.

33. In Smt. Selvi and others v. State of Karnataka[12], while dealing with the involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and the Brain Electrical Activation Profile test for the purpose of improving investigation efforts in criminal cases, a three-Judge Bench opined that the compulsory administration of the impugned techniques constitute cruel, inhuman or degrading treatment in the context of Article 21. Thereafter, the Bench adverted to what is the popular perception of torture and proceeded to state as follows: -

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 persons 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)]. After so stating, the Bench in its conclusion recorded as follows: -

We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to cruel, inhuman or degrading treatment with regard to the language of evolving international human rights norms.

34. Recently in Vishwanath S/o Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal[13], although in a different context, while dealing with the aspect of reputation, this Court has observed as follows: -

..reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity.

35. We have referred to these paragraphs to understand how with the efflux of time, the concept of mental torture has been understood throughout the world, regard being had to the essential conception of human dignity.

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 majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the Welfare State is governed by rule of law which has paramountcy. It has been said by Edward Biggon the laws of a nation form the most instructive portion of its history. The Constitution as the organic law of the land has unfolded itself in 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 to a crime is required to possess the qualities of patience and perseverance as has been stated in Nandini Sathpaty v. P. L. Dani[14].

37. In Delhi Judicial Services Association v. State of Gujarat[15], while dealing with the role of police, this Court condemned the excessive use of force by the police and observed as follows:-

The main objectives of police is to apprehend offenders, to investigate crimes and to prosecute them before the courts and also to prevent commission of crime and above all to ensure law and order to protect citizens life and property. The law enjoins the police to be scrupulously fair to the offender and the Magistracy is to ensure fair investigation and fair trial to an offender. The purpose and object of Magistracy and police are complementary to each other. It is unfortunate that these objectives have remained unfulfilled even after 40 years of our Constitution. Aberrations of police officers and police excesses in dealing with the law and order situation have been subject of adverse comments from this Court as well as from other courts but it has failed to have any corrective effect on it. The police has power to arrest a person even without obtaining a warrant of arrest from a court. The amplitude of this power casts an obligation on the police and it must bear in mind, as held by this Court that if a person is arrested for a crime, his constitutional and fundamental rights must not be violated.

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 (supra): -

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 individuals 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 sustain 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 accomplishes, 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. It was also filed in a revenue proceeding by the 5th respondent. The High Court has

recorded that the competent authority of the State has conducted an enquiry and found the erring officers to be guilty. The High Court has recorded the findings in the favour of the appellant but left him to submit a representation to the concerned authorities. 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 of the IPC. We are really concerned how in a country governed by 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 & Sadocks 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 have some kind of sadistic pleasure or to please someone meted out the appellant with this kind of treatment. It is not to be forgotten that when dignity is lost, the breath of life gets into oblivion. In a society governed by rule of law where humanity has to be a laser beam, as our compassionate constitution has so emphasized, the police authorities cannot show the power or prowess to vivisect and dismember the same. When they pave such path, law cannot become a silent spectator. As Pithily stated in Jennison v. Baker[16]:-

The law should not be seen to sit by limply, while those who defy if go free, and those who seek its protection lose hope.

41. Presently, we shall advert to the aspect of grant of compensation. The learned counsel for the State, as has been indicated earlier, has submitted with immense vehemence that the appellant should sue for defamation. Our analysis would clearly show that the appellant was tortured while he was in custody. When there is contravention of human rights, the inherent concern as envisaged in Article 21 springs to life and enables the citizen to seek relief by taking recourse to public law remedy.

42. In this regard, we may fruitfully refer to Nilabati Behera v. State or Orissa[17] wherein it has been held thus: -

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.

43. Dr. A.S. Anand J., (as his Lordship then was), in his concurring opinion, expressed that 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 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 seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing 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, by 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.

44. In Sube Singh v. State of Haryana[18], a three-Judge Bench of the Apex Court, after referring to its earlier decisions, has opined as follows: -

It is thus now well settled that 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 enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of Code of Civil Procedure.

45. At this stage, we may fruitfully refer to the decision in Hardeep Singh v. State of Madhya Pradesh.[19] The appellant therein was engaged in running a coaching centre where students were given tuition to prepare for entrance test for different professional courses. On certain allegation, he was arrested and taken to police station where he was handcuffed by the police without there being any valid reason. A number of daily newspapers published the appellants photographs and on seeing his photograph in handcuffs, the appellants elder sister was so shocked that she expired. After a long and delayed trial, the appellant, Hardeep Singh, filed a writ petition before the High Court of Madhya Pradesh at Jabalpur that the prosecution purposefully caused delay in conclusion of the trial causing harm to his dignity and reputation. The learned single Judge, who dealt with the matter, did not find any ground to grant compensation. On an appeal being preferred, the Division Bench observed that an expeditious trial ending in acquittal could have restored the appellants personal dignity but the State instead of taking prompt steps to examine the prosecution witnesses delayed the trial for five long years. The Division Bench further held there was no warrant for putting the handcuffs on the appellant which adversely affected his dignity. Be it noted, the Division Bench granted compensation of Rs. 70,000/-. This Court, while dealing with the facet of compensation, held thus:-

Coming, however, to the issue of compensation, we find that in light of the findings arrived at by the Division Bench, the compensation of Rs. 70,000/- was too small and did not do justice to the sufferings and humiliation undergone by the appellant. In the facts and circumstances of the case, we feel that a sum of Rs. 2,00,00/- (Rupees Two Lakhs) would be an adequate compensation for the appellant and would meet the ends of justice. We, accordingly, direct the State of Madhya Pradesh to pay to the appellant the sum of Rs. 2,00,000/-(rupees Two Lakhs) as compensation. In case the sum of Rs.70,000/- as awarded by the High Court, has already been paid to the appellant, the State would naturally pay only the balance amount of Rs.1,30,000/- (Rupees One Lakh thirty thousand).

Thus, suffering and humiliation were highlighted and amount of compensation was enhanced.

46. 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 mans 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 tyrannize 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 visualized 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.5.00 lacs (Rupees five lacs 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 realized from the erring officers in equal proportions from their salary as thought appropriate by the competent authority of the State.

47. Consequently, the appeal is allowed to the extent indicated above. However, in the facts and circumstances of the case, there shall be no order as to costs.

[K. S. Radhakrishnan]
[Dipak Misra]

New Delhi; August 03, 2012.

❑❑❑

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

RE - INHUMAN CONDITIONS IN 1382 PRISONS

Bench :
Madan B. Lokur, J.

WRIT PETITION (CIVIL) NO.406/2013

RE - INHUMAN CONDITIONS IN 1382 PRISONS

ORDER

1. Prison reforms have been the subject matter of discussion and decisions rendered by this Court from time to time over the last 35 years. Unfortunately, even though Article 21 of the Constitution requires a life of dignity for all persons, little appears to have changed on the ground as far as prisoners are concerned and we are once again required to deal with issues relating to prisons in the country and their reform.

2. As far back as in 1980, this Court had occasion to deal with the rights of prisoners in Sunil Batra (II) v. Delhi Administration.[1] In that decision, this Court gave a very obvious answer to the question whether prisoners are persons and whether they are entitled to fundamental rights while in custody, although there may be a shrinkage in the fundamental rights. This is what this Court had to say in this regard:

"Are prisoners persons? Yes, of course. To answer in the negative is to convict the nation and the Constitution of dehumanization and to repudiate the world legal order, which now recognises rights of prisoners in the International Covenant on Prisoners' Rights to which our country has signed assent. In Batra case,[2] this Court has rejected the hands-off doctrine and it has been ruled that fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.

3. A little later in the aforesaid decision, this Court pointed out the double handicap that prisoners face; the first being that most prisoners belong to the weaker sections of society and the second being that since they are confined in a walled-off world their voices are inaudible. This is what this Court had to say in this regard:

"Prisoners are peculiarly and doubly handicapped. For one thing, most prisoners belong to the weaker segment, in poverty, literacy, social station and the like. Secondly, the prison house is a walled-off world which is incommunicado for the human world, with the result that the bonded inmates are invisible, their voices inaudible, their injustices unheeded. So it is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure."

4. In Rama Murthy v. State of Karnataka[3] this Court identified as many as nine issues facing prisons and needing reforms. They are:

(i) over-crowding;

1 (1980) 3 SCC 488
2 (1978) 4 SCC 494
3 (1997) 2 SCC 642

(ii) Delay in trial;

(iii) Torture and ill-treatment;

(iv) Neglect of health and hygiene;

(v) Insubstantial food and inadequate clothing;

(vi) Prison vices;

(vii) Deficiency in communication;

(viii) Streamlining of jail visits;

(ix) Management of open air prisons.

This Court expressed the view that these major problems need immediate attention. Unfortunately, we are still struggling with a resolution of at least some of these problems.

5. In T. K. Gopal v. State of Karnataka[4] this Court advocated a therapeutic approach in dealing with the criminal tendencies of prisoners. It was pointed out that there could be several factors that lead a prisoner to commit a crime but nevertheless a prisoner is required to be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was pointed out that it is this philosophy that has persuaded this Court in a series of decisions to project the need for prison reforms. This is what this Court had to say:

"The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy."

6. In this background, a letter on 13th June, 2013 addressed by Justice R.C. Lahoti, a former Chief Justice of India to Hon'ble the Chief Justice of India relating to conditions in prisons is rather disturbing. Justice R.C. Lahoti invited attention to the inhuman conditions prevailing in 1382 prisons in India as reflected in a Graphic Story appearing in Dainik Bhaskar (National Edition) on 24th March, 2013. A photocopy of the Graphic Story was attached to the letter.

Justice R.C. Lahoti pointed out that the story highlights:

(i) Overcrowding of prisons;

(ii) Unnatural death of prisoners;

(iii) Gross inadequacy of staff and

(iv) Available staff being untrained or inadequately trained.

7. Justice R.C. Lahoti also pointed out that the State cannot disown its liability to the life and safety of a prisoner once in custody and that there were hardly any schemes for reformation for first time offenders and prisoners in their youth and to save them from coming into contact with hardened prisoners.

4 (2000) 6 SCC 168

8. Justice R.C. Lahoti ended the letter by submitting that the Graphic Story raised an issue that needed to be taken note of and dealt with in public interest by this Court and that he was inviting the attention of this Court in his capacity as a citizen of the country. We may say that Justice R.C. Lahoti has brought an important issue to the forefront, dispelling the view:

"Judges rarely express concern for the inhumane treatment that the person being sentenced is likely to face from fellow prisoners and prison officials, or that time in prison provides poor preparation for a productive life afterwards. Courts rarely consider tragic personal pasts that may be partly responsible for criminal behavior, or how the communities and families of a defendant will suffer during and long after his imprisonment."[5]

9. By an order dated 5th July, 2013 the letter was registered as a public interest writ petition and the Registry of this Court was directed to take steps to issue notice to the appropriate authorities after obtaining a list from the office of the learned Attorney General.

10. In reply to the notice issued by this Court, several States and Union Territories gave their response either in the form of communications addressed to the Registry of this Court or in the form of affidavits. It is not necessary for us to detail each of the responses. Suffice it to say that on the four issues raised by Justice R.C. Lahoti there is general consensus that the prisons (both Central and District) are over-crowded, some unnatural deaths have taken place in some prisons, there is generally a shortage of staff and it is not as if all of them are adequately and suitably trained to handle issues relating to the management of prisons and prisoners and finally that steps have been taken for the reformation and rehabilitation of prisoners. However, a closer scrutiny of the responses received indicates that by and large the steps taken are facile and lack adequate sincerity in implementation.

11. In view of the above, the Social Justice Bench of this Court passed an order on 13th March, 2015 requiring the Union of India to furnish certain information primarily relating to the more serious issue of over-crowding in prisons and improving the living conditions of prisoners. The order passed by the Social Justice Bench on 13th March, 2015 reads as follows:-

"We have heard learned Additional Solicitor General and would like information on the following issues:

(i) The utilization of the grant of Rs.609 crores under the 13th Finance Commission for the improvement of conditions in prisons.

(ii) The grant to the States in respect of the prisons under the 14th Finance Commission.

(iii) Steps taken and being taken by the Central Government as well as by the State Governments for effective implementation of Section 436A of the Code of Criminal Procedure, 1973.

(iv) Steps taken and being taken by the Central Government and the State Governments for effective implementation of the Explanation to Section 436 of the Code of Criminal Procedure, 1973 and the number of persons in custody due to their inability to provide adequate security/surety for their release on bail.

(v) The number of persons in custody who have committed compoundable offences and are languishing in custody.

(vi) Steps taken for the effective implementation of the Repatriation of Prisoners Act, 2003.

We expect all the State Governments to fully cooperate with the Central Government in this regard since the matter involves Article 21 of the Constitution and to furnish necessary information within three weeks.

5 Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse by Eva S. Nilsen, Boston University School of Law Working Paper Series, Public Law & Legal Theory Working Paper No. 07-33

List the matter on 24th April, 2015."

12. In compliance with the aforesaid order, the Union of India through the Ministry of Home Affairs filed a detailed affidavit dated 23rd April, 2015. It was stated in the affidavit that all States and Union Territories were asked to provide the information as required by this Court but in spite of reminders and meetings, the information had not been received from the State of Uttarakhand and the Union Territories of Dadra & Nagar Haveli, Daman & Diu and Lakshadweep.

13. It was stated that one of the problems faced in aggregating the information that had been received was that management information systems were not in place in a comprehensive manner. To remedy this situation an e-prisons application was being designed so that all essential data could be centrally aggregated. It was stated in the affidavit that a draft project report was being prepared through a project management consultancy so that an e-prisons application could be rolled out with integrated information in all States and Union Territories comprehensively for better monitoring of the status of prisoners, particularly undertrial prisoners.

14. In response to the first issue, it was pointed out in the affidavit in the form of a tabular statement that funds were made available under the 13th Finance Commission for the improvement of conditions in prisons in respect of several States. We are surprised that no grant was allotted in as many as 19 States and in the States where grants were allotted, the utilization was less than 100%, except in the State of Tripura.

15. With regard to the grant under the 14th Finance Commission, it was stated that the 14th Finance Commission had reported that the States have the appropriate fiscal space to provide for the additional expenditure needs as per their requirements. The 14th Finance Commission did not make any specific fund allocation in favour of the Central Government but the States had projected their demands individually and the tabular statement in that regard is annexed to the affidavit. As far as the Union Territories are concerned, apart from Delhi and Puducherry none of the Union Territories had projected any demand.

16. With regard to the third issue regarding effective implementation of Section 436A of the Code of Criminal Procedure, (for short the Cr.P.C.), the affidavit stated that an advisory had been issued by the Ministry of Home Affairs of the Government of India on 17th January, 2013 to all the States and Union Territories to implement the provisions of Section 436A of the Cr.P.C. to reduce overcrowding in prisons. Among the measures suggested in this regard by the Ministry of Home Affairs was the constitution of a Review Committee in every district with the District Judge in the Chair with the District Magistrate and the Superintendent of Police as Members to meet every three months and review the cases of undertrial prisoners. The Jail Superintendents were also required to conduct a survey of all cases where undertrial prisoners have completed more than one fourth of the maximum sentence and send a report in this regard to the District Legal Services Committee constituted under The Legal Services Authorities Act, 1987 as well as to the Review Committee. It was also suggested that the prison authorities should educate undertrials of their right to bail and the District Legal Services Committee should provide legal aid through empanelled lawyers to the undertrial prisoners for their release on bail or for the reduction of the bail amount. The Home Department of the States was also requested to develop a management information system to ascertain the jail-wise progress in this regard.

17. The aforesaid advisory dated 17th January, 2013 was followed up through a letter of the Union Home Minister to the Chief Ministers/Lieutenant Governors on 3rd September, 2014. It was pointed out in the letter that as per the statistics provided by the National Crime Records Bureau (NCRB) as on 31st December, 2013 the number of undertrial prisoners was 67.6% of the entire prison population and that the percentage was unacceptably high. In this context it was suggested that the provisions of Section 436 of the Cr.P.C. as well as Section 436A of the Cr.P.C. had to be made use of. It was also suggested that steps be taken to utilize the provisions of plea bargaining, the establishment of fast track courts,

holding of Lok Adalats and ensuring adequate means for the production of the accused before the Court directly or through video conferencing.

18. Yet another letter was sent to the Director General of Prisons of all States/Union Territories on 22nd September, 2014 by the Ministry of Home Affairs drawing attention to the directions of this Court in Bhim Singh v. Union of India dated 5th September, 2014[6] relating to Section 436A of the Cr.P.C. and to take necessary steps to comply with the orders passed by this Court.

19. In a similar vein, yet another advisory was issued by the Government of India on 27th September, 2014. It was averred in the affidavit that as a result of these advisories and communications, some undertrial prisoners have been released in implementation of the provisions of Section 436A of the Cr.P.C.

20. With regard to the fourth issue concerning the effective implementation of Section 436 of the Cr.P.C., the affidavit stated that an advisory was issued way back on 9th May, 2011 in which it was pointed out, inter alia, that prison overcrowding compels prisoners to be kept under conditions that are unacceptable in light of the United Nations Standard Minimum Rules for Treatment of Offenders to which India is the signatory. It was pointed that as per the statistics prepared by the NCRB as on 31st December, 2008 prisons in India are overcrowded to the extent of 129%. The advisory highlighted some measures taken by some of the States to reduce the number of undertrial prisoners, including their release under the provisions of the Probation of Offenders Act, 1958 and encouraging NGOs in association with District Legal Services Committees to arrange legal aid for unrepresented undertrial prisoners as well as to implement the guidelines issued by the Bombay High Court in Rajendra Bidkar v. State of Maharashtra, CWP No. 386 of 2004 (unreported decision).

21. With regard to the fifth issue relating to the number of persons who have been languishing in jails in compoundable offences, a chart was annexed to the affidavit which indicated, by and large, that quite a few States had taken no effective steps in this regard particularly Andhra Pradesh, Assam, Chhattisgarh, Haryana, Kerala, Mizoram, Nagaland, Odisha, Punjab, Rajasthan, Telangana, Tripura and Uttar Pradesh. The reason why many undertrial prisoners had not been released was their inability to provide security and surety for their release. The steps taken to have these prisoners released from custody were not indicated in the affidavit.

22. With regard to the effective implementation of the Repatriation of Prisoners Act, 2003 it was stated that agreements on transfer of sentenced persons have been bilaterally signed with 25 countries but the agreements are operational after ratification by both sides only with respect to 18 countries. In addition, transfer arrangements have been made with 19 countries under the Inter-American Convention on Serving Criminal Sentences Abroad thereby making the total number of countries with which transfer arrangements have been made for prisoners to 37 countries.

23. Keeping in view the affidavit dated 23rd April, 2015 filed by the Ministry of Home Affairs and the somewhat lukewarm response of the States and Union Territories, the Social Justice Bench passed the following directions on 24th April, 2015:

"We have perused the affidavit filed by the Ministry of Home Affairs on 23rd April, 2015 and have heard learned counsel. The admitted position is 67% of all the prisoners in jails are under trial prisoners. This is an extremely high percentage and the number of such prisoners is said to be about 2,78,000 as on 31st December, 2013.

Keeping this in mind and the various suggestions that have been made in the affidavit, we are of the view that the following directions need to be issued:

1. A Prisoners Management System (a sort of Management Information System) has been in use in Tihar Jail for quite some time, as stated in the affidavit. The Ministry of Home Affairs should

6 MANU/SC/0786/2014

carefully study this application software and get back to us on the next date of hearing with any suggestions or modifications in this regard, so that the software can be improved and then deployed in other jails all over the country, if necessary.

2. We would like the assistance of the National Legal Services Authority (NALSA) in this matter of crucial importance concerning prisoners in the country. We direct the Member Secretary of NALSA to appoint a senior judicial officer as the nodal officer to assist us and deal with the issues that have arisen in this case.

3. For the purpose of implementation of Section 436A of the Code of Criminal Procedure, 1973 (for short "the Code"), the Ministry of Home Affairs has issued an Advisory on 17th January, 2013. One of the requirements of the Advisory is that an Under Trial Review Committee should be set up in every district. The composition of the Under Trial Review Committee is the District Judge, as Chairperson, the District Magistrate and the District Superintendent of Police as members.

The Member Secretary of NALSA will, in coordination with the State Legal Services Authority and the Ministry of Home Affairs, urgently ensure that such an Under Trial Review Committee is established in every District, within one month. The next meeting of each such Committee should be held on or about 30th June, 2015.

4. In the meeting to be held on or about 30th June, 2015, the Under Trial Review Committee should consider the cases of all under trial prisoners who are entitled to the benefit of Section 436A of the Code. The Ministry of Home Affairs has indicated that in case of multiple offences having different periods of incarceration, a prisoner should be released after half the period of incarceration is undergone for the offence with the greater punishment. In our opinion, while this may be the requirement of Section 436A of the Code, it will be appropriate if in a case of multiple offences, a review is conducted after half the sentence of the lesser offence is completed by the under trial prisoner. It is not necessary or compulsory that an under trial prisoner must remain in custody for at least half the period of his maximum sentence only because the trial has not been completed in time.

5. The Bureau of Police Research and Development had circulated a Model Prison Manual in 2003, as stated in the affidavit. About 12 years have gone by and since then there has been a huge change in circumstances and availability of technology. We direct the Ministry of Home Affairs to ensure that the Bureau of Police Research and Development undertakes a review of the Model Prison Manual within a period of three months. We are told that a review has already commenced. We expect it to be completed within three months.

6. The Member Secretary of NALSA should issue directions to the State Legal Services Authorities to urgently take up cases of prisoners who are unable to furnish bail and are still in custody for that reason. From the figures that have been annexed to the affidavit filed by the Ministry, we find that there are a large number of such prisoners who are continuing in custody only because of their poverty. This is certainly not the spirit of the law and poverty cannot be a ground for incarcerating a person. As per the figures provided by the Ministry of Home Affairs, in the State of Uttar Pradesh, there are as many as 530 such persons. The State Legal Services Authorities should instruct the panel lawyers to urgently meet such prisoners, discuss the case with them and move appropriate applications before the appropriate court for release of such persons unless they are required in custody for some other purposes.

7. There are a large number of compoundable offences for which persons are in custody. No attempt seems to have been made to compound those offences and instead the alleged offender has been incarcerated. The State Legal Services Authorities are directed, through the Member Secretary of NALSA to urgently take up the issue with the panel lawyers so that wherever the

offences can be compounded, immediate steps should be taken and wherever the offences cannot be compounded, efforts should be made to expedite the disposal of those cases or at least efforts should be made to have the persons in custody released therefrom at the earliest.

A copy of this order be given immediately to the Member Secretary, NALSA for compliance. List the matter on 7th August, 2015 for further directions and updating the progress made. For the present, the presence of learned counsel for the States and Union Territories is not necessary. Accordingly, their presence is dispensed with."

24. The order dated 24th April, 2015 made a pointed reference to the extremely high percentage of undertrial prisoners and the total number of prisoners as on 31st December, 2013.

25. Reference was also made to the fact that the Bureau of Police Research and Development had circulated a Model Prison Manual in 2003 but since about 12 years had gone by, the Ministry of Home Affairs was directed to ensure that the Bureau of Police Research and Development undertakes a review of the Model Prison Manual within a period of three months.

26. Directions were also issued for the assistance of the National Legal Services Authority (NALSA) to assist the Social Justice Bench and deal with the issues that had arisen in the case.

27. A direction was also issued to ensure that the Under Trial Review Committee is established within one month in all districts and the next meeting of that Committee in each district should be held on or about 30th June, 2015. NALSA was required to take up the issue of undertrial prisoners particularly in the State of Uttar Pradesh where as many as 530 persons were in custody only because of their poverty.

28. Pursuant to the aforesaid order and directions, NALSA filed a compliance report on 4th August, 2015 in which it was stated that steps have been taken to ensure that Under Trial Review Committees are set up in every district and the State Legal Services Authorities had also been asked to take up the cases of prisoners who were unable to furnish bail bonds and to move appropriate applications on their behalf.

29. The compliance report stated that with regard to the Prisoners Management System, the Ministry of Home Affairs had already appointed a project management consultant to prepare a detailed project report for the e-Prisons project. It was stated that there were four prison software applications that had been developed by (i) National Informatics Centre (ii) Goa Electronic Ltd. (iii) Gujarat Government through TCS and (iv) Phoenix for Prison Management System in Haryana. The various applications would be evaluated and discussed in a conference of the Director General (Prisons)/Inspector General (Prisons) to be held on 20th August, 2015.

30. The compliance report also indicated a break-up of the meetings of the Under Trial Review Committees that had been set up in the various States and that reports of the meeting that were directed to be held on or about 30th June, 2015 were still awaited from a few States and Union Territories.

31. As regards the Model Prison Manual it was submitted that a draft had been prepared and was circulated for comments and a further meeting was scheduled to be held in August, 2015 to finalize the draft.

32. With regard to the cases of undertrial prisoners who were unable to furnish bail bonds it was stated that as many as 3470 such persons were in custody due to their inability to furnish bail bonds and a maximum number of such undertrial prisoners were in the State of Maharashtra, that is, 797 undertrial prisoners. It was stated that as many as 3278 undertrial prisoners were those who were involved in compoundable offences and efforts were being made to expedite the disposal of their cases.

33. Keeping in view the compliance report as well as some of the gaps that appeared necessary to be filled up, the Social Justice Bench passed an order dated 7th August, 2015 requiring, inter alia, the Under Trial Review Committee to include the Secretary of the District Legal Services Committee as one of the members of the Review Committee. The Ministry of Home Affairs was directed to issue an appropriate order in this regard.

34. With regard to the Model Prison Manual, it was suggested to the learned Additional Solicitor General appearing on behalf of the Union of India that the composition of the Committee looking into the Model Prison Manual should be a multi-disciplinary body involving members from civil society and NGOs as well as other experts. It was also directed that the Model Prison Manual should look into providing a crèche for the children of prisoners.

35. With regard to the large number of undertrial prisoners in the State of Maharashtra, it was directed that the matter should be reviewed and an adequate number of legal aid lawyers may be appointed so that necessary steps could be taken with regard to the release of undertrial prisoners in accordance with law, particularly those who had been granted bail but were unable to furnish the bail bond due to their poverty.

The order dated 7th August, 2015 reads as follows:-

"We have gone through the compliance report filed on behalf of NALSA and we appreciate the work done by NALSA within the time frame prescribed. We find from the report that the Under Trial Review Committees have been established in large number of districts but they have not been established in all the districts across the country. Mr. Rajesh Kumar Goel, Director, NALSA - the nodal officer will look into the matter and ensure that, wherever necessary, the Under Trial Review Committee should be established and should meet regularly.

We are told that the Under Trial Review Committee consists of the District Judge, the Superintendent of Police and the District Magistrate. Since the issues pertaining to under trial prisoners are also of great concern of the District Legal Services Authorities, we direct that the Under Trial Review committee should also have the Secretary of the District Legal Services Authority as one of the members of the Committee. The Ministry of Home Affairs will issue a necessary order in this regard to the Superintendent of Police to associate the Secretary of the District Legal Services Authority in such meetings.

It is stated that so far as a software for the prisoners is concerned, the Ministry of Home Affairs has appointed a Project Management Consultant and at present there are four kinds of software in existence in the country with regard to prison management. It is stated that a meeting will be held on 20th August, 2015 with the Director General (Prisons)/Inspector General (Prisons) to evaluate the existing application software. We expect an early decision in the matter and early implementation of the decision that is taken. It is stated that a Model Prison Manual is being looked into since the earlier Manual was of considerable vintage.

We are told that a meeting is likely to be held towards the end of this month to finalize the Model Prison Manual. Learned ASG is unable to inform us about the composition of the Committee that is looking into the Model Prison Manual. We have suggested to him (and this suggestion has been accepted) that a multi-disciplinary body including members from Civil Society, NGOs concerned with under trial prisoners as also experts from some other disciplines, including academia and whose assistance would be necessary, should also be associated in drafting the comprehensive Model Prison Manual.

To the extent possible, the Model Prison Manual should be finalized at the earliest and preferably within a month or two, but after having extensive and intensive consultations with a multi-disciplinary body as above. In the Model Prison Manual, the Ministry of Home Affairs should also look into the possibility of having a creche for the children of prisoners, particularly women prisoners as it exists in Tihar Jail. We find that the number of under trial prisoners in the State of Maharashtra is extremely large and we also think that there are not adequate number of legal aid lawyers to look into the grievances of under trial prisoner. Mr. Rajesh Kumar Goel, Director, NALSA says on behalf of NALSA that necessary steps will be taken to appoint adequate number of legal aid lawyers so that necessary steps can be taken with regard to the release of under trial prisoners in accordance with law including those who have been granted bail but are unable to furnish the bail bond.

List the matter on 18th September, 2015."

36. When the matter was taken up by the Social Justice Bench on 18th September, 2015, Mr. Gaurav Agrawal, Advocate was appointed as Amicus Curiae to assist the Social Justice Bench.

37. On that date, the learned Additional Solicitor General informed the Social Justice Bench that the Ministry of Home Affairs had duly written to the Directors General of all the States and Union Territories to ensure that the Secretary of the District Legal Services Committee is included as a member in the Under Trial Review Committee. The learned Additional Solicitor General also informed that the Model Prison Manual was likely to be made available sometime in the middle of December, 2015.

38. It was pointed out on behalf of NALSA by Mr. Rajesh Kumar Goel that some clarity was required with respect to paragraph 4 of the order dated 24th April, 2015. In view of this request, it was clarified that there is no mandate that a person who has completed half the period of sentence, in the case of multiple offences, should be released. This was entirely for the Under Trial Review Committee to decide and there was no direction given for release in this regard.

39. With regard to the large number of undertrial prisoners in Maharashtra who were entitled to bail, it was submitted that out of 797 such undertrial prisoners nearly 503 had been released and that steps were being taken with regard to the remaining undertrial prisoners.

40. The order passed by the Social Justice Bench on 18th September, 2015 reads as follows:-

"This petition pertains to what has been described as inhuman conditions in 1382 prisons across the country. On our request, Mr. Gaurav Agrawal, Advocate has agreed to assist us in the matter as Amicus Curiae since the complaint was received by Post. The Registry should give a copy each of all the documents in this matter to Mr. Gaurav Agrawal.

Learned Additional Solicitor General has drawn our attention to the order dated 7th August, 2015 and in compliance thereof he has stated that the Ministry of Home Affairs has written to the Directors General of all the States/Union Territories on 14th August, 2015 to ensure that the Secretary of the District Legal Services Committee is included as a member in the Under Trial Review Committee. A similar letter was written by NALSA on 11th August, 2015. NALSA should follow up on this and ensure that it is effectively represented in the Under Trial Review Committee. It is not yet clear whether the Under Trial Review Committee has been set up in every District. Learned Additional Solicitor General and Mr. Rajesh Kumar Goel, Director, NALSA will look into this and let us know the progress on the next date of hearing. As far as the software for Prison Management is concerned, it is stated by the learned Additional Solicitor General that all the Directors General of Police have been asked to intimate which of the four available software is acceptable to them. He further states that the software will be integrated on the cloud so that all information can be made available regardless of which software is being utilized. He expects the needful to be done within a period of about two months. We expect the Directors General of Police in every State/Union Territory to respond expeditiously to any request made by the Ministry of Home Affairs in this regard.

With regard to the Model Prison Manual of 2003, it is stated by the learned Additional Solicitor General that meetings have been held in this regard and it is expected that the Model Prison Manual will be made available by sometime in the middle of December, 2015. He states that people from academia as well as NGOs are associated in the project. It is expected that the Prison Manual will also take care of establishing a creche in respect of women prisoners who have children.

With regard to the release of under trial prisoners, particularly in the States of Uttar Pradesh and Maharashtra, as mentioned in our order dated 24th April, 2015, learned Additional Solicitor General says that at the present moment he does not have any instructions in this regard, but the Ministry of

Home Affairs will write to the State Governments/Union Territories to take urgent steps in terms of our orders.

Mr. Rajesh Kumar Goel, Director, NALSA says that legal aid lawyers have been instructed to take steps for the possible release of under trial prisoners in accordance with law. Mr. Rajesh Kumar Goel has also drawn our attention to paragraph 4 of the order dated 24th April, 2015. We make it clear that there is no mandate that a person who has completed half the period of his sentence, in the case of multiple offences, should be released. This is entirely for the Under Trial Review Committee and the competent authority to decide and there is absolutely no direction given by this Court for release of such under trials. Their case will have to be considered by the Under Trial Review Committee and the competent authority in accordance with law.

Mr. Rajesh Kumar Goel, Director, NALSA says that steps are being taken to appoint an adequate number of panel lawyers.

With reference to the release of under trial prisoners, he says that in the State of Maharashtra, as per the information available, 797 under trial prisoners were entitled to bail and with the efforts of the State Legal Services Authority, nearly 503 have since been released. Steps are being taken with regard to the remaining under trial prisoners.

Mr. Rajesh Kumar Goel, Director, NALSA says that the Member Secretaries of the State Legal Services Authority will be advised to compile relevant information with regard to the cases of compoundable offences pending in the States so that they can also be disposed of at the earliest. We expect the States of Uttar Pradesh and Maharashtra to expeditiously respond to the letter written by NALSA since the maximum number of cases pertaining to compoundable offences are pending in these States.

List the matter on 16th October, 2015."

41. Pursuant to the aforesaid order, NALSA filed another compliance report dated 14th October, 2015 in which it was stated that an Under Trial Review Committee had been set up in every district. However, the annexure to the compliance report indicated that no information was available from the State of Jammu & Kashmir and in some States particularly Gujarat and Uttar Pradesh and the Union Territory of Andaman & Nicobar Islands, the Secretary of the District Legal Services Committee was not made a member of the Review Committee.

42. It was also stated that the State Legal Services Authority had been requested to appoint an adequate number of panel lawyers and to instruct them to take steps for the early release of undertrial prisoners.

43. When the matter was taken up on 16th October, 2015 the Social Justice Bench expressed its distress that only three States had responded to the information sought by the Ministry of Home Affairs with regard to holding the quarterly meeting of the Under Trial Review Committee on or before 30th September, 2015. Learned counsel appearing for the Union of India stated that the matter would be taken up with all the State Governments with due seriousness and it would be ensured that such meetings are held regularly. It was also stated that the latest status report would be filed in the second week of January, 2016.

44. Learned amicus curiae informed the Social Justice Bench that the Under Trial Review Committee had been set up in every district and a representative of the District Legal Services Committee was included in the said Committee. The order dated 16th October, 2015 reads as follows:-

"It is very disconcerting to hear from learned counsel for the Union of India that there is no information available except from three States with regard to the release of under trial prisoners. A meeting of the Under Trial Review Committee was supposed to be held on or before 30th September, 2015, but only three States have responded to the information sought by the Ministry of Home Affairs, Government of India.

Learned counsel for the Union of India says that the matter will now be taken up very seriously with all the State Governments and the Union Territories and it will be ensured that the meetings are regularly held in terms of the Advisories given by the Ministry of Home Affairs at least once in every three months.

Learned counsel for the Union of India also says that the latest status report will be filed in the second week of January, 2016.

In the meanwhile, learned amicus curiae informs us that the Under Trial Review Committee has been set up in every District and a representative of the District Legal Services Authority has been included in all the Under Trial Review Committees and, therefore, to this extent the order dated 18th September, 2015 has been complied with.

List the matter on 29th January, 2016. We make it clear that learned counsel for the Union of India should be fully briefed in all aspects of the case."

45. In compliance with the order passed on 16th October, 2015 an affidavit dated 22nd January, 2016 was filed by the Ministry of Home Affairs in which it was stated that a detailed evaluation of the software for the e-Prisons Project had been completed and guidelines had also been circulated to all the States for their proposals and for exercising their option for selecting the appropriate software.

46. It was stated in the affidavit that a provision for funds had been made for the application software from the Crime and Criminal Tracking Network & System (CCTNS) project and an amount of Rs.227.01 crores had been approved for the implementation of the e-Prisons Project. It was stated that the e-Prisons proposals had been received from seven States and other States/Union Territories had been asked to expedite their proposal for evaluation by the Ministry of Home Affairs.

47. With regard to the Model Prison Manual, it was stated that the revised Model Prison Manual had been approved by the competent authority and it was circulated to all States and Union Territories. The revised manual also included a provision for a suitable crèche for the children of women inmates in the prison.

48. With regard to the quarterly meetings of the Under Trial Review Committee, the affidavit disclosed the dates on which such Committees had met but on a perusal of the chart annexed to the affidavit there is a clear indication that not every such Committee met on a quarterly basis. This is most unfortunate.

49. With regard to the undertrial prisoners who could be considered for release under the provisions of Section 436A of the Cr.P.C., some progress had been made except in the States of Assam, Bihar, Chhattisgarh, Goa, Karnataka, Meghalaya, West Bengal, and the Union Territories of Dadra & Nagar Haveli and Lakshadweep. It was stated in the affidavit that notwithstanding the lack of detailed information it did appear that due to the institutionalization of the exercise, the number of undertrial prisoners eligible for release under Section 436A of the Cr.P.C. had been considerably reduced in some States.

50. In the hearing that took place on 29th January, 2016 it was pointed out that considerable progress had been made inasmuch as the Model Prison Manual had been finalized and perhaps circulated to all the States and Union Territories; Under Trial Review Committees had been set up in every district but unfortunately many of such Committees were not meeting on a regular basis every quarter; the application software for prison management had more or less been identified but a final decision was required to be taken in this regard; steps were required to be taken for the release of undertrial prisoners particularly in the State of Uttar Pradesh and the State of Maharashtra and wherever necessary, the number of panel lawyers associated with the State Legal Services Authority/District Legal Services Committee were required to be increased to meet the requirement of early release of undertrial prisoners and prisoners who remain in custody due to their poverty and inability to furnish

bail bonds. In addition, it was pointed out that steps should be taken to ensure that wherever persons are in custody under offences that are compoundable, steps should be taken to compound the offences so that overcrowding in jails is reduced.

51. Has anything changed on the ground? The prison statistics available as on 31st December, 2014 from the website of the NCRB[7] indicate that as far as overcrowding is concerned, there is no perceptible change and in fact the problem of overcrowding has perhaps been accentuated with the passage of time. The figures in this regard are as follows:

	Central Jails	District Jails
Capacity 1,52,312	1,35,439	
Actual 1,84,386	1,79,695	
%	121.1%	132.7%
Undertrials	95,519 (51.8%)	1,43,138 (79.7%)

52. The maximum overcrowding is in the jail in the Union Territory of Dadra & Nagar Haveli (331.7%) followed by Chhattisgarh (258.9%) and then Delhi (221.6%).

53. It is clear that in spite of several orders passed by this Court from time to time in various petitions, for one reason or another, the issue of overcrowding in jails continues to persist and apart from anything else, appears to have persuaded Justice R.C Lahoti to address a letter of the Chief Justice of India on this specific issue of overcrowding in prisons.

54. We cannot forget that the International Covenant on Civil and Political Rights, to which India is a signatory, provides in Article 10 that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Similarly, Article 5 of the Universal Declaration of Human Rights (UDHR) provides: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

With reference to the UDHR and the necessity of treating prisoners with dignity and as human beings, Vivien Stern (now Baroness Stern) says in A Sin Against the Future: Imprisonment in the World as follows:

"Detained people are included because human rights extend to all human beings. It is a basic tenet of international human rights law that nothing can put a human being beyond the reach of certain human rights protections. Some people may be less deserving than others. Some may lose many of their rights through having been imprisoned through proper and legal procedures. But the basic rights to life, health, fairness and justice, humane treatment, dignity and protection from ill treatment or torture remain. There is a minimum standard for the way a state treats people, whoever they are. No one should fall below it."[8]

55. In a similar vein, it has been said, with a view to transform prisons and prison culture:

"Treating prisoners not as objects, but as the human beings they are, no matter how despicable their prior actions, will demonstrate an unflagging commitment to human dignity. It is that commitment to human dignity that will, in the end, be the essential underpinning of any endeavor to transform prison cultures."[9]

56. The sum and substance of the aforesaid discussion is that prisoners, like all human beings, deserve to be treated with dignity.

7 http://ncrb.nic.in

8 Vivien Stern, A Sin Against the Future: Imprisonment in the World 192 (1998).

9 The Mess We're In: Five Steps Towards the Transformation of Prison Cultures by Lynn S. Branham, Indiana Law Review, Vol. 44, p. 703, 2011

To give effect to this, some positive directions need to be issued by this Court and these are as follows:

1. The Under Trial Review Committee in every district should meet every quarter and the first such meeting should take place on or before 31st March, 2016. The Secretary of the District Legal Services Committee should attend each meeting of the Under Trial Review Committee and follow up the discussions with appropriate steps for the release of undertrial prisoners and convicts who have undergone their sentence or are entitled to release because of remission granted to them.

2. The Under Trial Review Committee should specifically look into aspects pertaining to effective implementation of Section 436 of the Cr.P.C. and Section 436A of the Cr.P.C. so that undertrial prisoners are released at the earliest and those who cannot furnish bail bonds due to their poverty are not subjected to incarceration only for that reason. The Under Trial Review Committee will also look into issue of implementation of the Probation of Offenders Act, 1958 particularly with regard to first time offenders so that they have a chance of being restored and rehabilitated in society.

3. The Member Secretary of the State Legal Services Authority of every State will ensure, in coordination with the Secretary of the District Legal Services Committee in every district, that an adequate number of competent lawyers are empanelled to assist undertrial prisoners and convicts, particularly the poor and indigent, and that legal aid for the poor does not become poor legal aid.

4. The Secretary of the District Legal Services Committee will also look into the issue of the release of undertrial prisoners in compoundable offences, the effort being to effectively explore the possibility of compounding offences rather than requiring a trial to take place.

5. The Director General of Police/Inspector General of Police in-charge of prisons should ensure that there is proper and effective utilization of available funds so that the living conditions of the prisoners is commensurate with human dignity. This also includes the issue of their health, hygiene, food, clothing, rehabilitation etc.

6. The Ministry of Home Affairs will ensure that the Management Information System is in place at the earliest in all the Central and District Jails as well as jails for women so that there is better and effective management of the prison and prisoners.

7. The Ministry of Home Affairs will conduct an annual review of the implementation of the Model Prison Manual 2016 for which considerable efforts have been made not only by senior officers of the Ministry of Home Affairs but also persons from civil society. The Model Prison Manual 2016 should not be reduced to yet another document that might be reviewed only decades later, if at all. The annual review will also take into consideration the need, if any, of making changes therein.

8. The Under Trial Review Committee will also look into the issues raised in the Model Prison Manual 2016 including regular jail visits as suggested in the said Manual. We direct accordingly.

57. A word about the Model Prison Manual is necessary. It is a detailed document consisting of as many as 32 chapters that deal with a variety of issues including custodial management, medical care, education of prisoners, vocational training and skill development programmes, legal aid, welfare of prisoners, after care and rehabilitation, Board of Visitors, prison computerization and so on and so forth. It is a composite document that needs to be implemented with due seriousness and dispatch.

58. Taking a cue from the efforts of the Ministry of Home Affairs in preparing the Model Prison Manual, it appears advisable and necessary to ensure that a similar manual is prepared in respect of juveniles

who are in custody either in Observation Homes or Special Homes or Places of Safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.

59. Accordingly, we issue notice to the Secretary, Ministry of Women and Child Development, Government of India, returnable on 14th March, 2016. The purpose of issuance of notice to the said Ministry is to require a manual to be prepared by the said Ministry that will take into consideration the living conditions and other issues pertaining to juveniles who are in Observation Homes or Special Homes or Places of Safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.

60. The remaining issues raised before us particularly those relating to unnatural deaths in jails, inadequacy of staff and training of staff will be considered on the next date of hearing.

(Madan B. Lokur)

(R.K. Agrawal)

New Delhi; February 5, 2016

❑❑❑

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Mahadev Gope & Ors. Versus The State of Jharkhand

CORAM:
HON'BLE MR. JUSTICE D.N. PATEL
HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR

I.A. No. 1105 of 2013 In Cr. Appeal (DB) No. 1088 of 2012

Mahadev Gope & Ors. ... Appellants
Versus
The State of Jharkhand ... Respondent

For the Appellant : Mr. A.K. Sahani, Advocate

For the Respondent : Mr. T. N. Verma, A.P.P.

06/Dated: 4th March. 2013 Per D.N. Patel J.

1. This Interlocutory Application has been preferred by the present appellants, who are in jail since 17.04.2003, and because of poor economic conditions, they were unable to prefer criminal appeal, against the judgment of conviction and order of sentence dated 17th April 2003 passed by 3rd Addl. Sessions Judge, Bokaro in S.X No. 105 of 2000. There is delay of about 3430 days, in preferring the criminal appeal. The reason, given in the LA. specially in paragraph No. 9, is poverty and poor economic conditions of these appellants. It is also vehemently submitted by counsel for the appellants that though the State is wedded with the duty to provide legal aid which is constitutional duty, under;Aritlcle 14 to be read with Article 39-A of Constitution of India to be read with the provisions of The Legal Services Authorities Act, 1987, no legal aid has ever been provided to these appellants neither the Jailor of the Hazaribagh Central Jail has taken any care not any higher ranking officer of the Home Department has taken any care off providing the legal aid. There are all chances that these appellants may be acquitted, from the charges, looking to several errors committed by the learned trial court, in appreciating the evidences on record.

2. We have heard learned counsel for the State who has submitted that they are not aware why the legal aid is not provided to these appellants, though the appellants are in jail since April, 2003 without preferring any appeal. The counsel for the! State submitted that because of lack of instructions, the time may kindly be granted.

3. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, it appears that there is a delay of 3430 days in preferring the appeal because of poor economic conditions of these appellants. It is a constitutional duty of the State under Article 14 and 39-A of the Constitution of India to be read with the provisions of The Legal Services Authorities Act, 1987 to provide legal aid to these types of convicts, who are in jail. It appears that Jailor of the Central Jail. Hazaribagh. has failed to perform his duties nor the higher ranking officers have carefully gone through the registers, which are maintained in the jail that who are convicts in the jail, who have not preferred appeal. Such type of verification of the register ought to have been done periodically by the higher ranking officers of the Home Department, may be under the leadership of Secretary, Home Department or may be under the leadership of I.G. (Prison). Both these officers have failed to perform their duties. We, therefore, direct -

(a) The Jailors of all the five Central Jails of the State of Jharkhand to remain personally present in Court on the next date of hearing at 10.30 a.m. because the similar was the situation for Central Jail at Ranchi when this Court (particularly Hon'ble Jusctice D.N. Patel) has visited the Central Jail, Ranchi in the month of August, 2012, more than 130 applications were preferred by the convicts from the Central Jail. Ranchi. who were convicted and who were not provided legal aid. Upon analysis, it was found that some of them were convicted in the year 1999, in the year 2000 and in the year 2001. therefore, we hereby direct the Jailors of all the Central Jails to remain present on the next date of hearing at 10.30 a.m. and they will come with a data, if any of the convicts in their jail have not preferred appeal before this Court after their conviction by the learned trial court;

(b) We also direct the Secretary. Home Department as well as I.G. (Prison) to verify such registers which are maintained by the Cental Jails, by the Central Jail immediately arid later on, to veriiv such registers which are maintained by all the jails of State of Jharkhand whether there is any convict in the jail, who has not preferred any appeal, after their conviction and specially because of their poor economic conditions.

(c) It also appears from the narration of these appellants, two of them are senior citizens and, therefore, we also direct the Jailors of the Central jail to provide data as to how many senior citizens are in their Central Jails. Similarly, how many are female convicts in their respective Central Jails with details, if they have preferred any criminal appeal or not.

4. Registry is directed to send a copy of this order to

(a) Secretary, Home Department;

(b) Inspector General of Prisons;

(c) Mr. K. Vijay Kumar, Advisor to His Excellency, the Governor of the State of Jharkhand, because at present, there is a President's Rule in the State under Article 356 of the Constitution of India.

5. Matter is adjourned on 06.03.2013.

(D.N.Patel, J.)

(Shree Chandrashekhar, J.)

❑❑❑

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Mahadev Gope & Ors. Versus The State of Jharkhand

CORAM:
HON'BLE MR. JUSTICE D.N. PATEL
HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR

I.A. No. 1105 of 2013 In Cr. Appeal (DB) No. 1088 of 2012

Mahadev Gope & Ors. … Appellants
Versus
The State of Jharkhand ... Respondent

For the Appellants : Mr. A.K. Sahani, Advocate

For the Respondent : Mr. R. Mukhopadhyay, S.C. II, Mr. T. N. Verma, A.P.P.

07/Dated: 6 th March, 2013 Per D.N. Patel, J.

1. This Interlocutory Application has been preferred for condonation of delay of 3430 days in preferring the criminal appeal from Central Jail, Hazaribagh. This applicant (original applicant) was in jail since last several years and it has been stated in the interlocutory application that because of the poor economic condition, he was not in a position to prefer appeal.

2. On an earlier date of hearing i.e. on 04.03.2013, a detailed order was passed by this Court, calling all the Superintendents of the Central Jails in the State of Jharkhand. There are five Central Jails in the State of Jharkhand, namely,

(I) Birsa Munda Central Jail, Hotwar, Ranchi;

(ii) Central Jail, Palamau;

(iii) Central Jail, Dumka;

(iii) Central Jail, Ghaghidih, East Singhbhum, Jamshedpur; and

(v) Central Jail, Hazaribagh.

These are the Central Jails situated in five separate districts. The Superintendents of the five Central Jails, namely, Mr. D.K. Pradhan (Birsa Munda Central Jail, Hotwar, Ranchi), Mr. Uday Kumar Kushwaha (Central Jail, Palamau), Mrs. Rupam Prasad (Central Jail, Dumka), Mrs. OliveGrace Kullu (Central Jail, Ghaghidih, East Singhbhum, Jamshedpur) and Md. Mashudul Hassan (Central Jail, Hazaribagh) have appeared in Court today with certain registers, maintained by the Jails.

3. We have perused the registers which they have brought before this Court. On perusal of these registers, which have been produced by the Superintendents of all Central Jails, we find that they have not maintained such registers properly. We are not satisfied with the record maintained by the Central Jails, especially on the point whether the convict has actually preferred the criminal appeal or not. All these registers have been perused with the help of Superintendents of Central Jails, Mr. R. Mukhopadhyay, learned S.C. II and with the help of A.P.Ps. and looking at these registers, we find that the State of Jharkhand has not properly mentioned the details about the criminal appeal number, which has been preferred by the convict. It is not sufficient for Superintendents of Central Jails to record in the register that the convict is going to prefer an appeal from outside. What is required to be

pointed out in the register is whether the convict, has actually preferred an appeal or not. There is a vast difference between these two phraseology and there is a deep Vally between the two. To prefer an appeal through a lawyer, who is outside the jail or through Pairvkar, who is outside the jail, is a wish of the convict, but, sometimes actually there is no appeal preferred by these outside persons and we have come across several convicts, who could not prefer their criminal appeal, even after one decade of conviction. Some facts about these types of matters, were highlighted in the order dated 04.03.2013 and this matter is no exception to this. There is a delay of 3430 days means more than 9 years and 5 months. The man is convicted and sentenced for life imprisonment and the Superintendent of the concerned jail has not taken any care to this type of convict. The duty of the superintendent of jail never comes to an end by just mentioning that "upon asking the convict, it is stated that appeal will be preferred by the private lawyer". This is an entry in the registere maintained by the Jail Authority. This answer of the convict should have been reviewed by the superintendent of the jail after some reasonable period, because, it is the statutory duty of the State to provide legal aid. Access to justice makes the convict equal in comparison with the rich man or the powerful person. Article 14 of the Constitution guarantees the right of equality and it is the duty of the State to make such types of convicts equal with others i.e. equal with those who are preferring appeal promptly. State has failed to perform its duty in providing equal opportunity in law or equal protection of law, as guaranteed under Article 14 of the Constitution of India. Superintendent of jail is in a Loco Parentis position . If in a family a child is not eating food, always father or mother will supply the food or fulfill his or her need by hook or by crook. Similarly, if any convict is not ready to take a legal aid at the cost of the government and if his wish is that he will prefer appeal through private lawyer and no such appeal is filed then, after a reasonable time, it is the duty of the superintendent of the concerned jail to write a letter to the Legal Services Authorities. It is not out of place to mention here that in every Central Jail, there is a legal aid clinic. Normally, the legal aid clinic is being used by the persons, who are in jail as a convict or as an undertrial prisoner. This is a very limited use of the legal aid clinic. In a broader sense, even this type of legal aid clinics can also be used by the Superintendent of Central Jail. They should have informed the lawyers, who are attending the legal aid clinic in the jail, who are normally appointed by the Jharkhand State Legal Services Authorities (hereinafter referred to as for the sake of brevity, "JHALSA") that few persons/convicts though earlier wanted to prefer appeal through private lawyers, but, they for any reason whatsoever, have not preferred any appeal, and therefore, the legal aid should be provided promptly. This should have been informed by the superintendent of the Central Jail at the legal aid clinic in their own Central jail or they should have written a letter to the JHALSA directly. We have come across several entries in the registers maintained in the Central Jails that the convicts are in the jail since years, but, they do not have certified copy of the conviction order. Perhaps, this may also be the reason for not preferring the appeal. This is also no reason in the eye of law. Even, in absence of certified copy, a letter could have been written by the Superintendent of the Central Jail to JHALSA and, in turn, JHALSA will get the certified copy from the concerned trial court through the panel of Advocates appointed by JHALSA. It ought to be kept in mind by the state authorities that there is not a single justifiable reason for the superintendent of Central jails why the appeal has not been preferred by the convicts after their conviction and even if the convicts say that they do not want to prefer appeal, it is a pious duty of the superintendent of the Central jail, because he is in a loco parentis position and it is also a constitutional duty of the said authority to provide free legal aid to those, who are in jail. It is not a discretion of the superintendent of Central jails, but it is his statutory and constitutional duty to provide the same, and therefore, the excuses which we have heard from the aforesaid Superintendents that sometimes convicts are not ready to prefer appeal, is no reason at all not to provide legal aid. In several Criminal Appeals, preferred from Jail, there are orders which have been passed for suspension of sentence under Section 389 Cr.P.C., looking to the evidences on record. In one such Cr. Appeal No. 1129 of 2012, which was preferred from jail for grant of legal aid, there is an order of suspension of sentence under Section 389 Cr.P.C. This type of benefit of suspension of

sentence could not be given to the accused, as there is no appeal preferred because no legal aid has been provided to them. We are not at all satisfied with the oral explanation of the Superintendents of the Central Jails nor we are satisfied with the maintenance of data in their registers, especially, about the grant of legal aid and especially about the fact whether actually Criminal Appeal has been preferred or not. Even today also, the Central Jail Superintendents are seeking time to verify whether there are convicts in their respective Jails, who have not preferred Criminal Appeals. They themselves are not sure. This is what is stated by each and every Superintendents of the aforesaid Central Jails and they are seeking one week's time.

4. As has been stated in the order dated 04.03.2013, when this Court visited the Central Jail, Ranchi, which is also known as Birsa Munda Central Jail, in the month of August, 2012, the answer given by Jail Superintendent was that there is not a single convict, who has not preferred an appeal, but, within a week or ten days' time, approximately 130 letters have been received from the Jail, namely, Birsa Munda Central Jail, that all these 130 convicts want to prefer appeal and their convictions were of the years 1999, 2000, 2001, etc. This cannot be tolerated. We have no time to go to each and every Central Jail and other District Jails. We have no time to verify this type of cases of convicts, who have not preferred Criminal Appeals, due to poverty, by visiting each and every Central Jails, District Jails and SubJails. One example of Central Jail, Ranchi, is enough. Looking to the registers, which are presented before us today, from the respective Superintendents of the Central Jails and looking to the hesitation on the part of the Superintendents of the Central Jails that they are not sure even today before this Court that each and every convict has preferred a criminal appeal. This answer is alarming.

5. We, therefore, appoint the following five Committees for five Central Jails in the State of Jharkhand for getting a report, whether any convict, in these five Central Jails, has not preferred appeal due to poverty and poor economic conditions:

(i) For Birsa Munda Central Jail, Hotwar, Ranchi, the following is the Committee constituted of the Lawyers, who will visit this jail and will verify the aforesaid aspects of the matter for grant of legal aid and for enhancement of access to justice:

(i) Mr. Atanu Banerjee

(ii) Ms. Amrita Banerjee

(iii) Mr. Yogesh Modi

(ii) For Lok Nayak Jai Prakash Narayan Central Jail, Hazaribagh, the following is the Committee constituted of the Lawyers, who will visit this jail and will verify the aforesaid aspects of the matter for grant of legal aid and for enhancement of access to justice:

(i) Mrs. Rashmi Kumar

(ii) Mr. Ramit Satender

(iii) Mrs. Sweta Singh

(iii) For Central Jail, Dumka, the following is the Committee constituted of the Lawyers, who will visit this jail and will verify the aforesaid aspects of the matter for grant of legal aid and for enhancement of access to justice:

(i) Dr. H. Waris

(ii) Mr. Rajesh Kumar Mahtha

(iii) Ms. Priya Shrestha

(iv) For Central Jail, Palamau, the following is the Committee constituted of the Lawyers, who will visit this jail and will verify the aforesaid aspects of the matter for grant of legal aid and for enhancement of access to justice:

(i) Mr. Manoj Tandon

(ii) Ms. Bakshi Bibha

(iii) Mr. Deepak Kumar Bharti

(v) For Central Jail, Ghaghidih, East Singhbhum, Jamshedpur, the following is the Committee constituted of the Lawyers, who will visit this jail and will verify the aforesaid aspects of the matter for grant of legal aid and for enhancement of access to justice:

(i) Mr. Ravi Prakash

(ii) Ms. Nalini Jha

(iii) Mr. Rahul Saboo

(vi) All the above Committee members are the Lawyers of the panel of JHALSA. They shall be provided vehicle by JHALSA. They shall visit the respective Central Jails, as stated hereinabove and Advocate at Sr. No.1 in every Committee shall fix the date and time for the visit and they will intimate in advance to JHALSA, so that the vehicle shall be provided to them jointly.

(vii) We hereby direct the said authorities of jail that these Committees shall be allowed to enter the Jails and these Committee members will be allowed to have conservation with the convicts, so that they may find out whether they are in need of legal aid or not. They will also be entitled to verify the registers maintained by the Superintendents of the Central Jails and the jail authority shall cooperate with these Committees. In each Committee, the Lawyer at Sl. No.1 will the head of the said Committee. He will communicate to JHALSA as well to Mr. R. Mukhopadhyay, learned S.C. II, so that he may, in turn, inform the concerned jail authorities about their entry and exit and for verification of the aforesaid documents and for conversation directly with the jail inmates.

6. We also direct that this visit shall be conducted on or before the next date of hearing and they shall give their report to this Court separately in writing with their suggestions about their observations. The report shall have at least the following data:

(a) The date and time of visit;

(b) The type of registers verified by them;

(c) The jail inmates with whom they have talked, especially those who are awarded life imprisonment or more than 10 years' imprisonment;

(d) In each Committee, there is a female advocate, who shall visit the female ward also;

(e) Their observations in the jail, about kitchen, library, dispensary or medical facility etc.;

(f) These Committees will also get suggestions from the Superintendents of the concerned Central Jails for proper and necessary maintenance of the record, especially for providing legal aid, because, today in the open Court also clearly these Superintendents of the Central Jails have several suggestions like appeal number should be there in the register, days for which the provisional bail/temporary bail/suspension of sentence for temporary period. This detail should be mentioned in the register and there should also be a column if the accused is not surrendering in time;

(g) These Committees will also point out in the report about the female convicts or undertrials in the jail with children below the age of six years;

(h) These Committees shall also point out in the report, if there is any convict, who is ailing since long and if answer is yes, the type and nature of ailment;

(i) These Committees shall also point out, is there any physically handicapped convict in the jail, if answer is yes, with name, the Sessions Trial/Trial court number, etc.;

(j) These Committees shall also have conversation with the jail doctor about the separate registers, which are maintained for convicts/undertrials, who are ill;

(k) These Committees shall also visit medical clinic. They will specially ask the jail doctor, is there any mentally ill convict in their jail or not;

(l) These Committees shall also verify the nature of the food supplied to them;

(m) These Committees shall also find out the positions of the senior citizens, especially those who are ailing and accurately the figures of female convicts/undertrials, senior citizens, ailing persons in the jail, handicapped persons, etc. shall be reflected in the report upon proper verification of the registers maintained by the jail authorities with special reference to the fact that since how long they are in jail.

(n) Maximum capacity of the Jail to keep the convicts and undertrial prisoners.

(o) Actual number of convicts and undertrial prisoners in the Jail, so that one can easily find out whether the Jail is overcrowded.

7. These are the minimum requirements of the report to be given by the Committees to this Court on or before the next date of hearing. The Committee can also point out, other relevant and noticeable facts about the Jail.

8. If these Committees are not in a position to return on the same day, then, we hereby direct the State authorities to provide these Committee members adequate lodging and boarding facilities in the government guest house or such other accommodation, and female advocate shall be given a separate room, who is a member of the Committee.

9. These Committees will be entitled for reimbursement of any actual expenditure of typing, etc. upon presentation of the vouchers to JHALSA.

10. Copy of this order shall be given to the counsels of the parties to this Interlocutory Application as well as to the Advocates of the Committees.

11. The matter is adjourned for 20th March, 2013.

(D.N. Patel, J.)

(Shree Chandrashekhar, J.)

❑❑❑

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Mahadev Gope & Ors. Versus The State of Jharkhand

CORAM:
HON'BLE MR. JUSTICE D.N. PATEL
HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR

LA. No. 1105 of 2013 in Criminal Appeal (DB) No. 1088 of 2012

Mahadev Gope & Ors. ..... Appellants
Versus
The State of Jharkhand ..... Respondent

For the Appellants : Mr. Ajit Kumar, Mr. Amrita Banerjee, Mr. Vikash Kumar, Advocates

For the State : Mr. R.Mukhopadhyay, S.C. II, Mr.T.N.Verma,A.P.P.

10/Dated: 17th April. 2013 PerD.N.Patel.J.:

1. The present Interlocutory Application has been preferred by the present appellants who are in Jail since 17.04.2003. Because of the poor economic condition, they were unable to prefer criminal appeal against the judgment and order of conviction and sentence dated 17.04.2003 passed by 3rd Additional Sessions Judge, Bokaro in Sessions Trial No. 105 of 2000. There is delay of about 3430 days in preferring the criminal appeal. The reasons given in paragraph No. 9 of the Interlocutory Application is poverty and poor economic condition of these appellants.

2. We have passed detailed order on 04.p3.2013 pointing out that it is the duty of the Superintendent of concerned Jail to intimate the Legal Services Authorities to provide the convicts the legal aid under the provision of the Legal Services Authorities Act, 1987 which has been enacted keeping in mind Article-14 to be read with Article 39-A of the Constitution of India as, no convict/ under trial prisoner can send any letter out of jail. The State has failed to provide legal aid to these appellants since long. Jharkhand legal Services Authorities has not been informed, at all, by the Superintendent of Central Jails about this type of convicts, who are in jail, since long without preferring Criminal Appeal. This Court passed order on 04.03. 2013, when the jailor of five Central Jails of State of Jharkhand were ordered to remain personally present before this Court. They came with register etc. maintained by the Jails and again matter was heard on 06.03.2013. We have perused the registers maintained by the following five Central Jails of the State of Jharkhand :

(a) Birsa Munda Central Jail, Hotwar, Ranchi,

(b) Central Jail, Palamau,

(c) Central Jail, Dumka,

(d) Central Jail, Ghaghidih, East Singhbhum, Jamshedpur, and,~

(e) Central Jail, Hazaribagh.

3. We were not satisfied with the explanation given by the Superintendent of these five Central Jails that the convicts who are in jail are not demanding legal aid and therefore, they are not given any legal aid for preferring criminal appeal, even after their conviction by the Trial Court. Such convicts, are several in numbers and we have pointed out in our orders that the Superintendent of Central Jails are in loco-parantus position and even if these convicts are not demanding legal aid, once the limitation period

for preferring criminal appeal is over, it is the duty of the Superintendent of Central Jail to intimate the Legal Services Authorities so that Legal Services Authorities can take care of such type of convicts in preferring criminal appeal through the lawyers who are on the panel of Jharkhand Legal Services Authorities or who are on the panel of District Legal Services Authorities.

4. We have also mentioned in our earlier orders dated 04.03.2013 and 06.03.2013 that there is no proper Registers which are maintained by the Central Jails and what is required to be dealt by the Central Jail that has been pointed out in these two orders in detail.

5. This Court has come across several similar type of matters in which there is delay of more than 3000 davs and therefore, we ..appointed five Committees each consisting of three advocates who are on the panel of Jharkhand Legal Services Authorities and each Committee was requested to visit a particular Central Jail.

6. The directions have also been given in order dated 06.03.2013, that they have to point out in their report after their visit in the Central Jail, the details of which are mentioned in paragraph no. 6 of the order of this Court dated 06.03.2013. The details to be point out in the report are about female convicts or under-trial prisoners in the Jail with children below the age of six years about ailing convicts, the nature of their ailments, about physically handicapped convicts in Jail, about jail dispensary and the maximum capacity of the Jail to keep the convicts and under-trial prisoners and the actual number of convicts in the Jail etc.

7. All the five Committees have given their reports about their visit in the five Central Jails, these reports we have been taken on record.

8. The advocates who have visited the Central Jails as per our direction in the order dated 06.03.2013 have observed several noticable facts in the Jail and they have many more things to convey to this Court. Several things in their reports have been mentioned in the forms of suggestions. Over and above several suggestions stated in their reports, they have pointed out in detail about their observations during their visit in the Central Jail.

9. We have perused the reports of these five different Committees and we have heard the advocates of five Committees and thev have mainly pointed out the following aspects :

(i) There is no proper maintenance of the data / Register in the Central Jail which would clearly state whether criminal appeal by the convict has been preferred through Jail or through legal aid or through outside lawyers. No criminal appeal number has been mentioned in the Register of the Central Jail therefore, actually no data can be gathered as to how many convicts have preferred appeal through outside pairvikar or through legal aids,

(ii) There are several Registers which have been perused by these Committees and according to these advocates several columns of these Registers are based upon old Jail Manual which are of no use and instead of those columns other columns can be added like the criminal appeal number or like the date on which temporary bail is granted, the period of temporary bail, the date on which the accused has to surrender after getting temporary bail etc.

(iii) Committee who has visited Central Jail, Dumka has mentioned in suggestion No. (ii) of paragraph No. 19 of the report that there are several columns like “date of whip, if whipped”. Days of whipping the convicts have gone, but, entries in Registers continued. Fresh application of mind is required to replace this type of columns.

(iv) In the Jail Register, there is no proper column as to temporary / provisional bail etc. because this Court has observed in several matters that the State of Jharkhand had no data available about the absconding accused. These data must have been maintained through proper Register and therefore, necessary columns should have been there in Register. After release of the convicts

on temporary bail or release of under trial prisoner on temporary bail on which date he has surrendered or whether he has actually surrendered, these columns ought to have been added.

(v) Separate Legal Aid Register or data through computer should have been maintained with the history of the convicts especially, mentioning about the senior citizens, ailing convicts or under-trial mentally ill, handicapped, female convicts and female convicts with children below the age of six years because this has its own value so far as legal aid is concerned and so far as early hearing of their matters in the Court is concerned.

(vi) It is suggested that it is very difficult for the Authorities in Jail to maintain detailed data etc with limited staff. Several posts though sanctioned but are vacant.

(vii) Medical clinics require lot of improvement and they are in their poorest condition in the Central Jails. There is no pathological laboratories. For smallest thing either convicts have to go out or their blood / urine samples has to go out.

(viii) There must be a separate website of each and every Central Jail giving the particulars about the total number of convicts, male, female, senior citizens, ailing persons etc.

(ix) With all necessary details the names of convicts along with father's name should have been mentioned on the website. Because it is observed by this committee members that several convicts / under-trial prisoners in the Jail, are having same name.

(x) In the Central Jail, Dumka there is extension wing also duly constructed but it is yet to be operated.

(xi) Committees have also suggested that various activities like weaving of woolen cloths or weaving of shawl or preparing certain articles are carried out with the help these convicts and they are also paid wages for per day basis but the same is not adequate.

(xii) It has been observed by these Committees that there are total sixty one children below the age of six years and they are staying in these five Central Jails with their mothers and therefore, it is suggested by the Committees that a separate provisions may be made where these female convicts with the children may be kept so that all proper care may be taken about the health of the children with a Paediatrics Doctor with such other requirements which are needed for a child below the age of six years. There are grand-mothers also who are having their grand children with them. These sixty one children are not in Jail because of their own fault. They are either with their mother or with their grand-mother and therefore, it is suggested by the Committees that the best available facilities for the rearing of the children should be provided by the State, (xiii) There are approximately 409 senior citizens in these Central Jails. Several of them are ailing and few of them are even unable to walk; even few of them are unable to hear and in one Jail, namely Birsa Munda Central Jail, Ranchi one convict is aged about 103 years and therefore, it is suggested by these committee members that appeal of these senior citizens, if pending before any Court must be disposed of at the earliest and it may also be verified by the State for their pre-mature release.

(xiv) As per Jail manuals, State Sentence Review Board has to be constituted and it is duty of the Jail Authorities to point out to these Committees or Board about the details of the convicts who have completed more than fourteen years in the Jail, but, it is observed by these Committees that there are several cases pending before such Board, (xv) The advocate of these Committees have also observed that there are several persons who are in Jail who though have been granted bail by the Appellate Court, but, they are unable to furnish bail bond or sureties because of their poor economic conditions and hence although the bail is granted they are in Jail. These observations

are coming from the Central Jail. Hazaribagh. Dumka and Palamau. Seventeen cases are from Ranchi Central Jaiji and there are few cases in Jamshedpur Central Jail also.

(xvi) There are positive things also observed by the Committees especially in Central Jail, Dumka as well as Ranchi that there is separate kitchen for ailing persons in the Jail which is also known as "Medical Kitchen". It is suggested by the Committee members that similar "Medical Kitchen" facilities should be provided in all the Central Jails as well in other Jails,

(xvii) It is suggested by the Committee members that there ought to be separate kitchen facilities for female convicts. Their ward is not hygienic and female ward is in very pathetic condition in Central Jail. Hazaribagh.

(xviii) The Committee members have also observed that the female convicts require separate kitchen mainly for the reason that they are having children and committee members have observed that small children are suffering from malnutrition. Small childrens were given water directly from the tank and not the purified water. It is also ovserved by the Committee Members who visited Central Hazaribagh that there is no adequate water facilities. Similar is the situation in Central Jail, Jamshedpur.

(xix) It is also observed by the Committee members that several persons have not preferred criminal appeal and few have come directly to Jharkhand Legal Services Authorities and the total number has crossed bv now 200. From one Central Jail, Hazaribagh it is approximately 40 in numbers and it is suggested by the Committees that all the convicts and under-trial prisoners were happy by the visit of this type of Committees and they have ventilated several grievances to these Committees and it as desirable that such periodical visit may be permitted by this Court so that correct facts about Jails and actions taken by the respondent-State may be brought on record,

(xx) It is suggested by these committees that the superintendent, Central Jails have no information about the criminal appeals preferred either through legal aid or through private pairvikar in this Court. Whether these appeals are on board of Final Hearing or at the stage of Hearing, what is number of criminal appeal; whether such bail application preferred has been rejected by this Court, no such details is available in the Central jails, therefore it is suggested by the committee members that these details may be provided to the concerned jail after the admission of the criminal appeal and for that, one copy of the order of admission of the criminal appeal may be sent to the concerned jail so that there may be proper entry in their registers, similar method may be adopted even while granting or rejecting interlocutory application in criminal appeal and necessary details may also be made available on the website of this Hon'ble Court or on the Website of Jharkhand Legal Services Authorities. As on today whenever Superintendent of Central jails are referring website, they are unable to get details of criminal appeal number of the convicts who are in jail.

(xxi) It is observed by the committee members that whenever there is transfer of the convicts from one jail to another, there is one document popularly known as 'Passbook', which reveals the wages earned by the under trial prisoners for the work done in jail, however, these Passbooks are not transferred immediately upon their transfer from one jail to another and therefore they are losing their wages, (xxii) It is also suggested by the committee members* that as in these jails very good printing work and computer usage are going on, Government as well as Semi-Government Institutions or other bodies should give, them the work, so that the convicts or under trial prisoners may be engaged in good creative activities and in lieu of their work, they would get sizable amount of wages which can be utilized by their family members who are out of Jail. In Jamshedpur Central Jail, there is no such reformatory training programme and also no vocational training is going on.

(xxiii) It is observed by the committee members that mobile jammers were not working and the mobiles of committee members were ringing during their visit in the Jail. Likewise Close Circuit Television (CC TV) Cameras which are usually installed to verify the movement, were not working properly. In the Central Jail, at Ranchi, out of sixteen CC TV Cameras only two were working. In Jamshedpur, out of 22 CCTV Cameras, only four were working.

(xxiv) There is also suggestion by these Committee Members that some Central Jails have space where small outlet can be constructed so that goods prepared and manufactured by these convicts or under-trial prisoners can be sold, (xxv) It is observed by the Committee Members that there are approximately 117 mentally ill prisoners in the Central Jails which have been mentioned separately in the reports for each and every Central Jails. They are also not getting proper treatment and they are not being provided adequate and bare necessary facilities. It is also observed by the Committee Members that in a Jail there is separate medical ward for this type of persons. The prisoners who are healthy are also staying in the Jail Hospital and actually those who are ill are in their respective wards. This situation could have been avoided by the Central Jail Superintendent. The Jail Doctors should be transferred frequently; There are several jail doctors who are in Jail for several years. This is a very alarming situation. (xxvi) It is observed by the committee members that there is need for the improvement of infrastructure in all the five Central Jails. They have also mentioned about the over-crowding in these central jails. This is the position of Central Jail, but there may be much more over-crowding in District Jails and Sub Jails. These jails are over-crowded and it has been observed by the Committee Members that unnecessarily high capacity has-been estimated by the Central Jail Superintendents and infact the jail capacity is much lesser. There is inflated figure about the capacity of the Central Jail.

(xxvii) It is observed by the Committee Members that in Central Jail, Palamau and Dumka there is no permanent Doctor appointed and it is also observed by the Members of the Committees that there are inadequate number of doctors looking after the Jail inmates. There is no proper medical equipment available in the Jails. (xxviii) There is suggestion of the Committee Members that there is dire need of female doctors in all the Central Jails with female nurses, compounders, etc. There is also paucity of adequate tablets and medicines.

(xxix) Proper sanitation facilities are also very much required in these Jails.

(xxx) Jail Adalats should have been frequently organised so that small offences may be finally decided / settled.

10. In view of these observations of the Committees and in view of the two orders passed by this Court on 04.03.2013 and 06.03.2013 and also looking to the limited scope of the Interlocutory Application No. 1105 of 2013 which has been filed for delay condonation, we hereby direct the Register General to this Court to place these two orders dated 04.03.2013 and 06.03.2013 as well as today's order along with the reports of these five Committees who have visited five Central Jails before the Hon'ble Chief Justice of this Court for taking decision to treat these reports and their suggestions as stated hereinabove as Public Interest Litigation. Looking to their reports larger public interest is involved because the jail inmates are deprived of natural rights, human rights, constitutional rights, fundamental rights and statutory rights and it is the duty of the State to maintain Jails properly and provide the inmates of the Jails adequate, facilities which are bare minimum requirement for human life. They are in jail because of the order passed by the Court which is also known as judicial custody, their family members would be suffering, if some jail inmate expires because of ill health. The persons who are out of jail are vitally concerned with the well being of the jail inmates and therefore, larger public interest is involved. Hence, we hereby direct the Registrar General of this Court to place the matter before the Hon'ble Chief Justice with aforesaid orders and reports of the five Committees.

11. We have heard counsel for both the sides. This Interlocutory Application has been preferred under Section 5 of the Limitation Act for condonation of delay of 3430 days.

12. Looking to the reasons in this Interlocutory Application especially stated in paragraph no. 9, we hereby condone the delay in preferring criminal appeal. The Interlocutory Application is allowed and disposed of.

13. Registry is directed to enlist the Criminal Appeal No. 1088 of 2012 on the Board of "Admission" on 23rd April, 2013. This appeal will be heard along with Criminal Appeal No. 1243 of 2003, which was preferred by another convict and co-accused of the same Sessions Trial.

(D.N. Patel, J.)

(Shree Chandrashekhar, J.)

❑❑❑

IN THE HIGH COURT OF JHARKHAND, RANCHI

Jinda Oraon Versus The State of Jharkhand

CORAM :
HON'BLE MR. JUSTICE D. N. PATEL
HON'BLE MR. JUSTICE P. P. BHATT

I.A. No.668 of 2014 IN Cr. Appeal (D.B.) No. 43 of 2014

Jinda Oraon ..... Appellant
Versus
The State of Jharkhand ..... Respondent

For the Appellant : Mr. Yogendra Prasad, Advocate

For the State : A.P.P.

03/Dated 24th February, 2014 per D.N. Patel, J.

1. This application has been preferred for condonation of delay of 3375 days in preferring the Criminal Appeal.

2. This Criminal Appeal has been preferred by the advocate of Jharkhand State Legal Services Authority (for the sake of brevity, hereinafter to be referred to as the 'JHALSA').

3. It appears that the Jharkhand High Court Legal Services Committee vide letter No.HCLSC/634/10 dated 26.7.2010, informed the advocate on the panel of JHALSA to prefer the appeal on behalf of the appellant, but, the appeal was preferred on 29.1.2014 and the reasons assigned to have been that there was nobody who can file the affidavit on behalf of the appellant.

4. It appears that there is a lethargic, callous and casual approach. We, therefore, direct the Secretary, Jharkhand High Court Legal Services Committee, that -

(a) to maintain proper Register with minimum columns like the name of the parties, the name of the Jail from where the application has been received, the date of the application received from the Jail, the date on which the matter is assigned to the advocate, who is on the panel of JHALSA;

(b) it is the duty of the Secretary, Jharkhand High Court Legal Services Committee to do the proper follow up that whether the advocate on the panel of the JHALSA has preferred an appeal or not;

(c) if the appeal is not preferred within the reasonable time of approximately two weeks, the Secretary, Jharkhand High Court Legal Services Committee shall find out the reasons for not to prefer an appeal and he will assist the Advocate on the panel of JHALSA so nicely and accurately that in any case the appeal shall be preferred within a further period of one week thereafter;

(d) if the appeal is not preferred even after this assistance, it will be assigned to another advocate on the panel of JHALSA;

(e) The Secretary, Jharkhand High Court Legal Services Committee shall keep vigilant eye upon the filing of the matter once it is assigned to the panel advocate of the JHALSA, be it a Criminal Appeal, Bail Application or Interlocutory Application, etc. Duty never comes to an end after assigning the matter to the panel advocate. Proper and adequate monitoring on the part of the Secretary, Jharkhand High Court Legal Services Committee ought to have been done.

(f) The Secretary, Jharkhand High Court Legal Services Committee shall convene a meeting at least quarterly with the advocates who are on the panel of JHALSA, who are taking longer time in preferring the criminal appeal, bail application or interlocutory application etc. in the Court. The periodic meeting will bring on surface the difficulties of the advocates on panel and those difficulties may be reduced in writing and may be brought to the knowledge of the Chairman of Jharkhand High Court Legal Services Committee and to the knowledge of Executive Chairman of JHALSA. In this case, a letter was written in the year 2010 and the Criminal Appeal was preferred on 29th January, 2014. It appears that after writing a letter to the panel advocate, no care has been taken.

(g) We, also, direct the Secretary, Jharkhand High Court Legal Services Committee to place on the website of JHALSA that which matter is assigned to which advocate on panel. This is necessary to make the system more transparent. This will be useful to Jail Authorities also for their record and to inform convict/under trial prisoner, in their jail about case number, name of Advocate. Convict or under trial prisoner can also contact, through jailor, the said lawyer if he/ she wants to give further instruction to the panel lawyer. On the website, the name of the advocate on panel, the name of the parties, the name of the Jail and the date on which the matter is assigned and the date on which the matter is filed, shall be reflected.

5. Looking to the reasons stated in this Interlocutory Application, the I.A. is allowed as there are reasonable reasons for condonation of delay of 3375 days.

6. The Registry of this Court is directed to enlist the Criminal Appeal on the board of admission on 3rd March, 2014.

7. The Registrar General of this Court is directed to send the copy of this order to (a) the Member Secretary, JHALSA and (b) the Chairman, Jharkhand High Court Legal Services Committee.

(D. N. Patel, J.)

(P. P. Bhatt, J.)

❑❑❑

Prepared by

Jharkhand State Legal Services Authority

NYAYA SADAN, Near A.G. Office, Doranda, Ranchi

Phone : 0651-2481520, 2482392, Fax : 0651-2482397

Email : jhalsaranchi@gmail.com, Website : www.jhalsa.org

This Handbook is also available on official website of JHALSA **"www.jhalsa.org"**