CHRI 2020

HANDBOOK OF
LANDMARK JUDGMENTS ON HUMAN RIGHTS AND POLICING IN INDIA

CHRI
Commonwealth Human Rights Initiative
working for the practical realisation of human rights in the countries of the Commonwealth

Commonwealth Human Rights Initiative

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CHRI's seeks to promote adherence to the Universal Declaration of Human Rights, the Commonwealth Harare Principles and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights.

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INTRODUCTION

The Constitution of India – the foundational law of India – binds all State institutions to uphold the Fundamental Rights contained in Part III, seen as the heart of the Constitution. This flows from the duty of the State to protect and promote human rights.

The role of the police in India is especially significant in this regard. The police are oath-bound to act strictly in accordance with the Constitution and the law. As the first agency of contact in the criminal justice system, the police have the duty to ensure that the fundamental rights to equality before the law, the gamut of rights on arrest and detention, and the freedom of speech, expression and peaceful assembly are guaranteed. Exigencies and realities of operational policing can sometimes conflict with human rights; and rights protection depends heavily on police having the instinct and knowledge to balance these conflicts.

The Supreme Court of India has over the years explained and expanded the scope of Fundamental Rights in the realm of criminal justice; and has pronounced landmark judgments that lay down the scope of those rights, limits on policing powers, directions for the police, and remedies for victims of rights abuses, all towards stronger compliance with human rights standards.

This handbook explains 26 landmark judgments of the Supreme Court that articulate the constitutional standard of Fundamental Rights of persons within the criminal justice system when they come in conflict with policing powers, and the specific laws, principles, and guidelines laid down by the Court. These cover a varied set of legal issues such as registration of criminal cases, arrest of persons, rights of arrested persons, bail, evidence gathering powers of the police, right to public protest etc. This also serves as an update of an earlier compilation of Supreme Court jurisprudence on human rights and policing published by CHRI[1] in 2005.

The aim behind this handbook is to distill the Court's jurisprudence through case summaries that clearly identify the prevailing legal positions, and also situate the precedents of each case within a wider legal context. It is designed to be an aid to police/law enforcement officers, lawyers, researchers, and others, to be able to have a comprehensive, accessible source to the Court's body of jurisprudence on policing and human rights, that lays out the correct procedures for discharging policing functions.

While the cases mentioned here do comprise the crucial jurisprudence on these issues, it is in no way meant to be a complete or exhaustive list of the jurisprudence of either the Supreme Court or the High Courts.

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[1]Commonwealth Human Rights Initiative, Report: Human Rights and Policing: Landmark Supreme Court Directives and National Human Rights Commission Guidelines, 2005: https://www.humanrightsinitiative.org/publications/hrc/humanrights_policing.pdf

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A. REGISTRATION OF FIRST INFORMATION REPORT (FIR)

LALITA KUMARI v GOVT. OF UTTAR PRADESH & ORS., AIR 2014 SC 187 (A Judgment of the Constitution Bench of the Supreme Court of India)

The duty of the police to mandatorily register an FIR for the commission of a cognizable offence

Brief Facts

The father of a kidnapped minor girl approached the Supreme Court over the failure of the police to initially register an First Information Report (FIR) and then after the FIR had been registered, to conduct a proper investigation and find her. The petition filed by the father sought directions from the Court to the police to apprehend the suspects and recover the girl. However, this failure of the police to register FIRs in this and several other cases was referred to a Constitutional Bench on the following issues.

Issues for consideration

1. Is it mandatory for the police to register a First Information Report (FIR) under Section 154 of the Code of Criminal Procedure, 1973[2], upon receiving any information relating to commission of a cognizable offence? Or do they have the power to conduct a 'preliminary inquiry' before registering the FIR, in order to test the credibility of such information?

   The Court noted that there were conflicting decisions on this issue, and some judgments had interpreted Section 154 as giving discretionary power to the police to conduct a "preliminary inquiry" before registering the FIR. This allowed the police to determine whether the complaint/first information was genuine, so as to prevent unnecessary harassment of the accused.

2. Whether the non-registration of the FIR immediately on receiving a complaint, creates scope for manipulation by the police that negatively affects the right of the victim/complainant to have their allegations investigated fairly?

3. Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is registered, then does it infringe the rights of an accused?

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[2] Section 154. Information in cognizable cases-
(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
...
(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.
(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-Section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an Officer-in-Charge of the police station in relation to that offence.

Observations by the Court

Registration of an FIR was the first step of the right of the victim of a crime to access justice. Non-registration of FIRs contributed to societal lawlessness. The use of the word "shall" in Section 154(1) implied that it was mandatory for the police to register an FIR if the information/complaint given to it disclosed a cognizable offence[3]. The police had no option/discretion to refuse to register an FIR, even if the information was not credible or reasonable.

The first information disclosing a cognizable offence had to be recorded in an FIR book (also called 'FIR register') and must bear a unique number for the police station it was registered in.

Addressing the concern that this mandatory requirement would be used to harass persons by registering false FIRs against them, the Court observed that if the police felt that the complaint/first information was not genuine, it could conduct a fair investigation, and file a final report to close the case.

However, the Court also created an exception to this rule of mandatory registration of FIRs for a small category of cases, where a 'preliminary inquiry' by the police was allowed before registration of the FIR. These fall in 5 categories mentioned in paragraph 6 below. However, the Court ruled that even in such cases, the preliminary inquiry could be conducted only to determine whether there was a cognizable offence or not, and had to be concluded within 7 days.

Directives of the Supreme Court

(1) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

(2) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

(3) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

(4) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

(5) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

(6) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/family disputes

b) Commercial offences

[3] Although defined narrowly under Section 2(c) of the Code of Criminal Procedure, a "cognizable offence" is a category of offence for which the police has the power to register an FIR, investigate or arrest a person without obtaining a warrant from a Magistrate. This is distinct from a non-cognizable offence, defined under Section 2(l), for which the police require a warrant from the Magistrate to do as above. All offences under the IPC or any other penal law are categorised as cognizable or non-cognizable by the legislature.

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

(7) The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

(8) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

(9) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

Developments in the Law

The important issue of territorial jurisdiction to register and investigate FIRs did not come up in Lalitha Kumari, although it is crucial to any discussion regarding registration of FIRs.

In Satvinder Kaur v. State (Govt. of NCT of Delhi)[4], the Supreme Court held that the police have a duty to register an FIR into a cognizable offence even if the offence had been committed inside the territorial jurisdiction of a different police station. In such a situation, the FIR should be forwarded to the correct police station having jurisdiction to investigate that offence, commonly referred to as a 'zero FIR'. It was also held that if an offence was committed in multiple jurisdictions, then the police of any of those jurisdictions could register an FIR and investigate the case. In 2015, the Ministry of Home Affairs also issued a national advisory for mandatory registration of FIRs for commission of cognizable offences and registration of zero FIRs for offences committed outside jurisdiction.[5]

However, in Navinchandra N. Majithia v. State of Maharashtra & Ors.[6], the Supreme Court warned against the misuse of the above position to harass persons by registering FIRs against them in remote places, unconnected to the offence.

In 2013, non-registration of FIRs by a public servant in cases of gender-based crimes against women was made a punishable offence, punishable upto 2 years imprisonment.[7]

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[4] AIR 1999 SC 3596

[4] Advisory dated 12.10.2015, as accessed on https://www.mha.gov.in/sites/default/files/AdvisoryFIR-290513.pdf

[5] AIR 2000 SC 2966

[6] Section 166A. Public Servant disobeying direction under Law
Whoever, being a public servant—
(a) …
(b) …fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509, shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.

SAKIRI VASU v STATE OF UTTAR PRADESH & OTHERS, AIR 2008 SC 907 (A Judgment of the Division Bench of the Supreme Court of India)

The power of the Magistrate to direct the registration of FIR by the police, and ensure a proper investigation.

Brief Facts

The father of a deceased Major in the Indian Army who had died under suspicious circumstances approached the Supreme Court. He contended that his son had been murdered, but the case was wrongly being treated as one of suicide by the local police. Thus, he was aggrieved and dissatisfied by the investigation into the death of his son, and prayed that the case be transferred to the CBI for investigation.

Issues for consideration

Did a victim/complainant who was aggrieved by poor or improper investigation being conducted by the police in their case, have any legal recourse to ensure a proper investigation?

Observations by the Court

Under Section 156(3) CrPC[8], a Magistrate had the power to direct the registration of an FIR on the asking of an aggrieved complainant/victim, to initiate the process of the law and safeguard their rights. Thus, if the police was illegitimately refusing to register an FIR, the complainant/victim could approach the Magistrate to direct the police to register it.

Yet, there was no provision in the CrPC which gave a Magistrate the power to direct the course of investigation. In fact, under law, investigation was solely the domain of the police, and the judiciary could not interfere in it. Thus, in the absence of such an explicit power under the CrPC, how could the Magistrate ensure a proper investigation?

To overcome this, the Supreme Court invoked the 'doctrine of implied power'. This doctrine stated that when a power is given to an authority to do something, it includes such incidental or implied powers which would ensure the proper doing of that thing. Therefore, applied to this situation, it would mean that since the Magistrate had the power to ensure the registration of FIR under Section 156(3), they also had the 'implied power' to ensure a proper investigation once that FIR was registered. Thus, using the doctrine of implied power, a Magistrate could ensure that a proper investigation is conducted into the grievances of the complainant/victim.

This could take the form of monitoring of the investigation by the Magistrate to ensure that the police was performing its duty and conducting a proper investigation. So in cases where the Magistrate felt that the police had not performed its duty of investigating the case at all, or had not performed it satisfactorily, s/he could issue a direction to the police to conduct the investigation properly, and could also monitor it.

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[8] Section 156. Police officer's power to investigate cognizable case.
(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

Thus, laying out the entire process to be adopted by an aggrieved complainant/victim in case of failure by the police to register an FIR, the Court stated that such person could first approach the Superintendent of Police under Section 154(3) CrPC[9] seeking registration of an FIR, by an application in writing. If the FIR was still not registered, the person could approach the Ilaqa/Area Magistrate in an application under Section 156(3) CrPC, for directions to the police to register the FIR. The Magistrate could also exercise its powers under Section 156(3) to "monitor" the investigation to ensure that it was being carried out properly by the police.

It was also noted that though the general rule was that a Magistrate could not interfere with the investigation being conducted by the police, this rule did not apply to cases where the investigation was not being conducted properly.

Thus, Sakiri Vasu walks a tightrope: providing a victim the right to seek a proper investigation by the police through Magisterial supervision, but without interfering with the police's domain over investigations, or colouring the outcome of the investigation with the opinion of the Magistrate which is not allowed under the law[10].

Directions of the Court

A Magistrate, in exercise of the power under Section 156(3) CrPC, can not only direct the police to register an FIR and investigate a case, but can also monitor or oversee the investigation and ensure that it is being conducted in a fair and proper manner.

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[9] Section 154. Information in cognizable cases-
(1) Every information relating to the commission of a cognizable offence, if given orally to an Officer-in-Charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
...
(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.
(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-Section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

[10] *Abhinandan Jha & Ors. v. Dinesh Mishra*, AIR 1968 SC 117

T.T. ANTONY v STATE OF KERALA, AIR 2001 SC 2637 (A Judgment of the Division Bench of the Supreme Court of India)

Only the earliest or the first information in regard to the commission of a cognizable offence should be registered as an FIR. There cannot be a second FIR or a fresh investigation based on every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences.

Brief Facts

In the year 1994, in the backdrop of a political conflict between a sitting Minister of the Government of Kerala, and members of Communist Party of India (Marxist), his former political party, two incidents of violence took place on the same day. In both incidents, the police fired at members of CPI(M) and its affiliated organisations, who had gathered to protest the visit of the Minister, killing 5 persons. Subsequently, two FIRs were registered by the police for the two incidents in the same police station i.e. Kuthuparamba, district Kannur, against known and unknown protestors. Public uproar followed, and a Commission of Inquiry was constituted into the incidents of police firing. The Commission of Inquiry concluded that the Minister, the Deputy Superintendent of Police, and the Deputy Collector were responsible for the firing by the police.

As a consequence, a third FIR for murder was registered at the same police station against the above three persons, in which several other police officials were also implicated later. They sought the quashing of this third FIR before the High Court of Kerala but failed. Thus, they approached the Supreme Court.

Issues for consideration

Though the case involved many legal issues, the Supreme Court framed the following issue regarding registration of a second FIR for the same incident.

Whether registration of a new case, which is in the nature of the second FIR under Section 154 of CrPC, is valid and can it form the basis of a fresh investigation?

Observations by the Court

The police had the duty to record the 'first information' received by it regarding a cognizable offence, and register an FIR. This set the criminal law into motion, leading to an investigation into the alleged offence on the basis of the powers of the police under Sections 156 and 157, CrPC.

However, there may be situations where more than one 'information' is given to the police in respect of the same incident, after an FIR has already been registered based on the very first information. In those situations, any subsequent information should not be recorded as a separate FIR, but should be considered statements received in the investigation of the first FIR itself. The registration of a second FIR for the same incident was against the scheme of the CrPC.

In a situation where during the investigation of an FIR, more offences were discovered by the police, they should add those offences in the first FIR itself, instead of registering another FIR. Similarly, if there was a change in the suspects/accused during the investigation, a new FIR should not be registered. Even after the completion of investigation and filing of a charge sheet, if the police gather further information or material, a new FIR need not be registered, and instead further investigation can be conducted in the first FIR, normally with the permission of the court, under Section 173(8) of the CrPC[11].

Thus, only the earliest information about the commission of a cognizable offence has to be recorded as the 'first information' and a second FIR cannot be registered on receipt of a subsequent information. Accordingly, it quashed the FIR for murder registered against the three persons.

It should be clarified that this did not mean that the three persons were exonerated by the Court, but only that their involvement in the incident, including the allegations of murder, had to be investigated as part of the earlier FIR, instead of registering a new or subsequent FIR into the same incident.

Developments in the Law

Although TT Antony is the landmark and authoritative judgment on the issue of a second FIR, the legal principle in TT Antony has evolved over time. For instance, if the incident in the second FIR was part of the 'same transaction' as the incident in the first FIR, a second FIR was not sustainable [Babubhai v State of Gujarat[12]]. Another instance was when the second FIR was a consequence/ fall-out/outcome of the incident that was the subject-matter of the first FIR [C. Muniappan v State of Tamil Nadu[13]].

However, there are some situations where the TT Antony principle does not apply, and two FIRs could be registered. For instance, when the two FIRs involved different but overlapping offences [Ram Lal Narang v State (Delhi Administration)[14]].

Another situation where a second FIR is permissible was where there were cross-complaints filed by opposite parties to an incident. In Upkar Singh v Ved Prakash[15], the Supreme Court held that TT Antony only excluded a second FIR based on a subsequent complaint by the same or

[11] Section 173. Report of police officer on completion of investigation.
(1) Every investigation under this Chapter shall be completed without unnecessary delay.
(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-
(a) the names of the parties;
(b) the nature of the information;
(c) the names of the persons who appear to be acquainted with the circumstances of the case;
(d) whether any offence appears to have been committed and, if so, by whom;
(e) whether the accused has been arrested;
(f) whether he has been released on his bond and, if so, weather with or without sureties;
(g) whether he has been forwarded in custody under section 170.
...
(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the Officer-in-Charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).

[12] (2010) 12 SCC 254

[13] AIR 2010 SC 3718

[14] AIR 1979 SC 1791

[15] AIR 2004 SC 4320

another complainant against the same accused, but did not exclude the registration of an FIR as a 'counter-case'[16] by the accused in the first FIR (or on their behalf), alleging a different version of the same incident. A third situation was where the investigation of an FIR led to the discovery of a new crime of greater scope [Nirmal Singh Kahlon v State of Punjab[17]].

Thus, although the principle laid down in TT Antony still holds ground - that two FIRs cannot be registered for the same incident - there were some situations where this principle did not apply, and a second FIR can be registered.

[16] Also referred to as 'cross-case'

[17] AIR 2009 SC 984

YOUTH BAR ASSOCIATION OF INDIA v UNION OF INDIA, AIR 2016 SC 4136 (A judgment of the Division Bench of the Supreme Court of India)

Every accused in a criminal case has the right to the copy of the FIR registered against them, whether from the police or the Court.

Brief Facts

In this case, the Supreme Court was dealing with a petition to direct police agencies to upload all FIRs registered in India on the official website of the police, as early as possible, preferably within 24 hours of registration.

Observations by the Court

The Court recognized that the right to personal liberty under Article 21 of the Constitution of India of a person accused in a criminal case, could not be realised unless they had access to the FIR registered against them, and they were able to take steps vital to protecting their rights.

Thus, uploading of all FIRs was required to be made mandatory, except in some cases where the offence was of a sensitive nature, such as sexual offences, sexual offences against minors, insurgency, or terrorism. In such cases, the accused could approach the Superintendent/ Commissioner of Police for the FIR, who had to constitute a three-member committee to decide whether it could be provided to the accused or not. In case of denial, the accused could approach the court for a copy of the FIR.

Directives by the Court

The Supreme Court not only made the online uploading of FIRs mandatory (except in certain cases), but also gave an accused the right to obtain a copy of the FIR from the police or the Court.

(1) An accused is entitled to get a copy of the FIR at an earlier stage than as prescribed under Section 207 of the Code of Criminal Procedure[18].

(2) Accused with reasons to suspect that they have been roped in a criminal case and have been named as an accused in an FIR, can submit an application through their representative/ agent/parokar for grant of a certified copy of the FIR, to the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such an application being made, the copy shall be supplied within twenty-four hours.

(3) Once the FIR is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, it shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inherent under Section 207 of the Code of Criminal Procedure.

(4) The copies of the FIRs should be uploaded on the police website, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category,

[18] The stage of Section 207 CrPC is known as the stage of 'supply of documents'. At this stage, an accused is supplied with the entire copy of the charge sheet, documents collected by the police during the investigation, including the FIR, and the statements of witnesses recorded during investigation. So it is the stage where the accused fully gets to know what the allegations and supporting evidence against them are.

offences under POCSO Act and such other offences. If there is no such website, it should be uploaded on the official website of the State Government, within twenty-four hours of the registration of the FIR so that the accused or any person connected with the same can download it, and file appropriate application before the Court as per law for redressal of their grievances. It may be clarified here that in case there are connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours only due to connectivity problems.

(5) The decision not to upload the copy of the FIR on the website shall be taken by an officer not below the rank of Deputy Superintendent of Police, or any person holding an equivalent post. In the case of states where the District Magistrate has a role, they may also assume the said authority. A decision taken by the concerned police officer or the District Magistrate shall be duly communicated to the concerned jurisdictional Magistrate.

(6) The word 'sensitive' apart from the other aspects which may be thought of as being sensitive by the competent authority as stated herein before would also include the concept of privacy, as per the nature of the FIR. The examples given with regard to the sensitive cases are absolutely illustrative and are not exhaustive.

(7) If an FIR is not uploaded, needless to say, it shall not ensure per se a ground to obtain the benefit of pre-arrest/anticipatory under Section 438 of the Code of Criminal Procedure.

(8) In case a copy of the FIR is not provided on the ground of the sensitive nature of the case, a person grieved by the said action, after disclosing their identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where the Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

(9) The competent authority referred to herein above shall constitute the committee, as directed herein-above, within eight weeks from the date of the judgment.

(10) In cases wherein decisions have been taken not to give copies of the FIR regard being had to the sensitive nature of the case, it will be open to the accused/authorized representative/ parokar to file an application for grant of certified copy before the Court to which the FIR has been sent and the same shall be provided in quite promptitude by the concerned court not beyond three days of the submission of the application.

(11) The directions for uploading of FIR on the website of all the States shall be given effect from 15th November, 2016.

Right of informant/complainant/victim to copy of FIR

While Youth Bar Association rules on the issue of supply of the FIR to accused, the complainant/victim also has a statutory right to a copy of the FIR, free of cost, under Section 154(2) CrPC[19]. Judgements of the Supreme Court such as Bhagwant Singh v. Commissioner of Police[20] have strongly reiterated that it is the right of every complainant to be provided a copy of the FIR, free of cost.

[19] Section 154. Information in cognizable cases.
(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.
(3) ...

[20] AIR 1985 SC 1245

B. ARREST OF PERSONS

JOGINDER KUMAR v STATE OF UP, AIR 1994 SC 1349
(A Judgment of the Full Bench of the Supreme Court of India)

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so."

Brief Facts

A young lawyer was called to the police station by the Senior Superintendent of Police, Ghaziabad, along with his brothers, to make enquiries from them in a criminal case. After the enquiry, his brothers were let go, but the Petitioner was illegally detained by the police. The next day, his family was informed that instead of being produced before a Magistrate, he had been taken to another police station. Later he was moved from that police station to an undisclosed location. His family filed a writ of habeas corpus[21] in the Supreme Court on his behalf, seeking his production.

During the hearing of the writ petition, the Petitioner was produced by the police before the Supreme Court, and the police claimed that he had never been detained, but had merely been cooperating with the police in the investigation of a case.

Issues for consideration

How does a court strike a balance between the expanding horizon of human rights, and the need to arrest persons at a time when crime rates are expanding?

Observations by the Court

The Court noted that the law on arrest in India tried to balance the rights, liberties and privileges of the accused, a single individual, with those of the society, a collection of individuals. However, as stated in the Third Report of the National Police Commission, the power to arrest was one of the chief sources of corruption in India and nearly 60 percent of the arrests made in India were either unnecessary or unjustified. Such arrests or detentions caused incalculable harm to the reputation and self-esteem of a person and violated their rights under Article 21 of the Constitution of India.

Thus, the Court held that although the police had the unquestionable legal powers to arrest a person in a cognizable criminal case, every arrest had to be justified. Arrests could not be made in a routine manner, merely on an allegation or a suspicion of their involvement in a crime. Every arrest should be made after the police officer reached a reasonable satisfaction after some investigation that the complaint was genuine and bona fide, the accused was complicit in the crime, and the arrest was necessary and justified.

Developments in the Law

The power of arrest is discretionary, and had to be done with caution and not mechanically. It was not necessary for the police to arrest the accused in every case, as held in M.C. Abraham v State of Maharashtra[22]. Most importantly, even a court, including a High Court, could not direct the police to arrest an accused as it was unjustified interference in the investigation.

[21] A writ of habeas corpus is used to bring a detainee, arrestee, or prisoner before the court to determine if the person's detention, arrest, or imprisonment is lawful.

[22] (2003) 2 SCC 649

In Arnesh Kumar v State of Bihar[23], dealing the power of arrest of the police in cases with offences punishable upto seven years, the Supreme Court noted that the amended Section 41(1)(b) CrPC[24] required the police officer to arrest only after satisfaction of certain conditions as stipulated in the provision. The Court held that the law required the police officer to decide whether arrest was really required in the case and the purpose it would achieve. Thus, every arrest had to be based on justifiable reasons.

[23] AIR 2014 SC 2756

[24] Section 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 –

(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) the police officer has reason to believe on the basis of such complaint information of suspicion that such person has committed the said offence; or

(ii) the police officer is satisfied that such arrest is necessary –

(a) to prevent such person from committing any further offence;

(b) or for proper investigation of the offence; or

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

(d) 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.

D.K. BASU v STATE OF WEST BENGAL, AIR 1997 SC 610 (A Judgment of the Division Bench of the Supreme Court of India)

"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'."

Brief Facts

The Petitioner, the Executive Chairman of Legal Aid Services, West Bengal, addressed a letter to the Chief Justice of India drawing his attention to certain news items published in the newspapers - *the Telegraph, the Statesman and the Indian Express* - regarding deaths in police lock-ups and in custody. He urged for an in-depth examination of this issue, particularly the need to create mechanisms for accountability of police officials trying to hush up custodial violence, and frame guidelines to award compensation to victims/family members of victims of atrocities and custodial deaths. The Supreme Court treated this letter as a writ petition, regarding incidents of custodial violence not just in the state of West Bengal, but all over the country.

Issues for consideration

The petition raised fundamental issues concerning the use and abuse of police powers, and of developing mechanisms to prevent custodial torture and abuse of powers by police officials and other law enforcement officers.

It also considered whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India.

Observations by the Court

Under the Constitution of India, arrested and imprisoned persons were guaranteed various crucial Fundamental Rights. Under Article 20(3), they had the right against self-incrimination during police interrogations. Under Article 21, a guarantee against torture by the state, and under Article 22, the multiple rights against unlawful detention beyond 24 hours without production before a Magistrate, against arrest or detention without being informed the grounds of arrest, and representation by a legal practitioner of choice.

After asserting the above protections, the Court noted provisions in the Code of Criminal Procedure, aimed at providing procedural safeguards to arrestees by regulating the power of the police during and after arrest. For instance, the police's power to arrest (Section 41), the method and manner of arrest (Section 46), the extent of restraint by the police permissible against the arrestee (Section 49), and others. Thus, powers of arrest of the police were not limitless, but governed by provisions of the Constitution and the CrPC.

However, there was growth in incidents of torture and deaths in judicial custody despite these rights and procedural safeguards. This rise in the number of custodial violence cases had been noted in the Third Report of the National Police Commission. The Court expressed strong condemnation of custodial violence used by policing agencies, as a violation of basic human rights of persons, and its negative impact on the Rule of Law and the criminal justice system.

Touching upon the issue of the difficulty in prosecuting police officials for custodial crimes, the Court noted that in cases of custodial death or torture especially within police stations, the police failed to follow even basic processes of criminal procedure. Rather than registering an FIR, they acted to conceal or destroy evidence, and manipulate the records of the police station to hide culpability

of police officials. To overcome this, the Court recommended lowering the strict adherence to the standard of "proof beyond reasonable doubt" in cases of prosecution of police officials for custodial crimes, by lowering the bar of proving the offence in custodial violence prosecutions. It also reiterated the recommendation of the 113th Report of the Law Commission of India to insert Section 114B in the Indian Evidence Act to include a presumption that if a person suffered an injury while being in police custody, it was caused by the police official. This would place the burden on the police to show how the person suffered the injury, if not at their hands.[25]

A lot of emphasis was also placed on the broader goal of introducing mechanisms for making arrests more transparent and the police more accountable for violations of rights. The Court even suggested introducing a structure of appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention.

Lastly, it issued a number of requirements/guidelines to be followed in all cases of arrests and detentions as preventive measures, through which the Court sought to fill up the legislative gap in this respect.

Directives by the Supreme Court

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

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may 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 center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

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

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

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

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

[25] No such amendment has been made by the legislature in the Indian Evidence Act.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State 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 illaqa Magistrate for his record.

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

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

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

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.

Developments in the Law

Even before DK Basu, in Sheela Barse v State of Maharashtra[26], the Supreme Court had passed very specific directions regarding the rights of female arrestees - keeping female suspects in separate lock ups from men within the police station, guarded by female Constables, and interrogated only in the presence of female police officials. It also passed crucial general directions for arrestees, that were reiterated and cemented in DK Basu.

DK Basu has become the most consequential judgment on Articles 21 and 22 rights of arrestees. Its critical influence was reinforced by the multiple amendments made in the CrPC incorporating many of the directives/guidelines/requirements issued by the Court. For instance requirements 1

[26] AIR 1983 SC 378

to 3, 5, and 6 regarding the procedure for arrest were partially incorporated in Sections 41B and 50A that came into effect in 2010. Similarly, the directive for medical examination of the arrested person (8) was incorporated into the amended Section 54, the right to consult a lawyer of choice (10) in Section 41D, and the setting up of control rooms (11) in Section 41C.

The case has continued to run since then, and the issues before the Court have also evolved over time. For instance, in 2015, the Court directed State Governments in Arunachal Pradesh, Mizoram, Meghalaya, Tripura, Nagaland, and Delhi, to set up State Human Rights Commissions under the Protection of Human Rights Act, 1993. It held that the lack of state commissions, especially in the north-eastern states which were situated far away from the seat of the National Human Rights Commission in Delhi, effectively meant a denial of access to this redressal mechanism for violation of human rights, and so a denial of the right to access justice itself. The Court also directed state governments to consider setting up human rights courts, for trying offences arising out of violation of human rights.

In 2020, the Amicus Curiae in this case moved the Supreme Court for revival of the DK Basu case in light of incidents of custodial deaths in 2020 of a father-son duo in Tamil Nadu, and the alleged encounter death of a gangster in Uttar Pradesh.

In Paramvir Singh Saini v Baljit Singh & Ors[27], as a measure to curb custodial violence in police stations, the Supreme Court directed all State/UT governments to install CCTV cameras and provide all supporting facilities to cover every part of every police station in India. The Central Government has to install CCTV cameras in the interrogation and holding rooms of investigating agencies under its control such as the Criminal Bureau of Investigation and the National Investigation Agency. This CCTV camera footage has to be preserved for at least six months, and made available to victims of custodial violence or to Human Rights Commissions if complaints of human rights violations are made against the police.

[27] SLP (Criminal) No. 3543 of 2020, order dated 02.12.2020

KHATRI & ORS. V STATE OF BIHAR & ORS., (1981) 1 SCC 627 (A Judgment of the Division Bench of the Supreme Court of India)

"The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigenous and whatever is necessary for this purpose has to be done by the State."

Brief Facts

In 1980, in an infamous incident of brutal custodial torture and violence against undertrials, jail officials blinded several men lodged at Bhagalpur Central Jail by pouring acid into their eyes. This has since been known as the 'Bhagalpur blindings incident'.

Afterwards, when those undertrials were produced before Judicial Magistrates for remand proceedings for the first time after their blinding, most were not represented by any lawyer. Even the Magistrates did not offer them any legal representation at State cost, supposedly for the reason that they had not asked for it. Due to this lack of legal representation, most of them continued to languish in jail despite being subjected to custodial torture and violence.

Issues for consideration

Ensuring the right to free legal representation for the poor and indigent at state expense was one of the principal issues before the Court in this case.

Observations by the Court

The right to free legal services was an essential ingredient of 'reasonable, just and fair' procedure (in a reference to Maneka Gandhi v Union of India[28]) for the person accused of an offence, and was implicit in the Article 21 right to life and liberty. Thus, right to legal representation was a Fundamental Right under the Constitution of India. In furtherance, the State has a constitutional mandate to provide a lawyer to an accused who was unable to afford one on their own. Yet, most States in the country had not ensured free legal services for accused persons. The argument of 'financial constraints' raised by the state as a reason to deny free legal representation was also rejected.

Another important question that the Court dealt with was: when does this right to free legal representation arise? It was held that such right begins from the moment of the first production of the arrestee before the Magistrate, since this was the first opportunity for them to exercise their right to seek bail, or resist their remand at the hands of the police.

It also held that judges were under an obligation to inform the accused about their right to obtain free legal services at state cost, if they could not afford it on their own. It noted the failure of the Magistrates in this regard when the blinded undertrials were produced before them.

Developments in the Law

In Madhav Hayawadanrao Hoskot v State of Maharashtra[29] free legal aid to an accused was held to be an inalienable right of fair procedure, and was a fundamental constitutional directive of the state under Article 39A of the Constitution of India[30]. Even the lawyers providing this legal aid

[28] AIR 1978 SC 597

[29] AIR 1978 SC 1548

[30] Article 39A. 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

themselves have to be given reasonable remuneration for their work. Free legal representation is available to an accused throughout the life of the criminal proceedings against them, whether during trial or in appeal. In Sheela Barse v State of Maharashtra[31], legal assistance to poor and indigent accused, whether undertrials or convicts, was held to be a constitutional mandate under not just Articles 21 and 39A, but also of the Article 14 right to equality.

In Mohammed Ajmal Mohammad Amir Kasab & Ors. v State of Maharashtra & Ors.[32], it was held that it is the duty of the Magistrate to inform the accused that they had a right to consult and be defended by a legal practitioner, and if they did not have a lawyer, it would be provided to them at state expense.

Thus, the right to consult and be defended by a lawyer is a fundamental right under Article 22(1) of the Constitution[33] and the law on this issue is undisputed. Yet, there are other related aspects of when and how that right is to be exercised in reality, that have continued to evolve over time.

When does the right to access legal representation first arise? Different judgments have held differently. Khatri itself held that this right arose at the time of first production and this view has later been reinforced by Mohammed Ajmal Mohammad Amir Kasab. Sheela Barse advanced this to the time of arrest itself (which could be upto 24 hours before the first production). DK Basu v State of West Bengal[34] held that arrestees should be permitted to meet their lawyer during interrogation, which could be anytime after arrest. However, even before all these judgments, Nandini Satpathy v PL Dani[35] applied this right even before arrest, at the time of questioning itself.[36]

How is this right to be exercised, especially during questioning/interrogations? This is the most contentious question. In Nandini Satpathy, the Supreme Court drew inspiration from the right to access to a lawyer during interrogations as mandated by the United States Supreme Court in Miranda v Arizona[37]. It held that in protection of the Article 20(3) right against self-incrimination, the access to a lawyer during interrogation is essential, and the lawyer should be allowed to be present at the time of their examination. This was not only to prevent possible right violations if Investigating Officers posed self-incriminating questions contrary to the Article 20(3) protection; but also to intercept any intimidation or any other tactic by the police to obtain incriminating statements. However, the lawyer could not answer or supply answers to the questioned person or otherwise interfere with the questioning itself. But Mohammed Ajmal Mohammad Amir Kasab disagreed with Nandini Satpathy and held that this right is not to be construed as permitting a lawyer to be present during interrogations. DK Basu has taken a middle path - that an arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

A very crucial judgment of the Bombay High Court in Cecilia Fernandes v State[38] underlined the importance of privacy of consultation of an arrestee with their lawyer. Thus, it held that an accused in police custody had the right to consult their advocate in private, out of earshot of the police.

other disabilities.

[31] AIR 1983 SC 378

[32] AIR 212 SC 3565

[33] Article 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

[34] AIR 1997 SC 610

[35] AIR 1978 SC 1025

[36] Although unlike the other judgments, *Nandini Satpathy* was a case of access to a private lawyer, and not of providing free legal aid/representation by the state.

[37] 384 U.S. 436 (1966)

[38] Criminal Misc. Application No. 9 of 2005, decided on 06.04.2005.

The police could not insist on knowing the instructions given by the accused to their advocate in confidence.

The right to legal representation applies not just during interrogations or court proceedings, but also to accused in jail. For such an accused, consultation with their lawyer is by booking legal interviews through a procedure under the prison rules of the state, and this procedure had to be reasonable, just, and fair[39] as held in Francis Coralie Mullin v Administrator, Union Territory of Delhi[40]. Any impractical, inconvenient or unreasonable procedures to book legal interviews with prisoners would obstruct and thus violate Articles 14 and 21, and the right to legal representation.

[39] Reasonable, just and fair is the constitutional test of all procedure under the law, as laid down in *Maneka Gandhi v Union of India*, AIR 1978 SC 597

[40] AIR 1981 SC 746

PREM SHANKAR SHUKLA v DELHI ADMINISTRATION, AIR 1980 SC 1535
(A Judgment of the Full Bench of the Supreme Court of India)

"Zoological culture cannot be compatible with reverence for life, even of a terrible criminal."

Brief Facts

The Petitioner, a prisoner lodged at Tihar Jail, Delhi, wrote a letter to a judge of the Supreme Court complaining that he and other prisoners were being forcibly handcuffed by the jail authorities while being taken to and from courts. This was despite their protests about the torture and humiliation implicit in handcuffing. This also violated the directions of the Supreme Court in Sunil Batra v. Delhi Administration & Ors.[41], where the Court had ruled against the indiscriminate use of handcuffs when prisoners were being transported to and from courts, but for exceptional cases, where it was unavoidable due to a tendency for violence or attempted escape.

Issues for consideration

Balancing the need to deter the escape of a prisoner with the need to preserve their dignity, the Court considered the following issues:

Can the custodian fetter the person of the prisoner, while in transit, with irons, maybe handcuffs or chains or bar fetters? When does such traumatic treatment break into the inviolable zone of guaranteed rights? When does disciplinary measure end and draconic torture begin?

What are the constitutional parameters, viable guidelines and practical strategies which will permit the peaceful co-existence of custodial conditions and basic dignity?

Thus, in this case, the Court was investigating deeper issues of rights of prisoners against custodial cruelty and infliction of indignity within the human rights parameters of Fundamental Rights.

Observations by the Court

The Court started by recognising the absence of any clear 'detention jurisprudence' in India, the pragmatic consideration of preventing escape attempts, and the need to respect the dignity of the prisoner when it came to handcuffing.

Touching upon international law, in Article 5 of the Universal Declaration of Human Rights, 1948[42], and Article 10 of the International Covenant on Civil and Political Rights, 1966[43], there was a recognition that persons did not lose their right to treatment with dignity and humanity merely due to their prisoner status.

The Court also referred to Maneka Gandhi v Union of India[44] and its expansive interpretation that even procedural rights of persons had to be "fair, just and reasonable" and satisfy the rigour of Articles 14, 19 and 21 of the Constitution of India, as held in Sunil Batra. Thus, applied to prisoners, Article 14 prevented their arbitrary, discriminatory and cruel treatment, Article 19 prescribed restrictions on free movement unless in the interests of the general public, and Article 21 prescribed fair procedure and forbade barbaric and punitive treatment.

Applying these principles to the issue of handcuffing, the Court held that handcuffing was prima facie inhuman and unreasonable, was overly harsh and punitive, and appeared to be imposed

[41] AIR 1980 SC 1579

[42] *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

[43] *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

[44] AIR 1978 SC 597

arbitrarily by the police and prisons. In the absence of a fair procedure for handcuffing, and without objective monitoring of its use, handcuffing would violate the fundamental rights of prisoners. Preventing the escape of a prisoner was certainly in the public interest, but it could not be done in a way that caused mental or physical torture to the prisoner.

Thus, the Court held that handcuffs or other fetters shall not ordinarily be forced on an undertrial prisoner. It was implicit in Articles 14 and 19 that when there was no compulsive need to fetter a person's limbs, doing so was arbitrary and thus violative of Article 14, and violated the freedom of movement under Article 19. Handcuffing should only be used in cases where there was a well-grounded basis that the prisoner might attempt to escape, and there was no other reasonable way of preventing it. Alternative methods of preventing escape should also be developed to reduce reliance on handcuffing, such as having a few more police guards to accompany the prisoner.

The Court also ruled that the practice of deciding which prisoners to handcuff on the basis of their economic or social status, as laid down in the Punjab Police Rules[45], was illegal. Socio-economic class was not a measure of a person's likelihood of escape. Such a system of classification was elitist. Nor was the seriousness of the offence a person was accused of as a determining factor, since they may not be of a violent character or attempt to escape. Only tangible testimony, documentary or otherwise, be a vital ground for handcuffing or fettering, and even this could be avoided by increasing the number of accompanying prison police personnel.

For extreme cases where handcuffs absolutely had to be put on the prisoner, the Court held that the escorting authority had to contemporaneously record the reasons for doing so, otherwise, such procedure would be unfair and bad in law, under Article 21. It also cautioned against the recording of reasons to be a mechanical and mindless process. The escorting officer must show the reasons for handcuffing to the Presiding Judge and get their judicial approval, and in the absence of such approval, no escorting authority could handcuff the person.

Developments in the Law

Even in the years following Prem Shankar Shukla, cases continued to emerge about the indiscriminate use of handcuffs against prisoners in violation of the Supreme Court's directions. In such cases, the Supreme Court responded by gradually withdrawing the power from police and jail authorities to decide to handcuff a prisoner 'handcuffs', and vesting it in courts. For instance, in Sunil Gupta & Ors. v State Of Madhya Pradesh & Ors.[46], the Court held that a person remanded to custody by a court was in judicial custody, and therefore, the taking of such person to and from court was only under the judicial orders of the court. The final power of approval whether the reasons for handcuffing were justified or not was only with the court.

In Citizens of Democracy v State of Assam & Ors.[47], the Supreme Court went a step further. It clarified that the law and directions in the Sunil Batra and Prem Shankar Shukla judgments were binding on all authorities in India and any violation would attract the penal provisions of the Contempt of Courts Act as well as any other penal law applicable. It also withdrew the power of police or jail authorities to unilaterally impose handcuffing upon prisoners without obtaining permission from the Judge in the given case of the prisoner. Thus, a handcuff could only be inflicted on an undertrial prisoner after obtaining permission from the Judge.

[45] The Punjab Police Rules also apply to the Delhi Police.

[46] (1990) 3 SCC 119

[47] (1995) 3 SCC 743

C. BAIL AND BONDS

GURBAKSH SINGH SIBBIA & ORS. v STATE OF PUNJAB, AIR 1980 SC 1632
(A Judgment of the Constitution Bench of the Supreme Court of India)

"When the even flow of life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law can then be perverted for achieving extraneous ends… That can even take the form of the parading of a respectable person in handcuffs, apparently on way to a court of justice. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973."

Brief Facts

The Petitioner was the Minister of Irrigation and Power in the Government of Punjab and was an accused in a case of political corruption. He filed an application in the High Court of Punjab and Haryana under Section 438 of the Code of Criminal Procedure, 1973,[48] seeking his release on bail in case of his arrest in the case.

The High Court rejected his application, stating several reasons, the principal one being that the power to grant 'pre-arrest' bail was an extraordinary discretionary power and must only be exercised in exceptional cases. It held that the Petitioner was accused of a serious economic offence involving high level corruption and thus, this discretionary power must not be exercised to his benefit. The High Court also added other principles regulating and limiting the scope of power of the court under Section 438, which were not part of the provision.

The Petitioner approached the Supreme Court, and argued that since the provision did not itself contain any limitations on the use of the power of Section 438 by the court to grant 'pre-arrest bail', the High Court was not right in introducing such limitations. Even more so since the provision was created to protect personal liberty under Article 21 of the Constitution of India.

Issues for consideration

The provision for pre-arrest or 'anticipatory bail' in the CrPC was necessary to protect the personal liberty of persons, yet it had an impact on the investigative powers of the police. How were these two competing interests supposed to be balanced while exercising this power under Section 438? And were there any limitations in the power of the court under Section 438?

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[48] Section 438. Direction for grant of bail to person apprehending arrest.
(1) When any person has reason to believe that he may be arrested on an 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; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.
(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 think 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, be 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).

Observations by the Court

The old Code of Criminal Procedure of 1898, did not have any provision corresponding to Section 438 for pre-arrest/anticipatory bail. This was introduced in the new Code of Criminal Procedure when it was enacted in 1973, incorporating this suggestion from the 41st Report of the Law Commission of India[49].

Under the Section 438 so added, a person could apply for bail to the High Court or the Court of Session in anticipation of their arrest, and hence the name 'anticipatory bail' was commonly used to refer to it. Normally, 'bail' was granted after a person had been arrested, and so 'anticipatory bail' was basically a direction to the police to immediately release the person on bail in a case if they were arrested. So while 'bail' was granted after arrest, 'anticipatory bail' was granted before arrest, to come into effect the moment the arrest took place in the future, to prevent the person from going into the custody of the police or to the jail.

The purpose behind having this provision was to protect from arrest those persons targeted by the police for oblique purposes or motives, such as political antagonism or personal rivalry, even though they were innocent. Since the arrest restricted their liberty, and even resulted in humiliations like being paraded in handcuffs on their way to court, it was important to have a provision such as 'anticipatory bail' to prevent these situations.

Thus, on the question of whether the wide power to grant 'anticipatory bail' should be restricted or limited, the Court held that the legislature had added Section 438 in the new CrPC giving broad and unrestricted power to the court to grant anticipatory bail. Such a broadly worded provision should not generally be limited or constrained through judicial interpretation. This applied even more so to a provision like Section 438, which extended the principle of presumption of innocence by protecting persons from unwarranted arrests. Another reason for this conclusion was that in the CrPC, the power of courts to grant post-arrest bail[50] had many limitations and qualifications, but pre-arrest anticipatory bail did not have any. Instead, wide discretion had been given to the court to grant or deny anticipatory bail "if it thinks fit". For instance, bail should normally not be given in cases punishable by imprisonment for life or death, but there was no such qualification for anticipatory bail. The only condition that the person seeking anticipatory bail had to meet was they had to show there was "reason to believe" that they may be arrested for a non-bailable offence, to show that the expectation of arrest was based on a reason and not merely an unfounded fear.

The next logical question that came up before the Court was: How was this wide, discretionary power to be exercised by judges? It held that no formula can be devised to regulate the use of the power to grant anticipatory bail. That would be against the very spirit of the provision. The power had to be used by the court on a case by case basis, depending on the specific facts of every case.

For instance, in cases where the allegations against a person were rooted in ulterior motives, whether to injure or humiliate that person by having them arrested, anticipatory bail should be granted. But if the person was one who, if they were given anticipatory bail, would flee from justice, or would not appear before the court when required, or influence witnesses, anticipatory bail should not be granted. Another consideration to deny anticipatory bail would be if it was in the larger public or state interest.

The Court did warn against passing a "blanket" order of anticipatory bail that the person cannot be arrested for any case, because it could create an immunity for a person to carry out illegal activities. So an anticipatory bail should be specific to the offences/case for which it is effective.

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[49] 41st Report of the Law Commission of India (The Code of Criminal Procedure, 1898) as accessed on https://lawcommissionofindia.nic.in/1-50/Report41.pdf

[50] Under Section 437 and 439 of the Code of Criminal Procedure, 1973.

Thus, it was up to the High Court or Court of Session to decide how the discretion to grant anticipatory bail should be exercised, as long as it is done objectively and by following established principles. If any court made an error of judgment and wrongly granted anticipatory bail, it could always be corrected by a superior court.

In the end, the Court granted anticipatory bail to the Petitioner.

Directives by the Court

(1) Section 438(1), CrPC, lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that they have "reason to believe" that they may be arrested for a non-bailable offence. This belief must be founded on reasonable grounds. Mere 'fear' is not 'belief. The grounds on which the belief of the applicant is based that they may be arrested for a non-bailable offence, must be capable of being examined by the court objectively. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

(2) If an application for anticipatory bail is made to the High Court or the Court of Session, it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the CrPC, as and when an occasion arises.

(3) The filing of an FIR is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

(4) Anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.

(5) Section 438, being pre-arrest bail, cannot be invoked after the arrest of the accused. After arrest, the accused must seek their remedy under Section 437 or Section 439 of the CrPC.

Developments in the Law

Although the dismissal of the anticipatory bail means that the person does not have immunity from arrest, it does not necessarily imply that they must be arrested immediately, as held in MC Abraham & Anr. v State of Maharashtra[51]. The Supreme Court held that even while dismissing anticipatory bail applications, a court cannot direct the police to arrest the applicants. Arrest of a person had to be based on legitimate grounds under the law, and could not be made on the direction of the court.

Before granting or rejecting anticipatory bail, the court could also grant an interim bail, for a short duration. In Siddharam Satlingappa Mhetre v State of Maharashtra[52], the Supreme Court held that when an accused files for anticipatory bail before it, if the court is inclined to grant it, then an interim bail can be granted initially and notice can be issued to the public prosecutor. After hearing the public prosecutor, the court can either reject the application, or confirm the interim bail while imposing conditions.

[51] (2003) 2 SCC 649

[52] AIR 2011 SC 312

In Sushila Aggarwal v State (NCT of Delhi)[53], the Constitution Bench of the Supreme Court held that anticipatory bails should ordinarily not be limited to a fixed period of time, and the life of anticipatory bail can continue till the end of the trial. However, for special or peculiar reasons, the court had the power to limit the tenure of the anticipatory bail.

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53 AIR 2020 SC 831

SANJAY CHANDRA v CBI, AIR 2012 SC 830 (A Judgment of the Division Bench of the Supreme Court of India)

"... one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."

Brief Facts

The Supreme Court in this case was hearing a batch of petitions filed by the accused in the 2G Spectrum Scam case, where they had been accused of criminal conspiracy to bribe politicians and bureaucrats, and illegally secure government telecom licenses from the government. The Petitioner and the other accused had been arrested during the investigation of the case, and had been in custody for seven months.

The Trial Court and the Delhi High Court rejected their bail applications, on several grounds. Firstly, due to the seriousness of the allegations against them that involved losses to the public exchequer ranging in several thousands of crores. Also, the volume of evidence collected against them, and the likely heavy sentence to be imposed on conviction. The possibility that they might use their power to influence witnesses, or abscond and not face trial. And finally, due to the strong opposition by the CBI to their bail.

Thus, they approached the Supreme Court seeking bail.

Issues for consideration

The Court in this case was mainly concerned with the principles governing the grant of bail to undertrials in India, and what considerations should weigh in the mind of judges while considering bail applications.

Observations by the Court

The Court asserted two core principles of criminal jurisprudence in India, the first being the presumption of innocence - that every person was deemed to be innocent until duly tried and found guilty. Thus, no matter what the allegations against an undertrial were, it could not be assumed that they had committed those crimes. And naturally, they should also not be punished for those alleged crimes till they had been convicted by a court of law, since it meant psychological and physical deprivation for the undertrial. Thus, pre-conviction imprisonment could and should not be 'punitive', meaning that an undertrial accused must not be denied bail to give them a 'taste of imprisonment'.

The Court also asserted a second principle - that granting bail to an undertrial was the rule and committing them to jail was the exception. Bail, a term not defined in the CrPC, was a conditional liberty granted to an accused on a bond by them and their surety/guarantor that they would appear before the court when required. To give effect to this principle, wide discretionary powers

had been given to the courts under Section 437[54] and 439[55] of the CrPC to grant bail except in

[54] Section 437 - When bail may be taken in case of non-bailable offence.
(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an Officer-in-Charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years;

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm;

Provided further that the Court may also direct "that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason; Provided also that themere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that the shall comply with such directions as may be given by the Court. Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under Sub-Section (1) the Court shall impose the conditions—

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such 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 or tamper with the evidence.

and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under Sub-Section (1), or Sub-Section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under Sub-Section (1), or Sub-Section (2), may, if it considers it necessary to do so, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

[55] Section 439 - Special powers of High Court or Court of Session regarding bail.
(1) A High Court or Court of Session may direct—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-Section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that Sub-Section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of

a few cases. In determining how that discretion was to be exercised, the Court should consider whether the undertrial, if granted bail, would influence the witnesses, or abscond from justice and not stand trial when required. The gravity and heinousness of the crime should also be considered since there may be factors that induce an undertrial to avoid facing trial.

The Court also looked at other factors that must be considered while deciding whether or not to grant bail since being in jail also negatively affected other rights of the person. For instance, undertrials on bail were better placed to defend themselves in their cases than those in jail.

Community roots of undertrials must also be factored in while assessing whether they could be a flight risk. The deplorable conditions in jails in India, delays in trials of cases, and the considerable public expenses involved in housing undertrials who were not even flight risks, were also factors that weigh on the side of grant of bail, rather than continued incarceration.

Following these principles and applying them to this case, the Court rejected the argument of the prosecution that the seriousness or gravity of the allegations should by itself be a reason to deny bail. It held that the maximum punishment of the offences was seven years. The record of the case was voluminous and the trial was likely to take a long time. And since the investigation of the case was complete, their presence in custody was not required for investigative purposes either.

Thus, in conclusion, the Court granted bail to all the accused in this case.

Developments in the Law

Since its passing, Sanjay Chandra has become the most important and frequently cited judgment on bail, since it not only reinforces the long established principles of bail and personal liberty, but also tests and applies those principles to an emerging category of cases where economic offences and mammoth financial frauds are alleged.

However, there are judgments, both preceding and subsequent to Sanjay Chandra, that limit its applicability to cases of serious economic offences, or where the maximum imposable sentence was greater than seven years, as was the case in Sanjay Chandra. In fact, the Supreme Court has repeatedly held that cases of economic offences involving huge loss of public funds affecting the economy and financial health of the country required a different approach in matters of bail[56], effectively stating that the principles of Sanjay Chandra did not apply.

For instance, in State of Bihar v Amit Kumar[57], a case where large scale tampering of the Bihar Intermediate Examination's answer sheets had taken place, the main accused was denied bail. It held that since the maximum punishable sentence in the case was life imprisonment, much higher than Sanjay Chandra, it was a ground to reject bail.

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opinion that it is not practicable to give such notice.
Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application[1].
(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.
(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

[56] *Nimmagadda Prasad v Central Bureau of Investigation*, AIR 2013 SC 2821 and *Y.S. Jagan Mohan Reddy v Central Bureau of Investigation*, AIR 2013 SC 1933

[57] AIR 2017 SC 2487

In Virupakshappa Gouda & Ors. v State of Karnataka & Ors.[58], a case of honour killing, it was held that the fundamental principle of presumption of innocence cannot be the sole reason to grant bail. If the nature of the crime and the manner of its commission were grave, they were factors that could override those in favour of granting bail. Therefore, the seriousness of the crime became the determining factor leading to the dismissal of the bail.

The Supreme Court has also specified other considerations such as the nature of evidence against the accused, character of the accused, larger interests of the public/State, as factors that should be taken into account before granting bail[59].

[58] AIR 2017 SC 1685

[59] *Central Bureau of Investigation v V. Vijay Sai Reddy*, AIR 2013 SC 2216

HUSSAINARA KHATOON & ORS. v HOME SECRETARY, STATE OF BIHAR & ORS, AIR 1979 SC 1360
(A Judgment of the Full Bench of the Supreme Court of India)

"Are we not withholding basic freedoms from these neglected and helpless human beings who have been condemned to a life of imprisonment and degradation for years on end?... Many of these unfortunate men and women must not even be remembering when they entered the jail and for what offence?"

Brief Facts

A writ of habeas corpus[60] was filed in the Supreme Court based on reports carried by the Indian Express newspaper in January 1979 about the state of poor undertrials in Bihar's jails. Arguing that their continued imprisonment was illegal, the petition prayed for the release of men, women and even children, who had been lodged in jails as undertrials for long periods of time, sometimes over 10 years, often for trivial offences carrying minor punishments.

Issues for consideration

In this case, the Court was primarily concerned with the issues of inequity within the bail system in India which resulted in lengthy incarcerations for the poor. It considered the following issues:

(1) The bail system under the CrPC suffered from an antiquated property oriented approach - that the risk of monetary loss was the only deterrent against undertrials fleeing from justice. This resulted in the requirement of the accused to furnish a 'personal bond'[61] as a condition for release on bail, in the form of a monetary obligation.

(2) Courts mechanically insisted on solvent sureties/guarantors[62] to stand bail for the accused, so as to be able to pay the bond amount in case the accused failed to appear in court.

(3) This system operated very harshly against the poor, who found it difficult to furnish bail even without sureties, and especially difficult with them. This resulted in their inability to secure release from jail.

Observations by the Court

Struck by the undue detention of poor undertrials by the criminal justice system for years on end, the Supreme Court held that bail procedures in India had to satisfy the Maneka Gandhi v. Union of India[63] standard of being "reasonable, just and fair". A procedure which kept such a large number of people behind bars without trial for so long could not be regarded as reasonable, just or fair so as to be in conformity with the requirement of Article 21. The Court pressed on the need for the law to radically change its approach to pretrial detention and ensure a 'reasonable, just and fair' procedure. It pushed for thorough reforms in the bail system to make pretrial release from jail accessible for the rich and the poor alike.

After identifying the 'property oriented approach' as an unfair barrier for securing release from jail, the Court called for the introduction of newer approaches to ensure that undertrials do not flee

[60] A writ of habeas corpus is used to bring a detainee, arrestee, or prisoner before the court to determine if the person's detention, arrest, or imprisonment is lawful.

[61] A personal bond is an undertaking given by a person released on bail to appear before the court when required, on the penalty of forfeiture of an amount of money decided by the court in case of failure to appear.

[62] Surety or guarantor is a person who stands or provides guarantee that the person released on bail will appear before the court when required. They have to furnish a surety bond as an undertaking to ensure the appearance of the person, also on the penalty of forfeiture of the amount in case of failure of that person to appear.

[63] AIR 1978 SC 597

from justice without imposing an inequitable burden on poor undertrials. One of these was the 'roots in the community' approach - that a person who has roots in the community and not likely to abscond, could be released on a personal bond. It also prescribed factors to assess the eligibility of an accused to be released under this approach. Thus, after assessment, if the court was satisfied that the accused had ties in the community and there was no substantial risk of non-appearance, the accused could be released on a personal bond.

Even while granting release on personal bond, the bond amount should not be set based merely on the nature/seriousness of the charge against the accused, but should be an individualised amount based on their financial circumstances and probability of absconding.

Thus, the Court held that the requirement of financial solvency of the accused should not result in denial of bail and deprivation of personal liberty under Article 21 of the Constitution of India to poor and indigent persons.

Developments in the Law

The issue of onerous bail conditions, and how that results in denial of liberty for the accused has been a prevalent issue in India. In fact, Hussainara Khatoon itself came on the heels of another judgment of the Supreme Court in Moti Ram & Ors. v. State of M.P.[64] where it strongly criticised the imposition of a surety amount of Rs. 10,000 on a poor mason for securing bail. It made an affirmative distinction that courts should be liberal in imposing bail conditions on the poor, indigent, infirm, young persons, and women. It also held that the surety produced by the accused does not have to be from the same district as where the court granting bail is situated.

In Raghubir Singh & Ors. v State of Bihar[65], the Supreme Court recognised that sometimes it may not be possible for an undertrial to furnish bail soon after the order is passed, for reasons including poverty, but they should not be deprived of the benefit of bail because of their inability to furnish bail bonds right away. Therefore, a liberal approach had to be adopted by the court in case of the poor.

The principle against imposition of unreasonable bail conditions would not only apply to post-arrest bail, but also to pre-arrest/anticipatory bail, as held in Kunal Kumar Tiwari v State of Bihar[66].

In Bhim Singh v Union of India[67], the Supreme Court took note of Section 436A of the CrPC, which mandates the release of undertrials who have already spent half of the period of their maximum possible sentence[68]. On a nationwide scale, it directed judges to conduct weekly visits to jails to examine the status of undertrials prisoners, and immediately grant bail to those entitled under Section 436A.

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[64] AIR 1978 SC 1594

[65] AIR 1987 SC 149

[66] AIR 2017 SC 5416

[67] (2015) 13 SCC 605

[68] Section 436A - Maximum period for which an under trial prisoner can be detained.
Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties;
Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties;
Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

D. POWERS OF POLICE DURING INVESTIGATION

STATE OF BOMBAY v KATHI KALU OGHAD & OTHERS, AIR 1961 SC 1808 (A Judgment of the Constitution Bench of the Supreme Court of India)

The doctrine of protection against self-incrimination under Article 20(3) of the Constitution of India and the power of the police to collect specimen handwriting or fingerprint of the accused.

Brief Facts

In this case, the Respondent had been accused of committing murder. One piece of evidence against him was a chit of paper gathered by the police, which allegedly contained his handwriting. During investigation, when the Respondent was in police custody, the police took three specimens/ samples of his handwriting from him. These three specimens were compared with the handwriting on the chit by a handwriting comparison expert. The expert opined that the two handwritings matched.

The Trial Court convicted the Respondent and relied on the chit as one piece of evidence against him. The Respondent challenged his conviction before the High Court arguing that he had been compelled to give a specimen handwriting sample to the police during his custody. It was argued that this was a violation of Article 20(3) of the Constitution of India, referred to as the fundamental right against self-incrimination[69]. The High Court ruled that he had been compelled to give his handwriting sample, and therefore, the protection of Article 20(3) had been violated and acquitted him.

Thus, the case came before the Constitution Bench of the Supreme Court.

In a connected case that was heard along with this case, a similar issue arose. This is with respect to the forcible collection of specimen fingerprint and palm prints from the accused while he was in police custody during the investigation of that case.

Issues for consideration

1. What does it mean for a person to be 'a witness against himself' within the meaning of Article 20(3) of the Constitution? If an accused has been forced/compelled to give specimen handwritings during the investigation of a case, does that mean that they have been 'compelled to be a witness against himself'?

2. Does the mere fact that the accused was in police custody when the specimen handwritings had been taken could by itself amount to compulsion? What other circumstances amounted to compelling a person to 'be a witness against himself'?

During the arguments in this case, two counter positions were argued by the opposite parties. The Petitioner/State of Bombay argued two things in favour of a limited or restricted interpretation of the Article 20(3) protection. Firstly, it argued that the expression 'compelled to be a witness' used in Article 20(3) should only mean being compelled to give 'oral testimony'. Therefore, a person could not be compelled to give oral testimony against himself, but could be compelled to produce

[69] Article 20(3). No person accused of any offence shall be compelled to be a witness against himself. This fundamental right essentially means that a person cannot be compelled or forced to become a witness against themselves in a criminal case. Thus, any action of the police, where the evidence has been collected in violation of this fundamental right, would be unconstitutional and illegal. This right acts as a protection for an accused, making illegal, all evidence gathered or collected by violating it.

a document, exhibit or examine their body, or to take the specimen writing, thumb impression, impression of the palm or the feet or the fingers of an accused[70]. This compulsion would not violate Article 20(3). Secondly, it was argued that this protection of Article 20(3) was only available to an accused during court proceedings, not during investigation.

On the other hand, the Respondent argued that Article 20(3) provided complete protection of the widest amplitude to an accused, irrespective of the time and place, or the nature of the evidence, whether it is oral, documentary, or material. It was also available not only during court proceedings, but also during investigation. Thus, any act, speech, production of document, or taking specimens from an accused, which is compelled, forcible, or non-voluntary, violated the Article 20(3) protection.

Observations by the Court

In order to address the issues in this case, the Court first discussed its earlier judgment in M.P. Sharma & Ors. v Satish Chandra, District Magistrate, Delhi[71] which had also dealt with the right/protection against self-incrimination under Article 20(3). In that case, the Supreme Court had gone into the origin and scope of the doctrine of protection against self-incrimination in English and American law. It had made two principle interpretations regarding the Article 20(3) protection in M.P. Sharma's case.

Firstly, the Court had concluded that the protection from being 'compelled to be a witness against himself' was bigger than merely being compelled to give oral testimony in a trial in which the accused admitted to their guilt, or said something that would become evidence in the prosecution's case against them. Restricting Article 20(3) as applying only to oral testimony in a trial would wrongly limit the wide protection it offered to an accused.

Secondly, it interpreted the expression 'to become a witness' to include giving evidence through lips, or by production of a thing or a document, or in other modes. Thus, according to M.P. Sharma, every compelled act by the accused, whether spoken words or providing documents, was 'to furnish evidence' against himself, and therefore violated the Article 20(3) protection.

Therefore, the Supreme Court began by analysing whether the above interpretation of Article 20(3) by the Supreme Court in M.P. Sharma's case was correct. And if it was correct, did it also imply that compelled collection of handwriting, fingerprint, or palm print specimens from the accused also violated the Article 20(3) protection?

The Court held that although the Article 20(3) protection did exclude compelled oral or written testimonies by the accused, it could not have been intended to also exclude thumb impression, specimen handwriting, etc, as that would create obstacles in the way of efficient and effective investigations by the police into crimes.

The Court also held that forcibly taking a person's specimen handwriting or fingerprint for the purpose of comparison did not amount to being 'compelled to be a witness against himself' and did not violate Article 20(3). The reason was that an accused would 'be a witness against himself' if they were to testify to what they had seen or heard that would tend to incriminate them. However, the compelled production of documentary evidence in the possession of the accused, would not

[70] These are bodily samples of the accused collected during the investigation usually to compare with evidence collected during the investigation, to determine whether the evidence could be connected to the accused. For example, evidence in the form fingerprints collected from a crime scene could be compared with the fingerprint specimens/samples collected from the accused during the investigation, to determine whether the accused was present at the scene of the crime.

[71] AIR 1954 SC 300

mean 'to be a witness against himself' because it did not convey their personal knowledge or testimony related to the allegations. Therefore, 'being a witness against himself'' only meant conveying information based upon the accused's personal knowledge, but did not include the mere mechanical process of producing documents in court which did not contain any statement of the accused based on their personal knowledge.

Thus, applying these principles to the case, the Supreme Court held that the specimen handwriting or fingerprint of an accused was not their 'personal testimony', but were only materials for comparison. Therefore, compelling the accused to give these specimens, and using them in evidence against them, did not violate the Article 20(3) protection.

Another reasoning given by other judges was that compelling the accused to give these specimens may make them a witness, but not 'against himself' so as to violate Article 20(3). This was because the specimen fingerprint did not incriminate the accused and was not evidence against the accused by itself. It was the fingerprint collected from the scene of the crime, when positively matched with the specimen fingerprint, that incriminated the accused. Thus, specimens collected from the accused are only meant for comparison with other handwritings or fingerprints. Thus, the Court held that the protection under Article 20(3) would not apply to the collection of such samples, even if obtained under compulsion.

The Court also held that the mere fact that the accused was present in the police custody at the time of making a statement would not mean that the statement had been given by them under compulsion. The accused would have to show something more to establish that they were 'compelled'.

Directives of the Supreme Court

(1) 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. In other words, the mere fact of being in police custody at the time when the statement was made would not, by itself, lead to the inference that the accused was compelled to make the statement. However, this fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) 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'.

(3) 'To be a witness' includes making an oral or written statement, production of documents, or giving materials which may be relevant at a trial to determine the guilt innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(5) 'To be a witness' means giving personal knowledge in respect of relevant facts by an oral or written statement, made or given in Court or at any other time.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. However, the constitutional interpretation of this expression has a wider meaning, i.e. bearing testimony in or out of Court, by a person accused of an offence, whether orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time they made the statement. It is not enough that they should become an accused, any time after the statement has been made.

Developments in the Law

In India, Kathi Kalu Oghad is the most important judgment on the doctrine of protection against self-incrimination under Article 20(3) of the Constitution of India. It settled the law regarding the collection of bodily samples from accused. This paved the way for other statutes and judgments to expand the extent of specimens that could be collected from the accused. For example, in Ritesh Sinha v State of Uttar Pradesh[72], this principle was extended to voice samples as well, even though the police or Magistrate did not have any power to collect voice samples under the CrPC.

In 2005, the legislature amended the CrPC to insert Sections 311A, which provided the Magistrate the power to order a person to give specimen signatures or handwriting[73]. The amendment also empowered the police to request a medical practitioner to examine the body parts or discharges of accused, such as blood stains, semen, hair, fingernail clippings etc. by the use of scientific techniques such as DNA profiling[74], for collection of evidence. These provisions give enormous powers to the police to collect bodily specimens from an accused during investigation.

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[72] AIR 2019 SC 3592

[73] S. 311 A. Power of Magistrate to order person to give specimen signature or handwriting-
If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting;
Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.
Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

[74] Section 53. Examination of accused by medical practitioner at the request of police officer.
(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.
(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.
Explanation.— In this section and in sections 53A and 54,—
(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;
(b) "registered medical practitioner" means a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

RITESH SINHA v. STATE OF UTTAR PRADESH & OTHERS, AIR 2019 SC 3592 (A judgment of the Division Bench of the Supreme Court of India)

Power of a Magistrate to order an accused to give their voice specimen to the police for comparison.

Brief Facts

During the investigation, the police sought to collect the voice specimen/sample from an accused for comparison with a recorded conversation that the police had gathered in evidence. The accused opposed this on the ground that there was no specific provision in the CrPC for the police to take the voice specimen of an accused during the investigation, nor the Magistrate had any power to give such a direction to the accused to give their voice specimen.

Issues for consideration

1. Whether Article 20(3) of the Constitution of India[75], which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice specimen during the investigation into an offence?

2. Whether in the absence of any provision in the Code of Criminal Procedure, can a Magistrate authorize the investigating agency to record the voice specimen of the person accused of an offence?

Observations of the Court

On the first issue, the Court began by going back to the legal position settled by State of Bombay v Kathi Kalu Oghad[76], that the fundamental right against self-incrimination under Article 20(3) of the Constitution of India prohibited a statement or testimony given by the accused that had the tendency to incriminate them. However, it did not include "materials for comparison" such as handwriting, signature, or finger impression of the accused. The Court also noted, as held in Kathi Kalu Oghad, that giving such material for comparison could mean that the accused was being 'compelled to be a witness' and provide evidence, but not against himself. Thus, Article 20(3) would not be violated by the compelled collection of voice specimens of the accused.

On privacy concerns, the Court held that a judicial order compelling a person to give a voice specimen did not violate their fundamental right to privacy. It cited the famous privacy judgment in K.S. Puttaswamy v Union of India[77], where it was held that the fundamental right to privacy is not absolute, and in certain circumstances, may have to bow down to a compelling public interest.

On the second issue, the Court recognised that a specific provision in the CrPC for the collection of the voice specimen of an accused during the investigation was missing, although such provisions with regard to blood and DNA samples[78], handwriting sample[79], and medical examination of rape accused[80], had been introduced in the CrPC through amendments. However, it held that where

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[75] *No person accused of any offence shall be compelled to be a witness against himself.*

[76] AIR 1961 SC 1808

[77] AIR 2017 SC 4161

[78] Section 53, IPC

[79] Section 311-A, IPC

[80] Section 53A, IPC

there were gaps in procedure, the Court had the authority to step in and fill up the gap to ensure substantial justice, instead of letting the gap persist.

Directives of the Court

By exercising the constitutional authority vested in the Supreme Court under Article 142 of the Constitution of India[81], it conferred the power on a Magistrate to order a person to give a specimen/ sample of their voice for the purpose of investigation of a crime.

Criticism

One major point of criticism of this judgment is the use of Article 142 by the Supreme Court to grant a specific legal power to the Magistrate which the legislature had itself not granted. This is particularly crucial since the legislature did amend the Code of Criminal Procedure to grant powers to the Magistrate for collection of blood, DNA or handwriting samples, but not for collection of voice samples. Thus, the Supreme Court had overridden the legislative intent of restricting the power of the Magistrate when it came to voice samples.

Another point of criticism is the dismissal of the fundamental right to privacy in favour of the "compelling public interest", without undertaking a detailed comparison or weighing of these two competing interests.

[81] Section 142. Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc
(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

PEOPLE'S UNION FOR CIVIL LIBERTIES v UNION OF INDIA, AIR 1997 SC 568
(A Judgment of the Division Bench of the Supreme Court of India)

"... the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone-conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office."

Brief Facts

The Petitioner, a civil rights organisation, filed a public interest litigation in the Supreme Court challenging the constitutionality of Section 5(2) of the Indian Telegraph Act, 1885[82]. This provision empowered the government to intercept or 'tap' phones for specified reasons. The petition was filed in the wake of the CBI report 'Tapping of politicians phones', which revealed that several intelligence, law enforcement, and investigating agencies had been authorised by the central and state governments to intercept phones. It also revealed hundreds of instances of unauthorised interceptions, interceptions beyond the authorised period, and improper maintenance of interception files and records.

The Petitioner argued that this power of interception was very broad and undefined, and therefore, arbitrary. It violated the fundamental rights of persons and should be held to be unconstitutional. It also sought the introduction of safeguards to Section 5(2), to rule out arbitrariness and to prevent indiscriminate phone-tapping by governments.

Issues for consideration

Did Section 5(2) of the Indian Telegraph Act and the broad and undefined power to intercept telephones and tap conversations that it granted to the government violate the right to free speech and expression under Article 19(1) of the Constitution, and the right to life and liberty under Article 21?

Observations by the Court

'Right to privacy' was part of the 'right to life and personal liberty' under Article 21 of the Constitution of India, as held in the judgment of the Constitution Bench in Kharak Singh v State of

[82] Section 5. Power for Government to take possession of licensed telegraphs and to order interception of messages.
1. ...
2. On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:
Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.

UP & Ors.[83] and several other judgments. Applying this right to the issue of phone interceptions, the Court held that it included the right to hold a telephonic conversation in the privacy of one's home or office without interference.

The Article 19(1)(a) right to freedom of speech and expression meant the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on the telephone, they are exercising their right to freedom of speech and expression. Thus, the tapping of telephone calls restricted this right, and would be unconstitutional unless it came within one of the grounds of restriction under Article 19(2)[84].

Discussing the provisions of Section 5(2), the Court noted that it allowed the Central Government or State Government or any officer specially authorised in this behalf, to intercept messages (which includes calls) in the event of the occurrence of a public emergency or in the interest of public safety. Also, the government had to be satisfied that it was necessary in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, or to prevent incitement to the commission of an offence. Thus, two sets of conditions had to be satisfied before the government could allow an interception under Section 5(2).

However, it held that Section 5(2) did not prescribe any procedure according to which this power to intercept had to be exercised. This made the power to intercept telephones arbitrary, fanciful or oppressive. This failed to meet the standard of 'just, fair, and reasonable', that every mode of restriction of fundamental rights had to meet, as held in Maneka Gandhi v Union of India[85].

Therefore, while the Court did not declare Section 5(2) to be unconstitutional, it laid down a set of procedural safeguards for the exercise of the power to intercept telephones under Section 5(2).

Directives by the Court

(1) An order for telephone-tapping in terms of Section 5(2) can only be issued by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case, the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary.

(2) The order shall require the person to whom it is addressed to intercept in the course of their transmission by means of a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the order.

(3) The matters to be taken into account in considering whether an order is necessary under Section 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

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[83] AIR 1963 SC 1295

[84] Article 19. Protection of certain rights regarding freedom of speech etc.
(1) All citizens shall have the right
(a) to freedom of speech and expression;
(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

[85] AIR 1978 SC 597

(4) The interception required under Section 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order. This had to be an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

(5) The order under Section 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at any time before the end of two month period, renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

(6) The authority which issued the order shall maintain the following records:

a. the intercepted communications,
b. the extent to which the material is disclosed,
c. the number of persons and their identity to whom any of the material is disclosed,
d. the extent to which the material is copied and,
e. the number of copies made of any of the material.

(7) The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

(8) Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

(9) There shall be a Review Committee consisting of the Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

a. The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order, has there been any contravention of the provisions of Section 5(2) of the Act?
b. If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.
c. If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect.

Developments in the Law

In a subsequent judgment of Amar Singh v Union of India[86], where a prominent politician alleged illegal interception of his telephone, the Supreme Court laid down an additional safeguard to prevent improper interception requests. It held that if a network service provider receives a request or communication under Section 5(2) for interception, they should first verify its authenticity from the author if there is any doubt on its authenticity or bona fides, before allowing the interception, since any authorised interception violated the fundamental right to privacy.

[86] (2011) 7 SC 69

POORAN MAL v DIRECTOR OF INSPECTION (INVESTIGATION), AIR 1974 SC 348
(A Judgment of the Constitution Bench of the Supreme Court of India)

"... neither by invoking the spirit of our Constitution nor by a strained construction of any of the *fundamental rights can we spell out the exclusion of evidence obtained on an illegal search"*

Brief Facts

Various search and seizure operations were conducted by the Income Tax authorities, at the properties of the Petitioner, a businessman. Post the searches, the Income Tax officials seized account books, documents, cash, jewellery and other valuables. These search and seizure operations were challenged by the Petitioner in court on several grounds including that the authorisation for the search and seizure was illegal and mala fide, and not in conformity with the powers under the Income Tax Act. It was prayed by the Petitioner that since the search and seizure itself was illegal, the evidence so seized should not be allowed to be used in any prosecution or proceedings against him.

Issues for consideration

Is evidence obtained in an illegal search and seizure admissible? Put differently, if an evidence has been collected illegally during an investigation, can that evidence be used in the prosecution of a person?

Observations by the Court

The Court noted that there was no provision in the Constitution of India that prohibited the admission of evidence obtained in an illegal search and seizure. Even under the Indian Evidence Act, 1872, which governed the admissibility of evidence in India, illegality of the search did not make the evidence inadmissible. Thus, an evidence may have been collected illegally, but as long it was relevant, it was admissible. According to the Court, the spirit of the Constitution was not to exclude such evidence, contrary to what was argued by the Petitioner.

Citing the Constitutional Bench judgment in MP Sharma v Satish Chandra[87], the Court held that unlike the Constitution of the United States that specifically protected citizens from unreasonable searches and seizures under the Fourth Amendment[88], there was no such provision in the Constitution of India, nor was there any justification to import any such right.

Thus, in India, as in England, the test of admissibility of an evidence lay in its relevance, and unless there was a prohibition in the Constitution or any other law against evidence gathered as a result of illegal search or seizure, it could not be shut out.[89]

Coming to the present case, the Court concluded that even if the search and seizure was in contravention of the powers of the authorities in the Income Tax Act, the material seized was liable to be used in the Income Tax proceedings against the person from whom it was seized.

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[87] AIR 1954 SC 300

[88] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[89] This is a reference to the doctrine of 'fruits of a poisonous tree'. According to this doctrine, the evidence (fruit) from an illegal search or seizure which is a tainted source (the tree), would also be tainted and hence, inadmissible. This judgment essentially holds that the doctrine does not apply in India.

Developments in the Law

Even before Pooran Mal, the Supreme Court had held in Radha Kishan v State of UP[90], that a person whose premises were being searched illegally in contravention of the provisions of the CrPC could resist such illegal search on their premises. However, the judgment also held that the evidence seized or obtained during such an illegal search would not be illegal, though the courts should examine such evidence carefully before relying on it.

Though not illegal or admissible, illegally obtained evidence had to be approached with caution, as advised by the Supreme Court in Dr. Pratap Singh vs. Director of Enforcement, Foreign Exchange Regulation Act & Ors.[91]. In State of M.P. through CBI & Ors. v Paltan Mallah & Ors.[92], the Supreme Court explicitly relaxed the requirement of strict adherence to the provisions of CrPC in searches and seizures. It was held that the general provisions related to search and seizure in the CrPC should be treated as guidelines and not mandatory, and in case of minor violations in collection of evidence, the discretion lay with the court whether to accept or reject the evidence.

In Yashwant Sinha v. CBI[93], the Pooran Mal principle of admissibility was applied to three documents published by The Hindu newspaper pertaining to the Rafale Aircraft purchase deal, including two 'secret' documents under the Official Secrets Act, 1923. The Court held that even if the documents had been obtained improperly by the newspaper, they could not be shut out of consideration since they passed the test of relevancy.

However, this principle of admissibility of illegally obtained evidence does not apply to seizures of drugs/contraband for prosecutions under the Narcotics Drugs and Psychotropic Substances Act (NDPS Act), as held by the Constitution Bench of the Supreme Court in State of Punjab v Baldev Singh[94]. This was held so, because prosecutions of persons for possession of drugs depended almost solely on recovery and seizure of drugs from them. Therefore, given the importance of this evidence of possession and seizure of drugs in proving the guilt of the accused, illegally seized drugs, by violating the provision of search and seizure under the NDPS Act[95], could not be made admissible in evidence. Otherwise, convictions of persons would be the direct outcome of drugs seized by violating the provisions of search and seizure. This judgment affirms that not only is the evidence in drug crimes prosecutions important, but also that it is important that the evidence has been obtained by following proper procedure under the law.

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[90] AIR 1963 SC 822

[91] AIR 1985 SC 989

[92] AIR 2005 SC 733

[93] AIR 2019 SC 1802

[94] AIR 1999 SC 2378

[95] Section 50 of the NDPS Act

E. RIGHTS OF ACCUSED DURING INVESTIGATION

STATE OF GUJARAT v SHYAMLAL MOHANLAL CHOKSI & OTHERS., AIR 1965 SC 1251
(A Judgment of the Constitution Bench of the Supreme Court of India)

Court shall not summon the accused person to produce a document or thing in his possession.

Brief Facts

In a prosecution under the Moneylenders Act, the prosecutor moved an application before the Magistrate under Section 94(1) CrPC, 1898, to order the moneylender-accused to produce the daily account book and ledger of a particular year. The Magistrate rejected the application on the ground that the accused could not be compelled to produce any document that would incriminate him, citing Article 20(3) of the Constitution of India. When the issue came up before the Sessions Judge, the issue was referred to the High Court of Gujarat in a criminal reference[96].

The High Court agreed with the Magistrate that the constitutional protection against self-incrimination available to accused under Article 20(3) would make any such order by the court illegal and in violation of this protection. Thus, the case came up before the Constitution Bench of the Supreme Court.

Issue for consideration

In exercise of the power under Section 94(1) CrPC[97], can a court summon an accused before it to produce a document or a thing in their possession? Or would such a summons or order, violate the protection against self-incrimination under Article 20(3) of the Constitution of India by compelling an accused 'to be a witness against himself'?

Observations by the Court

The Supreme Court noted that the rule against self-incrimination[98] was a fundamental criminal law principle in other common law jurisdictions such as the United Kingdom and the United

[96] References can be sent by any court to its High Court under Section 395 CrPC, where any case pending before that court involves a question as to the validity of an Act, Ordinance or Regulation, or any provision under it, and the court thinks that the same is invalid or inoperative, but it has not been declared so by the High Court. The court can refer the question along with its opinion and reasoning, for the decision of the High Court.

[97] Section 94 of the Code of Criminal Procedure, 1898, was replaced by, and corresponds to Section 91 of the Code of Criminal Procedure, 1973.

Section 91. Summons to produce document or other thing.

(1) Whenever any Court or any Officer-in-Charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

[98] Article 20(3). No person accused of any offence shall be compelled to be a witness against himself. This fundamental right essentially means that a person cannot be compelled or forced to become a witness against themselves in a criminal case. Thus, any action of the police, where the evidence has been collected in violation of this fundamental right, would be unconstitutional and illegal. This right acts as a protection for an accused, making illegal, all evidence gathered or collected by violating it.

States. However, this rule as applicable in India was not absolute. For instance, it did not apply to civil proceedings, or proceedings involving imposition of penalties or forfeitures. Nor did it apply to witnesses in trials, who could not be excused from answering questions that may incriminate themselves or expose them to penalties.[99]

The Court referred to its earlier Constitution Bench judgments in M.P. Sharma & Ors. v Satish Chandra, District Magistrate, Delhi[100] and State of Bombay v Kathi Kalu Oghad & Ors.[101] to reiterate that Article 20(3) protection was available to accused and witnesses. It would stand to be violated if the document sought from the accused/witness contained statements based on their personal testimony or had the tendency to incriminate them. Such protections were part of the CrPC as well, where persons were exempted from answering questions that might expose them to a criminal charge.[102]

Coming to the provision in question i.e. Section 94 of the CrPC, 1898, the Supreme Court noted that Section 94 authorised a court or the police to issue a summons or written order to 'a person' who had in their possession, a document or a thing that was relevant to a criminal case. Under Section 96 of the CrPC, 1898, the court also had the power to issue a search warrant if that person would not produce that document or thing, or the court did not know who was in possession of that document or thing, or for a general search and inspection[103]. The court could also specify the particular place which had to be searched or inspected.

According to the Supreme Court, a summon or written order under Section 94 to a person to produce a document or a thing could not be issued to an accused in a criminal case, if that document or thing tended to incriminate them. This would directly violate Article 20(3). The Court also held that the use of the word 'person' in Sections 94 and 96 instead of the word 'accused', meant that such power was only intended to be used against a person who was not an accused. Thus, an accused who possesses a document or thing that incriminates them in a criminal case, cannot be summoned by a court or the police to produce that document or thing.

However, the above does not impact the power of the police to themselves conduct search to recover or seize evidence against an accused under other provisions of the CrPC[104]. This is so because in such a situation, the accused would not be compelled 'to be a witness against himself', and Article 20(3) would not be violated.

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[99] Section 132 of the Indian Evidence Act, 1872

[100] AIR 1954 SC 300

[101] AIR 1961 SC 1808

[102] For example, Section 161(2) CrPC states that a police officer investigating a case may examine any person who has knowledge of the facts of that case, and that person will be bound to answer all such questions truthfully, except the questions whose answers would have a tendency to expose that person to a criminal charge or penalty or forfeiture.

[103] A general search warrant is for a roving search to discover documents, things, or objects related to criminal liability of persons in a case, or to discover a specific document(s), thing(s), or object(s) when its location or possessor is not known. Because it is such a wide power, it must be exercised by the court only after applying its mind and finding necessary reasons for its issuance.

[104] For example, under Section 165, CrPC, a police officer can search a place for the investigation of a case.

Directive of the Supreme Court

In exercise of its power under Section 94 CrPC, 1898 (Section 91 under the CrPC, 1973), neither the Court nor the police officer can issue a summons or written order to an accused, requiring them to produce a document or a thing, if such document or thing had a tendency to incriminate the accused. Such a summons or written order would violate the constitutional protection against self-incrimination available to an accused under Article 20(3) of the Constitution of India.

Developments in the Law

In V. S. Kuttan Pillai v Ramakrishnan & Anr.[105], the issue that arose before the Supreme Court was whether a search warrant could be issued under Section 93 CrPC, 1973[106] [corresponding to Section 96, CrPC, 1898], for an office which belonged to the accused to seize a document or a thing. The Court held that if a summons could not be issued to an accused under Section 91 CrPC, 1973 [corresponding to Section 94 CrPC, 1898] because it violated Article 20(3), then by extension, no search warrant could be issued against the accused under Section 93. However, a general search or inspection warrant could be issued by a court, and its execution in the premises of the accused to search and seizure documents, even those that could incriminate the accused, would not be illegal. But even then, the accused could not be compelled to incriminate themselves in these search and seizure proceedings, for instance by forcing the accused to participate in them, because that would violate Article 20(3). They could remain a passive spectator to the search proceedings.

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[105] AIR 1980 SC 185

[106] Section 93. When search warrant may be issued.
(1) (a) Where any Court has reason to believe that a person to whom a summons or order under section 91 or a requisition under sub- section (1) of section 92 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or
(b) where such document or thing is not known to the Court to be the possession of any person, or
(c) where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search- warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.
(2) The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.
(3) Nothing contained in this section shall authorise any Magistrate other than a District Magistrate or Chief Judicial Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority.

NANDINI SATPATHY v P.L. DANI & ANOTHER, AIR 1978 SC 1025
(A Judgment of the Full Bench of the Supreme Court of India)

"The first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof. Of course, the means must be as good as the ends and the dignity of the individual and the freedom of the human person cannot be sacrificed by resort to improper means, however worthy the ends."

Brief Facts

The Petitioner was accused of acquiring assets disproportionate to her known sources of income during her tenure as the former Chief Minister of Odisha, and an FIR was registered against her.

During the investigation, the police interrogated her. During the interrogation, the police gave her a written list of questions and sought her oral responses. However, she refused to answer them. This led to the police invoking a charge under Section 179 of the Indian Penal Code[107] for refusing to answer the questions. She challenged the invocation of this charge before the High Court and then the Supreme Court.

Issues for consideration

The Supreme Court in this case was principally concerned with the conflict between two competing legal and policy interests. On one side was the Article 20(3) protection against self-incrimination[108] and the right of silence of an accused during a police interrogation that arose out of it. On the other side was the public-policy need to empower police to investigate crimes by interrogating and obtaining answers from an accused.

Under Section 161(2) CrPC, a right of silence was available to a witnesses being questioned by the police during an investigation, if the answer to a particular question had the tendency to expose them to a criminal charge[109].

So the questions before the Court were: Did the Petitioner, who was an accused not a witness, have a right to silence during an interrogation, and could an accused refuse to answer questions either on the basis of the Article 20(3) protection or Section 161(2) CrPC? If so, what was the extent of that right?

Thus, the Supreme Court framed the following issues of present relevance:

1. Is a person 'suspected' of a crime entitled to the right to silence which is available to a person 'accused' of a crime? Or is it enough that the person is only a 'potential' accused?

[107] Section 179. Refusing to answer public servant authorised to question.—Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

[108] Article 20(3). No person accused of any offence shall be compelled to be a witness against himself.
This fundamental right essentially means that a person cannot be compelled or forced to become a witness against themselves in a criminal case. Thus, any action of the police, where the evidence has been collected in violation of this fundamental right, would be unconstitutional and illegal. This right acts as a protection for an accused, making illegal, all evidence gathered or collected by violating it.

[109] Section 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) ...

2. Does the protection against self-incrimination operate only for the particular accusation for which the person is being questioned, or does it also extend to other pending or potential accusations outside that specific investigation? That is to say, can an accused person, who is being questioned by a police officer in a certain case, refuse to answer questions that are incriminating only for that case, or even for any other case as well?

3. Is the right to silence available to a person only in Court or is it also available during interrogation during the police investigation?

4. What is the ambit of the cryptic expression 'compelled to be a witness against himself' occurring in Article 20(3) of the Constitution? Does 'compulsion' mean physical pressure or unlawful duress or does it also cover the cryptic compulsions or psychic coercion, given a tense situation or officer in authority interrogating an accused person, armed with power to insist on an answer?

5. Does being 'a witness against himself' include testimonial tendency to incriminate or also any probability of guilt flowing from the answer?

6. What are the parameters of Section 161(2) CrPC? Does the tendency to expose a person to a criminal charge also include answers which have an inculpatory impact in other criminal cases actually or about to be investigated or tried?

7. Does 'any person' in Section 161 CrPC include an accused person or only a witness?

8. When does an answer self-incriminate or tend to expose one to a charge? What distinguishes permissible and impermissible interrogations and answers? Is the setting of the interrogation relevant or not?

9. Does mens rea[110] form a necessary component of Section 179 IPC, and, if so, what is its precise nature? Can a mere apprehension that any answer has a guilty potential form a defence against a charge of Section 179, IPC?

10. Where do we demarcate the boundaries of benefit of doubt in the setting of Section 161(2) CrPC and Section 179 IPC?

Observations by the Court

The Supreme Court undertook a deep assessment of the constituent words of Article 20(3) in order to extract its meaning and applicability and the issues for consideration in this case. The Court noted that Article 20(3) existed in the form of a general fundamental right protection and was available to every accused person in India, but its wording was not very specific about which situations it applied to.

For instance, unlike Section 161(2) CrPC, which specifically applied during the questioning of a witness in an investigation, Article 20(3) did not by itself specify what stage of a case it applied to - investigations, inquiries or trials. Therefore, the Court interpreted the words "to be a witness against himself" to carry a wide meaning, and concluded that the Article 20(3) protection was available to an accused person at any stage of a case. However, in other respects, the Court read the Article 20(3) protection narrowly. For instance, it held that such protection was only available

[110] *Mens rea* refers to the intention to commit a crime.

against statements made by the accused that were confessional or had a clear tendency to self-incriminate. Thus, the Article 20(3) protection was not a blanket protection against giving any statement to the police.

Similarly after analysing the words "accused of any offence", the Court held that this meant that the accusation could be in relation to the case the person was being questioned in, or any other offence pending or imminent. However, citing Kathi Kalu Oghad v State of Bombay[111], it held that only a person who was an accused at the time of their interrogation would have the protection of Article 20(3). But if they gave a statement before they became an accused in the case, the Article 20(3) protection would not be available against that statement.

The words "compelled to be a witness" and the compulsion prohibited by Article 20(3) included not just physical threats or violence, but also psychic torture, atmospheric pressure, environmental coercion, tiring interrogative, overbearing or intimidatory methods. The use of these methods to obtain a testimony from the accused would be considered compulsion and thus, prohibited by Article 20(3). But it excluded the threat of legal penalty for violation upon refusal to answer, although frequent threats of prosecution for not answering the question may be considered as undue pressure, violating Article 20(3).

Coming to the crucial issue of how such a right is to be realised within the confines of a police station, the Court drew inspiration from the right to access to a lawyer during interrogations mandated by the United States Supreme Court in Miranda v Arizona[112]. The Court held that the access to a lawyer is essential to a person availing their Article 20(3) rights during interrogation and the lawyer of the person should be allowed to be present at the time of their examination. This was not only to prevent right violations by the answering of questions that run afoul the Article 20(3) protection, but also by intercepting any intimidation or any other tactic by the police to obtain incriminating statements. However, it was clarified that the lawyer could not supply answers to the person or otherwise interfere with the questioning. It went a step further, and directed that the police must warn the accused about their Article 20(3) rights prior to the interrogation itself.

Another crucial discussion in the judgment was on another question: What was the purpose behind interrogating an accused? Was it to obtain a confession through whatever means necessary, or was it a more meaningful search for facts and the truth? And what means were justified in this process? In answering these questions, the Court underlined the link between confessions and the torture that is used to obtain them. The Court unequivocally lay on the side of investigators deploying skillful and psychological interrogations over physical ones that, to put it in the Court's own words, rely on giving "the fist a rest and the wit restlessness". Coming down strongly on the use of torture during interrogations, it held that the first obligation of the criminal justice system was to secure justice by seeking and substantiating truth through proof. In this process, the means must be as good as the ends and the dignity and freedom of the individual could not be sacrificed by resorting to improper means, however worthy the ends.

Thus, the Court advised a system where a person without a lawyer would be taken to a non-partisan official such as a Doctor or a Magistrate after their interrogation, so as to inform them about possible Article 20(3) violations i.e. taking of compelled statements of the accused. This, the Court believed, would make the process of enforcing Article 20(3) rights more practical and realistic.

In the end, the Court directed the Petitioner to answer all non-incriminatory questions put to her by the police, and directed that in case she sought the protection of Article 20(3) from answering any question, she must indicate in which case or offence the answer of such question may incriminate

[111] AIR 1961 SC 1808

[112] 384 U.S. 436 (1966)

her. It also directed that the Investigating Officer had the freedom to prosecute her under Section 179 IPC for any wrongful refusal to answer a question under the guise of the Article 20(3) protection.

Developments in the Law

Despite being a landmark judgment on the right of silence under Article 20(3) and the right to access a lawyer during interrogations, Nandini Satpathy's applicability has been restricted by subsequent judgments on the latter issue. In Poolpandi v Superintendent, Central Excise[113], the Supreme Court limited the applicability of the direction to access a lawyer during interrogation to only apply to "regular criminal cases" initiated by the "police". According to Poolpandi, this did not apply to investigations, inquiries, and prosecutions under the Customs Act, since customs officials were legally not "police"[114].

In Senior Intelligence Officer v Jugal Kishore Samra[115], the Supreme Court applied the Poolpandi rule of excluding Customs Act cases to cases under the Narcotics Drugs and Psychotropic Substances Act as well. However, given the precarious health of the Petitioner in that case, it made an exception and allowed the presence of a lawyer at some distance or behind a glass partition, without the right to speak to the lawyer during the interrogation.

[113] AIR 1992 SC 1795

[114] *Illias v Collector of Customs, Madras*, AIR 1970 SC 1065. However, the issue whether an official under the NDPS Act is a police official or not has been referred to a larger bench of the Supreme Court for consideration in *Tofan Singh v State of Tamil Nadu*, Criminal Appeal No. 152/2013.

[115] (2011) 12 SCC 362

SELVI & ORS. v STATE OF KARNATAKA & ANR., AIR 2010 SC 1974
(A Judgment of the Full Bench of the Supreme Court of India)

An accused cannot be compelled to undergo a narco analysis test, polygraphic examination, or a Brain Electrical Activation Profile test.

Brief Facts

During the investigation of a criminal case, the police sought to administer tests like narco analysis test[116], polygraph examination[117], Brain Electrical Activation Profile (BEAP) etc. upon the Petitioner who was an accused in the case. According to the police, these were investigative tools that could be administered on the accused to help with the investigation. But the Petitioner/accused refused to voluntarily undergo these tests, and claimed that the involuntary administering of these tests would violate the Article 20(3) protection from self-incrimination[118].

The Karnataka High Court ruled that since polygraph examination and BEAP test[119] recorded physiological, not verbal, responses of the accused/test subject, they were not 'testimonial compulsion', and thus did not violate Article 20(3). Regarding the answers given during a narco analysis, the High Court held that they did not violate Article 20(3) because at the time of giving the answers by the accused/test subject, it was not known whether those answers were incriminating or not.

Issues for consideration

1. Whether the involuntary administration of certain scientific technique tests like narco analysis, polygraph examination, and the BEAP test violate the 'right against self-incrimination' in Article 20(3) of the Constitution?

2. Whether the investigative use of these techniques created a likelihood of incrimination for the test subject?

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[116] In a narco analysis test (commonly referred to as the truth serum test), the test subject is given an intravenous drug by medical professionals (sodium pentathol) which causes them to enter a hypnotic trance and become less inhibited. This makes them more likely to divulge information in responses to the questions asked by the investigators. The premise is that during the hypnotic stage induced by the drug, the subject is unable to suppress the memories associated with relevant facts. Sodium Pentathol is also the drug given to patients as general anesthesia in surgical procedures.

[117] In a polygraph examination (commonly referred to as a lie-detector test) several instruments such as cardiographs, pneumographs, cardio-cuffs and sensitive electrodes, are attached to the subject for measuring and recording the physiological responses like respiration, blood pressure, blood flow, pulse and galvanic skin resistance. Then, the subject is questioned by the examiner, and this test captures the physiological responses of the subject while answering those questions. It is said that in case the subject is lying, they will produce a different physiological response than when they are answering honestly. This, it is said, separates the false responses from the truthful ones.

[118] Article 20(3). No person accused of any offence shall be compelled to be a witness against himself.
This fundamental right essentially means that a person cannot be compelled or forced to become a witness against themselves in a criminal case. Thus, any action of the police, where the evidence has been collected in violation of this fundamental right, would be unconstitutional and illegal. This right acts as a protection for an accused, making illegal, all evidence gathered or collected by violating it.

[119] It is a process of detecting whether an individual is familiar with certain information by way of measuring activity in the brain that is triggered by exposure to selected stimuli. It is conducted by attaching electrodes to the scalp of the test subject and the subject is then exposed to auditory or visual stimuli (words, sounds, pictures, videos) that are relevant to the facts being investigated alongside other irrelevant words and pictures. The electrodes measure the emission of the wave components by the subject upon exposure to the stimuli. The underlying theory is that in the case of guilty suspects, the exposure to the material probes will lead to the emission of P300 wave components which will be duly recorded by instruments. By examining the records of these wave components, the examiner can make inferences about the subject's familiarity with the information related to the crime.

3. Whether the results derived from these techniques amounted to 'testimonial compulsion' thereby attracting the bar of Article 20(3)?

4. Whether the involuntary administration of these techniques is a reasonable restriction on 'personal liberty' as understood in the context of Article 21 of the Constitution?

Observations by the Court

After discussing the techniques of these tests and the limited reliability of their results, the Court observed that Article 20(3) prohibited compulsion on the accused to give statements that would be incriminating. By barring such compelled statements, Article 20(3) operated as a vital safeguard in favour of the liberties of the accused. Without it, investigators would have an incentive to compel the accused to give incriminating statements, encouraging the use of torture and other 'third-degree methods' by the police to obtain them. In this way, Article 20(3) also ensured the right to personal liberty under Article 21.

The Supreme Court disagreed with the High Court's conclusion, and held that if these tests/techniques were administered involuntarily/compulsorily to the accused, the statement or information obtained from them would be based on coercion, threat, or inducement. This would clearly violate the Article 20(3) protection against compelled self-incrimination and would be inadmissible as evidence. Therefore, the accused had a right to silence against questions whose answers would be incriminating, and any force, threat or coercion used to compel the accused to answer them would violate Article 20(3).

The Court noted that a compelled 'testimony' was prohibited by Article 20(3), and since narco analysis involved the accused actually speaking, such testimony would be prohibited by Article 20(3).

However, the situation was different for polygraph examination and the BEAP test since they were not based on any verbal testimony by the accused; but on the inferences drawn from their physiological responses to questions or probes. The Court held that that 'testimonial compulsion' prohibited by Article 20(3) was not limited to verbal responses but also extended to non-verbal responses. The inferences drawn in polygraph or BEAP were based on the physiological responses of the accused while answering questions. Thus, since the answers were themselves based on the personal knowledge of the accused, so too were the physiological responses, and by extension, the results/inferences. Therefore, the results of these test were based on the personal knowledge of the accused. This amounts to more than the mere the collection of physical characteristics or information for identification or corroboration[120], and so, they violated Article 20(3). Put differently, the physiological responses collected from an accused during polygraph or BEAP tests were not the same as collecting their fingerprint or handwriting samples, since the former involved the personal knowledge of the accused, whereas the latter did not.

On the fourth issue, the Court held that the involuntary or compelled administration of any of these tests curtailed 'personal liberty', since the forcible interference with the mental processes of the subject amounted to an invasion of their right to privacy, and also constituted 'cruel, inhuman and degrading treatment' which is prohibited under Article 21[121]. The results gathered from these techniques also came into conflict with the right to a fair trial. Invocation of a compelling public interest cannot justify the dilution of constitutional rights such as the right against self-incrimination.

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[120] In *State of Bombay v Kathi Kalu Oghad*, the Supreme Court had held that if the compelled incriminating statement of the accused was based on their personal knowledge of the facts, it would be prohibited by Article 20(3). But the collection of physical characteristics for identification did not violate Article 20(3).

[121] *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*, AIR 1981 SC 746

However, the Court clarified that the protection of Article 20(3) would only be available against compelled administration of these tests. If the accused willingly consents to undergo any of these tests, the protection would not be available. Nor would the protection be available if the compelled administration was in the course of civil proceedings. Even when the tests are administered by consent of the accused, the test results themselves did not constitute evidence, but only the information or material subsequently discovered with the help of the test results could be admissible in evidence under Section 27 of the Indian Evidence Act.

DISTRICT REGISTRAR & COLLECTOR, HYDERABAD & ANR. V. CANARA BANK & ORS., AIR 2005 SC 186 (A judgment of the Division Bench of the Supreme Court of India)

"unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the Bank tend, to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid."

Brief Facts

In this case, the Supreme Court was dealing with the legality of searches under the Section 73 of the Indian Stamps Act, 1899, as amended by the State of Andhra Pradesh[122]. It granted virtually limitless powers of search and seizure to any person authorised by the District Collector, in any private property, without any requirement of recording the reasons necessitating the search.

The dispute arose when this power was sought to be exercised for searches and seizures in banks to seize records of their account holders. Upon being challenged by the banks, the High Court struck down the amendment as it violated the right to equal treatment under the law under Article 14 of the Constitution. Thus, the matter reached the Supreme Court.

Issues for consideration

Whether such unrestricted power to seize financial documents of customers from their banks was legal and constitutional?

Observations by the Court

The Court held that under Article 21, the right to privacy had been recognised under the Constitution and upheld by the Supreme Court in earlier judgments, Kharak Singh v State of UP[123], Govind v. State of Madhya Pradesh & Ors.[124] and R. Rajagopal v. State of Tamil Nadu[125]. The right to privacy had been recognised as 'the right to be left alone', though it was not an absolute right. For instance, it could not be claimed over public records. It could also be superseded by a compelling public interest such as prevention and investigation of a crime.

The amended Section 73 applicable in Andhra Pradesh allowed any person authorised by the District Collector to get access to documents in private custody or the custody of a public officer, whether those documents were evidence or not. Any such person could exercise this power without them or the District Collector recording any reasons for why such a search was necessary. Thus, the power under this provision was very broad, unregulated, and unjustified.

[122] Section 73. (1) Every public officer or any person having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may attend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorized in writing by the Collector to enter upon any premises and to inspect for such purposes the registers, books, records, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge and if necessary to seize them and impound the same under proper acknowledgement:

…

(2) Every person having in his custody or maintaining such registers, books, records, papers, documents or proceedings shall, when so required by the officer authorized under sub-section (1), produce them before such officer and at all reasonable times permit such officer to inspect them and take such notes and extracts as he may deem necessary.

...

[123] 1964 (1) SCR 332

[124] AIR 1975 SC 1378

[125] AIR 1995 SC 264

In the present case, the Court held that bank account holders who had opened accounts with their banks expected an element of confidentiality with regard to their banking transactions. It did not matter whether the documents related to those accounts or transactions were in their own premises, or in the premises of the bank. The right to privacy of an account holder over their banking documents existed not just in their own home, but also in the documents kept at the bank. Thus, the right to privacy flowed from the 'person' and not the place'.

The searches challenged by the banks in the present case subjected them to legally unsustainable encroachments that were without any reasonable or probable basis. Unless the District Collector had a probable or reasonable cause, or basis or material to reach an opinion that the documents in possession of the bank tended to prove or lead to the discovery of any fraud related to stamp duty, such search or seizure would not be valid.

Similarly, the Court held that the power given to the District Collector under the amendment to authorise any person to conduct search and seizure was also excessive and unconstitutional. The State had to clearly designate the officers who could conduct search and seizure, or specify a minimum criteria of seniority for such an officer. The amendment thus, did not pass the test of 'fair, just and reasonable' as devised in Maneka Gandhi v Union of India[126].

In conclusion, the Supreme Court upheld the judgment of the High Court and declared the amendments to be unconstitutional.

Directives of the Supreme Court

This judgment lays down the limitations to the power of search and seizure. Although not dealing strictly with the police or its powers under the CrPC, this judgment lays down the general constitutional directive: the procedure for searches and seizures under the law cannot be unfair, unreasonable, or arbitrary. This would be in violation of the test laid down in Maneka Gandhi's judgment.

[126] AIR 1978 SC 597

BABUBHAI v STATE OF GUJARAT & ORS., (2010) 12 SCC 254 (A Judgment of the Division Bench of the Supreme Court of India)

"Not only the fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. Investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. Where non-interference of the court would ultimately result in failure of justice, the court must interfere."

Brief Facts

In July 2008, violent altercations and rioting took place between the Bharwad and the Koli Patel communities in Gujarat, over the plying of rickshaws in the area surrounding Dhedhal village, District Ahmedabad. Three persons died and many other persons sustained injuries, including police officials. Two FIRs were registered for the incidents, the first on the complaint of a Sub-Inspector of Gujarat Police, and the second on the complaint of the Appellant, a member of the Koli Patel community.

After completion of the investigations, charge sheets were filed by the police in both cases against the same accused. Persons belonging to the Bharwad community alleged that the investigation had favoured the Koli Patel community and had been biased against their community. It was alleged that the police had not recorded any statements of witnesses of the Bharwad community who had been injured or whose houses had been burnt down. Without those statements, the charge sheet filed by the police against the accused belonging to the Koli Patel community was weak and ineffective, and would ultimately result in their acquittal. Also, it was alleged that the police had shielded these accused from arrest by claiming that they were absconding and could not be found, whereas actually they had been seen attending court with the police itself.

The Gujarat High Court agreed with the bias allegations, and transferred the investigation to the State CB-CID Crime Branch. It quashed the second FIR and clubbed it with the first one, and directed that a fresh investigation be conducted in the clubbed case.

Issues for consideration

Although the main issue in this case related to the registration of two FIRs regarding the same set of incidents, the other issue, presently of relevance, was:

What is the right to a free and fair investigation of an accused under Article 21 of the Constitution of India? What was the duty of the court if an investigation had been unfair, biased, and mala fide?

Observations by the Court

It is the duty of the police to carry out an investigation that is fair and without any ulterior motives. The conduct of the police had to be impartial, without any suspicion towards its genuineness, and should exclude any fabrication of evidence. A fair investigation was the backbone of the Rule of Law. Relying on judicial precedents[127], the Supreme Court held that the role of the investigator of a criminal case was not to strengthen the prosecution's case on the basis of any evidence merely to secure a conviction, but to unearth and bring out "the real and unvarnished truth" before the court.

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[127] *RP Kapur v State of Punjab*, AIR 1960 SC 866, *Jamuna Chaudhary v State of Bihar*, AIR 1974 SC 1822 and *Mahmood v State of UP*, AIR 1976 SC 69.

The right to a fair investigation was part of the fundamental rights of accused persons under Articles 20[128] and 21[129] of the Constitution of India. Article 21 prohibited the restriction/deprivation of the personal liberty of any person by a procedure not established by law. An unfair, unjust or malicious investigation, could not possibly be considered to be a 'procedure established by law' and thus, would be arbitrary deprivation of personal liberty.

The investigation of a criminal case was a statutory power that under the CrPC, was exclusively within the domain of the executive and the police. The judiciary should normally not interfere with it. However, if the police had investigated in a mala fide manner, or abused its powers, the courts had a duty to interfere if necessary, and ensure a fair and proper investigation.

If the court found an investigation to be biased, and not proper or objective, to help a particular party in a case, the court could direct further investigation. However, in exceptional/special/extraordinary cases, to prevent the miscarriage of justice[130], the court had the power to order a fresh investigation[131].

Applying these principles to the present case, the Supreme Court held that the investigation had been totally one-sided, biased, and mala fide. One community had clearly been favoured by the police, and the other had faced unwarranted harassment. If the investigation had been unfair, the charge sheet being its outcome, was also invalid. The charge sheet was unreliable, to reveal the truth about the incidents that had taken place.

Thus, in conclusion, the Supreme Court upheld the transfer of investigation to the independent agency, and quashed the charge sheets filed by the police.

Directives of the Court

If the investigation in a criminal case was biased, unfair, or mala fide, the High Court and the Supreme Court can interfere with the investigation and take steps or pass orders to ensure a proper investigation. In exercise of this power, it can even transfer the investigation to another investigating agency.

Developments in the Law

A fair and unbiased investigation is not just a right of an accused - a complainant or a victim of a crime equally has a right to a fair investigation under Article 21, as held by the Supreme Court in Nirmal Singh Kahlon v State of Punjab[132].

Police investigation of a case cannot be funded by a party to a case, as it affects the neutrality of the investigation, as held in Navinchandra N. Majithia v State of Meghalaya & Ors[133]. The

[128] Article 20. Protection in respect of conviction of offences
(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
(2) No person shall be prosecuted and punished for the same offence more than once.
(3) No person accused of any offence shall be compelled to be a witness against himself.

[129] Article 21. Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.

[130] Miscarriage of justice is a legal expression used to refer to a situation of failure of justice where there has been a gross deprivation of the rights of a person.

[131] A fresh investigation is also called 're-investigation' or 'de-novo investigation'. It refers to the process of conducting an investigation of the entire case afresh. This means a re-examination or re-assessment of the entire case from the police from the start. This is different from 'further investigation', which refers to a limited process of investigating specific aspects of the case that the police had not investigated properly earlier or not investigated at all.

[132] AIR 2009 SC 984

[133] AIR 2000 SC 3275

Supreme Court ruled that all police investigations had to be funded by the State, and prohibited the police from taking any financial assistance from private parties (such as the complainant or the victim) to meet the expenses of the investigation. Accepting such financial assistance would compromise the fairness of the investigation, which was a fundamental right. It would also unfairly disadvantage poor persons in comparison to rich persons who could use their resources to influence the investigation in their favour.

Another aspect of neutrality that has been emphasised by the Court in Mohan Lal v State of Punjab[134] is that a police official who was the informant of an FIR, could not be the investigator of that FIR. This was to exclude any possibility of bias or a predetermined conclusion in the investigation of the case.

[134] AIR 2018 SC 3853

F. DEPRIVATION OF FUNDAMENTAL RIGHTS

RUDUL SHAH V STATE OF BIHAR & ANR., AIR 1983 SC 1086
(A Judgment of the Full Bench of the Supreme Court of India)

"... 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."

Brief Facts

A habeas corpus petition was filed in the Supreme Court by the Petitioner, who was kept in jail for fourteen years even after he had been acquitted. In the petition, he asked for release from jail, rehabilitation, reimbursements of medical expenses, and compensation for illegal imprisonment.

The jail authorities countered his petition in Court by claiming that he was not released from jail because he was "insane", although they provided no medical basis for making this claim.

Issues for consideration

How can the Court, in exercise of its writ jurisdiction under Article 32 of the Constitution of India, rectify the injustice suffered by the Petitioner?

Observations by the Court

Under the ordinary process of the law in India, a monetary claim for enforcement of rights or obligations had to be made before a civil or criminal court. For the enforcement of Fundamental Rights, monetary compensation to the victim did not strictly form part of the jurisprudence in India.

Under Article 32 of the Constitution of India[135], the Supreme Court has the power to issue writs such as habeas corpus, mandamus, prohibition, quo warranto, and certiorari for the enforcement of any Fundamental Right under Part III of the Constitution. Thus. the Court could exercise the Article 32 power to remedy or prevent the violation of Article 21 right to life and liberty, and that could also mean ordering monetary compensation to persons whose rights had been violated by the State and its functionaries. Thus, as a remedial measure, the Court could make the State liable to repair the damage done by its officers to the rights of the Petitioner. Also, this monetary compensation did not preclude the Petitioner or any other victim from seeking damages from the State and its officials in civil proceedings.

Developments in the Law

Over the years, the Courts have awarded compensation for varying violations of Fundamental Rights, especially the Article 21 right to life and liberty. For instance, compensation in the form of exemplary costs on the state for illegal arrest and imprisonment of the Petitioner with malicious intent was awarded in Bhim Singh v State of J&K & Ors.[136]

[135] Article 32, Remedies for enforcement of rights conferred by this Part
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power 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 this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

[136] AIR 1986 SC 494

In MC Mehta v Union of India[137], the Supreme Court further evolved the justification for the award of monetary compensation under Article 32. It noted that under its Article 32(1) power to enforce fundamental rights, it was free to devise any appropriate procedure for the enforcement of such right. It also clarified that this power was not just to prevent the violation of rights, but also provide relief to victims against a breach or violation that had already been committed, which could take the form of compensation in certain cases. However, the Court also held that this power should only be exercised in "appropriate cases", where the violation of the fundamental right was gross, patent or glaring, or it was inflicted on a large scale, or where it would be unduly harsh or oppressive to require an economically or socially disadvantaged victim to seek remedy under civil law. Thus, enforcement of fundamental rights by award of compensation under Article 32 was an exceptional remedy, and could not be done in ordinary cases as a substitute to a remedy under private law through civil proceedings.

The celebrated judgment of DK Basu v State of West Bengal[138] recognised the need to make the State vicariously liable for an established infringement of the fundamental right to life of a citizen by the public servants employed by it by award of monetary compensation[139]. This was not only an effective, but sometimes the only suitable remedy for the redressal of established deprivation of fundamental rights.

In Dr. Rini Johar & Anr. v State of MP & Ors.[140], the Petitioners suffered the deprivation of their fundamental rights in the form of arrest in complete violation of the procedures in the CrPC and the judgment of DK Basu v State of West Bengal[141]. For instance, the arrest was made by the Madhya Pradesh police in Pune, outside its jurisdiction, yet the information of arrest was not provided to the District Police Control Room [as required under Section 41C]. They were arrested without being issued a valid notice of appearance [Section 41A] as mandated in the judgment of Arnesh Kumar v State of Bihar[142]. The arrest itself was made without a satisfaction of the necessary conditions [Section 41]. They were not produced before the local judge/Ilaqa Magistrate, but straightaway brought to Madhya Pradesh [Section 167(1)]. They were also treated with indignity and humiliation while being transported from Pune to Bhopal by the Madhya Pradesh police. The Court awarded compensation to the Petitioners for violation of their Article 21 right to be treated with dignity, and for the restriction of their personal liberty in violation of the procedures and provisions of the CrPC.

The judgment of Inhuman Conditions in 1382 Prisons, In re[143] acknowledged other circumstances where detention was payable by the State to citizens. For instance, for illegal detention after acquittal, unlawful arrest and detention, or murder of a prisoner by a co-prisoner.

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[137] AIR 1987 SC 1086

[138] AIR 1997 SC 610

[139] Vicarious liability is a form of a strict liability where the liability is of a superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the 'right, ability or duty to control' the activities of a violator.

[140] AIR 2016 SC 2679

[141] AIR 1997 SC 610

[142] AIR 2014 SC 2756

[143] (2017) 10 SCC 658

NILABATI BEHERA v STATE OF ORISSA & ORS., AIR 1993 SC 1960
(A Judgment of the Full Bench of the Supreme Court of India)

"... when the court molds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen."

Brief Facts

The Petitioner Nilabati Behera was the mother of twenty-two year old Suman Behera who was detained by the police in relation to a theft, and was found dead on the railway tracks the following day. His body bore several injury marks and it was alleged that his death was caused by custodial violence inflicted on him when he was in the custody of the police. The police claimed that Suman Behera had escaped from police custody and suffered injuries and death since he was run over by a train.

The Petitioner wrote a letter to the Supreme Court which was converted into a writ petition. In the letter she demanded compensation for the violation of the Article 21 fundamental right to life of her son.

Issues for consideration

The Court considered two issues:

1. Whether the death of Suman Behera was a case of a custodial death?

2. If yes, what liability did the state and police officials have to compensate the Petitioner for the death of her son?

Observations by the Court

The post mortem report recorded a long list of injuries on the body of the deceased, and concluded that all the injuries could have been caused by lathi blows, but not by being run over by a train. Additionally, the police failed to present any evidence that they had searched for him after his alleged escape. There was considerable delay in their arrival to the train tracks where his body was discovered. Thus, on the first issue, the Court ruled that his death was custodial in nature.

Coming to the second issue, the Court held that the State did have a public law liability to compensate victims in cases of violation of their Fundamental Rights by the State or its functionaries. It cited several judgments including Rudul Shah v State of Bihar[144], and Section 9(5) of the International Covenant on Civil and Political Rights, 1966, to assert the principle that a claim for compensation payable by the State could be made under public law based on strict liability of the State to compensate victims of contravention of Fundamental Rights, and the courts could award monetary compensation for such contraventions. Articles 32 and 226 were constitutional remedies available to victims to approach the Supreme Court or High Court, and the courts could award compensation to victims.

This was over and above the private law remedy for damages resulting from the deprivation of fundamental rights[145]. It also acknowledged that because a private law remedy was less likely to

[144] AIR 1983 SC 1086

[145] A tort is a civil remedy in the form of damages for a breach of a legal duty by a person.

be accessed by those with limited financial means, the constitutional scheme of Articles 32 and 226 should be able to provide for compensation to such persons under public law. The Court also held that while the State could claim protection under the concept of sovereign immunity[146] against a private law remedy, for a public law constitutional remedy like Article 32 or 226 of the Constitution, this protection was not available to the State.

Finally, the Court directed the State to pay a compensation of Rs. 1,50,000 to the Petitioner, calculated based on the age and monthly income of the deceased.

Developments in the Law

In State of Maharashtra v Christian Community Welfare Council of India[147], the Court held that in cases of custodial death, the culpable police officials can personally also be held liable to compensate the family of the deceased, if the death of the person was not caused in the performance of official duty or due to abuse of force.

However, in Sube Singh v State of Haryana[148], the Supreme Court cautioned against award of compensation in cases where death of a person has resulted while in custody, but there is no evidence of torture supported by medical report or marks, scars or disability, or the allegations are exaggerated. In such cases, the traditional civil remedy of civil or criminal action would be the most appropriate remedy.

[146] It is the immunity that a state has from being sued in court by its own citizens.

[147] AIR 2004 SC 7

[148] AIR 2006 SC 1117

G. TRANSFER, QUASHING AND CLOSURE OF CRIMINAL CASE

STATE OF WEST BENGAL & OTHERS v COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS & OTHERS, AIR 2010 SC 1476
(A Judgment of the Constitution Bench of the Supreme Court of India)

Constitutional Courts can exercise their powers of judicial review to transfer the investigation of a case from the State police to an agency outside the State.

Brief Facts

The Committee for Protection of Democratic Rights, West Bengal, challenged the investigation being conducted by the police and the CID of West Bengal in a case dating back to 2001, of a politically motivated incident of mob violence which had resulted in 11 casualties. The Respondent organisation claimed that the investigation in the case was not unbiased or impartial, due to the political influence of the ruling party, and sought the transfer of the investigation to an independent agency. The High Court agreed, and handed over the investigation from the State Investigating Agency, which was under the Government of West Bengal, to the Central Bureau of Investigation (CBI), which was under the Central Government.

The State of West Bengal challenged this before the Supreme Court, and eventually the matter came up before the Constitution Bench.

Issues for consideration

Whether the High Court could exercise its jurisdiction under Article 226 of the Constitution of India[149], and direct the CBI to investigate a cognizable offence[150] that had taken place within the territory of a State, without the consent of the State Government?

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[149] Article 226. Power of High Courts to issue certain writs
(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose
(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories
(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without
(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated
(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32.

[150] Section 2 (c) of the Code of Criminal Procedure- "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

The Government of West Bengal argued that under the Seventh Schedule of the Constitution, police was the exclusive jurisdiction of the State. Thus, under the federal structure and principle of separation of powers, both part of the Indian Constitution, the investigation of this case could only be conducted by the state police. The transfer of investigation to the CBI, which was an agency under the Central Government, violated this constitutional scheme. It argued that even if the state police was failing to conduct a proper investigation, the same could not be transferred to a central agency.

Observations by the Court

The Supreme Court discussed the federal system in India's Constitution, the distribution of legislative powers between the centre and states, and the power of judicial review of constitutional courts such as the Supreme Court and the High Court. It also discussed several landmark cases, which had established the prevailing constitutional jurisprudence on these issues.

The Court partly agreed with the argument of the State of West Bengal, that by transferring the investigation from the state police to the CBI, the High Court had transgressed the doctrine of separation of powers and the distribution of legislative powers. However, it reasoned that both the High Court and the Supreme Court of India, being constitutional courts, had a crucial duty to exercise their power of judicial review of executive action under Articles 32 and 226 of the Constitution, to do justice in cases where Fundamental Rights had been violated. This overarching power of judicial review was so integral to India's Constitution that it formed part of its basic structure, and could not be removed even by a constitutional amendment[151]. Thus, the power of judicial review to protect Fundamental Rights and do justice in case of their violation, superseded even the doctrine of separation of powers.

Thus, the Court concluded that the issue of transfer of investigation from the State police to the CBI in this case should not be viewed as an issue of violation of separation of powers of the Centre and State. Instead, it should be seen as an issue of enforcement of Fundamental Rights of victims, which the Court could do under its power of judicial review to ensure justice.

Directives of the Court

(1) A direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution (or by the Supreme Court under Article 32), to the CBI, to investigate a cognizable offence alleged to have been committed within the territory of a State, without the consent of that State, neither impinges upon the federal structure of the Constitution, nor violates the doctrine of separation of powers, and shall be valid in law. Being the protectors of civil liberties of the citizens, the Supreme Court and the High Courts not only have the power and jurisdiction but also an obligation to protect the fundamental rights guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

(2) However, this extraordinary power must be exercised sparingly, cautiously, and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights.

Developments in the Law

Since its pronouncement, this judgment has become an authoritative law on the subject of transfer of investigation to another investigating agency. Recent judgments have expanded the scope of this legal principle to hold that when questions arise about the fairness, genuineness or honesty

[151] See *L. Chandra Kumar v. Union of India & Ors.*, AIR 1997 SC 1125. The basic structure doctrine was propounded in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

of the investigation in a given case in which the trial is already underway, then a Constitutional Court has a duty to step in and has the power to stay the trial and order fresh investigation or re-investigation by a different agency[152]. However, this power to transfer the investigation to CBI is not available to a Magistrate under Section 156(3) CrPC, as held by the Supreme Court in Central Bureau of Investigation v State of Rajasthan & Anr.[153]

[152] *Dharam Pal v. State of Haryana & Ors.*, AIR 2016 SC 618 & *Pooja Pal v. Union of India & Ors.*, AIR 2016 SC 1345

[153] 2001 (2) ACR 1857 (SC)

STATE OF HARYANA & ORS. v CH. BHAJAN LAL & ORS., AIR 1992 SC 604
(A Judgment of the Division Bench of the Supreme Court of India)

"... if a police officer transgresses the circumscribed limits and improperly and illegally exercise his investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen, then the Court on being approached by the person aggrieved for the redress of any grievance, has to consider the nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echelons since human dignity is a dear value of our Constitution."

Brief Facts

The Petitioner was a former Minister and the former Chief Minister of the State of Haryana. He was accused by his political rival of amassing assets far in excess of his sources of income. An FIR was registered against him for offences under the IPC and the Prevention of Corruption Act. The Petitioner sought quashing of this FIR by the High Court of Punjab and Haryana, and a restraint on the police to investigate the case.

After discussing the allegations against the Petitioner, and the law on the subject of quashing of FIRs, the High Court held that the allegations against the Petitioner did not constitute any cognizable offence. Thus, there was no basis for the police to have registered the FIR and conduct any investigation, and so it quashed the FIR. This was challenged by the State before the Supreme Court.

Issues for consideration

The Court considered several legal issues, including the obligation of the police to register an FIR, its powers of investigation, the power of the courts to scrutinise the investigation, and even quash the FIR.

Observations by the Court

The registration of an FIR takes place under Section 154(1) of the CrPC[154]. This provision mandates registration of any information that discloses the commission of a cognizable offence[155]. The word 'information' used in Section 154 is unqualified, meaning that the legislature intended any information related to the commission of a cognizable offence should be registered. Upon receiving such an information, the police could not conduct an enquiry whether the information was reliable or genuine, and refuse to register the FIR. 'Reasonableness' or 'credibility' were not criteria that the information had to meet.

After registering the FIR, the police had the power to investigate any cognizable case[156] and could proceed with the investigation if they had "reason to suspect" the commission of an offence[157]. In

[154] Section 154 - Information in cognizable cases
(1) Every information relating to the commission of a cognizable offence, if given orally to an Officer-in-Charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

[155] *Lalita Kumari v Govt. of Uttar Pradesh & Ors.*, AIR 2014 SC 187

[156] Section 156. Police Officer's power to investigate cognizable offence
(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

[157] Section 157. Procedure for investigation

case the police did not find sufficient ground to investigate, they could not investigate and close the case on this basis.[158] However, they had to report their decision to not investigate to the area Magistrate and the reasons for doing so, and also notify the informant.[159]

These decisions regarding the investigation were exclusively within the domain of the police and other investigating agencies, and courts had no control over, or the power to stifle or interfere with the investigation, as long as the powers within the CrPC were being exercised legitimately by the police. A Magistrate could not interfere with the investigation. But if the investigatory powers were improperly or illegally being exercised by the police, affecting the personal liberty or property of a citizen, then the High Court could exercise its jurisdiction under Article 226 of the Constitution of India, and restrain the police from misusing their powers. Thus, the power to investigate was not immune from judicial scrutiny.

Coming to other major issue of quashing of FIR, the Court noted that a High Court had the power to do under Article 226(1)[160] of the Constitution or Section 482 of the CrPC[161]. But the question was under what circumstances could this power be exercised?

After discussing multiple judicial precedents on this issue, the Court extracted the following categories of cases where the FIR could be quashed by the Court either to prevent the abuse of the legal process or to ensure justice, although it was not a complete or exhaustive list:

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused,

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(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that—
(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the Officer-in-Charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;
(b) if it appears to the Officer-in-Charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.
(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to Sub-Section (1), the Officer-in-Charge of the police station shall state in his report his reasons for not fully complying with the requirements to that Sub-Section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

[158] Section 157(1), Proviso (b)

[159] Section 157(2)

[160] 226. Power of High Courts to issue certain writs
(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

[161] S. 482. Saving of inherent power of High Court
Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provisions in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

But the Court cautioned that this power to quash should be used sparingly, with circumspection, and in the rarest of rare cases. The Court could not conduct an enquiry as to the reliability or genuineness of the allegations, and should not use this power arbitrarily.

Thus, applying these principles to the facts of the FIR against the Petitioner, the Court held that since the complaint against the Petitioner disclosed the commission of cognizable offence, the FIR had been correctly registered. The facts of the case did not fall within any of the categories laid down by the Court. But since no investigation had been conducted due to the stay of investigation by the High Court, it was premature for the Court to comment on whether the complaint was true or false. That could only be determined after an investigation had been conducted by a competent official. Therefore, it gave time to the State Government to direct an investigation into the case.

ABHINANDAN JHA & ORS. v DINESH MISHRA, AIR 1968 SC 117

(A Judgment of the Division Bench of the Supreme Court of India)

"…the investigation, under the Code, takes in several aspects, and stages, ending ultimately with the formation of an opinion by the police as to whether, on the material covered and collected, a case is made out to place the accused before the Magistrate for trial, and the submission of either a charge-sheet, or a final report is dependent on the nature of the opinion, so formed. The formation of the said opinion, by the police, as pointed out earlier, is the final step in the investigation, and that final step is to be taken only by the police and by no other authority."

Brief Facts

In two unconnected cases, similar points of controversy arose. In both cases, after completing the investigation the police filed a 'final report'[162] before the Magistrate to close the cases. The reason was the same in both: the first information provided by the Complainant was found false or incorrect.

In both cases, the Complainant filed a 'protest petition'[163] opposing the final report and the closure of the case. After hearing arguments, the separate Magistrates in the two cases directed that instead of closing the case, the police to file a 'charge sheet' against the accused. The accused challenged these orders before the Sessions Court and the High Court, without any success, and finally approached the Supreme Court.

Issues for consideration

When, after the conclusion of investigation in a criminal case, the police intend to close the case by filing a final report under Section 173(2) of the Code of Criminal Procedure, can the Magistrate direct the police to file a charge-sheet against the accused?

Thus, the Court was dealing with the issue of whether a Magistrate can direct the final outcome or conclusion of a criminal investigation and order the police to file a charge sheet against the accused? Or alternatively, can the Magistrate order the filing of a final report for closure of the case against the accused? The Supreme Court noted that there was a conflict of opinion between various High Courts on this point, and sought to resolve it.

Observations by the Court

The scope of powers of the police with regard to the investigation of a case was very wide, contained in Chapter XII of the CrPC, Sections 154 to 173. Under the scheme of the CrPC, the manner and method of conducting the investigation had been left entirely to the police, and only the police had the power to form the opinion as to whether the accused should be chargesheeted or not. The Magistrate had no observable powers to interfere with the investigation or order its outcome in a particular way.

However, this did not imply that the Magistrate was bound to accept the police's opinion. Under Section 190 of CrPC, the Magistrate did have the power to 'judicially' deal with the report filed by the police upon the conclusion of the investigation, and could form its own opinion as to whether

[162] After concluding the investigation of an FIR, the police has to file a 'Report' before the Magistrate under Section 173(2) of the CrPC. The police can either file a 'Charge Sheet' or 'Challan' against the accused. However, if the police find that there is insufficient evidence or the accused has not been identified, the police can file a 'Final Report', also referred to as 'Closure Report', 'Cancellation Report', or 'Untrace Report'. However, none of these terms are mentioned in the CrPC.

[163] When the police file a Final Report and seek closure of the case, the complainant has the right to file a 'Protest Petition' before the Magistrate to oppose the closure of the case. This has evolved as a procedural practice, though there is no such right in the CrPC. See *Bhagwant Singh v. Commissioner of Police*, AIR 1985 SC 1285.

there was sufficient evidence to proceed with the case or not, and accordingly take cognizance of the offence[164].

Therefore, even if it was the opinion of the Investigating Officer that there was a case to proceed against the accused, and a charge-sheet was filed, it was open to the Magistrate to take a different view - that no offence was made out against the accused, or that the case lacked sufficient material to prosecute the accused. Of course, if the Magistrate was in agreement with the opinion of the Investigating Officer, they could take cognizance of the offence and proceed with the case against the accused.

Coming to the issue under consideration, i.e. a situation where the police opine that no case is made out against the accused, and file a 'final report', but the Magistrate is in disagreement. The Court observed that the Magistrate is legally empowered under Section 156(3) of the CrPC[165], to reject the final report filed by the police, and instead direct the police to conduct further investigation in the case. If ultimately after further investigation, the police again file a final report, the Magistrate can still disagree with the opinion of the police and hold the view that an offence is made out, take cognizance of the offence and proceed to summon the accused.

Thus, the Court concluded, that if the police files a final report in a given case, and the Magistrate disagrees with the police, then s/he cannot direct the police to file a charge-sheet. However, the Magistrate is not bound to accept the final report filed by the police and can take recourse to the above-stated options.

Thus, the power of the police to investigate, and the power of the Magistrate to close or proceed with the case, were separate and independent of each other.

Directives of the Supreme Court

(1) The police have the sole domain over the manner of investigation of a criminal case. After completing the investigation, it is the sole decision of the police to file a charge sheet or final report in the case. The Magistrate cannot interfere with either of these powers of the police.

(2) If after investigation, the police/Investigating Officer forms the opinion that a case is made out against the accused, and files a charge-sheet, the Magistrate can accept the charge-sheet, take cognizance of the offence, and summon the accused.

(3) If the Magistrate disagrees with the opinion of the police/Investigating Officer, and is of the view that no case is made out, then s/he can decline to take cognizance and close the case.

(4) If after investigation, the police/Investigating Officer forms the opinion that no case is made

[164] Cognizance, though not formally defined in the Code of Criminal Procedure, 1973, has been interpreted by the courts, as the stage in the life of a criminal case, when on the filing of a charge sheet by the police (or on the filing of a private complaint by any person), the Magistrate first applies his/her mind to the contents of a criminal case and takes judicial notice of the same, with the intention to proceed with the case according to law. This power of the Magistrate is contained under Section 190 of the Code of Criminal Procedure. For more clarification, see *R.R. Chari v. State of Uttar Pradesh*, AIR 1951 SC 207, *Gopal Das Sindhi & Ors. v. State of Assam & Anr.*, AIR 1961 SC 986, etc.

[165] 156. Police officer' s power to investigate cognizable case.
(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

out against the accused, and files a final report, then the Magistrate has three options.

a. If the Magistrate disagrees with the opinion of the police/Investigating Officer, and is of the view that the offence is made out, s/he can reject the final report, take cognizance of the offence, summon the accused, and proceed with the case, or,

b. If the Magistrate disagrees with the opinion of the police/Investigating Officer, and is of the view that the case requires further probe, s/he can direct the police to carry out further investigation in exercise of its power under Section 156(3) of the Code of Criminal Procedure. After further probe, the Magistrate can take cognizance and proceed with the case, or,

c. The Magistrate can reject the final report and treat the protest petition as a complaint filed by the complainant. The Magistrate can then take cognizance of this complaint and direct the complainant to give evidence under Section 200 of the Code of Criminal Code.

Developments in the Law

In Bhagwant Singh v Commissioner of Police[166], the Supreme Court safeguarded the right of the informant/complainant/victim to be heard at this stage of the case. It held that the closure/dropping of a criminal case prejudicially affects the right of the complainant/victim of the FIR. Thus the principles of natural justice required that prior to dropping/closing the case, the Magistrate must issue notice to the informant and give the informant an opportunity to oppose the closure of the case. Even if a person is not the informant, but is a victim or relative of the victim in a case, they do have the right to appear before the Magistrate at the time of consideration of the final report and make submissions with regard to the case, though the Magistrate is not obligated to issue notice to them.

In Jakia Nasim Ahesan & Ors. v State of Gujarat & Ors.[167], the Supreme Court further advanced the right of the informant/complainant to effectively challenge the closure of the case. It held that after issuing notice to the complainant, the court shall also make available to them the copies of the statements of witnesses, other related documents, and the investigation report of the case.

[166] AIR 1985 SC 1285

[167] AIR 2012 SC 243

H. PUBLIC PROTEST

RAMLILA MAIDAN INCIDENT v HOME SECRETARY, UNION OF INDIA & ORS., (2012) 5 SCC 1
(A Judgment of the Division Bench of the Supreme Court of India)

The right of persons to public protest and the powers of the police under Section 144, CrPC to regulate protests.

Brief Facts

In June 2011, an organisation named Bharat Swabhiman Trust obtained permissions from the Municipal Corporation of Delhi and the Delhi Police to hold a yoga training camp for about five thousand people at Delhi's Ramlila Maidan. However, instead of a yoga training camp, an anti-government agitation on the issue of corruption and illegal black money stashed abroad was organised. And on the date of the event, the crowd swelled to over fifty thousand people. The permission to hold the camp was withdrawn by the government and late at night, an order under Section 144 of the CrPC[168] was passed by the police, prohibiting the agitation at the site.

Past-midnight, police and para-military battalions entered Ramlila Maidan to detain the protestors who were asleep by then, leading to violence, such as throwing of bricks, lathi charge, and firing of tear gas shells by the police, in which many persons got injured. All the protestors were driven out and Baba Ramdev, who was heading the agitation, was arrested.

The Supreme Court took suo-moto notice of the incident.

Issues for consideration

Was the use of Section 144, CrPC by the police justified in law or did it amount to violation of the fundamental rights of the gathered persons/protestors?

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[168] 144. Power to issue order in urgent cases of nuisance of apprehended danger.
(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, of an affray.
(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte.
(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.
(4) No order under this section shall remain in force for more than two months from the making thereof: Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.
(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor- in- office.
(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub- section (4).
(7) Where an application under sub- section (5) or sub- section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

Observations by the Court

The right to public protest was recognised under Articles 19(1)(a) and (b) of the Constitution of India[169] i.e., the fundamental rights to free speech and expression, and to assemble peacefully without arms. However, these rights were not absolute. Articles 19(2) and 19(3)[170] empowered the State to impose "reasonable restrictions" on the exercise of these rights, for one of the reasons provided. The State did not have the power to take away the right to protest by prohibiting the gathering of an assembly, but could only regulate or impose reasonable restrictions in the interest of public order.

Even the State's power to restrict these rights was limited to the reasons provided in Articles 19(2) and (3) of the Constitution, and not for any other reason. And even then, the restrictions imposed had to follow the principle of least invasiveness[171]. Whether any restriction imposed by the State was reasonable or not, was a question for the courts to decide through judicial scrutiny.

Any action taken by a public authority, such as the police, which restricted fundamental rights must have its basis in law, and must be 'just, fair, and reasonable'[172], a test laid down in Maneka Gandhi v Union of India[173]. And if any action was found to be restricting fundamental rights, the authority had to show and justify that it was reasonable, or otherwise it would be deemed unconstitutional.

Coming to Section 144 of the CrPC, the Court held that it empowered certain Magistrates to direct any person to abstain from doing a certain act or to take action as directed, where sufficient ground for proceeding existed and immediate prevention and/or speedy remedy was desirable. Section 144 was intended to serve the public purpose of protecting public order. Its powers did restrict fundamental rights, but they were reasonable: It provided a complete procedure to be followed by the Magistrate, specified a time limit for which an order would be valid, and the circumstances that were to be considered by the Magistrate while passing an order under Section 144. Therefore, the power under Section 144 was constitutional and did not violate fundamental rights.

Thus, if an authority empowered under Section 144 anticipated imminent threat to public order or tranquility from a meeting or gathering, it could pass temporary orders prohibiting it. This restriction would be reasonable. However, there were some checks and limits to this power: It could only be used in emergent situations with real threat to public order and tranquility[174], the order should be in writing, it should be based on the facts of that particular situation, stating the reasons for imposing the restriction, and the restriction should be minimal and least invasive.

The impact of such an order on persons protesting in exercise of their Article 19(1)(a) and (b) rights

[169] Article 19(1) All citizens shall have the right—
(a) to freedom of speech and expression;
(b) to assemble peacefully and without arms;

[170] Article 19(2) - Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
(3) - Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

[171] The restriction should be imposed in a manner and to the extent unavoidable in a given situation.

[172] In other words, the restrictive action must not be discriminatory, arbitrary, fanciful, or oppressive.

[173] AIR 1978 SC 597

[174] Section 144 order cannot be passed merely on a 'likelihood' or 'tendency' to threaten public order. There has to be 'present danger' or even an 'apprehension of danger'. *Babulal Parate v State of Maharashtra & Ors.*, AIR 1961 SC 884.

would be that the gathering of persons assembled legally, would become an unlawful assembly, if ordered to disperse. The empowered authority would also have the necessary power to ensure removal of the assembly, even arresting or detaining them, and if necessary even punishing them under Section 129 of the CrPC[175]. Such an order could also be passed for a potentially unlawful assembly.

Applying this analysis to the facts of the case, the Court held the revocation of Section 144, CrPC to be unjustified. Firstly, the police were well aware of the excess number of people at the site, and the change in purpose of the gathering. Yet they did not take any steps to invoke Section 144 till late into the night. Secondly, no incident or information justified the use of Section 144 as a late night emergency measure, without prior intimation to the organisers and giving them a hearing. At midnight, when the gathered persons were asleep, there was no real threat of communal or social disorder as claimed by the police. Nothing was so urgent that it justified waking people up in the middle of the night and forcing their eviction.

Importantly, the Court held that although the Section 144 order required the site to be vacated by the gathered public, the police did not make any public announcement of the imposition of Section 144. Thus it did not give the peacefully gathered persons either sufficient time or opportunity to disperse themselves. The Court also held that the right to sleep was a basic human right and a constitutional freedom acknowledged under Article 21 of the Constitution of India, and a sleeping assembly of persons could not be presumed to be illegal to justify an order under Section 144.

On a different note, the Court also held that although the right to hold public meetings or protests was a fundamental right, it was the responsibility of the government to maintain public order and tranquility, which it had delegated to the police. Thus, the requirement to take permission from the police to hold public meetings or protests was a reasonable restriction of fundamental rights. However, the police had to be objective and could not unduly deny permission requests.

Thus, the Court concluded that the restriction of the fundamental right to protest of the gathered protestors in Ramlila Maidan arising from Articles 19(1)(a) and (b) was unreasonable, and therefore unconstitutional.

Developments in the Law

In Mazdoor Kisan Shakti Sangathan v Union of India & Ors.[176], the repeated imposition of Section 144 in areas of New Delhi (Parliament House, North and South Block, Central Vista Lawns) by the Delhi Police, prohibiting public meetings, protests, processions, demonstrations, etc. was challenged. The method adopted by the police was that immediately on the expiry of 60 days[177] another identical order would be issued, creating a permanent and continuous ban on protests in these areas. According to the Petitioner, this violated the fundamental right to peaceful assembly.

[175] Section 129. Dispersal of assembly by use of civil force.
(1) Any executive Magistrate or officer in charge of a police station or, in the absence of such officer in charge, any police officer, not below the rank of a sub- inspector, may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.
(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub- section (1), may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

[176] AIR 2018 SC 3476

[177] Under Section 144(4), an order can only be valid for a maximum of two months.

Thus, the issue before the Court was whether anticipatory action in the form of repeated prohibitory orders under Section 144 could be passed, and whether they were "reasonable restrictions" to fundamental rights. The Court held that the repeated prohibitory orders created an effective ban on protests. It directed the Commissioner of Police to frame appropriate guidelines to permit and regulate a limited number of demonstrations, instead of banning all of them. However, it also held that the right to protest had to be balanced with the rights of the residents of the area where the protest was being held, and the former could not completely trample upon the latter.

This balancing of rights approach was also followed in Amit Sahni v Commissioner of Police & Ors.[178] related to the anti-Citizenship (Amendment) Act protests at Shaheen Bagh in Delhi. The protest site at Shaheen Bagh had been set up on a stretch of a major public access road, causing inconvenience to commuters. The Court held that demonstrations expressing dissent were crucial to the survival of a democracy, but they had to take place in designated areas alone, and not wherever the protestors chose to. Such a restriction is reasonable.

In Anuradha Bhasin & Ors. v Union of India & Ors.[179], the Supreme Court made it imperative upon the State issuing a Section 144 order to make it public so as to make it possible for an individual aggrieved by such an order to challenge its validity before the Magistrate under Section 144(5).

[178] AIR 2020 SC 4704

[179] AIR 2020 SC 1308

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CHRI PROGRAMMES

CHRI seeks to hold the Commonwealth and its member countries to high standards of human rights, transparent democracies and Sustainable Development Goals (SDGs). CHRI specifically works on strategic initiatives and advocacy on human rights, Access to Justice and Access to Information. Its research, publications, workshops, analysis, mobilisation, dissemination and advocacy, informs the following principal programmes:

1. Access to Justice (ATJ) *

*** Police Reforms:** In too many countries the police are seen as an oppressive instrument of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that the police act as upholders of the rule of law rather than as enforcers of a regime. CHRI's programme in India and South Asia aims at mobilising public support for police reforms and works to strengthen civil society engagement on the issues. In Tanzania and Ghana, CHRI examines police accountability and its connect to citizenry.

*** Prison Reforms:** CHRI's work in prisons looks at increasing transparency of a traditionally closed system and exposing malpractices. Apart from highlighting systematic failures that result in overcrowding and unacceptably long pre-trial detention and prison overstays, it engages in interventions and advocacy for legal aid. Changes in these areas can spark improvements in the administration of prisons and conditions of justice.

2. Access to Information

*** Right to Information:** CHRI's expertise on the promotion of Access to Information is widely acknowledged. It encourages countries to pass and implement effective Right to Information (RTI) laws. It routinely assists in the development of legislation and has been particularly successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh, Ghana and Kenya. In Ghana, CHRI as the Secretariat for the RTI civil society coalition, mobilised the efforts to pass the law; success came in 2019 after a long struggle. CHRI regularly critiques new legislation and intervene to bring best practices into governments and civil society knowledge both at a time when laws are being drafted and when they are first being implemented. It has experience of working in hostile environments as well as culturally varied jurisdictions, enabling CHRI bring valuable insights into countries seeking to evolve new RTI laws.

***Freedom of Expression and Opinion -- South Asia Media Defenders Network (SAMDEN):** CHRI has developed a regional network of media professionals to address the issue of increasing attacks on media workers and pressure on freedom of speech and expression in South Asia. This network, the South Asia Media Defenders Network (SAMDEN) recognises that such freedoms are indivisible and know no political boundaries. Anchored by a core group of media professionals who have experienced discrimination and intimidation, SAMDEN has developed approaches to highlight pressures on media, issues of shrinking media space and press freedom.

It is also working to mobilise media so that strength grows through collaboration and numbers. A key area of synergy lies in linking SAMDEN with RTI movements and activists.

3. International Advocacy and Programming

Through its flagship Report, Easier Said Than Done, CHRI monitors the compliance of Commonwealth member states with human rights obligations. It advocates around human rights challenges and strategically engages with regional and international bodies including the UNHRC, Commonwealth Secretariat, Commonwealth Ministerial Action Group and the African Commission for Human and People's Rights. Ongoing strategic initiatives include advocating for SDG 16 goals, SDG 8.7 (see below), monitoring and holding the Commonwealth members to account and the Universal Periodic Review. We advocate and mobilise for the protection of human rights defenders and civil society spaces.

4. SDG 8.7: Contemporary Forms of Slavery

Since 2016, CHRI has pressed the Commonwealth to commit itself towards achieving the United Nations Sustainable Development Goal (SDG) Target 8.7, to 'take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.' In July 2019 CHRI launched the Commonwealth 8.7 Network, which facilitates partnerships between grassroots NGOs that share a common vision to eradicate contemporary forms of slavery in Commonwealth countries. With a membership of approximately 60 NGOs from all five regions, the network serves as a knowledge-sharing platform for country-specific and thematic issues and good practice, and to strengthen collective advocacy.

This handbook explains 26 landmark judgments of the Supreme Court that articulate the constitutional standard of Fundamental Rights of persons within the criminal justice system when they come in conflict with policing powers, and the specific laws, principles, and guidelines laid down by the Court. These cover a varied set of legal issues such as registration of criminal cases, arrest of persons, rights of arrested persons, bail, evidence gathering powers of the police, right to public protest etc. This also serves as an update of an earlier compilation of Supreme Court jurisprudence on human rights and policing published by CHRI in 2005.

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