RIGHTS OF ARRESTED PERSON - CASE ANALYSIS

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RIGHTS OF THE ARRESTED PERSON
ANALYSIS OF THE LEADING CASES OF THE SUPREME COURT
1990-2000

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CHAPTER-I

INTRODUCTION

State and for that matter the police as its principal law enforcing agency have the undoubted duty to bring offenders to book. Even so, the law and procedure adopted by the State for achieving this laudable social objective have to conform to civilized standards. The procedure adopted by the State must, therefore, be just, fair and reasonable.\(^2\)

In their battle against crime and delinquency, State and its officers cannot on any account forsake the decency of State behavior and have recourses to extra-legal methods for the sake of detection of crimes and even criminals. How can they insist on good behaviour from others when their own behaviour is blameworthy, unjust, and illegal? In a democratic society even the rights of the arrested and accused are sacrosanct for though accused of an offence he does not become a non-person. As a matter of fact, the laws of India, which is constitutional, evidentiary and procedural-have made elaborate provisions for safeguarding the rights of arrested with a view to protect his dignity as a human being and giving him benefits of a just, fair and impartial trial\(^3\)

The Code of Criminal Procedure is mainly procedural, yet it deals with three distinct but closely related subjects, the Constitution and power of courts, the conduct of criminal proceedings and the prevention of crimes by interference beforehand. However, we are concerned with those provisions of the Code which entitle an accused of certain rights during the course of any investigation, enquiry or trial of an offence with which he is charged.

However, has to be taken note of that the crimes have to be prevented and criminals punished to maintain the even tenor of life in the community. The basic object of Criminal law is to suppress criminal enterprise. Society must be protected from transgression of Law. To achieve this end, there must be correspondence between the crime committed, and the punishment imposed. When the two fail to jibe, scorn and disrespect for the Law will be the harvest. As pointed out by Streetfield Committee on sentencing, the question to be asked is, ‘who should be the beneficiary of the Criminal Justice system - the community or the offender’. Undoubtedly, the

\(^2\) Maneka Gandhi v. Union of India; AIR 1978 SC 597.
\(^3\) R. Deb, RIGHTS OF THE ACCUSED UNDER THE LAW
society must be the beneficiary or the larger beneficiary. In a catena of cases, the need for imposing penal sanctions in adequate measure was highlighted. Justice to the victim and the community must be assured by the criminal justice system. There are contemporary challenges and if the system cannot meet them, they will destroy it. Criminal Law reveals cross-cultural conflicts. Public interest must be served while the human dignity of the arrested must be maintained and the rigours of imprisonment are ameliorated.

Maybe every prisoner looks back at the dawn and views with anguish, the empty spaces which is used to fill his world. Imprisonment may strip him of certain facets of life. At the same time, he does not become a non-person and such rights, as human dignity requires and circumstances justify must be granted to him. The problems must be identified before the remedies are thought of.

**Aims and Objectives of the Research**
The main purpose of this research project is to discuss the various important Supreme Court cases relating to Rights of Arrested Persons and to deal with the various sections under the Criminal Procedure Code relating to it.

**Chapterisation**
The researcher is going to discuss about following topics in his project:

(a) The Rights of Arrested Persons- An Introduction
(b) The provisions under the CrPc relating to Rights of Arrested Persons.
(c) International human rights standards governing the Rights of Arrested Persons.
(d) Case Study
(e) Conclusion

**Sources of the Research**
The following secondary sources of data have been used in the project:

(a) Books available in the National University of Juridical Sciences Library
(b) Certain Websites

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5 Lord Scaman, HAMLYN LAW LECTURES.
Method of Writing and Mode of Citation

The researcher here has adopted the doctrinal method of research in the compilation of this project. The method of writing is M. L. A. (Modern Language Association of America). The researcher has followed uniform method of citation throughout the course of this project.
CHAPTER- II

RIGHTS OF ARRESTED PERSON- PROVISIONS UNDER THE CODE OF CRIMINAL PROCEDURE

Though the police have been given various powers for facilitating the making of the arrest, the powers are subject to certain restraints. These restraints are primarily provided for the protection of the interest of the person to be arrested, and also the society at large. The imposition of the restraints can be considered, to an event, as the recognition of the rights of the arrested person. There are, however some other provisions which have rather more expressly and directly created important rights to favour of the arrested person. Some of the following are discussed below-

(a) When police may arrest without warrant: Under sections 41 very wide powers are conferred on the police in order for them to swiftly act for the prevention or detection of cognizable offences without the formality and delay of having to go to a Magistrate for the order of arrest. Therefore, the arrest and detention of persons without warrant of caprice but are governed by rules which are clearly laid down by law. There can be no legal arrest if there is no information or reasonable suspicion that the person has been involved in a cognizable offence however the burden is on the police officer to satisfy the court before which the arrest is challenged that he has reasonable ground of suspicion.

(b) Right to know the grounds of arrest- According to section 50(1), “every police officer or other person arresting any person without a warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.”

Apart from the provisions of the code recognizing the right to know the ground of arrest, our constitution has also conferred on this right the status of a fundamental right. Article 22(1) provides, “No person who is arrested shall be detained in custody without being

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7 Raju Mia, 44 CWN 502.
8 Emperor v. Vimlabai Deshpande, AIR 1946 PC 123.
informed as soon as may be, of the ground of such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of this choice.”

The rules emerging from decisions such as Joginder Singh v. State of UP\(^9\) and D.K Basu v. State of West Bengal\(^10\), referred to, have been enacted in Section 50-A\(^11\) making in obligatory to on the part of the police officer not only to inform the friend or relative of the arrested person about his arrest, etc but also to make an entry in the register maintained by the police. The magistrate is also under an obligation to satisfy himself about the compliance of the police in this regard.

(c) Arrest- how to be made- Section 46 envisages three modes of arrest, i.e. submission to custody, touching the body physically, or confining the body. Arrest is restraint on personal liberty. Unless there is submission to custody, by words or by conduct, arrest must be made by actual contact.\(^12\) In case force is required, it should be no more than which is justly required and this section does not give a right to cause death of a person, who is not accused of an offence punishable with the death or with imprisonment for life\(^13\). Accordingly, a police officer in an attempt to re-arrest an escaped person has no right to shoot.\(^14\)

(d) No unnecessary restraint- According to section 49, there should be no more restraint than is justly necessary to prevent escape, i.e. reasonable force may be used for the purpose, if necessary; but before keeping a person under any form of restraint there must be an arrest. Restraint or detention without arrest is illegal.

(e) Person arrested to be informed of grounds of arrest and of the right to bail- Section 50 provides that any person arrested without warrant shall immediately be informed of the grounds of his arrest, and if the arrest is made in a bailable case the person shall be informed of his right to be released on bail. Arrest without compliance of this provision will be illegal and will make the officer or person making such illegal arrest liable to all such remedies as are available in case of an illegal arrest. Section 50 is mandatory and if its provisions are not complied with, the non-consideration of such non-conformance by

\(^10\) (1997) 1 SCC 416.
\(^12\) Thaneil Victor v. State, 1991 Cr LJ 2416 (Mad).
\(^13\) Sec. 46(3).
\(^14\) Dakti, AIR 1955 All 379.
the court when considering the question of bail operates to the prejudice of the arrested person and the order is liable to be set aside on this ground.\(^{15}\) This provision carries out the mandate of Article 22(1) of the Constitution of India\(^{16}\).

(f) Search of arrested person- Section 51 is the only provision which allows a police officer to make a personal search of arrested persons, but it comes into operation after the arrest and not before. Search should be made in the presence of a respectable and independent witness, but this provision under section 51 does not permit medical examination of the accused without his consent. With regard to the provisions of this section the reference may be made to article 20(3) of the Constitution which is a guarantee to the accused against testimonial compulsion. The principle appears to be that though an accused cannot be compelled to produce any evidence against him, it can be seized under process of law from the custody or person of the accused by the issue of a search warrant.

(g) Person arrested not to be detained more than 24 hours- The constitutional and legal requirements to produce an arrested person before a Judicial Magistrate within 24 hours of the arrest must be scrupulously observed.\(^{17}\) Section 57 is concerned solely with the question of the period of detention. The intention is that the accused should be brought before a magistrate competent to try or commit, with the least delay. The right to be taken out of police custody by being brought before a Magistrate is given, firstly, to prevent arrest and detention with a view to extract confession, or as a means of compelling people to give information, secondly, to prevent police stations being used as though they were prisons, and thirdly, to afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge.\(^{18}\)

(h) Right to consult and to be defended by a counsel of his choice and to get free legal aid in case of economically disabled accused- Apart from ensuring a fair prosecution, a society under the Rule of law has also a duty to arrange for the defence of the accused, if he is too poor to do so. Free legal aid to persons of limited means is a service which the modern State, in particular a welfare state, owes to its citizens.\(^{19}\)

\(^{15}\) Govinda, Pd. 79 CWN 474.
\(^{16}\) Govind Prasad v. State of West Bengal, 1975 Cr LJ 1249 (Cal).
\(^{18}\) Rankin, J., in Md. Suleman, 30 CWN 985 (987) (FB).
(i) Rights to Anticipatory Bail- Section 438 deals with this right of the arrested. Special powers have been conferred only on the High Court and the Court of Session for directing a person on bail previous to his arrest, which is commonly called anticipatory bail, imposing such conditions as the court thinks fit. The order of anticipatory bail shall take effect at the time of arrest.\textsuperscript{20}

Consequences and liability if the provisions of the right of arrested persons are violated—

(1) A trial will not be void simply because the provisions relating to arrest have not been fully complied with. If the Court has jurisdiction to try an offence, any illegality or irregularity in arrest will not oust the jurisdiction of the court to try the offence.\textsuperscript{21} The question whether the police officer making the arrest was acting within or beyond his powers in effecting the arrest, does not affect the question whether the accused person was guilty or not guilty of the offence with which he is charged.\textsuperscript{22}

(2) Though the illegality or irregularity in making an arrest would not vitiate the trial of the arrested person, it would quite material if such person is prosecuted on the charge of resistance to or escape from lawful custody.\textsuperscript{23}

(3) If a private person attempts to make an arrest, the person against whom such attempt is made has every right to protect himself and to exercise his right to private defence in accordance with the provisions contained in Section 96-106 IPC.\textsuperscript{24} If the person making an illegal arrest is a police officer or a public servant, then the right of private defence against such police officer or public servant will not be as wide as it is against a private person, and would be subject to the restrictions contained in Section 99 if the IPC.

(4) If a public servant having an authority to make arrests, knowingly exercises that authority in contravention of law and effects an illegal arrest he can be prosecuted for an offence under Section 220 of the IPC. Apart from this special provision, any person who illegally arrests another is punishable under Section 342 IPC, for wrongful confinement.\textsuperscript{25}

\textsuperscript{22} Subramania Chetty, In re, AIR 1941 Mad 181.
\textsuperscript{23} Sec. 224, 225, 225-B of IPC.
\textsuperscript{24} Kolavennu Venkayya, In re, AIR 1956 AP 156.
\textsuperscript{25} Sharifbai v. Abdul Razak, AIR 1961 Bom 42.
(5) If the arrest is illegal, it is a sort of false imprisonment, and the person making such arrest exposes himself to a suit for damages in a civil court.\textsuperscript{26}

It may be mentioned here that the provisions regarding arrest cannot be by-passed by alleging that there was no arrest but only informal detention. Informal detention or restraint of any kind by the police is not authorized by law. “It is intolerable that the police should pursue the investigation of crime, by defying all the provisions of the law for the protection of the liberty of the citizen under the colorable pretention that no actual arrest has been made when all intents and purposes, a person has been in their custody.”\textsuperscript{27}

\textsuperscript{26} Anowar Hussain v. Ajoy Kumar Mukherjee, AIR 1965 SC 1651.
\textsuperscript{27} Queen v. Basooram Dass, 19 WR 36.
CHAPTER- III

THE RECENT SIGNIFICANT AMENDMENTS IN THE CODE OF CRIMINAL PROCEDURE, 1973 RELATING TO THE RIGHTS OF ARRESTED PERSONS

Law must change with the needs of a changing society, and must in the process safeguard the interest of innocent as well. With a view to protect the dignity and liberty of its citizens, Indian Government has made some sweeping changes in the Powers conferred on Police to arrest an accused. The amendment clearly lays down conditions which need to be met before a person can be arrested. By doing so, the government has given credence to the most basic Right of its citizens – Right to Live with Dignity.

- The scope for the definition of victim has been amended so as to include the victim’s guardian or legal heir in the definition itself.
- Referring to amendment in Sec.24, now the court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.
- The proceedings for sexual offences are now required to be held, as far as practicable by a court presided over by a woman.
- Unrestricted and unlimited powers of Arrest so far enjoyed and exercised by the Police stand restricted and conditioned, both in case of cognizable as well as non-cognizable offences.
- New sections 41A, 41B, 41C have been introduced to provide for detailed mandatory procedure in matters of arrest under various circumstances and also to provide for control room in every district, state and police headquarters, etc. in order to display the names and addresses of persons arrested along with the details of the person making the arrest. Arrested person has also been given the Right to meet an Advocate of his choice during interrogation, though not throughout the interrogation.
- A number of safeguards in matters of arrest of a woman have been incorporated in the new proviso to Sec.46.
- Provisions have been incorporated in Sec.54, and new Sections 55A and 60A of the CrPC Act to provide further safeguards and mandatory provisions regarding examination of arrested persons by Medical Officers, and taking care of their health and safety and such allied matters.
A new proviso to Sec. 157 provides important safeguards to victims of rape.

Provisions have been incorporated in Sec.161 and 164 about use of audio-video electronic means while recording the statements of the accused. Analogous provisions have been incorporated in the new proviso added under Sec.275(1).

Detention of the accused in custody and his production before the Magistrate are now regulated by new provisions and explanations inserted under Sec.167.

Maintenance of the Case Diary by the Police Officer will now be regulated by the new subsections 1A and 1B to Section 172.

A very important provision has been made in newly inserted sub-section 1A of Sec.173 wherein it is provided that the investigation in relation to rape of a child may be completed within 3 months from the date on which the information was recorded by the Officer incharge of the police station. If the offence relates to Sec.376, 376A, 376B, 376C and 376D of the IPC, the police officer has also to mention in the case papers whether the report of medical examination of the woman has been attached.

Newly inserted Sec.195A entitles a witness or any other person to file a complaint in relation to an offence under Sec.195A of the Indian Penal Code.

While conducting proceedings under Sec.242 of the CrPC, the Magistrate is now required to supply in advance to the accused, the statement of witnesses recorded by the police during investigation.

Provisions have been incorporated under Sec.309 to regulate adjournment of proceedings on the request of either party for one reason or other. Simultaneously a time limit of 2 months from the date of commencement of examination of witnesses has been provided for completion of trial of offences under Sec.376 – 376D.

Newly inserted Sec. 313(5) states that the court may take the help of prosecutor and defense counsel in preparing relevant questions, which are to be put to the accused and the court may permit filing of written statement under Sec.313 by the accused as sufficient compliance of the section.

The provisions relating to compounding of offences under various sections of the Indian Penal Code have been rationalized in the newly substituted tables given under Sec.320.
Substituted new sub-section 3 of Sec.320 CrPC now provides that when an offence is compoundable under this section the abetment or attempt to commit such offence or where the accused is liable under Sec.34 or Sec.149 of IPC, may be compounded in like manner.

Relating to camera trial under Sec.327(2), a new proviso has been added to state that Camera trial shall be conducted as far as practicable by a woman judge or magistrate.

Criminal proceedings against persons of unsound mind and lunatics are now regulated by amended Sec.328, 329 and newly substituted Sec.330. These give detailed procedures and safeguard proceedings against lunatics and persons of unsound mind.

Newly inserted section 357A incorporates a newly introduced Victim Compensation Scheme in order to alleviate the sufferings of the victim and to provide important safeguards to their right.

Amendment to Sec.372 provides that the victim shall have a Right to Appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation.

New Section 437A incorporates a very important provision to provide that before conclusion of trial or disposal of the appeal the court shall require the accused to execute bail bonds with surety to ensure his appearance before the higher court as and when required, and such bail bond may remain in force for 6 months.
CHAPTER- IV

INTERNATIONAL HUMAN RIGHTS STANDARDS GOVERNING THE TREATMENT OF ARRESTED PERSONS

The principal international Human rights documents clearly protect the Human Rights of prisoners. The International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, both prohibit torture and cruel, inhuman or degrading treatment or punishment, without exception or derogation. The ICCPR, in addition\textsuperscript{28} mandates that, “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of human person.” It also requires that “the reform and social readaptation of prisoners” be an “essential aim” of imprisonment.

Several additional international documents flesh out the human rights of persons deprived of liberty, providing guidance as to how governments may comply with their international legal obligations. The most comprehensive such guidelines are the United Nations Standard Minimum Rules for the Treatment of Prisoners (known as the Standard Minimum Rules), adopted by the U.N Economic and Social Council in 1957. It should be noted that although the Standard Minimum Rules are not a treaty, they constitute an authoritative guide to binding treaty standards.

Other Documents

The other documents relevant to an evaluation of prison conditions include the Body of Principles for the protection of All Persons under Any Form of Detention or Imprisonment, the basic principles for the Treatment of the Prisoners, and with regard to Juvenile Prisoners, the United Nation Standard Minimum Rules for the Administration of Juvenile justice (known as the “Beijing Rules”). Like the Standard Minimum Rules, these instruments are binding on

\textsuperscript{28} Article 10.
governments to the extent that the norms set out in them explicate the broader standards contained in Human rights treaties.\textsuperscript{29}

These documents clearly reaffirm the tenet that prisoners retain fundamental Human Rights. As the most recent of these documents, the Basic Principles for the Treatment of Prisoners, declares:

“Except for those limitations that are demonstratably necessitated by the fact of incarceration, all prisoners shall retain the Human Rights and fundamental freedom set out in the Universal Declaration of Human Rights, and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the Optional Protocol thereto, as well as such other rights as set out in other United Nations covenants.”

Reaffirmation of the tenet that prisoners retain fundamental Human Rights: Endorsing this philosophy in 1992, the United Nations Human Rights committee explained that States have “a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty” and stated:

“Not only many persons deprived of their liberty not be subjected to [torture or other cruel, inhuman or degrading treatment or punishment], including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than the resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all rights set forth in the (ICCPR), subject to the restrictions that are unavoidable in a closed environment”\textsuperscript{30}

Significantly, the Human Rights Committee has also stressed that the obligation to treat persons deprived of their liberty with dignity and humanity is a fundamental and universally applicable rule, not dependent on the material resources available to the State party.\textsuperscript{31}

\textsuperscript{29} www.hrw.org. Accessed on 30-07-09.
\textsuperscript{30} UN Human Rights Committee, General Comment 21, paragraph 3.
\textsuperscript{31} UN Human Rights Committee, General Comment 21, paragraph 4.
CHAPTER- V

CASE ANALYSIS

The frequent instances of police atrocities and custodial deaths have prompted the Supreme Court to have a review of its decisions like Joginder Kumar\textsuperscript{32}, Nilabati Behra\textsuperscript{33} and issue some instructions in D.K. Basu\textsuperscript{34}, to be followed in all cases of arrest or detention till further legal provisions are made.

Hence, the researcher has taken the three above mentioned cases for the analysis. The basis being the period in which the apex court delivered the respective judgments relating to rights of arrested persons, and then the reviewing its earlier decisions in 1997 during the historic decision of D.K Basu v. State of West Bengal.\textsuperscript{35}

\textbf{Joginder Kumar}

v.

\textbf{State of U.P. and ors.}

\textbf{Facts:}

The petitioner is a young man of 28 years of age who has completed his LL.B. and has enrolled himself as an advocate. The Senior Superintendent of Police, Ghaziabad, respondent No. 4 called the petitioner in his office for making enquiries in some case. The petitioner on 7.1.1994 at about 10 O'clock appeared personally along with his brothers Sri Mangeram Choudhary, Nahar Singh Yadav, Harinder Singh Tewatia, Amar Singh and Ors. before the respondent No. 4. Respondent No. 4 kept the petitioner in his custody. When the brother of the petitioner made enquiries about the petitioner, he was told that the petitioner will be set free in the evening after making some enquiries in connection with a case. On 7.1.1994 at about 12.55 p.m., the brother of the petitioner being apprehensive of the intentions of respondent No. 4, sent a telegram to the Chief Minister of U.P. apprehending his brother's implication in some criminal case and also further apprehending the petitioner being shot dead in fake encounter. In spite of

\textsuperscript{32} (1994) 4 SCC 260.
\textsuperscript{33} (1993) 2 SCC 746.
\textsuperscript{34} (1997) 6 SCC 642.
\textsuperscript{35} Ibid.
the frequent enquiries, the whereabouts of the petitioner could not be located. On the evening of 7.1.1994, it came to be known that petitioner is detained in illegal custody of 5th respondent, SHO P.S. Mussorie. On 8.1.1994, it was informed that the 5th respondent was keeping the petitioner in detention to make further enquiries in some case. So far the petitioner had not been produced before the concerned Magistrate. Instead the 5th respondent directed the relative of the petitioner to approach the 4th respondent S.S.P. Ghaziabad for release of the petitioner. On 9.1.1994, in the evening when the brother of petitioner along with relatives went to P.S. Mussorie to enquire about the well-being of his brother, it was found that the petitioner had been taken to some undisclosed destination. Under these circumstances, the present petition has been preferred for the release of Joginder Kumar, the petitioner herein.

The Court on 11.1.1994 ordered notice to State of U.P. as well as S.S.P. Ghaziabad. The said Senior Superintendent of Police along with petitioner appeared before this Court on 14.1.1994. According to him, the petitioner has been released. Though, as on today the relief in habeas corpus petition cannot be granted yet this Court cannot put an end to the writ petition on this score. Where was the need to detain the petitioner for five days. These matters require to be enquired into.

Issue:
Whether the horizons of the expanding human rights are violated because of indiscriminate arrests made by the police?

Contentions:

The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligation and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because, the constable blundered.
The National Police Commission in its Third Report referring to the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

In India, Third Report of the National Police Commission at page 32 also suggested:

...An rest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) the accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines.

Judgment and Analysis:

Articles 21 and 22(1) of the Constitution require be recognised and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements:

(1) An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.
(2) The Police Officer shall inform the arrested person when he is brought to the police station of this right.

(3) An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals. These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring clue observance of these requirements. In additions, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest.
Nilabati Behera

v.

State of Orissa and Ors

Facts:

A letter dated 14.9.1988 sent to this Court by Smt. Nilabati Behera alias Lalita Behera, was treated as a Writ Petition under Article 32 of the Constitution. The plaintiff's son, Suman Behera was taken from his home in police custody at about 8 a.m. on 1.12.1987 by respondent No. 6, Sarat Chandra Barik, Assistant Sub-Inspector of Police of Jaraikela Police Outpost under Police Station Bisra, Distt. Sundergarh in Orissa, in connection with the investigation of an offence of theft and detained at the Police Outpost. At about 2 p.m. the next day on 2.12.1987, the petitioner came to know that the dead body of her son Suman Behera was found on the railway track near a bridge at some distance from the Jaraikela railway station. There were multiple injuries on the body of Suman Behera when it was found and obviously his death was unnatural, caused by those injuries. The allegation made is that it is a case of custodial death since Suman Behera died as a result of the multiple injuries inflicted to him while he was in police custody; and thereafter his dead body was thrown on the railway track. The prayer made in the petition is for award of compensation to the petitioner, the mother of Suman Behera, for contravention of the fundamental right to life guaranteed under Article 21 of the Constitution.

The State of Orissa and its police officers, including Sarat Chandra Barik, Assistant Sub-Inspector of Police and Constable No. 127, Chhabil Kujur of Police Outpost Jeraikela, Police Station Bisra, are impleaded as respondents in this petition. The defence of the respondents is that Suman Behera managed to escape from police custody at about 3 a.m. on the night between the 1st and 2nd December, 1987 from the Police Outpost Jeraikela, where he was detained and guarded by Police Constable Chhabil Kujur; he could not be apprehended thereafter in spite of a search; and the dead body of Suman Behera was found on the railway track the next day with multiple injuries which indicated that he was run over by a passing train after he had escaped from police custody.
Issue:

Whether the claim for compensation made therein consequent upon the death of petitioner's son in police custody justified?

Contentions:

Suman Behera was taken in police custody at about 8 a.m. on 1.12.1987 by Sarat Chandra Barik, Asstt. Sub-Inspector of Police, during investigation of an offence of theft in the village and was detained at Police Outpost Jeraikela; Suman Behera and Mahi Sethi, another accused, were handcuffed, tied together and kept in custody at the police station; Suman Behera's mother, the petitioner, and grand-mother went to the Police Outpost at about 8 p.m. with food for Suman Behera which he ate and thereafter these women came away while Suman Behera continued to remain in police custody, Police Constable Chhabil Kujur and some other persons were present at the Police Outpost that night; and the dead body of Suman Behera with a handcuff and multiple injuries was found lying on the railway track at Kilometer No. 385/29 between Jeraikela and Bhalulata railway stations on the morning of 2.12.1987. It is significant that there is no cogent independent evidence of any search made by the police to apprehend Suman Behera, if the defence of his escape from police custody be true. On the contrary, after discovery of the dead body on the railway track in the morning by some railway men, it was much later in the day that the police reached the spot to take charge of the dead body. This conduct of the concerned police officers is also a significant circumstance to assess credibility of the defense version.

'A claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defense of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defense being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available...
A useful discussion on this topic which brings out the distinction between the remedy in public law based on strict liability for violation of a fundamental right enabling award of compensation, to which the defence of sovereign immunity is inapplicable, and the private law remedy, wherein vicarious liability of the State in tort may arise. It may also be referred to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Article 9(5) reads as under: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

Judgment:

The deceased Suman Behera was aged about 22 years and had a monthly income between Rs. 1200 to Rs. 1500. This is the finding based on evidence recorded by the District Judge, and there is no reason to doubt its correctness. Accordingly, we direct the respondent-State of Orissa to pay the sum of Rs. 1,50,000 to the petitioner and a further sum of Rs. 10,000 as costs to be paid to the Supreme Court Legal Aid Committee. The mode of payment of Rs. 1,50,000 to the petitioner would be, by making a term deposit of that amount in a scheduled bank in the petitioner's name for a period of three years, during which she would receive only the interest payable thereon, the principal amount being payable to her on expiry of the term. The Collector of the District will take the necessary steps in this behalf, and report compliance to the Registrar (Judicial) of this Court within three months.

It was clarified that the award of this compensation, apart from the direction for adjustment of the amount as indicated, will not affect any other liability of the respondents or any other person flowing from the custodial death of petitioner's son Suman Behera. We also expect that the State of Orissa would take the necessary further action in this behalf, to ascertain and fix the responsibility of the individuals responsible for the custodial death of Suman Behera, and also take all available appropriate actions against each of them, including their prosecution for the offence committed thereby.
Facts:

Mr. D.K. Basu, Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, on 26th August, 1986 addressed a letter to the Chief Justice of India drawing his attention to certain news items published in the Telegraph dated 20, 21 and 22 of July, 1986 and in the Statesman and Indian Express dated 17th August, 1986 regarding deaths in police lock-ups and custody. The Executive Chairman after reproducing the news items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and to provide for accountability of the officers concerned. It was also stated in the letter that efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". It was requested that the letter along with the news items be treated as a writ petition under "public interest litigation" category.

Considering the importance of the issue raised in the letter and being concerned by frequent complaints regarding custodial violence and deaths in police lock up, the letter was treated as a writ petition and notice was issued on 9.2.1987 to the respondents.

In response to the notice, the State of West Bengal filed a counter. It was maintained that the police was not hushing up any matter of lock-up death and that wherever police personnel were found to be responsible for such death, action was being initiated against them. The respondents characterised the writ petition as misconceived, misleading and untenable in law.

While the writ petition was under consideration a letter addressed by Shri Ashok Kumar Johri on 29.7.87 to Hon'ble Chief Justice of India drawing the attention of this Court to the death of one Mahesh Bihari of Pilkhana, Aligarh in police custody was received. That letter was also treated as a writ petition and was directed to be listed alongwith the writ petition filed by Shri D.K. Basu.

In almost every state there are allegations and these allegations are now increasing in frequency of deaths in custody described generally by newspapers as lock-up deaths. There did
not appear to be any machinery to effectively deal with such allegations. Since this was an all India question concerning all States, it was desirable to issue notices to all the State Governments to find out whether they were desired to say anything in the matter. Notices were issued to all the State Governments and also to the Law Commission of India with a request that suitable suggestions may be made in the matter.

**Issue:**
Whether monetary compensation should be awarded to the arrested persons for the established infringement of their Fundamental Rights by the police guaranteed under Articles 21 and 22 of the Constitution of India?

**Contentions:**

The importance of affirmed rights of every human being needs no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law.

Fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest. Chapter V of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person.
However, inspite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation.

Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminals and to interrogate him during the investigation of an offence but it must be remembered that the law does nor permit use of third degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.
Judgment:

It is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.

Analysis:

The frequent instances of police atrocities and custodial deaths prompted the Supreme Court to review its earlier decisions in this aspect and issue certain guidelines in relation to the rights of arrested person in this case. They are as follows-

(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 designation. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may either be a member of the family of the arrestee or respectable person in the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

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

The time, place of arrest and the 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.

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.

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 name and particulars of the police officials in whose custody the arrestee is.

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.

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

Copies of all the documents including the memo of arrest, referred to above, should be sent to the ilaqa 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 districts 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 above instructions the court noted, would entail not only departmental action but also punishment for contempt of court. These are applicable to the arrests made by the officers like the Customs Officers, Coastal Guard, BSF, etc.
CHAPTER – VI

CONCLUSION

To sum up, the power of arrest involves restriction of liberty of a person arrested and therefore, infringes the basic human rights of liberty. Nevertheless, the Constitution of India as well as International human rights law recognise the power of the State to arrest any person as a part of its primary role of maintaining law and order. The Constitution requires a just, fair and reasonable procedure established by law under which alone such deprivation of liberty is permissible.

Although Article 22 (1) of the Constitution provides that every person placed under arrest shall be informed as soon as may be the ground of arrest and shall not be denied the right to consult and be defended by a lawyer of his choice and S.50 of the Code of Criminal Procedure, 1973 Cr. PC requires a police officer arresting any person to "forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest". In actual practice these requirements are observed more in the breach.

Likewise, the requirement of production of the arrested person before the court promptly which is mandated both under the Constitution Article 22 (2) and the Cr. PC Section 57 is also not adhered to strictly.

A large number of complaints pertaining to Human Rights violations are in the area of abuse of police powers, particularly those of arrest and detention. Even after the prescribing of guidelines by the National Human Rights Commission to narrow the gap between law and practice, curtailing the powers of the police to effectively maintain and enforce law and order and proper investigation, it has been ineffective to a very large extent.

Hence, there is a dire need for a more stringent step to be taken and enforced to curtail the powers of arrest by police personnel in actual practice. One of the steps suggested is the formation of the office of police ombudsmen, as prevalent in the countries of Ireland and Brazil, which have to a very large extent been successful in controlling the exercise of arbitrary powers of the police and have helped in upholding the rights of arrested person to a wide extent.
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