

CASE COMMENT: DK BASU V STATE OF WEST BENGAL

-VASUNDHARA KAUSHIK¹

Abstract

The case of **D.K. Basu v State of West Bengal**² is very well known for the reason of inventiveness and independence practiced by the Supreme Court of India in designing procedural securities for the prisoners in the country. SC affirmed and extended essential rights in relation to the arrest and detention and compensatory remedies for infringement of those rights. The court additionally explained the procedural system to ensure the rights of those arrested and detained from police misuse. Rules with respect to a wide range of arrest and detention were made by the Supreme Court of India. The requirement for these rules emerged because of a writ petition filed seeking for preventive measures against custodial deaths. In this occurrence of D. K. Basu, two letters were changed over into one writ petition for the concern of tutelary deaths and for which the Supreme Court gave numerous mandatory guidelines for carrying out untroubled operations. Regardless of the fact that the code and constitution of our country provides for various strict safeguards, yet the reality remains that the power of arrest and detention is by and large wrongly and illicitly utilized in huge no. of cases almost everywhere throughout the nation. Custodial Torture and Deaths is a calculated assault on the human dignity and whenever such instance takes place through illegal arrest and detention, civilization takes a step backwards. For succeeding in the endeavors to put a stop to such instances, merely the guidelines are not enough to assist but besides these, their mentality and attitude is also required to be changed.

Introduction

Arrest and detention is an essential level or phase in the process of investigation of crimes. Proper and timely arrest of the accused persons in serious cases is very vital for an effective investigation. It additionally makes an environment of harmony and security in the psyches and minds of the individuals and the State by discouraging the wrongdoers from carrying out

¹ Student, B.A LL.B (Hons.) 3rd year, faculty of law, University of Allahabad

² AIR (1997) SC 610.

criminal activities. An arrest is prior to charge sheet, without arrest there can't be a charge sheet. The expression "arrest" alludes to an act of an individual being taken into custody who has been accused of a crime. It has derived its meaning from the French word "arreter" which signifies "to stay or to stop" and means a restriction on the individual. In another sense, it refers to apprehension of deprivation or infringement of right of personal liberty of a person by legal authorities.

Under the Indian law, Chapter V of the Criminal Procedure Code, from section 41 to 60, deals with Arrest of a person. Ironically, the CrPC 1973 has not defined the term "Arrest". The police is empowered and vested with the authority under CrPC to arrest a person in both non-cognizable as well as a cognizable case. In cases which are of cognizable nature, the police officials are empowered to arrest a person without taking warrant from three competent Magistrate. However, to arrest a person in the non-cognizable case, the police is under obligation to obtain from a competent magistrate a written warrant of arrest of the said person, the procedure for which has been provided under Section 155 CrPC.

Background of the Case

This case belongs to the category of landmark cases in which steps were taken to prevent "Custodial torture". In the present case, certain guidelines were provided in addition to constitutional and statutory safeguards which are to be followed in all cases of arrest and detention. Despite several attempts being made prior to this case by issuing guidelines to eradicate the possibility of committing of torture by the police officials, there were frequent instances of police atrocities and custodial deaths, like in the case of **Joginder Kumar vs State of U.P.**³ the Apex Court held that a person who has been arrested and has been held in custody is entitled to have one friend, relative or another person interested in his welfare, if he so demands or requests, to be informed that he has been arrested and the place where he has been detained. The police officer shall inform the arrested person when he is brought to the police station of this right. An entry, with respect to the person who was informed of the arrest of the arrestee, shall be requested to be made in the diary by the Police. The Magistrate is also bound to make sure or to satisfy himself that these requirements have been complied with. Regardless of issuing of the

³(1994) 4 SCC 260.

above guidelines, the misuse of power of arrest by the officials continued and there were still instances of torture and death of the persons detained by the Police. Therefore, the Supreme Court in the present case issued some guidelines which were required to be **mandatorily** followed by all the Centre and State investigating and security agencies, in all cases of arrest or detention.

Facts of the Case

On 26.08.1986, Shri DK Basu, the Executive Chairman, Legal Aid Services, West Bengal, a Non- Political organisation addressed a letter to the Chief Justice of India through a Public Interest Litigation, drawing his attention to certain piece of news item published in the Telegraph Newspaper regarding death of persons kept in police lock up and custody. Shri DK Basu requested that the letter which has been served to CJI, be treated as a Writ Petition within the “Public Interest Litigation” Category. Taking into consideration the importance of the issues raised in the letter, it was treated as a Writ Petition and notice was served to the Respondents. While the abovementioned Writ Petition was still under consideration, one Mr. Ashok Kumar Johri addressed a letter to the Chief Justice attracting his regards for the demise of one Mahesh Bihari of Pilkhana, Aligarh in Police Custody. On 14.08.1987, the Court made the Order issuing notifications to all the State Governments and notice was additionally issued to the Law Commission of India mentioning reasonable recommendations and suggestions within a time period of two months. In light of the above notice, affidavits were documented by a few states including West Bengal, Orissa, Assam, Himachal Pradesh, Haryana, Tamil Nadu, Meghalaya, Maharashtra and Manipur. Further, Dr.A.M.Singhvi, Senior Advocate was designated as Amicus Curiae to help the Court. Every one of the Advocates showing up provided for a fruitful help and assistance to the Court.

Issues

- Are the policemen justified in causing Custodial Torture and Deaths in cases of arrest and detention?
- Are policemen sometimes arbitrary in arresting a person?
- Are there any specified requirements and guidelines while making an arrest?

Observations of the Supreme Court:

The Court observed as under:

1. Custodial brutality, incorporating torment or torture and demise in the lock-ups, strikes a blow at the rule of law, which demands that the powers and authorities of the officials ought not exclusively to be derived from law yet in addition that the same authority ought to be constrained and limited by law. The security of a person from torture and maltreatment by the police and other law-authorizing officers involves profound concern in an independent society.
2. Custodial demise is maybe one of the most noticeably awful crimes or wrongdoings in a society which is civilized and administered by the rule of law.
3. In spite of the statutory and constitutional arrangements, aimed for shielding the individual freedom and life of a citizen of the country, emerging and growing incidences of tortures and deaths in police care has been an aggravating and a worrisome factor. Experience demonstrates that most exceedingly terrible infringement of human rights happens over the span of investigation when the police so as to verify proof or admission or confession regularly turns to third-degree strategies including torture and embraces procedures of screening capture by either not recording the capture or by depicting the hardship of freedom merely as a delayed cross-examination. The inherent rights in Articles 21 and 22(1) of the Constitution require to be desirously and carefully secured.

Decision of the Apex Court

Relying upon the decisions of this court in the cases of **Joginder Kumar vs State of U.P.**⁴, **Nilabati Behera v State of Orissa**⁵, **State of MP v Shyamsunader Trivedi**⁶ and the 113th Report of Law Commission of India recommending insertion of section 114-B in the Evidence Act, the SC held that while the freedom of the individual must yield to the security of the state,

⁴(1994) 4 SCC 260.

⁵(1993) 2 SCC 746.

⁶(1995) 4 SCC 262.

the right to interrogate the detenus, culprits or arrestees in the interest of the nation must take precedence over the individual's right to personal liberty. Having said that the action of the State, observed by this court, must be just and fair. Using any form of torture for extracting information would neither be right nor be just and fair, hence, impermissible, and offensive to Article 21 of the Constitution of India. A crime suspect, declared by the court, may be interrogated and subjected to sustained and scientific interrogation in the manner determined by the provisions of law, but, no such subject can be tortured and exposed to third degree methods or eliminated with a view to eliciting information, extracting a confession or deriving knowledge about his accomplices, weapons, etc. His constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of the things there would be a qualitative difference in the method of interrogation of such person as compared to an ordinary criminal. State Terrorism, declared by this court, is no answer to combat terrorism. It may only provide legitimacy to terrorism, which is bad for the state and the community and above all for the rule of law.

The court, for this case, further said that that the deaths in the lockups are to be diminished. It will straightforwardly and negatively affect the conviction of general society in law and order of the state. The Supreme Court through this case directed all the High Courts to scrutinize all the details and punishment that are being forced on detainees in the prisons. They were solicited to give a point by point and thorough list of details from every one of the people who were captured and whoever were put in the lockups.

Guidelines provided by the Apex Court

Certain mandatory guidelines have been given by the Supreme Court in this regard of Custodial Violence and brutality in order to limit this worry if not entirely dispose of for holding transparency in the records and setting answerability and accountability on the constabulary officers for no such activity happen yet again. Following are the Guidelines issued by the Supreme Court:

- I. The police workforce, who is carrying out the arrest and managing the cross-examination of the arrestee should bear precise, unmistakable and clear identification

and name labels with the posts they are holding. The particulars of all such police workforce who handle cross-examination of the arrestee should bear exact, noticeable and clear identification with their designations. A register has to be maintained which shall record all the particulars of those personnel who conduct the interrogations.

II. That the police doing the arrest will set up a memo of the arrest or capture at the time of capture and such memo will be attested by, in any event, one witness, who might be either an individual from the family of the arrestee or a respectable individual of the region from where the capture is made. It will likewise be countersigned by the arrestee and will contain the time and date of arrest.

III. An individual who has been captured or kept and is being held under care in a police station or cross-examination or interrogation centre or another lockup will be qualified for having one companion or relative or other individual known to him or having concern and interest in his welfare being informed, when practicable, that he has been captured and is being confined at the specific place, except if the verifying witness of the memo of capture is himself such a companion or a relative of the person arrested.

IV. The time, place of capture and scene of custody of an arrestee has to be notified by the police where the following companion or relative of the arrestee lives outside the area or town through the Legal Aids Organization in the District and the police headquarters of the region concerned telegraphically within a time of 8 to 12 hours after the capture.

V. The individual captured must be made mindful or aware of his entitlement to have somebody informed regarding his capture or arrest when he is put under arrest or is detained.

VI. With respect to the arrest of the individual, an entry has to be made in the diary at the place of detention of the individual which will likewise reveal the name of the following companion of the individual who has been informed regarding the capture and the names and points of particulars of the police authorities under whose authority the arrestee is.

VII. The arrestee should also be examined at the time of his arrest where he so demands and his/her major and minor wounds, if any present on his/her body, must be

recorded at that time. The Inspector Memo must be signed by both the police officer and the arrestee affecting the capture and its duplicate or copy to be given to the arrestee.

VIII. A medical examination of the arrestee ought to be conducted by a trained doctor every 48 hours amid his detainment in custody by a specialized and trained doctor on the board of approved doctors named by Director, Health Services of the concerned State or Union Territory, Executive, Health Services ought to plan such a board for all Tehsils and Districts as well.

IX. Duplicates of the considerable number of reports including the memo of arrest, alluded to above, ought to be sent to the Magistrate for his record.

X. The arrestee might be allowed to meet his legal advisor amid cross-examination, however not all throughout the cross-examination or interrogation.

XI. A police control room ought to be given at all locale and State Headquarters where data with respect to the capture and the spot of custody of the arrestee will be imparted by the officer making the capture, inside 12 hours of effecting the capture and, at the police control room, it ought to be shown or displayed on a prominent notice board.

Inability to consent and comply to the prerequisites in this previously mentioned shall aside from rendering the official concerned liable for departmental action, likewise render him at risk to be punished for contempt of court and the procedures for disdain of the court might be organized in any High Court of the country having regional jurisdiction over the issue.

The Court directed that these directions shall be widely circulated amongst the concerned authorities and personnel, and also be broadcasted on the All India Radio and Doordarshan.

With respect to the payment of compensation in cases of custodial death and torture, the Court said that monetary or pecuniary compensation is an appropriate and indeed effective and sometimes the only suitable remedy for redressal for established infringement of the fundamental right to life of citizen by the public servants and the State was vicariously liable for their Act.

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 be given the amount of compensation

from the state, which shall have the right to be indemnified by the wrongdoer, the Court observed.

Analysis of the Judgement

This case was the first of such kind which set an example in Indian Law wherein legitimate and rigorous rules were given by the Supreme Court of India for the activity of expanding of police power and primarily putting a check on the agony and pain done by the constabulary functionaries. Subsequent to this case, it has been referred to in such huge numbers of cases for the occurrence of comparable misfortunes by the people in similar positions and has offered guidance to a lot more decisions like **Delhi Jal Board v National Campaign for Dignity and Rights of Sewerage and Allied Workers**⁷, in Peoples 'Association for Civil Liberties, and so on and has hereinafter greatly affected these rules and these offences have been limited since so as now a check on the official governments have been made.

In light of the unique role played by the police in endeavours against torture, Justice Anand, for this case has summoned the specific sections of the Constitution of India pertinent to disallowing torture, misuse, and lethal or deadly power in custodial confinement. Article 21 gives that "no individual shall be denied of his life or personal liberty with the exception of as per established by law." Article 22 secures essential privileges of arrestees including rights to know purposes behind detainment and prompt access to a legal guidance or a lawyer. The Court has been fair, just and reasonable in giving these rules to the public officials. It is in this way obvious and put offering at a similar clasp that these law surfs stay unpunished under the assurance of their alleged legitimate duty. Indeed, even Court coordinated that these rules ought to be broadly coursed as Court referenced "Creating awareness about the rights of arrestee would be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability". These rules have been made with the goal that the constabulary officers don't twist their lawful power and on the off chance that they do, it is inspected and individuals are at the end shielded from such offense against them.

⁷(2011) 8 SCC.

The court in this occurrence said that the State has a duty of consideration towards each resident of the state to shield them from any lawlessness furthermore to satisfy their societal fulfilment. Our state does not provide for any stipulation for giving monetary pay to the unfortunate casualties for the violation of the cardinal rights not at all like Ireland where they are granted with financial remuneration for the failure on the part of the State to secure their cardinal rights by building up a review by the Court of Ireland which most necessarily should have been done.

A reference was put forth to the case of **Nilabati Bahera v. State of Orissa**⁸ in which the Supreme Court had held that detainees and detenus are not stripped off their Fundamental Rights under Article 21 and only such confinement as allowed by law could be forced on the enjoyment of the Fundamental Rights of the detainees and detenus. The facts of this case are that the son of Nilabati was in the jail. At around 8 in obscurity, she went to meet her son and to give him his dinner where he was consummately good and solid, yet in the following twenty-four hours she got the information that her son's dead body has been acquired from railway track and thus, files a writ petition for tutelary death. The argument here given by the constabulary functionaries is that he got away from where he was detained yet the outcome of the post-mortem study said that he died of the damages inflicted on his body and not from the railway track however none was submitted and they were held able for the offence they committed. In this occurrence, there was a noxious motivation behind the officials and they actually shrewdly arranged all the fake things and concocted the story to not get caught. They preeminent beat him to death and thereafter took his dead body to the railway track so that no one can know that it was crafted by the officers and attempted to show it to be a self-inflicted death.

The above cases provide for an example of tutelary deaths where those officers were well aware of what they were doing was contrary to jurisprudence but still they did it anyway for their malicious motivations and they injured the innocent persons aching them grievously at the clip of probe and question for fall backing the information out of them even after cognizing that our laws do not allow even the law defenders to utilize the 3rd grade intervention for which our Indian Penal Code, 1860 penalizes those people under Section 220, Section 330 and Section 331.

⁸(1993) 2 SCC 746.

These constabulary officers make every possible attempt to dispose the case off. Sometimes, by non-demonstrating anything in the records of the lock-up, sometimes, by disposing off the dead bodies or sometimes, by cooking out some fake story that the arrested person died after acquiring release from detention and if any ailment is done against such decease, it is not even given any kind of attention by these functionaries. The usage of Section 41 and Section 46 of CrPC are being misused by the constabulary officers which confers them the power to arrest without a warrant and the mode in which the arrest is made, respectively.

Analysis of the case with respect to the present scenario

Irrespective of the various constitutional and statutory arrangements provided for defending the individual's freedom and life of a citizen, the developing rate of torment, deaths, illicit confinement in police custody has been a worrisome factor. Experience demonstrates that the most exceedingly awful infringement of human rights occur over the duration of investigation, when the police so as to verify evidence or confession frequently resort to third-degree strategies including torture and adopt systems of screening arrest by either not recording the capture or portraying the deprivation of freedom simply as a drawn out cross examination. The broad and vast discretion given by CrPC to capture an individual cloth the police officials with unprecedented power which can be effectively manhandled. There have additionally been instances that the police neglect to educate the people arrested of the charge against them and subsequently, let the person so arrested struggle in custody, in complete obliviousness of their supposed violations.

The infamous meme case

Priyanka Sharma, a worker of BJP Youth Wing in the West Bengal, was arrested for sharing a 'meme' of the West Bengal Chief Minister Mamata Banerjee. A police complaint filed by Trinamool Congress worker Bivas Chandra Hazra alleged that the meme was against community guidelines. The photograph which the accused Priyanka Sharma had utilized is a superimposition or overlapping of Mamata Banerjee's face on the picture of actress Priyanka Chopra in the Met Gala 2019 outfit and make-up. She had been charged sections 66A (offensive messages), the non-bailable 67A (punishment for distributing or transmitting of material containing sexually explicit act, and so on in any electronic structure) of the Information Technology Act, 2000 and under Section 500 of the Indian Penal Code for

defamation). After being produced in the Howrah court of West Bengal on May 10, she was sent to a 14 days judicial custody on the above charges. Sharma claimed that she was unlawfully detained in prison for five days in spite of being conceded bail by the Supreme Court of India for posting a meme of Mamata Banerjee.

The Supreme Court acted properly and even-handedly by allowing bail to Priyanka Sharma however it wasn't right to ask her to delicate an apology. The transforming was done on a photograph of on-screen actress Priyanka Chopra, and there was not all that much, disparaging or illicit about it which would attract her arrest. The Supreme Court, which ought to have secured and respect the fundamental rights of Sharma and arraigned the legislature and the police officials for their unlawful activity, advised her to delicate a statement of apology. It had first advised her to delicate a prompt statement of apology however later revised the order and coordinated that she tender the conciliatory statement upon discharge. Moreover, an apology, in order to be acceptable, has to be voluntary. An involuntary and coerced apology can never be an expression of remorse in its actual sense and thus, brings up questions and doubts about the motivation behind the entire exercise in looking for her statement of apology, as a precondition for her discharge – and the authenticity of the Supreme Court's emphasis on an expression of remorse, particularly when the bench itself was persuaded that her capture or arrest was arbitrary in any case.

In spite of the fact that the Court, on account of **Shreya Singhal v Union of India**⁹ in 2015, had struck down section 66A of the Information Technology Act 2000, its recorded accentuation on the exemptions to the fundamental right of free speech instead of the extent of the opportunity has now been stretched out to the world of internet. Articulating their decision on a PIL recorded against the Section, which engages the police to capture an individual for supposedly posting 'offensive material' on social networking websites, the court decided that the section abused the essential and fundamental right to the right to speak freely and freedom of expression and was along these lines illegal.

Defining the freedom of speech and expression as "cardinal", the Bench in case of *Shreya Singhal v Union of India* stated: "The public's entitlement to know is legitimately influenced by

⁹AIR 2015 SC 1523.

Section 66-A of the Information Technology Act." Despite such unequivocal observations in the Shreya Singhal case, the West Bengal Police in the present case, still chose to feel free to press charges, is equivalent to contempt of court. Obviously, the police could have barely expressed that they were compelled by the state government to do as such. All things considered, there can be no reasons about slapping a section that has been ruled invalid by the highest court of the land. By asking that the injured individual issue a statement of apology, it has done well to mollify sentiments on both the sides.

In spite of the fact that the final report of the police in the Mamata Banerjee meme case alludes to Section 66 of IT Act as having been summoned for this case, obviously the police had Section 66A as a top priority in their minds, unaware of its striking down by the Apex Court in 2015. Section 66, which manages computer and technology related offences, is to be perused or read with Section 43, which involves punishment and remuneration for damage to the PC, computer structure and system, and so forth which clearly has no pertinence to this meme case. The act of the West Bengal police invoking Section 66A of the Information Technology Act, must make the Supreme Court take action against the erring officials.

Priyanka Sharma was just re-posting a harmless meme. It ought to be noticed that the government, referring to specialized and technical grounds, deferred her discharge from prison even after the court's order and the court needed to clarify that her arrest was discretionary. She likewise asserted that she was not permitted to either meet her lawyer or her relatives amid that time.

Her capture was a demonstration of bigotry and intolerance and a forswearing of her privilege of free speech in light of the fact that the supposed offence was that she had shared online an image showing a transformed face of Chief Minister Mamata Banerjee over the photograph of Priyanka Chopra at the MET Gala. Be that as it may, Sharma was captured and was sent to legal remand for 14 days. The Trinamool Congress government has been known in the past for its prejudice of criticisms and humour. Prior and similar to this case, a professor was captured for his cartoon of the West Bengal Chief Minister. Political figures and their supporters in the nation have frequently resented transformed photographs and images of their leaders.

Even after being struck down by the Apex Court, Section 66A still continues to be used as a weapon of choice of arrest by police across the country. The conjuring of Section 67A IT Act, managing electronic transmission of sexually explicit acts etc, couldn't in any way, shape or form to be connected to this image, as the fashion show, like the Met Gala, couldn't be so defined also, the transforming of one's photograph by another itself couldn't be sexually explicit, without some other demonstration or conduct. Nor the photo itself was of such a description that would put it into the category of sexually explicit.

Section 500 of the Indian Penal Code is also like the above sections, inapplicable for this situation. Submitting any demonstration which comprises slander under Section 499 IPC is culpable offence under Section 500 IPC. Be that as it may, summoning Section 499 IPC must fulfil the elements of Section 199(1) of CrPC first.

In the case of **Subramanian Swamy v Union of India**¹⁰ the SC has rejected the dispute that the words "some person aggrieved" in Section 199(1) can incorporate any and everybody. In the present case, Mamata Banerjee herself has not griped against it; nor did the public prosecutor complain had been recorded as a hard copy with the past approval of the state government, as required under the law. It isn't astounding that the experts documented a final report for the situation, dispossessed as it was of any kind of lawful assistance to the charges.

Conclusion

The law of arrest is one which balances, on one hand, the individual rights, freedoms and benefits, and on the other hand, individual obligations, commitments and duties; of gauging and adjusting the rights, liberties and privileges of the single individual and those of people on the whole; of essentially choosing what is needed and where to put the weight and the accentuation; of making a choice as to what should be put first – the criminal or society, the law violator or the one who abides by the law.

The efforts of the courts of our country, specifically of the Supreme Court in this field in the course of the last two decades has been to circumscribe the tremendous power of discretion

¹⁰W.P. (Crl) 184 of 2014.

vested by law in Police by imposing a few safeguards or shields and to manage it by setting out various rules and by exposing the said power to a few conditions. These efforts made by the courts all throughout has been to forestall its maltreatment while leaving it to independently exercise the powers and functions which has been entrusted with the Police officials. There have additionally been incalculable reports on custodial violence that persuade that hardship and deprivation of fundamental rights of the people detained has turned out to be very common these days, unfortunately.

Arrest has a lessening and debilitating impact on the character of an individual. The person who is unlawfully captured is outraged, distanced and ends up being antagonistic. In any case, there should be balance between security of state on one hand and individual opportunity on the other hand. There should be a few checks and control on this power and more people should be made aware about their rights, with the goal that balance of the society is not disturbed.