

(2006) 12 GUJ CK 0059

In the Gujarat High Court

Case No : Special Criminal Application No. 924 of 1997

Bachiben Naranbha

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 18-12-2006

Acts Referred:

Bombay Police Act, 1951 — Section 110, 117
Civil Procedure Code Amendment Act, 1973 — Section 176
Constitution of India, 1950 — Article 14, 142, 19, 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 164, 173, 174, 176
Penal Code, 1860 (IPC) — Section 114, 120B, 220, 306, 307

Citation : (2007) 3 GLR 1918

Hon'ble Judges : D.H. Waghela, J

Bench : Single Bench

Advocate : K.J. Panchal, for the Appellant; S.S. Patel, Public Prosecutor for Respondent 1 and R.K. Mishra, for Respondent 3, for the Respondent

Judgement

D.H. Waghela, J.—The present petition has its genesis in the letter dated 23.7.1997 addressed to the Hon'ble the Chief Justice by the petitioner stating that the petitioner was a widow whose sons had left the house under an apprehension of beating by police pursuant to a complaint and the local police sub inspector had visited her house in search of her sons on 30.7.1997 (sic). At that time, at around 02.00 a.m., police had taken away her younger daughter and, at around 04.00 a.m., she herself was taken to the police station to take her daughter back. When she asked her daughter about what had happened to her, she was told by her daughter that she was no longer fit to show her face to any one, that the officers had raped her and, after saying that, the daughter, aged 13, had poured kerosene and burnt herself. On that brief complaint, she urged that the dead body of her daughter may be disinterred and, after performing post mortem by a team of doctors, culprits may be punished.

1.1 That letter appears to have been forwarded by the office to the High Court Legal Aid Board and upon an advocate being appointed to assist, regular petition

invoking Articles 14, 19, 21 and 226 of the Constitution appears to have been prepared and filed with the affidavit of the petitioner. The prayers are made to direct the Central Bureau of Investigation to investigate the offences after registering a complaint against respondents No. 2,3 and others, to provide sufficient police protection to the petitioner, to direct the State Government to compensate the petitioner and her family members and to direct the investigating agency to exhume the body of the deceased girl for a detailed post mortem.

2. According to averments made on oath in the petition, the petitioner is a widow aged 75 years and respondents No. 2 and 3 were powerful and influential police officers of Savarkundla police station in Bhavnagar district. Her two sons were accused in a criminal case registered against them at Savarkundla police station and, out of them, one Santosh had surrendered and was taken in judicial custody while the other son Nitin was shown as absconding, though he had applied for anticipatory bail. Police sub-inspector Mr. Dubey, (who was joined as respondent No. 2 and whose name is deleted on 9.11.2000 on account of his death) had approached the petitioner at her residence and threatened her of dire consequence if she did not produce her second son at the police station. That ritual was performed for two days. Thereafter, Mr. Dubey along with police sub inspector Mr. Kyada, who is respondent No. 3 herein, and four other policemen had come to her house in a police jeep at 01.00 a.m. in a drunken condition in the early hours of 30.6.1997 and questioned the petitioner under threats. Then, Mr. Dubey ordered the police constables to pick up her daughter, namely, Nayanaben. Thereafter, the girl was brought near Mahakali Chowk where she was dragged out of the jeep and beaten with sticks and, when people in the neighbourhood came out upon hearing her wails, the police officials threatened them to go away and took the girl towards the town police station. At around 04.30 a.m., a police jeep with 4 to 5 police constables came to the residence of the petitioner and asked her to accompany them to the police station to see the consequences for her daughter. On reaching the police station, she found the girl lying unconscious on the floor of the office of the police station. Police Inspector Mr. Dubey and police sub-inspector Mr. Kyada asked her to take away the girl under threats. Police Inspector Mr. Dubey told her that he was a dacoit and would not hesitate to shoot them down if the happenings were disclosed to anyone, according to the averments. The petitioner has further stated that she was petrified, but managed to lift her semi-conscious daughter by hand and slowly tried to move out of the police station where again they were stopped and the girl was asked to lean against the wall and four police constables, under orders of Mr. Dubey, started to beat the girl on her back with clasped hands giving full blooded blows. The petitioner was butted off by sticks and kicked away by Mr. Dubey when she tried to intervene. Then, the petitioner and the deceased girl were forced to give thumb impressions on blank papers and on some booklets. Thereafter, the respondents concerned instructed their subordinates to call for a rikshaw and left the police station. Upon reaching her home at 05.30

a.m., the petitioner made her daughter lie on a cot where she collapsed and, a minute later, she was uncontrollably sobbing. The deceased told the petitioner that: "When she was taken to the police station, P.I. Dubey saheb and Kyada saheb and Sharadbhai who was already present at the police station had rounded her up. Then P.I. Dubey saheb was the first one who raped her and following him two other police constables raped her; Mr. Kyada started fondling and playing hands on her naked body and that Sharadbhai told her that she should not show her face to anyone as she is not worth it now". P.I. Dubey also insighted her by saying: "Now go and commit suicide, you have no face to show". After making the above statement, the girl is stated to have had chest pain and, while the petitioner went out to fetch milk for the girl, it appeared that Sharadbhai, his brother Bharatbhai, and Ibubhai came over to the house of the petitioner and they were walking out of the house when the petitioner returned. Soon thereafter, the petitioner went to boil milk in the kitchen and heard screams of the girl from bathroom and found her clothes on fire. The petitioner called for help and then her nephew and her daughter-in-law, who were residing nearby, came running and tried to put off the fire by throwing a blanket. The burn injuries were serious, but the girl was quite alive and conscious. When asked about the reason for immolating herself, she replied that: "P.I. Dubey and Mr. Kyada had threatened her that if you did not commit suicide by self-immolation and if the same incident is not reported in the papers by next day's newspapers, P.I. Dubey would kill her and her whole family".

2.1 According to the petition, when the girl was taken to K.K. Government Hospital, P.I. Dubey and Kyada came to the hospital and privately talked to the doctor in charge who referred the case to Government Hospital at Amreli. When the girl was shifted to Amreli, both the officers were there and dying declaration was attempted to be recorded. However, according to the petitioner's complaint in the petition, as the deceased girl was making allegations against the P.I. and the P.S.I. in the dying declaration, it was not recorded and then, upon dictation given by the PSI, dying declaration came to be recorded. Thereafter, the petitioner was forcibly and under threats sent away alongwith her daughter-in-law in a police jeep. Later on at around 01.30 p.m., the dead body of the deceased girl was brought to her home; but till the dead body was not buried, the police officials of Savarkundla police station kept a close watch upon the petitioner. Even thereafter, the petitioner was being shadowed, but she managed to escape from her home-town at midnight for Ahmedabad and approached this Court after obtaining legal aid.

3. On the basis of the above averments on broad facts of the case, the petitioner has contended in the petition that there has been a gross abuse and misuse of official powers conferred upon respondents No. 2 and 3, that witnesses were ready and willing to give statements before independent investigating agency, that the petitioner could not reach the court on account of being continuously shadowed by police officials and that the directions of the Apex Court issued in the case of B.K. Basu v. State of West Bengal and the fundamental rights of the

deceased were violated in the facts of the case.

4. On 28.7.1997, having regard to seriousness of the allegations, this Court found it to be a fit case to order exhumation and examination of the body of Nayanaben. For that purpose, enquiry was ordered to be conducted u/s 176 of the Code of Civil Procedure, 1973 by Sub Divisional Magistrate, Savarkundla under overall supervision of the District Magistrate, Bhavnagar. Respondents No. 2 and 3 were ordered to remain personally present in the court with relevant papers and a team of expert doctors was provided for proper examination and report. Pursuant to that inquiry under the provisions of Section 176 of the Cr.P.C., an interim investigation report dated 5.9.1997 was submitted with the conclusion as under:

At this stage of inquiry we have evidence to support beating of police. But we do not have evidences which can establish abduction, rape. Every effort will be made to find evidences to support complaint and bring out truth.

The same Sub Divisional Magistrate submitted further and final report dated 19.10.1997 with the conclusions as under:

(9)CONCLUSION:

1. Abduction by PI Dubey, PSI Kyada and some policemen at midnight of 29/30.6.1997

NOT PROVED.

2. Raping by PI Dubey and two other policemen

NOT PROVED.

3. Beating by police

PROVED.

Enough opportunities have been given to the petitioner to substantiate her charges against police officials. We have kept in mind guidelines issued by Hon. Court during various stages of inquiry. We have made every possible attempt to bring forward facts of case before Hon. High Court. We conclude the inquiry hoping that this will satiate Hon. Court as well as petitioner.

Your obediently, Sd/- (Bhavin Pandya, GAS) Sub Divisional Magistrate Mahuva.

5. On the other hand, an affidavit of Mr. T.K.Patel, Police Inspector, Savarkundla Town Police Station, executed on 16.9.1997, is filed to state, inter alia, that he had perused the petition and investigation papers in connection with the offence u/s 323 etc. of I.P.C. being C.R. No. NC 26/97 registered by his predecessor PI Shri H.K.Rathava against concerned police personnel in connection with the allegations made in the petition. After narrating the version of the respondents, fully exonerating them and justifying their actions, it is stated by him that, in view of the serious allegations made against police officers concerned and

allegations made in the petition, offence u/s 323 etc. of IPC was registered against concerned police officers, that whatever finding or report might be submitted by the Sub Divisional Magistrate, Mahuva, it would be binding on the State Government and would be accepted and that learned Judicial Magistrate, First Class was also requested to inquire into the offence registered vide NC CR No. 26/97 and submit report in accordance with law. By a further affidavit-in-reply, the same police inspector has submitted that a complaint has been filed against six police officials on 4.9.1997 and Criminal Case No. 58 of 1997 arising therefrom was pending before the court of learned Judicial Magistrate, First Class, Savarkundla. It is submitted by further affidavit dated 6.7.1998 that in view of report of the Sub Divisional Magistrate, nothing remained to be done in the matter and the petition should be disposed of accordingly.

6. More than eight years after the above record of pleadings and reports, the petition had come up for hearing when none remained present for the petitioner. Therefore, learned advocate Mr. K.J.Panchal was, on 14.11.2006, requested to assist the court as *amicus curiae*. He was ordered to be provided with photocopy of the entire file of the court and, after perusal of the record, he submitted that, in all, four proceedings have taken place in the facts of the present case. One was Accidental Death Case No. 15 of 1997 registered with Savarkundla police station upon death of the deceased girl being reported at 2.00 p.m. on 30.06.1997 by the medical officer of civil hospital, Amreli. Another proceeding was pursuant to C.R. No. II- 63 of 1997 registered with Savarkundla police station on the basis of complaint of police constable Asrafbhai Allarakha naming the deceased as an accused person for the offence under Sections 110 and 117 of the Bombay Police Act, for alleged indecent behaviour in public place. The date and time of the offence is shown in that FIR to be 30.6.1997 at 02.30 a.m. Another proceeding vide CR-II No. 26 of 1997 for the offence u/s 323 read with Section 114 of the IPC is registered as late as on 02.9.1997 showing the date and time of offence to be between 03.00 and 04.00 a.m. on 30.6.1997 and naming as accused persons the police inspector, police sub-inspector and 4 constables. The fourth proceeding is the enquiry held by the Sub Divisional Magistrate, Mahuva under the aforesaid order of this Court wherein several statements were recorded before that Magistrate.

6.1 Mr. Panchal submitted that the report of the Sub Divisional Magistrate is based on misreading of the material placed before him or collected by him and the Sub Divisional Magistrate has overlooked several important points. The report is also based on several presumptions without any supporting material. The report was, therefore, required to be discarded as worthless, according to his submission. Elaborating that submission, it was pointed out that, out of 51 statements recorded by the Sub Divisional Magistrate, 15 statements were of police officials and 12 statements were of such persons who did not have any personal knowledge of the incident. There were 12 statements, including 2 statements of the petitioner, her family members and neighbours which supported the say of the petitioner to some extent. There were 12 other

statements of such persons who could be under influence of police. There was sufficient material before the Sub Divisional Magistrate to conclude that, on the day of the incident, police did come to the house of the petitioner, beat her daughter mercilessly, dragged her out of her house and took her away. It was pointed out from the report of the Sub Divisional Magistrate that the version of the police officials which found favour with the Sub Divisional Magistrate was inconsistent with the complaint and the FIR registered as C.R.-II No. 63 of 1997. He also pointed out that, in the list of police officials who were on duty on 29/30.6.1997 between 23.00 hours to 05.00 hours, no lady police constable was referred; whereas in the report of the Sub Divisional Magistrate, a lady police constable was taken to be present on the basis of bare say of the persons who had appeared before the Sub Divisional Magistrate. There was no documentary evidence suggesting presence of any lady police constable at the relevant time in Savarkundla police station. As for the deceased girl, she was shown to be arrested by police in connection with CR-II No. 63 of 1997 and her arrest panchnama was drawn between 02.40 a.m. and 03.00 a.m. The second panch to the arrest panchnama had filed an affidavit stating that the formalities in arresting the deceased girl were legally performed. Thereafter, the same panch had appeared before the Sub Divisional Magistrate and stated that it was not known to him what the panchnama was about, he had not read its contents and had only put his signature below it. It was also pointed out that the boy, named Isa, who was mentioned as co-accused with the deceased girl in connection with the first C.R.II No. 63 of 1997 for the offences punishable under Sections 110 and 117 of the Bombay Police Act, had stated about a love affair with the deceased and also produced a few love letters to the investigating agency. Those love letters were stated to have been torn to pieces by the mother of Isa but such pieces were recovered and arranged to see the contents, but nothing substantial was found. On that basis, the Sub Divisional Magistrate recorded his conclusion that the deceased girl had relation with Isa. As against that, Mr. Panchal submitted that it was an unbelievable and unacceptable story since Isa could have no reason to preserve the torn pieces of love letters and the deceased girl is shown on the record all throughout to be illiterate and her thumb impressions were taken when she was released in the early hours of 30.6.2006. The Sub Divisional Magistrate had omitted to consider all the statements of neighbours of the petitioner and appeared to have adopted the version of police by misreading and overlooking all those statements which supported the say of the petitioner including the statement of the petitioner herself narrating a heart-rending story of suffering told to her by her daughter. Even the definite and specific report from the panel of doctors who examined the body of the deceased girl after being exhumed was misquoted and misread by the Sub Divisional Magistrate to reach to the conclusion that no spermatozoa was found, no mechanical injury was reported anywhere near the private parts of the deceased and that the alleged rape was not supported by any evidence since report of the second post mortem revealed no sign of rape or sexual torture. In fact, the second post mortem only revealed that, because of decomposition, after about a

month, doctors were unable to give any positive finding about rape.

6.2 Learned advocate Mr. Panchal also submitted that, after the second post mortem after the order of exhumation by this Court, clear signs of injuries were found at or about the private parts of her body and those injuries were serious enough to be evident even after burning and decomposition of the body. The report of the second post mortem cast a shadow of serious doubt on the first post mortem report since the first report of post mortem performed on 30.6.1997 itself did not report any external injuries which could be found at the time of second post mortem after 30 days. There was no conceivable reason for the girl of tender age to receive at or about her private parts injuries inflicted by hard and blunt objects. And, while the factum of injuries on the body of the deceased girl was conclusively established, the question remaining unanswered would be about the steps taken by the police after admittedly taking her into custody in the middle of night and before releasing her on bail.

7. Taking into account the totality of circumstances and the conflicting versions of what happened in the early hours of 30.6.1997 at Savarkundla police station, a thorough investigation by an independent agency and immediate payment of compensation was imperative, according to the submission of Mr. Panchal. It was stated at the Bar that, since the police inspector Mr. Dubey originally joined as respondent No. 2 herein has passed away and respondent No. 3 PSI Kyada has already retired, initiation of any departmental action against them was not possible. And further delay in granting any relief would amount to denial of justice to the septuagenarian petitioner and loss of important evidence forever, according to the submission.

8. Learned Counsel Mr. Mishra, appearing for respondent No. 3, and learned A.P.P. Mr. Patel, appearing for the State, submitted that the report submitted by the SDM pursuant to the interim order of this Court ought to be accepted as final since it was made by an independent authority after recording and considering the evidence and relevant material. It was also submitted that the affidavit-in-reply filed by the police inspector also gave complete account of the facts justifying presence of a lady constable at the time of interrogation of the deceased in Savarkundla police station which was required to be accepted and, in view of rejection on 6.1.2001 of the complaint by learned J.M.F.C. in Criminal Case No. 58 of 1997, no offence, much less an atrocity, could be said to have been committed by any member of the police force.

9. The version relied upon by the respondents as recounted in the affidavit-in-reply of the police inspector has a basic infirmity insofar as the affidavit is made by successor police inspector on the basis of his perusal of the papers of investigation by police without any personal knowledge of any of the facts. According to his version, the night of 30.6.1997 was a "combing night" and police inspector Mr. Dubey was on night-round in police jeep. One unarmed police constable, namely, Asrafbhai Allarakha, at the time posted near Octroi Naka area, saw at about 2.30 a.m. one rikshaw wherein the deceased and the boy,

namely, Isa, were seating and behaving in an indecent manner. When Asrafbhai Allarakha approached, the boy ran away and the deceased girl was caught there. Immediately thereafter, four other policemen who were in nearby area came there and took the girl to the police station where Asrafbhai Allarakha gave complaint against Nayanaben and Isa for the offence under Sections 110 and 117 of the Bombay Police Act which was registered as CR-II No. 63 of 1997 at 2.45 a.m. by police station officer Mr. C.P.Gohil. Then, a panchnama was prepared and the accused was arrested at 3.00 a.m. When all formalities in connection with the said crime were over, police inspector Mr. Dubey and police sub-inspector Mr. Kyada and police constable Mr. Kantilal came to the police station. It is stated that while police station officer Mr. Gohil filled in identification mark statement of the deceased by putting to her relevant questions, one lady constable Rekhaben Jayantilal was also present in the police station and she also interrogated Nayanaben. Thereafter, head constable Mr. P.B.Chaudhary recorded statement of the deceased u/s 164 of the Cr.P.C. During the course of investigation, police inspector Mr. Dubey also enquired from her as to where her two brothers, who were accused of the offence u/s 307 of the IPC, were. Then, Mr. Dubey asked the police station officer to call the mother of the deceased for releasing her on bail as she was a lady and the offence was a bailable one. Therefore, police constable Mr. Kantilal went to the house of the petitioner in a jeep and, after necessary formalities as to bail, Nayanaben was released. It is further stated on oath that, when the offence against the deceased was registered and when she was produced before the police station officer, 10 persons, including 2 panchas, 2 persons accused and arrested in other offences, 1 lady police constable, 4 other police constables and head constable in charge of the police station, in all 10 persons, were present.

8.1 The affidavit-in-reply further avers that, after the deceased girl had returned home, she had committed suicide at about 6.30 a.m., she was taken to Savarkundla Hospital for treatment and then shifted to Amreli General Hospital where the history given by her to the doctor was that: "An offence under Sections 110 and 117 of the Bombay Police Act was registered against her with Savarkundla police station and it affected her feelings and, therefore, she had committed suicide." Same thing was stated by her to her mother and in her statement before head constable posted at Amreli Civil Hospital. It is further stated on oath as under:

However, looking to the facts and circumstances of the case and serious allegations made against police officers concerned and the allegations made in this petition, offence u/s 323 etc. of IPC is registered against the concerned police officers, as stated above.

It is further stated in para 6, as under:

6. I say and submit that those responsible police officers against whom allegations are made, PI Shri Rathava has registered offence u/s 323, 114 of IPC being NC CR No. 26/97 and they are:

1. PI Shri AT Dubey
2. PSI Shri KB Kyada
3. HC Abdul Sultan
4. PC Asraf Allarakha
5. PC Jivabhai Bhimabhai
6. PC Gabharu Lakhabhai

It is also submitted that learned JMFC is also requested to inquire and submit report in accordance with law.

10. In the above backdrop of facts, pleadings, reports and averments before this Court, there clearly emerges two versions of the incident that took place in the early hours of 30.6.1997 in Savarkundla, which ended in the death of deceased Nayanaben. According to the respondents, it was a simple case of indecent behaviour at public place and arrest pursuant thereto of the girl who, after being immediately released on bail, committed suicide out of sense of shame, and, even allegation of beating by police were not proved in the judicial enquiry held pursuant to the NC CR-II No. 26 of 1997 in Enquiry Case No. 58 of 1997. And, on the other hand, if the allegations made on oath by the petitioner before this Court were to be believed in absence of even a bare denial by any of the police officers against whom specific averments are made, the deceased girl was dragged from her house in the middle of night, beaten on the public road, taken to the police station, gang-raped by police officers, beaten again and threatened with dire consequences unless she committed suicide. It cannot be gainsaid that the allegations and accusations made by the petitioner have, even after approaching this Court after ten years, not been investigated by any independent agency or officer. The respondents have chosen to rely upon the aforesaid affidavit of a police officer who has no personal knowledge of any matter and report of the SDM in which serious discrepancies and even perversity is pointed out by the learned amicus curiae. There are clear contradictions even between the said affidavit and report of the SDM.

10.1 Considering the report of the SDM, it has to be noted that the first order dated 28.7.1997, by which enquiry was ordered to be conducted u/s 176 of the Cr.P.C. by the SDM under overall supervision of the District Magistrate, was expressly for the purpose of exhumation and examination of the body of the deceased. Even without such order and intervention of this Court, u/s 174 of the Cr.P.C., death of the deceased was required to be intimated to the Executive Magistrate empowered to hold inquest and he was required to make investigation and draw up a report of the apparent cause of death describing the wounds, bruises and other marks of injury as may be found on the body and such report was required to be signed by such police officer who concurred therein and the report was required to be forthwith forwarded to the District Magistrate or the SDM. Admittedly, no such enquiry was made and no report was submitted. The

enquiry ordered by this Court to be conducted u/s 176 of the Cr.P.C. with the help of a team of doctors was obviously to ascertain the cause of death and injuries sustained by the deceased apart from the obvious burn injuries. However, the SDM has submitted the afore-mentioned interim report dated 5.9.1997 and final report dated 19.10.1997 and has extensively referred to the averments made in the petition to dispel the important allegations with detailed reasons based on his extensive enquiry, travelling far beyond the scope and work of exhumation and ascertaining the cause of death and injuries to be found on the body of the deceased girl. In other words, the SDM has practically written a judgment in favour of the respondents to exonerate them of all charges levelled in the petition, except the charge of beating by police, on the basis of the statements none of which could be subjected to any cross-examination.

10.2 The SDM has, in his final report, gone to the extent of observing, as under, in the concluding part:

There can be two possible reasons for committing suicide by Nayanaben.

1. Under social and family pressure as a result of case where police caught her red-handed with Isa, at mid night, while they were behaving indecently in public. She might have felt guilty and this may have compelled her to commit suicide.
2. Under the threat of police, specifically, PI Dubey and PSI Kyada and four alleged policemen.

Police has no reason to threaten except to hide rape incidence. Alleged rape has no evidence, including re-post mortem report which reveals no sign of rape or sexual torture. So, police had no valid reason to threaten Nayana to commit suicide.

While deceased Nayana was admitted to General Hospital, Amreli, she has informed M.O., Dr.Vadhel that, she burned herself, she has not said that she self-immolated under the threat of police. Secondly, Amreli police recorded statement of petitioner where she (petitioner) says, Nayana told me that, I had burned myself because I cannot show my face to any one.

If we look at the circumstances, it seems that Nayana has committed suicide due to guilt and shame as a result of the case under Bombay Police Act under Sections 110 and 117. She might have thought that, she could not cop up with the anger of her mother and brothers. She was too young to face this type of situation. Amid emotional and mental disturbance, she might have taken extreme step of committing suicide.

The above concluding observations are part of the findings which start in para 5 of the report as under:

5. FINDINGS:

(1) PETITIONER AND HER FAMILY BACKGROUND:

Petitioner Shrimati bachiben Naranbai Nathbava, Resident of Maninagar Savarkundla, is widow of Naranbhai Bharmalbhai Nathbava. Naranbhai passed away recently 1 1/2 years back, was having criminal background. His name is found in police record.

Petitioner's eldest son Nyaldas, occupation rikshaw driver, resident of Mota Zinzuda, tal.Savarkundla. Her second son Sagar occupation driving. Living at Amreli. Third son Naval. Occupation driving. Living at Rajkot. Fourth son Nitin. Occupation driving. Living with petitioner at the time of event (29/30.6.1997) was wanted under O.R. No. 43/97 of Savarkundla Town Police Station u/s 307 IPC. Presently under conditional bail. Fifth son Santosh was also absconding and wanted under same offence. At present he is in Bhavnagar jail. Sixth and youngest son Lashkar living with petitioner at Savarkundla. Petitioner having three daughters, namely, Santaben, Vilasben, married, living with her in-laws at Rajkot and Karjala, respectively. Third deceased Nayanaben. Petitioner's another daughter Anjuben died in 1992 due to accidental burns. Petitioner's eldest son Nyaldas living next to Bachiben with his family, but shifted to Mota Zizuda after the incidence of Nayanaben

2. ACCUSED AND THEIR SOCIAL BACKGROUND:

Main accused are PI Mr. A.T.Dubey PI, Mr. K.B.Kyada PSI and four policemen. All the above accused are responsible officials of police department of State Government.

10.3 Apparently, the SDM has taken pains to delve into the background of family of the petitioner and found it to have criminal background, but jumped at the conclusion that the deceased committed suicide due to guilt and shame as a result of the case under Bombay Police Act under Sections 110 and 117. Reading the report of the SDM as a whole, it has not only travelled far beyond the scope of the enquiry entrusted to him, but it clearly appears to be a vain attempt at exonerating the officers of the police department. However, the report does record that dying declaration of the deceased was not recorded and the Executive Magistrate concerned had clearly denied the contention of the police that he was approached for recording dying declaration. That amounted to negligence and, significantly, "procedural lapse" on the part of the police, according to the report. And, the allegation that police had beaten the deceased at Mahakali Chowk was found to be correct on the basis of enough evidence to support it. In fact, the finding in that regard is as under:

(d) Police had beaten deceased Nayanaben at Mahakali Chowk.

TRUE.

Reason: We have enough evidence to support that police has beaten Nayana. Police lifted Nayanaben from her house and brought at Mahakali Chowk is not correct. Police caught Nayana near Memon's shop at Mahakali Chowk while she was attempting to run away with the boy Isa in his autorikshaw.

Five police personnel were present during the incidence, namely, H.C.Chaudhary, H.C.Abdulbhai, PC Asrafbhai, PC Jivabhai and PC Gabharubhai.

Out of this five policemen, who exactly beaten, cannot be traced. We believe that all the five policemen jointly responsible for beating.

11. It is very difficult to believe that a young illiterate girl living with her mother would venture out after midnight and be caught indulging in indecent behaviour in a rikshaw at a public place, the policemen catching her would allow the boy to run away and they would catch her again and beat her at Mahakali Chawk while she would be attempting to run away with the boy. The very first statement of Mr. Allarakha who is supposed to have caught the girl and filed the complaint of indecent behaviour contradicts that version. If she could not have been beaten on the road, the only place she could have been beaten, molested or raped, could be in the police station. And, that would falsify the entire version of the respondents and report of the SDM. It is even more difficult to believe that either the unfortunate girl or her aged illiterate mother would mention sections of the Bombay Police Act before the doctor and site the case registered by the police as history of the burn injuries to the doctor at Amreli. Presence of police inspector and police sub-inspector Mr. Dubey and Mr. Kyada in the police station, at Savarkundla Hospital and at the hospital in Amreli is not in dispute. How could they fail in their primary duty of arranging to record dying declaration of the deceased is not explained anywhere. In view of such serious lapses on the part of the police, the statements made on oath by the petitioner about what she heard from the deceased could be taken as the last words of the deceased; and serious offences could have been registered and investigation could have been immediately commenced to collect necessary evidence. Instead, after the letter of the petitioner being treated as the basis of the petition and the petition being entertained and enquiry being ordered, the respondents have, after two months, registered a case of offence u/s 323 read with Section 114 of the I.P.C. "looking to the facts and circumstances of the case and serious allegations made against police officers concerned and the allegations made in this petition." That complaint was taken after recording afresh a statement of the petitioner on 02.09.1997 upon receiving a letter from the learned Additional Public Prosecutor appearing in the High Court. And, even in that statement the petitioner is supposed to have made it clear that the matter of rape of the deceased was pending before the High Court, obviously to exclude any enquiry into more serious allegations and offences. That statement of the petitioner dated 02.09.1997 even mentioned acceptance of the post mortem report submitted after exhumation, even though, as on that date, even the first interim investigation report dated 5.9.1997 was not submitted before this Court. All these circumstances clearly indicate not only the guilty conscience of the police officers concerned but an active manipulation, abuse of the process of Court and concoction of evidence in the process.

12. The net worthwhile undisputable result of the exercise of the enquiry u/s 176

of the Cr.P.C. ordered by this Court for exhumation and examination of the body is the post mortem report signed by three doctors of the Department of Forensic Medicine. The inferences as under drawn in that report may be reproduced:

INFERENCES

(1) The burns found on the dead body of Naynaben, D/o. Bachiben are ante mortem in nature. The cause of death of the deceased is attributed to burns. Mud samples (1), (2L) & (4B) show presence of hydrocarbons of kerosene suggestive of use of kerosene oil.

(2) There are evidences of mechanical injuries on the body of the deceased four in number on left gluteal left calf, left thigh and right high. These injuries were evident despite of burns present. They are ante mortem in nature and are possible by hard and blunt object/s. They are within 24 hours of death of the deceased.

(3) Because of stage of decomposition there are no findings present on the body suggestive of sexual assault and/or forcible penetration to the deceased prior to her death. The FSL report and the report from the Pathology department also show absence of spermatozoa in the vaginal swabs.

(4) From the physical and radiological examination of the deceased, her age at the time of her death was about 16-1/2 (6 months).

12. It is apparent from the material and record referred hereinabove that the deceased girl was, at least, severely beaten, taken to the police station in the middle of night and she was put into a mental condition in which she was impelled to immediately commit suicide at the tender age of around 16 years. The subsequent acts of commission and omission which are required to be fully and properly investigated, obviously denied to the petitioner even access to justice after proper investigation and trial. It cannot be gainsaid that, in a welfare state dedicated to social justice, police force is meant for protection of rights of the people and cannot convert itself into an instrument of oppression or violate human rights of the people with impunity. In the facts of the present case, there is no manner of doubt about violation of human rights of the deceased and the petitioner insofar as serious injuries were inflicted upon the deceased and justice was effectively denied to the petitioner.

13. The following relevant judgments and observations therein were pointed out by the learned amicus curiae.

(a) In Mohan Lal Sharma v. State of U.P. 1988 (3) Crimes 122, the Supreme Court found the report of magisterial enquiry to be unacceptable and directed reference of the case immediately to the Central Bureau of Investigation for a thorough and detailed investigation by it with an order to submit its report to the Chief Secretary of the State Government for appropriate action and to the Court for such follow-up action as may be found to be necessary.

(b) In *State of M.P. v. Shyamsunder Trivedi* 1995 SCC 715, Their Lordships found on their independent analysis of the material on record that the respondents therein were definitely present at the police station and were directly or indirectly involved in the torture of Nathu Banjara and his subsequent death while in police custody as also in making attempts to screen the offence to enable the guilty to escape punishment. The Supreme Court observed that the trial court and the High Court exhibited a total lack of sensitivity and a "could not care less" attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used at some police stations, despite being illegal.

(c) As held by the Apex Court in *D.K. Basu Vs. State of West Bengal*, 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. It is clarified therein that 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.

(d) It was already settled in *Rudul Sah Vs. State of Bihar and Another*, that administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country, as it has perished in some others, too well-known to suffer mention, it is necessary to educate ourselves into accepting that respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers.

(e) In *Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others*, the Supreme Court awarded, by way of compensation, to the mother of the deceased child, aged 9, a sum of Rs. 75,000/- and ordered recovery of the amount or part thereof from the officers who may be found to be responsible.

(f) In *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, it was admitted that Suman Behera was taken in police custody on 1.12.1987 at 08.00 a.m. and was found dead with multiple injuries the next day on the railway track without being released from custody. The Supreme Court held that burden was clearly on the respondents to explain how Suman sustained those injuries which caused his death. Unless a plausible explanation was given by the

respondents which was consistent with their innocence, the obvious inference was that the fatal injuries were inflicted to Suman Behera in police custody resulting in his death, for which the respondents were responsible and liable. The Supreme Court went on to observe that the constitutional remedy provided for enforcement of a fundamental right was distinct from any remedy in private law for damages for the tort resulting from the contravention of the fundamental right. That remedy of public law has to be more readily available when invoked by the have-nots who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tampered by judicial restraint. His Lordship Dr. Justice A.S.Anand added in his concurring judgment that the Apex Court and the High Courts, being protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief, in exercise of its jurisdiction under Articles 32 and 226 of the Constitution, to the victim or heir of the victim whose fundamental rights under Article 21 of the Constitution of India were established to have been flagrantly infringed, by calling upon the State to repay the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings....It is a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so, the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly, particularly where the fundamental rights of a citizen under Article 21 are concerned.

(g) In *Union of India v. Luithukla*, (1999) 9 SCC 273 the Supreme Court held the security forces liable to make payment of nominal amount of rupees one lakh on the basis that the victim was last seen in the company of security forces about 16 years ago.

(h) In *Shakila Abdul Gafar Khan v. Vasant Raghunath Doble* 2003 SCC 1918, the Apex Court observed that dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of the rule of law and administration of the criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. The diabolic recurrence of police torture was resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because the guardians of law destroy the human rights by custodial violence and torture, invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State, whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them. The anguish expressed in several judgments of the Supreme Court did not seem to have caused any softening of attitude in their inhuman approach in dealing with persons in custody. Rarely, in cases of police torture or custodial death is there

direct ocular evidence of the complicity of the police personnel who alone could explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and maltreatment of detainees/ undertrial prisoners or suspects tarnishes the image of any civilized nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and civilization itself would risk the consequence of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself. The Apex Court further observed in the last para of the judgment:

...When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or slumber will tend to paralyse by such inaction or lethargic action of the courts and erode in stages the faith, ultimately destroying the justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diverted by manipulative red herrings.

Then, even after declining to interfere with the judgment of acquittal, the Supreme Court found it a fit case for exercising its jurisdiction under Article 142 of the Constitution to direct the State Government to pay compensation of rupees one lakh to mother and children of the deceased and directed an enquiry by Head of the police force of the State under direct control of Chief Secretary of the State to find out who were the persons responsible for injuries on the body of the deceased. If on further enquiry it would be found that the acquitted accused had a role to play, it was left open to the authorities to initiate proceedings notwithstanding the order of acquittal. Action was also directed to be taken against the officials who did not register the FIR.

(i) Compensation of Rs. 20,000/- was awarded and ordered to be recovered from the concerned police officer by this Court in Lok Adhikar Sangh Vs. State of Gujarat and Others, wherein a lady sarpanch was arrested during night, handcuffed and paraded in the village. The police sub-inspector and the lady constable concerned were held to have clearly violated the directions contained in Government Circular dated 31.3.1980 as well as the directives of the Hon'ble Supreme Court, reiterated from time to time, prohibiting police officers from arresting a woman accused after sunset and before sunrise. It was held:

25. From a conspectus of the aforesaid decisions of the Apex Court, we see no room for doubt that even where criminal cases or departmental enquiries are pending against the police officials who are alleged to have committed violation

of a person's rights under Article 21 of the Constitution by resorting to unjustified or mala fide actions and imprisonment and/or handcuffing of a person, not warranted by the facts and circumstances of the case, the Court can hold an inquiry into such allegations for the limited purpose of deciding the matter in the domain of public law and the Court can direct the Government to pay compensation to the victim in a proceeding under Article 226 of the Constitution.

(j) In *Savinder Singh Grover* [1993 SCC (Cri.) 1464], from the report submitted by learned Additional District Judge, Delhi, it was found that the story given by the police indicating the circumstances leading to death of Savinder Singh on account of suicidal jump was not truthful. There was a strong suspicion of misfeasance and/or torture. On those facts, the Apex Court directed Central Bureau of Investigation to ensure that FIR was registered on the facts as emanating from the report and to pay a sum of rupees two lakhs as ex-gratia payment to the widow of the deceased. Relying upon that and other judgments, this Court had, in *Lok Adhikar Sangh v. State of Gujarat* 1997 40 GCD 283, upon a prima facie finding that the death of one Satishbhai was traceable to the custodial torture, found it just and proper to award Rs. 1.50 lakhs as compensation.

(k) In *Arvinder Singh Bagga Vs. State of U.P. and Others*, the Supreme Court accepted the report which, inter alia, stated as under:

Torture is not merely physical, there may be mental torture and psychological torture calculated to create fright and submission to the demands or command. When threats proceed from a person in authority and that too by a police officer, the mental torture caused by it is even more grave.

The Supreme Court noted the reported facts of fabrication, illegal arrest, arrest without credible information of involvement in a cognizable offence and described it as a blatant abuse of law. The amount awarded for illegally detaining and humiliating the persons were ordered to be recovered personally from the police officers concerned.

(l) Recently in *Prakash Singh v. Union of India* (2006) 3 SCC 417, the Supreme Court has, inter alia, directed constitution of a Police Complaints Authority at District and State levels to look into the complaints against police officers.

14. In view of the findings and the legal propositions recorded hereinabove, an appropriate order for payment of compensation to the petitioner and for proper investigation of the offences prima facie disclosed by her letter and statements made by her on oath, is required to be made in the interest of justice. The manner in which an enquiry into minor offences was caused to be initiated through court, while this Court was seized of the matter, and the way the so-called complaint of the petitioner was rejected, clearly reveals the ingenuity of the respondents in successfully thwarting proper investigation and prosecution. That enquiry was clearly vitiated by manipulation and concoction of the complaint itself. Therefore, the same machinery cannot be entrusted the task of

further and proper investigation. Nor can the aged, poor and hapless petitioner be expected to carry any further the fight for justice on her own. Learned A.P.P. has, on instructions and enquiry through the police inspector concerned, stated at the Bar that the petitioner is still living with one of her sons in Savarkundla town and may be available for recording her statement on oath.

15. In view of the aforesaid facts and circumstances, considering the loss, shock, suffering and delay, the respondent-State Government is directed to pay to the petitioner, by way of interim compensation for violation of fundamental rights of the petitioner and her daughter, Rs. 1,50,000/- The amount shall be deposited with the District Court at Amreli and, upon appropriate application being made and the petitioner being properly identified, an amount of Rs. 15,000/- shall be immediately paid to her in cash or by an account payee cheque in her name and the remaining amount of Rs. 1,35,000/- shall be deposited in a nationalized bank in the name of the petitioner in a fixed deposit for a period of two years with direction to directly pay her the interest every month. She shall also be permitted to make appropriate nomination with the bank for withdrawal of the amount in case of her death within the period of the fixed deposit. The learned District Judge, Amreli may allow earlier withdrawal of the whole or part of the fixed deposit, if upon an application made by the petitioner, he is satisfied that the facts and circumstances justified such withdrawal in the interest of justice. The learned District Judge, Amreli is requested to arrange for affording to the petitioner such legal aid as may be required by her and could be arranged at the local level.

15.1 The State Police Complaints Authority required to be constituted under the judgment of the Hon'ble Supreme Court in *Prakash Singh v. Union of India* (2006) 3 SCC 417 shall investigate into the offences, prima facie, disclosed during the present proceedings including the alleged offences under Sections 376, 363, 366, 330, 220, 306 read with Sections 120-B and 114 of the IPC and the offences, if any, under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, if applicable. If such Authority is, for any reason, not constituted or cannot undertake and start investigation by 26.01.2007, then, the investigation shall be entrusted to the Central Bureau of Investigation with a copy of this judgment and copies of the petition and entire record of the enquiry conducted by the SDM pursuant to the order of this Court. In either case, the investigation shall be completed and appropriate report shall be submitted latest by 16.03.2007 to the appropriate Court under the provisions of Section 173 of the Cr.P.C., with a copy to this Court for further orders, if necessary. It is clarified that the findings recorded herein will not be binding on the investigating agency since they are restricted to the purpose of passing appropriate order in the present proceedings.

16. This court has to place on record appreciation of extensive and elaborate work undertaken as *amicus curiae* by learned Counsel Mr. K.J.Panchal. The State Government is directed to pay to him, by way of cost and expenses for his

attendance throughout, preparation of written notes and perusal of the voluminous record, the sum of Rs. 7,500/-, even as he was disinclined to receive any amount by way of fees.

It will be open for the State Government to recover the aforesaid amounts of interim compensation and costs from the officers that may be found to be responsible at the end of the investigation and/or such enquiry as the State Government may find proper to undertake for fixing personal responsibility of the police personnel concerned.

17. Copies of this judgment and order shall be served directly by the Registry of this Court upon the Secretary, Home Department of the State Government, for immediate implementation, and upon the State Human Rights Commission for its kind consideration while taking immediate appropriate actions in future in cases of reports of atrocities by the police. A copy of this judgment and order shall also be served by the Registry upon the petitioner, free of cost. All copies shall be served by 10.01.2007.

18. Rule is made absolute accordingly.