
(2022) 10 BOM CK 0106

In the Bombay High Court

Case No : Criminal Writ Petition No.250 Of 2022(F)

Conceicao B. D'Souza

APPELLANT

Vs

State Of Goa And Others

RESPONDENT

Date of Decision : 18-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 20(3), 21, 22, 22(1), 22(2), 226, 227
Code Of Criminal Procedure, 1973 — Section 41, 41A, 41B, 41C, 41D, 41(1), 41(1)(b)
(ii), 46, 49, 50, 51, 51A, 53, 54, 55, 55(A), 56, 57, 58, 60A, 78, 79, 80, 88, 164, 167,
170, 176, 204, 209, 356(5), 436A, 440, 482
Aandhra Pradesh Excise Act, 1968 — Section 31(1), 34
Indian Penal Code, 1860 — Section 498A

Citation : (2022) 10 BOM CK 0106

Hon'ble Judges : M. S. Sonak, J; Bharat P. Deshpande, J

Bench : Division Bench

Advocate : Gaurish Agni, S.G. Bhobe

Final Decision : Disposed Of

Judgement

Bharat P. Deshpande, J

1. Rule. Rule returnable forthwith.

2. The petitioner who is the wife of Mr Bonaventure D'Souza preferred the present petition under Articles 226 and 227 of the Constitution of India together with Section 482 of Criminal Procedure Code (CrPC) alleging therein that her husband was illegally taken away from his house by the officers of respondent No.3 during midnight. Thus, she prayed for a writ of habeas corpus or any appropriate order or writ directing the respondents to produce her husband before this Court.

3. The prayers in paragraph No.38 (a) to (h) are as under:

(a) For a writ of Habeas Corpus or any other appropriate writ, order or a direction in the nature of a writ of Habeas Corpus or any appropriate order or

direction under Section 482 of the Criminal Procedure Code directing the Respondents to produce the Petitioner's husband, Mr. Bonaventure D'Souza before this Hon'ble Court as the action on par tof the Respondent No.3 is illegal and bad in law.

(b) For a declaration that the alleged arrest, detention and custody of the Petitioner's husband is illegal and bad in law and without jurisdiction.

(c) For an order of interim protection restraining the Respondent No.3 from arresting the Petitioner's husband and detaining him in custody, during the pendency of the above Petition.

(d) In alternative for an order to enlarge the Petitioner's husband on bail pending the hearing and final disposal of the present writ petition on such terms and conditions as deemed fit by this Hon'ble Court in the event the petitioner's husband is considered to be arrested.

(e) For Ex-Parte Ad-Interim relief in terms of (c) and (d) above.

(f) For Ad-Interim Relief in terms of (c), (d) and (e) above.

(g) For costs;

(h) Such other and further reliefs this Hon'ble Court deems fit and proper.”

4. On 23rd April 2022, the notice was issued to the respondents. The matter was called upon on 25th April 2022 wherein this Court passed the order as under:

“1. Mr. Agni appears for the Petitioner. Mr. Shailendra Bhohe the learned Public Prosecutor appears for Respondent Nos.1 and 2.

2. Mr. Agni states that service has been effected upon Respondent No.3 and affidavit of service will be filed in the course of the day. The Sheristedar has called out the matter to ascertain whether Respondent No.3 is present or not. There is no appearance on behalf of Respondent No.3.

3. We place the matter for further consideration on 26.04.2022.

4. At least, prima facie, there is no material before us to indicate that the provisions of Sections 78, 79 and 80 of Cr.P.C. have been followed in this matter. The learned Public Prosecutor states that he will make his submissions tomorrow. Accordingly, we place this matter on 26.04.2022.

5. Mr. Agni states that he will once again send intimation of tomorrow's hearing to Respondent No.3 together with a copy of this order.”

5. When the matter was taken up on 26th April 2022, and after hearing the parties following order was passed:

“1. We have heard Mr. Gaurish Agni learned Counsel for the Petitioner and Mr. S.G. Bhohe, learned Public Prosecutor for the State of Goa.

2. Leave to amend and implead Respondent Nos.4 and 5. Amendment to be carried out forthwith.

3. Mr. Bhobe states that in this case, Respondent No.3 did approach the Margao Town Police and sought assistance to apprehend Mr. Bonaventure D'Souza. However, Mr. Bhobe points out that no transit remand was obtained by Respondent No.3.

4. Mr. Agni learned Counsel for the Petitioner points out that even after Respondent No.3 was informed that the competent Magistrate has been moved at 3:00 a.m. on 21.04.2022 for bail, only to defeat the judicial process, Respondent No.3 not only apprehended Bonaventure, but carried him outside the borders of the State of Goa. Mr. Agni submits that Respondent No.3 has acted in gross violation of not only the statutory provisions, but also circular dated 16.05.2012, issued by the Government of India on the subject of arrest of accused persons outside the State/UT jurisdiction.

5. Thus, prima facie, if what is stated is correct, then we think that the conduct of Respondent No.3 in arresting Bonaventure and taking him to Andhra Pradesh in the early hours of 21.04.2022 is required to be further examined.

6. Accordingly, we issue notice to Respondent No.3, 4 and 5 to remain present along with Mr. Bonaventure D'Souza in this Court on 02.05.2022. The Respondent No.3 can also file his affidavit explaining his conduct. The affidavit will also have to explain the legality of Mr. Bonaventure's detention.

7. We direct that this notice be served on Respondent No.3 through the Home Secretary, State of Andhra Pradesh and the Director General of Police, State of Andhra Pradesh. We request both these senior officials to ensure that Respondent No.3 attends this Court, failing which, we will be constrained to consider whether any further orders are required to be made to secure his presence and explanation.

8. We also direct the Respondent No.2 to file an affidavit in this matter on or before 02.05.2022. Respondent No.2 to also render all assistance for service of notice on Respondent Nos.3, 4 and 5."

6. Finally, the matter was taken up during summer vacation on 2nd May 2022 and accordingly this Court passed following order:

" 1. In response to our Order dated 26.04.2022, Shri S. Krishna Kishore, Assistant Enforcement Superintendent representing respondent no.3 is present. Along with him even respondentnos.4 and 5 are present.

2. Mr. Bhobe, learned Public Prosecutor submits that these officers have brought along with them an affidavit but the same is not in the proper format. Mr. Bhobe, mainly to assist this Court, and based on instructions from these three officers submits that Mr. Bonaventure D'Souza was produced before the competent Magistrate in Andhra Pradesh and has since been remanded by Order dated

22.04.2022. A copy of the remand order made by the Judicial Magistrate First Class, Nellore is also produced for the perusal of this Court.

3. Mr. Bhohe also tenders affidavit of Mr. Sagar Dhatkar, Police Sub-Inspector, Margao Town Police Station explaining the role of the Margao Town Police in the matter.

4. Mr. Gaurish Agni, learned counsel for the petitioner however submits that the issue of the initial arrest of Mr. Bonaventure D'Souza and the manner in which he was picked up from the State of Goa requires consideration. He states that there are certain decisions of the Hon'ble Supreme Court which would hold that if the initial arrest is itself vulnerable and falls foul of not only the statutory safeguards provided in the Code of Criminal Procedure, 1973 but also the constitutional guarantees in Articles 21 and 22 of the Constitution of India then, the appropriate orders are required to be made in a writ seeking habeas corpus.

5. Mr. Agni, without prejudice to the above submits that now, steps will be taken to secure a regular bail in the meanwhile from the competent courts in the State of Andhra Pradesh. He however requests that it may be clarified that such proceedings can be taken out without prejudice to the pendency of the present petition.

6. Accordingly, it is clarified that Mr. Bonaventure D'Souza himself or through next friend can take out appropriate proceedings before the competent Courts in the State of Andhra Pradesh for securing regular bail.

7. On the larger issues now raised by Mr. Agni, the respondents no.3, 4 and 5 are directed to file their affidavit/s latest by 08.06.2022. Copy/copies of such affidavit/s will have to be furnished to the learned counsel for the petitioner as well as the learned Public Prosecutor for the State of Goa. 8. If the petitioner wishes to file any rejoinder, liberty is granted to do so by 13.06.2022 by similarly serving advance copies to the respondents or their counsel.

9. Place this matter for further consideration on 14.06.2022.

10. If respondent nos.3, 4 and 5 wish to appear through a counsel, then, their personal presence will not be necessary. However, if no arrangements are made for appearance through counsel, then, the officers will have to remain present personally on the next date."

7. From the above, it is clear that the husband of the petitioner was arrested from his house during night time (by the officers of Respondent No.3) on 21st April 2022 when he was called at Margao Town Police Station and thereafter he was taken in a car out of Goa.

8. From the affidavit filed on behalf of respondents No.3 to 5 starting from page No.82 onward, it is revealed from paragraph No.5 that the husband of the complainant was arrayed as accused No.14 in Crime No.40 of 2022 registered with Special Enforcement Bureau Station, Nellore-I on 28th March 2022 in

connection with the seizure of 5897 bottles of substandard diluted liquor. The other accused persons who were arrested in the said crime disclosed that they purchased such liquor from the husband of the petitioner and brother of husband of petitioner from Goa. Accordingly, the husband of the petitioner was arrayed as accused No.14 by filing application/memo before the Special Judicial magistrate first class for conducting trial of Prohibition and Excise offences, Nellore in connection with excise offence under section 34 of Andhra Pradesh Excise Act, 1968 which is punishable for a period of 8 years under section 31 (1) of the said Act. Such offence is cognizable and non-bailable.

9. The affidavit of respondents No.3 to 5 further shows that permission from the Director General of Police, Andhra Pradesh was sought and it was granted vide permission dated 07th April 2022. Accordingly, the Officers of Respondent No.3 reached Goa on 20th April 2022 for apprehending the husband of the petitioner and the brother of the husband of the petitioner. A requisition was then handed over to respondent No.2- Police Inspector, Margao Police Station to cooperate.

10. The affidavit further shows that on 21st April 2022 at around 01.30 hours the Officers of Respondent No.3 along with the local police went to the house of the petitioner and questioned her husband who confessed about the commission of the offence and accordingly he was arrested. Grounds of arrest were explained to the petitioner along with intimation of the arrest. Even the Advocate for the petitioner's husband was present. Similarly, information in writing was furnished to the Police Inspector, Margao Town Police Station about the arrest of the husband of the petitioner and he was brought to Margao Town Police Station. At that time the petitioner along with some other persons came to the Margao Town Station and tried to obstruct the Officers of Respondent No.3 in performing their duty. It was observed that obtaining transit remand from Magistrate is not feasible and due to the passage of time, there is every possibility that the husband of the petitioner would flee from the police station with the help of others. Accordingly, the Officers of Respondent No.3 explained it to Police Inspector, Margao Town Police Station/Respondent No.2 and after completing the procedure of arrest, left Margao at around 4.00am taking husband of the petitioner along with them towards Nellore. They reached Nellore by 11.30 p.m. on 21st April 2022. The husband of the petitioner was thereafter taken to the Primary Health Centre at Nellore at 00.10 a.m. on 22nd April 2022 for medical fitness certificate as well as a Covid-19 test in order to follow Covid protocol. The Primary Health Centre informed absence of the Medical Officer as well as the kit for conducting a Covid test and requested to produce the husband of the petitioner at 10.00a.m. on 22nd April 2022. Accordingly, he was brought to the Police Station and was produced before the Medical Officer at around 10.30 a.m. and immediately he was then taken to the JMFC Nellore along with the remand application. The learned JMFC Nellore after hearing the Officers of Respondent No.3 and also the accused, granted remand of judicial custody and accordingly husband of the petitioner was handed over to the Central Prisons Nellore at 5.p.m. of 22nd April 2022.

11. The affidavit of respondents No.3 to 5 further shows that on 04th May 2022, the husband of the petitioner was released on bail by the Special Judicial Magistrate, First Class, Nellore on condition.

12. In light of the above facts, order was passed on 02nd May 2022 as quoted above. However, it was felt proper to hear the learned Counsel for the petitioner and the learned Public Prosecutor for the State on the larger issues with regard to the arrest and detention of the suspects residing in Goa, by the Officers of the Police stations from outside Goa and the procedure to be adopted in such eventualities. Accordingly, the parties were directed to assist this Court by filing their affidavits/rejoinder so that proper guidelines could be formulated. Similarly, it was observed that this is not the solitary incidence of arrest and detention by the Officers of the Police Station or the enforcing agencies from outside Goa. Earlier, also such instances were reported in other States, the same issue arises and is discussed in various decisions including the issue discussed by the Delhi High Court and even Supreme Court in recent times.

13. It is well said that "an uncontrolled power is another enemy of freedom". Liberty is one of the most essential ingredients of modern civilised society.

14. Article 21 of the Constitution of India deals with the protection of life and personal liberty and provide that no person shall be deprived of his life or personal liberty except according to procedure established by law. Therefore personal liberty could be curtailed only as per the procedure established by law and not by any other means.

15. A Code of Criminal Procedure, 1973, in Chapter V deals with arrest of persons. Section 41 provides when police may arrest any person without warrant and it reads thus :

"41. When police may arrest without warrant-

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

[(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—

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

(ii) the police office is satisfied that such arrest is necessary—

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

(b) for proper investigation of the offence; or

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

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing.

28[Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.]

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;]

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of Section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

29[(2) Subject to the provisions of Section 42, no person concerned in a non-

cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.]”

16. By amendment Act 5 of 2009, Section 41A to 41D were introduced.

Such provisions came into force w.e.f. 01st November 2010. For the purpose of present matter, we would like to quote Section 41A, 41B and 41D as under :

41-A Notice of appearance before police officer

(1) 3[The police officer shall], in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

32[(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent court in this behalf, arrest him for the offence mentioned in the notice.]

41-B. Procedure of arrest and duties of officer making arrest.— Every police officer while making an arrest shall—

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be—

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

41-C. Control room at districts.—(1) The State Government shall establish a police control room—

(a) in every district; and

(b) at State level.

(2) The State Government shall cause to be displayed on the notice board kept outside the control rooms at every district, the names and addresses of the persons arrested and the name and designation of the police officers who made the arrests.

(3) The control room at the Police Headquarters at the State level shall collect from time to time, details about the persons arrested, nature of the offence with which they are charged and maintain a database for the information of the general public.

41-D. Right of arrested person to meet an advocate of his choice during interrogation.—When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.]”

17. In the present matter, we are only dealing with the arrest of any person by a Police Officer or the officer of investigating agency having powers of a police officer but not an arrest on the basis of any warrant.

18. Section 46 of CrPC deals with how arrest is made and reads thus:

46. Arrest how made.

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action:

1[Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.]

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

1[(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.]

19. Section 50 and 51A deals with the information or the grounds of arrest to be furnished to the person who is arrested by a Police Officer or to the nominee of such arrested person. Section 53 and 54 of Cr.PC mandate about the

examination of such arrested person by a medical practitioner at the request of the concerned Police Officer. Such examination of arrested person is necessary on two counts. First of all the police officer has to ascertain as to whether the arrested person is fit to be placed in custody and secondly when such person is arrested and a charge of committing an offence of such nature alleged to have been committed under such circumstances that there are reasonable grounds for believing that a examination of his person will afford evidence as to the commission of the offence.

20. Section 55 deals with the procedures when Police Officer deposes subordinate to arrest a person without warrant. Section 55(A) has been introduced w.e.f. 31st December 2009 state that it shall be a duty of the person having the custody of an accused to take a reasonable care of the health and safety of the accused.

21. Section 56 of the CrPC deals with the person arrested to be taken before Magistrate or officer in charge of the police station. Since this section is material for the present matter, it is quoted below for ready reference.

"56. Person arrested to be taken before Magistrate or officer in charge of police station- A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station."

22. Section 58 of the CrPC casts a duty on the Officer in charge of the Police Station to report to the Divisional Magistrate or to the Sub-Divisional Magistrate as the case may be, about the cases of all persons arrested without warrant, within the limits of their respective police stations, whether such persons have been admitted to bail or otherwise.

23. Section 60-A was inserted by Amendment Act 5 of 2009 w.e.f. 31st December 2009 which reads thus:

"60-A Arrests to be made strictly according to the Code. - No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest.]"

24. With these provisions provided under Cr.P.C. with regard to arrest and how such arrest is made, we would like to deal with certain decisions of the Supreme Court and the Delhi High Court in this regard.

25. In case of *Arnesh Kumar v/s. State of Bihar and another* (2014) 8 SCC 273, the Supreme Court while considering provisions of sections 41, 41(1) and 57 of CrPC reiterated guidelines. In paragraphs Nos. 5 and 6, the Supreme Court observed thus:

"5. Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the

police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Cr.PC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

6. Law Commissions, Police Commissions and this Court in a large number of judgments emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. Despite this legal position, the Legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, the Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short 'Cr.PC'), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest."

26. Further the Supreme Court in paragraph No.7.2 and 7.3 observed thus :

"7.2 Law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest.

7.3 In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the

arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 of Cr.PC.”

27. It further observed in paragraph 8 as under :

“An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India and Section 57, Cr.PC to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey.”

28. Finally, guidelines were issued which are found in paragraph 11 of the said judgment. For the purpose of deciding the present matter, such observations are also material and hence quoted below :

“11.1 All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC;

11.2 All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3 The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4 The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5 The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

11.6 Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

11.7 Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.”

29. In the celebrated case of D.K.Basu v/s. State of W.B. (1997) 1 SCC 416 , the Supreme Court while dealing with custodial violence / police atrocities has

observed in paragraph 17 as under :

"17. Fundamental rights occupy a place of pride in the India Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. 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, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State. In tune with the constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of the 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. Section 41 CrPC confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this Section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes Clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Section 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death."

30. The Supreme Court further in paragraph 33 while dealing with freedom of the individual qua the right to interrogate have observed thus:

"There can be no gain saying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated- indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third-degree method or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the methods of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is not answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge."

31. Final directions were issued in paragraph 35 in connection with preventive measures to be taken by the Police Officers in cases of arrest or detention till legal provisions are made in that behalf as preventive measures.

32. It is now a matter of record that after such directions were given in the above decision the amendments were introduced in CrPC as quoted earlier.

33. In the case of *Manibhai Ratilal Patel through Ushaben v/s. State of Gujarat and others* (2013) 1 SCC 314 , the issue before the Supreme Court was with regard to the powers to issue a writ of habeas corpus. It was reiterated that habeas corpus cannot be entertained when a person is committed to judicial custody or a police custody by a competent Court by an order which prima facie does not appear to be without jurisdiction nor it is based in absolute mechanical manner nor is wholly illegal. It was thus argued that the Writ Court is required to scrutinize legality or otherwise of order of detention/ remand which has been

passed and unless writ Court is satisfied that a person has been committed to jail custody by virtue of order that suffers from vice of lack of jurisdiction or absolute illegality, writ of habeas corpus cannot be issued.

34. In Sandeep Kumar v/s. State (Government of NCT of Delhi) and others 2019 SCC online Delhi 11901, the Division Bench while deciding the petition of habeas corpus found that the police officers from Uttar Pradesh, on the basis of FIR, entered the premises of Jawaharlal Nehru University (JNU) without informing the local police and thereafter picked up the petitioner and his wife from their residence and they were taken to Uttar Pradesh. The wife of the petitioner was then produced before the Magistrate and on the basis of a so-called statement under Section 164 CrPC she was handed over to her parents. The petitioner was detailed illegally in police lock up for 3 days, without producing him before any Magistrate. Thus, a committee was appointed to submit reports of such atrocities. The said committee also furnished suggestions on the procedure to be adopted in case of the police officer visiting another State or the jurisdiction of their police station and effecting arrest. This suggestions are found in paragraph 15 in Sr No.1 to 29 which reads thus :

"15. The Committee has, after examining all of the above material in detail, given detailed suggestions as to the protocol to be followed by the police in the event of inter-state arrest. These read as under:

"1. The Police Officer after assignment of the case to him, must seek prior permission/sanction of the higher/superior officers in writing or on phone (in case of urgency) to go out of State/UT to carry out investigation.

2. In a case when the police officer decides to effect an arrest, he must set out the facts and record reasons in writing disclosing the satisfaction that arrest is necessary for the purpose of investigation. At first instance, he should move the Jurisdictional Magistrate to seek arrest/search warrants under Section 78 and 79 Cr PC except in emergent cases when the time taken is likely to result in escape of the accused or disappearance of incriminating evidence or the procurement of arrest/search warrant would defeat the purpose. The Police Officer must record reasons as to what were the compelling reasons to visit other State without getting arrest/search warrants.

3. Before proceeding outside the State, the police officer must make a comprehensive departure entry in the Daily Diary of his Police Station. It should contain names of the police officials and private individuals accompanying him; vehicle number; purpose of visit; specific place(s) to be visited; time and date of departure.

4. If the possible arrestee is a female, a lady police officer be made part of the team. The Police Officers should take their identity cards with them. All police officers in the team should be in uniform; bear accurate, visible and clear identification and name tags with their designations.

5. Before visiting the other State, the Police Officer must endeavour to establish contact with the local Police Station in whose jurisdiction he is to conduct the investigation. He must carry with him the translated copies of the Complaint/FIR and other documents in the language of the State which he intends to visit.

6. After reaching the destination, first of all, he should inform the concerned police station of the purpose of his visit to seek assistance and co-operation. The concerned SHO should provide/render all legal assistance to him. Entry to this effect must be made at the said police station.

7. After reaching the spot of investigation, search, if any should be strictly conducted in compliance of the procedure laid down u/s 100 Cr PC. All endeavour should be made to join independent public witnesses from the neighbourhood. In case of arrest, the police officer must follow the procedure u/s 41A and 41B and Section 50 and 51 Cr PC. The process of arrest carried out by the police must be in compliance with the guidelines given in DK Basu case (Supra) and the provisions of CrPC.

8. The arrested person must be given an opportunity to consult his lawyer before he is taken out of State.

9. While returning, the police officer must visit the local police station and cause an entry made in the Daily Diary specifying the name and address of the person(s) being taken out of the State; articles if any, recovered. The victim's name be also indicated.

10. Endeavor should be made to obtain transit remand after producing the arrestee before the nearest Magistrate unless exigencies of the situation warrant otherwise and the person can be produced before the Magistrate having jurisdiction of the case without infringing the mandate of S. 56 and 57 of Cr.P.C. within 24 hours.

11. The magistrate before whom the arrestee is produced, must apply his mind to the facts of the case and should not grant transit remand mechanically. He must satisfy himself that there exists material in the form of entries in the case diary that justifies the prayer for transit remand. The act of directing remand of an accused is fundamentally a judicial decision. The magistrate does not act in executive capacity while ordering detention of the accused. He must ensure that requirements of S. 41 (I)(b) are satisfied. The police officer must send the case diary along with the remand report so that the magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. The magistrate should briefly set out reasons for his decision. (Manubhai Ratilal Patel v. State of Gujarat, (2013) 1 SCC 314)

12. Another mandatory procedural requirement for the Magistrate considering a transit remand application is spelt out in Article 22 (1) of Constitution of India. This entitles the person arrested to be informed as soon as may be the grounds

of such arrest. The Magistrate has to ensure that the arrested person is not denied the right to consult and to be defended by a legal practitioner of his choice. The Magistrate should ask the person arrested brought before him whether in fact he has been informed of the grounds of arrest and whether he requires to consult and be defended by any legal practitioner of his choice. (DK Basu, Supra) After the pronouncement of this judgment by the Hon'ble Supreme Court, new Sections 41A to 41D have been added to prevent unnecessary arrest and misuse of powers. Denying a person of his liberty is a serious matter.

13. In terms of S. 41C, control rooms be established in every district. Names and addresses of the persons arrested and designation of the Police Officers who made the arrest be displayed. Control Room at State level must collect details of the persons so arrested.

14. The police officer must record all the proceedings conducted by him at the spot and prepare an 'arrest memo' indicating time, date of arrest and name of the relation/friend to whom intimation of arrest has been given. It must reveal the reasons for arrest.

15. Since the arrestee is to be taken out of his State to a place away where he may not have any acquaintance, he may be permitted to take along with him (if possible), his family member/acquaintance to remain with him till he is produced before the jurisdictional Magistrate. Such family member would be able to arrange legal assistance for him.

16. The arrested person must be produced before the jurisdictional Magistrate at the earliest, in any case, not beyond 24 hours from the date of arrest excluding the journey time so that arrest of such person and his detention, if necessary, may be justified by a judicial order. The 24 hours period prescribed u/s 57 Cr PC is the outermost limit beyond which a person cannot be detained in police custody. It does not empower a police officer to keep a person in police station a minute longer than is necessary for the purpose of investigation and it does not give him an absolute right to keep a person till 24 hours.

17. On arrival at the police station, the police officer must make an arrival entry in the record and indicate the investigation carried out by him, the person arrested and the articles recovered. He should also inform his senior police officers/SHO concerned about it immediately. The superior Police Officer shall personally supervise such investigation.

18. The police officer should effect arrest u/s 41(I)(b) Cr PC only when he has reasonable suspicion and credible information. He must satisfy himself about the existence of the material to effect arrest. There must be definite facts or averments as distinguished from vague surmises or personal feelings. The materials before him must be sufficient to cause a bona-fide belief. He cannot take shelter under another person's belief or judgment. He must effect arrest at his own risk and responsibility as the effect of illegal arrest could be commission of offence of wrongful confinement punishable u/s 342 IPC. Burden lies on the IO

to satisfy the Court about his bona-fide. No arrest can be made because it is lawful for the police officer to do so. Denying a person of his liberty is a serious matter.

19. Medical examination soon after arrest to avoid possibility of physical torture during custody should be conducted.

20. The IO must maintain a complete and comprehensive case diary indicating the investigation carried out by him.

21. The log book of the vehicle used for transportation must be maintained and signed. The IO must indicate whether the vehicle was official or a private one; name of its driver and how and by whom it was arranged. Only official vehicle should be used for transportation to the extent possible.

22. At the time of recovery of the prosecutrix, the police officer, if he is satisfied that she is adult, should ascertain from her at the spot, whether she was present there with her free will. If the victim/prosecutrix is not willing to accompany the police officer or her relatives, the police officer must not exert force on the prosecutrix to take her away against her wishes. However, if the prosecutrix/victim of her own accord expresses willingness to accompany the police officer/relatives, her consent in writing should be obtained at the spot.

23. In case where the police officer finds the victim/prosecutrix to be a 'minor', soon after recovery, she should be produced before the local Child Welfare Committee for further decision regarding her custody. She must not be made to stay in the Police Station during night hours.

24. Statement of the prosecutrix u/s 164 Cr.P.C. must be recorded at the earliest.

25. MHA/Central Govt/Commissioner of Police must frame suitable guidelines for police officers to render all suitable assistance. The failure to adhere to the rules/guidelines should render the police officer liable for departmental action as well as contempt of the Court.

26. The public prosecutor should provide required assistance to the police officer visiting his State at the time of seeking transit remand.

27. The MHA/State Government should circulate the Rules/Guidelines/Notifications etc. from time to time to the Police officers in the State to create awareness. Periodically training should be provided to the Police Officers to sensitize them.

28. Instructions/Guidelines of similar nature should exist in all the States/UTs for speedy, smooth and effective inter-State investigation.

29. The delinquent Police Officer can be directed to pay compensation under the public law and by way of strict liability."

35. The Division Bench of Delhi High Court in paragraph 17 accepted the said suggestions of the committee which comprised of former Judge of Delhi High

Court and a former DGP of the Delhi Police and directed implementation of such suggestions by Delhi Police and by the Uttar Pradesh Police. A concerned DGP's and CP's of the respective areas were directed to issue orders to that effect.

36. Accordingly, Delhi Police issued a standing order No.109 of 2020 on "procedures for issuance of notices or order by police Officer" which is marked as "X1" in the petition.

37. In the recent decision in the case of Satender Kumar Antil v/s. Central Baureau of Investigation and another 2020 SCC OnLine Sc825, the Supreme Court while dealing with personal liberty discussed its earlier decision in the case of Arnesh Kumar(supra) extensively on observing that such guidelines issued in the case of Arnesh Kumar (supra) are not adhered in letter and spirit by the investigating machinery, observed in para No. 29 and 30 as under :

"29.Thus, we deem it appropriate to direct all the State Governments and the Union Territories to facilitate standing orders while taking note of the standing order issued by the Delhi Police i.e., Standing Order No. 109 of 2020, to comply with the mandate of Section 41A. We do feel that this would certainly take care of not only the unwarranted arrests, but also the clogging of bail applications before various Courts as they may not even be required for the offences up to seven years.

30. We also expect the courts to come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A. We express our hope that the Investigating Agencies would keep in mind the law laid down in Arnesh Kumar (Supra), the discretion to be exercised on the touchstone of presumption of innocence, and the safeguards provided under Section 41, since an arrest is not mandatory. If discretion is exercised to effect such an arrest, there shall be procedural compliance. Our view is also reflected by the interpretation of the specific provision under Section 60A of the Code which warrants the officer concerned to make the arrest strictly in accordance with the Code."

38. The Supreme Court further reiterated its observations in the case of Maneka Gandhi v/s. Union of India (1978)1 SCC 248 wherein it was held that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right under Article 21, and he would be entitled to enforce such fundamental right and secure his release.

39. Finally while concluding it is observed in paragraph No. 73 as under:

"73. In conclusion, we would like to issue certain directions. These directions are

meant for the investigating agencies and also for the courts. Accordingly, we deem it appropriate to issue the following directions, which may be subject to State amendments.:

"a) The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act so as to streamline the grant of bails.

b) The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in Arnesh Kumar (supra). Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.

c) The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the accused for grant of bail.

d) All the State Governments and the Union Territories are directed to facilitate standing orders for the procedure to be followed under Section 41 and 41A of the Code while taking note of the order of the High Court of Delhi dated 07.02.2018 in Writ Petition (C) No. 7608 of 2018 and the standing order issued by the Delhi Police i.e. Standing Order No. 109 of 2020, to comply with the mandate of Section 41A of the Code.

e) There need not be any insistence of a bail application while considering the application under Section 88, 170, 204 and 209 of the Code.

f) There needs to be a strict compliance of the mandate laid down in the judgment of this court in Siddharth (supra).

g) The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to constitution of special courts. The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.

h) The High Courts are directed to undertake the exercise of finding out the undertrial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.

i) While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.

j) An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code both at the district judiciary level and the High Court as earlier directed by this Court in Bhim Singh (supra), followed by appropriate orders.

k) Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening

application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.

l)All State Governments, Union Territories and High Courts are directed to file affidavits/ status reports within a period of four months.”

40. In the present matter, we are concerned with the directions in 73(d) as quoted above.

41. Thus, inspite of several precedents by the Supreme Court as well as standing orders issued by the Delhi Police, no such procedure has been adopted in the State of Goa till date.

42. We, thus, are constrained to record our anguish and to direct the DGP of Goa Police to take steps in the matter and as directed by the Supreme Court in case of Arnesh Kumar(supra) and provide the necessary guidelines.

43. Though in the present petition, it is clear that husband of the petitioner was arrested and produced before the Judicial Magistrate, the manner in which he was arrested from his house at around 1.30a.m. is surprising.

44. Be that as it may, since vide order dated 02nd May 2022 as quoted earlier, it was already observed that the husband of the petitioner was released on bail, the petition needs to be disposed of.

45. With the above directions, we expect that Goa Police will formulate standing orders as early as possible and in any case, not later than 3 months from today. A compliance report must be filed by the DGP, Goa latest by 31st January 2023.

46. Copy of this order shall be forwarded to DGP, Goa and also the Secretary (Home) of State of Goa, the learned Public Prosecutor appearing in the High Court for the purpose of compliance.

47. Rule made absolute in above terms.

48. The petition stands disposed of accordingly.