
(1947) 03 BOM CK 0008
In the Bombay High Court
Case No : Criminal Appeal No. 33 of 1947

Emperor	Vs	APPELLANT
Amimiya Imammiya		RESPONDENT

Date of Decision : 17-03-1947

Acts Referred:

Bombay District Police Act, 1890 — Section 80

Citation : (1947) 49 BOMLR 829

Hon'ble Judges : Lokur, J;Leonard Stone, J

Bench : Division Bench

Judgement

Leonard Stone, C.J.—This is an appeal by a head constable and six police constables against the convictions and sentences varying from three months" rigorous imprisonment in the case of accused No. 4 to three years" rigorous imprisonment in the case of accused Nos. 2, 7 and 8, to transportation for life in the case of accused Nos. 1, 3 and 5, In all the cases other concurrent sentences were passed on the accused by Mr. C.S. Deodhar, Sessions Judge of Kaira, on January 6, this year. Accused No. 6 died in the course of the proceedings.

2. The accused are not all similarly charged, the charges against them variously include rioting, unlawful assembly, causing hurt and murder, and the bare uncontrovertible facts from which these various charges spring are as follows. At about 7-20 p.m. on the evening of August 18, 1942, as the result of a collision, fortuitous in its actual occurrence, an armed force consisting of one Head Constable (accused No. 1) in command and seven other Constables (accused Nos. 2 and 8), five being armed with rifles and three with lathis, who were proceeding from Navli to Vasad by train, got down from the train at the intervening station of Adas on sighting, and then encountered, a party of 34 students, who had come from Baroda State earlier on that day and who were then in the proximity of the station; beat, them with lathis and opened fire, firing seven rounds of ball ammunition, which resulted in the death of four members of the party from Baroda and the wounding of ten others. I must at the outset, in

fairness to the accused, dispel certain prejudice which was allowed to creep into the case in the lower Court. The party from Baroda has been throughout the proceedings described as "boys" and sometimes as "satyagrahis" (those who offer "passive resistance" only). There is no evidence whether all or any of the members of the party were "sataygrahis" but their ages ranged from 18 to 23, the majority of them being 18 or 19 years of age. Eighteen years of age is, in this country, not only the age of the attainment of majority, but it is also the age, as it is in many other countries, for joining the army for military service. Throughout this judgment in referring collectively to these 34 young men I shall use the colourless expression "the party from Baroda."

3. The prosecution's case, as developed in this Court by the Advocate General, is that the Police, when they got off the train at Adas station, did not do so in the performance of any duty, but in order to carry out the premeditated design of giving the party from Baroda "khokhra" (the nearest English words are "hammering" or "abashing") and so, speaking sarcastically, "to give them "swaraj" (their freedom)." That there was no idea of pursuing an investigation, no idea of dispersing an unlawful assembly, no idea of apprehending any of the party from Baroda or of preventing any criminal act, no element of acting either in self defence or of protecting property, and that accordingly this is a case of wanton and unprovoked murder, deliberate in design and brutal in its execution, inspired by a thirst to revenge the murder of two policemen which had taken place 5 days previously at Dakore.

4. The defence is that the police were throughout justified in the circumstances in the action they took, that they were acting in discharge of their duty, and that these proceedings ought never to have been entertained by any Court at all, as the police rely on certain statutory provisions and in particular Section 80 of the Bombay District Police Act, 1890.

5. The incident belongs to the era of the troubled state of this country which prevailed after August 8, 1942, when the "Quit India" resolution was passed, and the case must be approached dispassionately. On the one hand the death of four young men and the wounding of ten others is a catastrophe in any circumstances, but on the other, police officers, like any other executive officers of Government, are entitled without fear or favour to invoke and receive the protection which the law bestows upon them; for it would be impossible for the affairs of any civilised community to be efficiently administered if changes in regime put executive officers of Government in peril of being victimised retrospectively. As time passes Governments come and go, but the even tenor of the duty of a public servant circumscribed by law must be pursued and upheld, immutable and inviolate, against any anticipatory hopes or apprehensions from changes in the political arena. This is one of the most fundamental principles upon which every modern democratic structure stands.

6. Before referring to the facts in any detail, it is very necessary in this case if we are to avoid-what appears to have happened in the Court below,-being engulfed

in a mass of contradictory evidence, to set out and keep clearly in mind, what the point of this case really is, and what is the law applicable.

7. The police force in the districts of this Province was established by the Bombay District Police Act, 1890, and in Chapter V are set out the executive powers and duties of the police. Section 51, which heads that chapter, provides, so far as material, that every police officer (which by the definition section includes a police constable) shall:-

(a) promptly obey and execute every warrant or other order lawfully issued to him by competent authority; and shall by all lawful means endeavour to give effect to the commands of his superior;

(b) to the best of his ability, obtain intelligence concerning the commission of cognizable offences or designs to commit such offences, and lay such information and take such other steps, consistent with law and with the orders of his superiors, as shall be best calculated to bring offenders to justice or to prevent the commission of offences,

(d) apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension there is sufficient reason;....

(f) discharge such duties as are imposed upon him by any law relating to revenue or other law at the time in force.

8. Chapter V of the Criminal Procedure Code deals with making arrests and Section 46 lays down that if any person forcibly resists the endeavour to arrest him, or attempts to evade arrest, a Police Officer may use all means necessary to effect the arrest. But nothing in the section gives a right to cause the death of a person, who is not accused of an offence punishable with death or transportation for life. Chapter IX of the Code gives power to the police and in certain circumstances to the Military to use force to disperse unlawful assemblies. Section 127 empowers a Magistrate or a police officer in charge of a police station to command any unlawful assembly, "likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly." By Section 128 if the assembly does not disperse "or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse," a Magistrate or officer in charge of the police station may proceed to disperse such assembly by force. Sections 129 to 131 are applicable to the use of military force and Section 132 provides protection against prosecution for any act done under this chapter.

9. By Section 96 of the Indian Penal Code, which applies to everybody, and is the right of every citizen, nothing is an offence which is done in the exercise of the right of private defence, and by Section 97 every person has a right subject to the restrictions contained in Section 99 to defend his own body and the body of any other person against an offence affecting the human body and also the right to defend the property of himself or of any other person against an act which is

an offence falling under the definition of theft, robbery, mischief or criminal trespass or any attempt thereat. The relevant restriction contained in Section 99 on the right of defence is that the right in no case extends to inflicting more harm than is necessary to inflict for the purposes of defence. But by Section 100 the right of the private defence of the body extends, subject to the restriction in Section 99, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the categories thereafter stated, which include reasonable apprehension that death will otherwise be the consequence of the assault or that an assault may reasonably cause apprehension that grievous hurt will otherwise be the consequence.

10. The right of the police to use fire-arms is contained primarily in two regulations set out in the Police Manual, which are made by the Inspector General of Police, subject to the orders of the Provincial Government, pursuant to the rule making powers contained in Section 27 of the Bombay District Police Act. Regulation 994, which is entitled "Use of Fire-Arms," provides:-

When Armed Police are employed for the maintenance of order, they shall be drawn up in strict Military formation, each body being under the direct command and control of a responsible officer, ordinarily of the rank of Head Constable or of higher rank. Armed Police shall in no circumstances, save as hereinafter provided, be posted in such manner as to preclude the responsible officer from exercising direct control over every individual Constable in the squad or platoon under his command.

11. Then follow certain instructions about equipment, and Sub-section (2) deals with the use of fire-arms to disperse rioters u/s 128 of the Criminal Procedure Code, and provides that fire should be opened only as a last resort after the fullest warning including warning the rioters beforehand,

that the fire will be effective, that ball ammunitions will be used at the first round, and that blank cartridges will not be used. Firing shall cease the instant it is no longer necessary. Care should be taken not to fire upon persons separated from the crowd, nor to fire over the heads of the crowd, as thereby innocent persons may be injured. Blank cartridges should never be served out to Police employed to suppress a riot.

12. To this regulation are appended certain notes, including note "I.G.P., 72 of August 11, 1925":-

When firing becomes inevitable, aim should be taken at the crowd and not in the air as experience proves that the latter procedure leads ultimately to greater loss of life.

13. Regulation 1183 is also headed "Use of Fire-arms," and Sub-section (1) deals with a person forcibly resisting arrest u/s 46 of the Criminal Procedure Code, that is to say cases of an arrest for an offence punishable with death or with

transportation for life. Sub-section (2) is as follows:-

Even in cases of offences punishable in a lesser degree than by death or transportation for life, though Section 46 of the Criminal Procedure Code does not authorise the killing of a suspected person merely for the sake of effecting his arrest, it does not deprive the Police Officer of his right of self-defence, if the resistance to arrest is such as would justify him in causing death in defence of his own person u/s 100 of the Indian Penal Code. This right of self-defence includes the use of fire-arms to overcome the resistance, if necessary, even with fatal effect.

14. In 1930, as a result of an incident in which a small party of armed police under the command of a Head Constable was overwhelmed by a riotous mob at a fair, to which they had been sent to maintain order, the Inspector General of Police issued Circular No. 23 of May 9, 1930, which is headed: "Disposition of Armed Police when employed for the maintenance of order and the use of fire-arms."

15. This circular is of considerable importance for three reasons: first, because it was re-issued as an order in July 1941; secondly, because although u/s 128 of the Criminal Procedure Code it is only a police officer of the rank of an officer in charge of a police station who is empowered to give an order for opening fire, the 1930 circular conveys, rightly or wrongly, to Head Constables that they also have such power when they are in charge of an armed party; and, thirdly, for the directive which the circular gives.

16. The circular having drawn attention to reg. 994 and having narrated the incident in which the police party was overwhelmed, because a constable fired in the air killing an innocent woman, which added fury to the mob, continues:-

A copy of Rule 994 of the Police Manual should be hung up in every Police Station and in the office of the Headquarters Sub-Inspector and the District Superintendent of Police and his Sub-Divisional Officers should make it a point to see that all their Station House Officers understand the orders.

When an armed party is sent out for the maintenance of order the party should, as far as possible, remain in charge of Sub-Inspector. Should this not be possible for any reason, written instructions should be issued to the Officer-in-charge of the party as regards their disposition.

17. The order of 1941 is contained in Circular No. 18 of July 11, 1941, by which, after referring to reg. 994, and to the 1930 circular, District Superintendents of Police were directed to bring the regulation and circular as well as the 1941 circular to the notice of all officers serving under them and continues:-

Who should be informed that firing in the air or over the heads of crowds will not be overlooked in future and that severe departmental action will be taken in such cases. It is most important that when the Police open fire the firing should be effective and that a shot should never be fired with the intention of missing.

As an additional safeguard against breach of this rule, the Headquarters Sub-Inspector or other Officer despatching a party, which may have to use fire-arms, as well as the officer in charge of the party, should verbally explain the rule to the men comprising the party.

18. No one disputes the legality of arming the police with service rifles, and that being so, it is obvious that occasions may arise, when it is not only lawful, but is the duty of the police to use them. That is how the position stood at the coming into operation of the Defence of India Act, 1939, and the rules made thereunder. By Section 2 of the Defence of India Act, certain emergency powers were given to the Central Government including the power to make rules for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, and, under such powers rules were made including Rules 56 and 132.

19. Rule 56 empowers the Central Government and Provincial Governments for the like purpose, quoted above from Section 2 of the Act, by general or special order, to prohibit, restrict or impose conditions upon the holding of or taking part in public processions, meetings or assemblies. Sub-rule (2) defines public processions, meetings and assemblies in very wide terms and Sub-rule (3) is as follows:-

(3) Any Police Officer may take such steps, and use such force, as may be reasonably necessary for securing compliance with any order made under this rule.

20. Sub-rule 132(1) provides:-

Any authority, officer or person who is empowered by or in pursuance of the Defence of India Act, 1939, or any of these rules to make any order, or to exercise any other power may, in addition to any other action prescribed by or under these Rules, take, or cause to be taken, such steps and use, or cause to be used, such force as may, in the opinion of such authority, officer or person, be reasonably necessary for securing compliance with, or for preventing or rectifying any contravention of, such order, or for the effective exercise of such power.

21. By Notification of the Government of Bombay, Home Department, No. S.D.W. 659 of February 23, 1942, the Provincial Government delegated its powers under Sub-rule 56(1) of the Defence of India Rules to District Magistrates, and by virtue of such delegated power, the District Magistrate of Kaira on August 9, 1942, made an order, prohibiting any public procession, meeting or assembly for any purpose (except for religious purposes), from taking place for three months from the date of the order.

22. The relevant statutory provisions which give special protection to the Police, in the circumstances therein mentioned, are Sub-section 17(1) of the Defence of India Act which provides that no suit, prosecution or other legal proceeding shall

lie against any person for anything done or intended to be done in good faith in pursuance of the Act, or the rules made thereunder, and the more general provisions of Section 80 of the District Police Act which are in these terms:-

(1) No Commissioner, Magistrate or Police-Officer shall be liable to any penalty or to payment of damages on account of any act done in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred on him by any provision of this Act or of any rule, order or direction lawfully made or given thereunder.

(2) No public servant or person duly appointed or authorised shall be liable as aforesaid for giving effect in good faith to any such order or direction issued with apparent authority by the Provincial Government or by a person empowered in that behalf under this Act or any rule made under any provision thereof.

(3) In any case of an alleged offence by a Magistrate, Police Officer or other person, or of a wrong alleged to have been done by such Magistrate, Police-Officer or other person, by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted more than six months after the date of the act complained of.

23. That being the law and the Police regulations applicable, the question in this case is whether accused No. 1, in giving the order to detain at Adas Station, and in ordering the opening of fire, and the remaining accused in obeying those orders were acting: "in good faith," as to accused No. 1 within the meaning of Section 17 of the Defence of India Act, and Sub-section (1) of Section 80 of the Police Act, and as to the remaining accused of Section 17 of the Defence of India Act and Sub-section (2) of Section 80 of the Police Act; if not, whether all of them are entitled to the protection of Sub-section (3) of Section 80, as having acted under colour or in excess of the duty or authority mentioned in that section; for this prosecution was launched over two years after the incident, alleged to be an offence, so that the statutory time limit of six months provided by Sub-section (3) has been greatly exceeded.

24. In this Court, the Advocate General has argued that Section 80 of the Police Act has no application at all, because the duty imposed and the authority conferred must be "by any provision of this Act or of any rule, order or direction lawfully made or given thereunder," and he submits that this was not the position in the case before us, and reliance is placed on a full bench decision of this Court: *Narayan Hari Tarkhande Vs. Yeshwant Raoji Naik*, .. In that case police officers in taking down the statements of witnesses not only deliberately took down a statement incorrectly, but also assaulted a witness, and it was held that whilst Sub-section 80(3) of the Police Act gave protection from an action so far as it related to taking down a statement incorrectly, because he was acting in the discharge of his duty and the authority conferred by Sub-section 51(1)(b) of the

Police Act, it did not protect the police officer from the alleged assault, as that could not be said to have been committed under colour or even in excess of such duty or authority, but was something completely outside it, I respectfully agree, for it can never be the duty of a police officer to extort a statement from a witness by using physical coercion. But the passage in that case relied upon by the Advocate General is in the referring judgment of Mr. Justice Fawcett at pp. 1022 and 1023, in which the learned Judge draws a distinction between a duty imposed and an authority conferred "by the Act," which are the words used in Section 80 of the Police Act and the more extended expression "by or under the Act," and points out that the taking down of statements is not one of the duties imposed by Section 51 of the Police Act. That seems to me to be rather a narrow construction to place on the Police Act, but the matter need not be further considered because, in my opinion, such a position does not arise in the case before us, since regulations 994 and 1083 with regard to the use of fire-arms, are made pursuant to the rule making powers contained in Section 27 of the Police Act and the circulars of 1930 and 1941 were orders by a superior police officer which every police officer is bound to obey u/s 51(a) of that Act. Further it is my opinion that pursuant to the oral orders of their superior officers, to which I will refer later, it was also the duty of every police officer to maintain and enforce the law as laid down by the Defence of India Act and the rules and orders made thereunder, as being "other law" within the meaning of "any...other law at the time in force" mentioned in Sub-section 51(f) of the Police Act.

25. Before referring to the facts, it is essential to consider the question of the onus of proof, a matter which appears to have escaped attention altogether in the Court below. These accused police officers, like any other accused persons, are entitled to be assumed to be innocent until by proper and sufficient evidence they are proved guilty. But the further question also arises as to the onus of proof with regard to their acting or not acting "in good faith" within the meaning of that expression as used in Section 17 of the Defence of India Act and Sub-sections 80(1) and (2) of the Police Act.

26. These sections gives statutory protection to certain Government servants, and in my judgment a uniformed police party once assembled for duty and while on duty and returning from duty must be presumed to be acting in good faith, until the contrary is proved by strong and cogent evidence.

27. No case in the Indian Courts has been cited to us on this question, but I respectfully agree with and adopt what was said by Lord Justice Scrutton in the English case, *G. Scammell & Nephew, Ltd. v. Hurley* [1929] 1 K.B. 419. That case involved the Public Authorities Protection Act, 1893, which provides a limit of six months for the commencement of all prosecutions and other proceedings in respect of any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority and to any neglect or default in the execution of such act, duty or authority. But in order for that statute to apply, the act or default must be done or made "in good faith", and the passage

in the judgment of Lord Justice Scrutton, which, in my opinion, in principle applies to the circumstances of the case before us, is (p. 429):-

In my opinion, when a defendant appears to be acting as a member of a public body under statutory authority and pleads the Public Authorities Protection Act, the plaintiff can defeat the claim by proving on sufficient evidence that the defendant was not really intending to act in pursuance of the statutory authority, but was using his pretended authority for some improper motive, such as spite, or a purpose entirely outside statutory justification. When defendants are found purporting to execute a statute, the burden of proof in my opinion is on the plaintiffs to prove the existence of the dishonest motives above described and the absence of any honest desire to execute the statute, and such existence and absence should only be found on strong and cogent evidence.

28. In my opinion, therefore, the vital questions in this case are, whether accused No. 1 in giving the orders he did and the remaining accused in obeying them acted in good faith in the discharge or the intended discharge of the duty and authority conferred on them by the statutory provisions, regulations, circulars and orders I have already mentioned, including in the ambit of their authority the right to act in self-defence and in defence of their arms and equipment, or whether they acted out of spite or malice, motivated by the sentiment of revenge, so that their actions became dishonest and done in bad faith, and whether if they did, their actions or intentions were so in excess of their duty or authority, as to deprive them of the status of acting under colour of it, and so deprive them even of the protection of Sub-section 80(3) of the Police Act; for, a comparison of the language of Sub-sections 80(1) and (2) with Sub-section 80(3) of the Police Act makes it plain that it is not every act of bad faith which is deprived of the more extended protection given by Sub-section 80(3): *Narayan v. Yeshwant* (supra), though the excess may be so blatant, so prolonged or so great as to lose the colour of office altogether.

29. With these principles in mind, I now approach the facts in this case, which it is necessary to introduce by some appreciation of the circumstances prevailing at that time.

30. The situation which had developed in the Kaira District immediately antecedent to the incident we are investigating can be conveniently taken from the evidence given at the trial by Mr. Darasha, District Superintendent of Police, which was accepted by the trial Judge. After the Quit India Resolution of August 8, 1942, serious disturbances broke out in the Kaira District and August 15 had been set aside for sabotage and the disruption of communications, though in fact nothing happened on the 15th, but on August 16 and 17 there were acts of sabotage in the Kaira District. Speaking of this situation the District Superintendent of Police said:-

After the Quit India Resolution, Kaira District became a danger spot in the Bombay Province so far as political activities were concerned.

Q.-Please explain what you mean by "danger spot."

A.-I meant to convey the idea that the people in Kaira District virtually declared an open rebellion against the State and the established authority.

Q.-What was the position of the Police in the District as a result of the aforesaid political situation ?

A.-The Police had to do their duties in maintaining law and order and they therefore came to be regarded with contempt and hostility.

31. The witness then goes on to refer to the fact that he sent daily reports on the situation to police headquarters, and all these reports are in evidence. From them and the evidence of the District Superintendent of Police at the trial, the following summary of the situation can be adduced. In Kaira District political agitation started in earnest from August 11, 1942. On that day a big crowd jeered at and abused and then attacked the police with brickbats and stones. The Deputy Superintendent of Police and four constables were injured at that time. The police opened fire and one person in the mob was killed. It was mostly "youngsters," who formed that mob and they belonged to the student class. On August 12, telegraph wires were cut near Borivli and processions were taken out in Anand, Dakore, Umreth and Borsad, but the police dispersed the processionists by a lathi charge. On August 13, there was a procession of 1,000 persons in Dakore and there was a clash between the processionists and the police. The crowd grew to 3,000 and some policemen were injured resulting in the police party opening fire in self-defence. Two policemen were killed and a third was seriously injured, in all 13 policemen were injured. One of the two constables was killed in the bazar and his body was afterwards found in a mutilated condition. As a result of the police firing on this occasion three persons were killed and two other seriously injured. A curfew order had to be imposed u/s 144 of the Criminal Procedure Code. On that day or on the next day a clash also occurred between the police and the people at Chaklashi when the crowd indulged in stone throwing, and the police opened fire killing one. Telegraph wires were cut near Karamsad, Umreth and Borsad and the telegraph staff at Karamsad sent for police assistance saying they were in danger. An attempt was made to set fire to the Income Tax Office at Nadiad, but this was extinguished. Four policemen were injured and one person from amongst the rioters was killed during the Chaklashi incident. On August 15 a police patrol bus was stoned and the police opened fire killing one person, and on this day further telegraph wires were cut. On the morning of the 17th two companies of British troops came to Nadiad and on this day there was a clash between the police and the people at Bhalada village to which place persons from Baroda State had gone and taken out a procession. When the police asked them to disperse they would not listen and attacked the police with lathis, dharias and swords. One police constable and one village policeman were injured. The police thereupon opened fire wounding three persons. On this day an attempt was made to set fire to the Santh Bazar chowki in Nadiad, but the fire was extinguished and a police party was defied and

stoned resulting in the police opening fire killing one man and wounding four others.

32. At this time accused No. 1 was in charge of the police outpost at Vasad, and with regard to the orders specifically given to him, the District Superintendent of Police confirms the evidence of accused No. 1 that he had been instructed:-

to keep a special watch over the railway properties, to patrol over the railway premises and to guard the properties and to prevent cutting of telegraph wires and removal of rails. Those officers further told me that I was entitled to open fire if I found myself in a dangerous position or if I found firing necessary in the course of discharge of that duty mentioned above. They further told me that these powers were given to me under the Defence of India Rules.

33. The District Superintendent of Police further stated in evidence:-

Accused No. 1 and the present constables in the dock had been entrusted with watching the railway and telegraph communications between Vasad Station and Anand. I had issued special instructions to the police to be extra vigilant in consequence of my having received information that August 15 was the date fixed for sabotage work somewhere between Bombay and Ahmedabad. They were asked to be vigilant from the 15th onwards. After the Quit India resolution and before the 18th we used to get lot of people in the Kaira District from the Native State of Baroda. Those trouble makers used to split back into the State limits and we could not pursue them. I had orally instructed the police under me in those days to be bold, firm and fearless in discharge of their duties as the days were most critical in the whole history of the State.

And he went on to refer to the fact that the instructions with regard to the use of fire-arms contained in the regulations in the Police Manual and the circulars of 1930 and 1941 had been specifically brought to the attention of the police at this time.

34. Before coming to the incident of August 18 it is necessary to describe briefly the locality in which it occurred. The State of Baroda to the south is separated from this part of the Kaira District by the river Mahi, the railway from Baroda having crossed this river comes to Vasad Station (accused No. 1's headquarters), and following the railway line northwards the next Station is Adas where the incident occurred. The next station northwards is Navli and beyond it lies Anand, which was the police headquarters to which accused No. 1 was immediately subordinate. To the north-west of Navli is the Agricultural Institute to which mention will be made later and to the west of Navli Station is Vadod and the tobacco depot of one Naranbhai. The distance of the depot from Navli Station is about 1/2 a mile and from Adas Station 2 1/2 miles.

35. The party from Baroda had come by this railway into the Kaira District on the morning of August 18, and having detrained at Navli most of them had proceeded to the Agricultural Institute. There is a conflict of evidence as to the

nature of their activities and intentions; but with regard to them the trial Judge says in his judgment:-

I believe further, though the boys deny, that they were going in a procession shouting slogans like "Inquilab Zindabad" "Do or Die," etc....

I find it difficult to persuade my mind to hold that the boys went to Anand Institute only for a pleasure trip, for Jayantilal (Exhibit 9) admittedly stated before the Magistrate, when he was examined u/s 202, Criminal Procedure Code, regarding his complaint (Exhibit 12), a month later after it was lodged, that the boys distributed patrikas in Vadod and Gopalpura....

If the All-India Congress Committee was declared to be an unlawful assembly (which fact was admitted by both sides) and if consequently the "Quit India" Resolution became a prejudicial report or a prohibited matter, the speech made in support of that also became, as conceded by both sides, a prohibitory patrika. The distribution of Gandhiji's speech amounted therefore to an offence. Whether patrikas were distributed in Gopalpura or not, the mere fact that in Vadod copies of Gandhiji's speech were distributed brought the boys within the four corners of the law as it then stood.

From the evidence and from the probabilities of the situation, I agree. I also agree that on this day the party from Baroda were committing unlawful acts and that they were unquestionably an unlawful assembly, in view of the District Magistrate's prohibitory order of August 9, 1942.

36. We now come to accused No. 1's first meeting with the party from Baroda, This took place at about 11-30 a.m. between the Agricultural Institute and Navli to which latter place accused No. 1 had gone for some routine work. Accused No. 1 had with him at that time only two armed constables and he estimated the number of the party from Baroda to be 70 to 80. Whether this was an overestimate and whether the party from Baroda was at that time accompanied by some local people is not clear, but accused No. 1 considered that he was not strong enough to intervene, and, it is common ground, that no conversations then took place between accused No. 1 or his two companions and the party from Baroda who continued on their expedition. Accused No. 1, however, telephoned for reinforcements and in due course he was joined by five other constables making his party eight in all and being the eight accused charged before the trial Court, accused No. 1 and two of the constables being armed with lathis and the remaining live constables with fire-arms. Thus reinforced the police went in Search of the party from Baroda, but it appears that the villagers gave warning to the party from Baroda so that the police were unable to find them. The only incident before the evening when the police, after a fruitless search entrained at Navli Station to return to the Police outpost at Vasad, is that in the course of their searchings the Police went to Vadod and it is to Naranbhai of the tobacco depot, that the prosecution allege that accused No. 1 made the threat, that if the police caught the party from Baroda they would give them "khokhra"

and thus give them their "swaraj." This alleged threat depends entirely on the evidence of Naranbhai. He says that about 3 or 3-30 p.m. on the afternoon in question the police party came to Vadod and that he (Naranbhai) was sitting in the village square:-

Those constables came to us and asked if we have seen the boys who had gone to village from outside. We did not reply. Again I say we replied that we have not seen them. Thereafter the constables abused the boys and threatened to beat them and give them thereby swaraj.

Later in his evidence, speaking of the advice which he subsequently gave to the party from Baroda when they came to his tobacco depot, he said:-

I advised the boys to go to Adas because at that time the police were beating all those persons who were wearing white caps in those days. They were doing so in Nadiad and Anand as in the rest of the country. Persons wearing white caps were congressmen. At that time the police were beating the congressmen wearing white caps and the students suspected to be taking part in Congress activities. The police used to beat the people indiscriminately. Even people suspected to be congressmen were used to be beaten whether they wore white caps or not.

37. Under cross-examination he somewhat modified these assertions, by saying, that although he and another man were wearing white caps at the time when the police party asked him about the party from Baroda, that neither of them was beaten, and he also said that later on when the party from Baroda questioned him as to why the police should beat them: "I told them that the police were sure to beat them as they were angry."

38. It is upon that evidence, that the very foundation of the prosecution case is laid, for apart from it there is no evidence at all of any antecedent intention or threat by the police party to beat the party from Baroda. The trial Judge makes no finding with regard to Naranbhai's veracity or the accuracy of his recollections of his conversation with the police, and it must be remembered that this conversation took place over 4 years before he gave evidence in the trial Court. All the learned Judge says is:

If Naranbhai is believed, that it seems that the Police had made up their minds to hammer the boys some hours before this offence.

39. Whether Naranbhai's recollection of his conversation with the police is accurate or inaccurate, it seems clear that apart from any such conversation, it was his expectation that the police would beat all persons wearing white caps. In my opinion, Naranbhai's evidence falls far short of that strong and cogent evidence which would be necessary to prove that accused No. 1 or any of his party had, before they encountered the party from Baroda near Adas Station, any preconceived or fixed intention of making an unprovoked attack on the party from Baroda.

40. After the police party had left Vadod, the party from Baroda arrived at

Naranbhai's tobacco depot, and Naranbhai gave them advice. Having told them that the police were angry and that they had better not risk an encounter, he invited the party from Baroda to spend the night at his depot, but this they said they could not do as they must catch the evening train back to Baroda. It was then that Naranbhai advised them not to catch the train at Navli, as that would be the station at which the police party would entrain. He accordingly said that the party from Baroda should take the longer route to Adas Station, with the object of merging into the crowd of people on the platform and thus getting into the train, without the police, who would already be in the train, noticing who they were. Naranbhai supplied a local boy as a guide to show the party from Baroda the way (2 1/2 miles) to Adas Station. If this plan had been successful, the incident which we are investigating would never have taken place. But it failed, because the party from Baroda did not arrive at Adas Station, before the train. Admittedly they had to run the last part of the way and got into Gemal's field on the west side of the railway line, the boundary between this field and the railway premises being a cactus hedge through which the party from Baroda could not find a way. The Police in the train, however, saw them as the train came into the station. It is not clear on the evidence whether the party from Baroda were still running or whether they were sitting down on the field side of the hedge. But it is common ground that none of them had crossed through the hedge. Probably some were doing one thing and some another, for it is most improbable that a party of 34 young men, who admittedly were not trained as a disciplined body, should walk and run 2 1/2 miles and then all arrive at the same spot at the same time.

41. Having seen the party from Baroda or some of its members, accused No. 1 gave the order to detrain, as soon as the train came to a stand still, and I feel not the slightest hesitation in holding that that order was a lawful order, and that accused No. 1 would have been failing in his duty if he had not given it. The party from Baroda was an unlawful assembly, who had been engaged in unlawful activities, and this very police party had been engaged for some hours in endeavouring to intercept them and disperse them, when they suddenly saw them by chance on the other side of the cactus hedge. It was half an hour before sunset and the party from Baroda were then in the vicinity of the railway line which it was the duty of accused No. 1 to protect. It was his clear duty to investigate, to disperse them and to arrest any of them if he could.

42. The police having detrained forced their way through the cactus hedge and encountered the leading members of the party from Baroda, literally face to face. The evidence of what then ensued is completely contradictory. The police say that one of the young men armed with a knife attacked accused No. 1 and that another of them grappled with one of the constables, whilst others of the party from Baroda threw stones, and that thereupon the three members of the police party who had lathis used them and accused No. 1 gave the order for fire to be opened. The witnesses from amongst the party from Baroda on the other hand say that one of their number, viz, Tulsidas, gave the order to sit down, and that

all the 34 members of the party sat down, presumably in token of "non-violent resistance," and that the police then beat them with lathis and opened fire without any provocation or justification whatever.

43. As in the case of Naranbhai's evidence, the evidence in the trial Court was given four years and four months after the event, an event which must have caused, on both sides, much discussion and debate and with regard to which there had already been one trial, viz. in 1943, when some of the party from Baroda were charged with offences of breach of the Defence of India Rules and were convicted by a trial Court, though discharged by an Appeal Court. Although it does not follow that the witnesses on either side are deliberately telling lies, it is impossible to think that after such a long delay, during which this incident must have been much considered, debated and rehearsed, that the recollections of any of them are reliable, and in my opinion the only safe course in view of the contradicting evidence is to rely on certain contemporary statements and documents. These consist of a telegram sent by accused No. 1 within 20 minutes of the occurrence, of the statement of one of the party from Baroda made to the Police Sub-Inspector when he arrived at about midnight, of the dying declarations of five of the young men recorded on the following day by a Magistrate, of the panchnama of the scene of the incident and of the evidence of Dr. Cooper who attended the wounded and who is able from his case notes and the ex-ray photographs to say something of the direction of the bullets. This latter evidence I regard as the most valuable of all.

44. The trial appears to have been conducted in the Court below with considerable bitterness, and a violent attack was made on the Magistrate Mr. Bhatt for his alleged bias in favour of the police, it being alleged that he deliberately took down the dying declarations incorrectly. In giving his evidence Mr. Bhatt was extremely foolish, for he denied that any portion of the five dying declarations was made in answer to questions from him, and he made it appear that in each case the dying declaration was the continuous narrative statement of the deponent. An examination of the statements makes it quite clear that in the case of four of them this was not so, since in them the declaration is narrative in form up to a certain point, and then contains three or four sentences which are quite obviously answers to specific questions. There is absolutely no reason why Mr. Bhatt should not have asked questions, but he was admittedly in a difficult position because although he had been told something of the occurrence before he went to take the dying declarations, he did not know for what purpose the declarations were to be used, viz. whether to prosecute the police or to prosecute the party from Baroda for being an unlawful assembly. In the question part of four of these declarations the deponents say that one of the young men had a knife. One of them gives this somewhat picturesque explanation, that the object of the knife was to carve "F" for "Freedom" on trees. Having carefully considered the dying declarations I do not believe that any part of them was fabricated by Mr. Bhatt, though his denial that any part of them was the result of his questions was a piece of extreme foolishness.

45. The panchnama made the next day on the scene of the incident disclosed, as one might suppose, that there were stones in this field, and a knife was taken possession of, though there is a dispute as to whether accused No. 1 recovered it from the hand of one of the young men who was killed. The telegram sent by accused No. 1 is admittedly inaccurate since it states that five people were injured, but it makes reference to an attack with a chaku (penknife) whereas the knife produced is a much larger variety. With regard to the Doctor's evidence, he quite definitely says that in three cases the bullets travelled in the body in a downward direction, consonant with the firer standing up and the injured man sitting down. But he rightly qualifies this by saying that it is not possible to draw that inference, unless it can be shown that the bullet in each of the 3 cases was an original strike and had not already passed through the body of somebody else. One of the most remarkable features of this incident is that seven bullets killed four and wounded ten persons, so that on an average each bullet must have passed through one body before it struck another. But this very fact is a point in favour of the police, because, if all the party from Baroda were sitting down when the firing took place, with the police standing up, -and it is nobody's story that they were not standing- it is difficult to see how seven bullets could kill or wound 14 persons, because if the line of flight of the bullets was in a downward direction, they would by every standard of probability go into the ground after passing through the body of the person first struck. Again, judged by every standard of probability, it seems most unlikely that even after the encounter with the police, and even after Tulsidas gave a direction to sit down, if he did so, that all the 34 young men acted or re-acted in the same way. There is no evidence at all that the party from Baroda had made any definite plan as to how they would act if they suddenly encountered the police. There is no evidence that they had agreed that in no circumstances would they offer resistance. The most striking piece of evidence in favour of the police, and upon which there is no challenge, is that the police did not load their rifles until after they were through the cactus hedge, and in physical contact with some of the members of the party from Baroda. The case for the prosecution is that this was a deliberate act of vengeance decided upon in advance, and that the police had decided to do what they did when they got down from the train if not before. I find it impossible to believe, that if that were the case, the Police would not have loaded their rifles before going through the cactus hedge and coming into physical contact with the party from Baroda, who in fact outnumbered them by four to one and who, from a Military point of view, stood a good opportunity of disarming the police before they could load their rifles and bring them into use as firearms.

46. In considering the action taken by the police it is very material to take into account the conditions which then prevailed. From the evidence of the District Superintendent of Police, to which I have already referred, one of the crowds which had attacked the police with brickbats and stones were "mostly youngsters" who belonged to the student class. Another clash with the police was

the result of persons from Baroda taking out processions in British India and this also ended in an attack on the police with lathis, dharias and swords. During the preceding week there had been other attacks on the police resulting in the death and injury to members of the police force there had been sabotage, arson and many acts of lawlessness, and all these things had happened within a few miles of the scene of this incident. On the occasion in question it was the clear duty of the police to intervene, even if by so doing they placed themselves in a position of danger. Having in the discharge of their duty placed themselves in a position of danger, they had all the rights of acting in self-defence and defence of their arms and equipment, if the circumstances were such that they reasonably apprehended peril to themselves or to property.

47. Can it be said, taking all these circumstances into account, that there was not any reasonable apprehension that the police party were in peril of assault which might result in death or grievous hurt to themselves or the loss of their arms ? I think not. It is not a question whether a more experienced police officer than accused No. 1 would have acted differently, or whether accused No. 1 committed an error of judgment, or whether he should have given more time for the situation to develop; the fact remains that a head-on collision ensued when the police emerged from the cactus hedge. It was the case of "a person who has to take a quick decision on a sudden emergency." See Hunter Commission (Minority Report), chapter IV, para. 1, p. 112.

48. The trial Judge, with all respect to him, seems to have become confused in the complexities and contradictions of what is admittedly a sensational and difficult case, some of the conclusions in his judgment I find impossible to reconcile. For example:-

In view of all these discussions my considered opinion is that the police jumped over into Gemal's field and started without uttering a word, first lathi charge and then firing with the aforesaid tragic results. There was no occasion whatsoever for them to do so in self-defence. There was no apprehension at all, much less reasonable apprehension, that there was danger of their either being killed or grievously injured. If this view is correct to take in view of the recorded evidence then the legal objections raised by the defence will all automatically answer themselves.

Morally the accused may be justified in what they did on behalf of the Government by putting down with a strong hand whatever they suspected as subversive to the established authority in the country but I cannot lose sight of the fact that in doing so they transgressed the plain provisions of the law. I therefore think that transportation for life will meet the ends of justice so far as accused Nos. 1, 3 and 5 are concerned.

49. Having given this appeal the best consideration I am able to give on the record before us, my opinion is:- I do not believe that there was any premeditated plan or intention in the police to kill or injure with firearms the

party from Baroda or any of them. I have no doubt that the police got down from the train in the performance of their clear duty and that they went through the cactus hedge in the performance of that duty. Having done so they came into actual physical collision with some of the members of the party from Baroda, inevitably some confusion must have ensued, though who first made an aggressive move can never be established from the contradictory evidence, but a sudden emergency arose and a quick decision had to be made.

50. The whole incident happened in a very short span of time, nevertheless, the firing took two definite stages, for two rounds were deliberately fired to kill two of the young men who were, according to the police, "the aggressors" or who were on any showing leaders; and five rounds were fired into the party from Baroda generally. The evidence is uncertain which of these stages preceded the other. The police say, that the two "aggressors" were first killed, and that then the general firing took place, whereas the evidence of members of the party from Baroda indicates that the five rounds of general firing took place first and that after it two of their number were singled out and dragged out and then shot. But in either event the two constables who fired the two individual rounds admittedly also took part in the general firing, fired by all five riflemen, and it is not disputed that only single rounds were loaded into the rifles at any one time. So that the two constables, accused Nos. 3 and 5, who fired the two rounds, also participated in the general firing and accordingly loaded their rifles twice.

51. Whichever of these stages took place first, resort to the second stage, without a halt in order to judge the efficacy or otherwise of the first stage, so as to determine whether firing was necessary, went, in my judgment, beyond the minimum use of force essential; though I am of the opinion that the opening of some fire cannot be condemned as being unlawful in the circumstances prevailing at the time of the incident, and in particular in view of the manner in which parties of lawbreakers in this district had previously reacted by attacks on the police on several recent occasions. There existed a paramount necessity, from a military point of view, of not getting his force of seven constables dispersed or involved with a party by whom they were outnumbered by four to one, with the consequent risk of being attacked or disarmed, this was in accordance with the regulations and circulars I have already mentioned, as also was the fact that the firing was effective and not in the air.

52. In my judgment the head constable was justified in apprehending not only that there was bodily danger but also that the arms of his party were in peril. The mistake of the head constable was in not giving the order to cease fire earlier than he did, that is to say, in indulging in the two stages of firing without any pause or halt. In this respect, and because the effect of these seven bullets was so devastating, he has left himself open to the charge that his objective was to terrorise and to cause an effect beyond the occasion. An excessive use of force for this reason was considered and condemned by the Hunter Commission; see the majority report Chapter III, paragraphs 39 and 40, and the minority report,

Chapter IV, paragraph 1, to which condemnation I respectfully add my entire approval and assent. But, in my judgment, what occurred in the case before us cannot be said to have been a use of force so unjustified or so excessive as to amount to accused No. 1 ceasing to act in the discharge of his duty and under colour of his office, the case of accused No. 1 comes within Sub-section 80(3) of the Police Act, and I do not think in his case it is necessary to determine whether he would also be entitled to protection under Sub-section (1) of that section, and to Section 17 of the Defence of India Act.

53. In the case of the remaining accused, who were under the head constable's command, they were executing the orders of their superior officer which were per se lawful, and which they were bound to obey. It would be destructive of discipline in the Police Force, and therefore contrary to public policy, if constables on such occasions were to be put in the position of having to question the orders of their superior officers which are per se lawful, though they be excessive. In this case I feel no hesitation in holding that the remaining accused are entitled to the protection of Sub-section 80(2) as well as Sub-section (3) of that section. They are also entitled to the protection of Section 17 of the Defence of India Act.

54. In the result the Sessions Judge was wrong in ever entertaining these proceedings against any of the accused, and their convictions and sentences ought never to have been passed. In my opinion the convictions and sentences of all the accused must be quashed and an order made for their immediate discharge.

Lokur, J.

55. I agree. At this stage we have been sufficiently taken through the evidence in the case to be able to come to the definite conclusion that the accused were acting under colour or in excess of the duty imposed upon them by the Bombay District Police Act, 1890, so as to entitle them to the benefit of Section 80, Sub-section (3), of that Act.

56. The facts of the case which are admitted or proved or which need not be disputed at this stage may be briefly stated. During the period when meetings and processions were prohibited as a sequel to the passing of the "Quit India" resolution by the All India Congress Committee on August 8, 1942, some 30 or 35 youngsters from Baroda started taking out morning processions known as "Prabhat Pheri," shouting slogans and performing flag salutations in public. Having done this in Baroda town for about 10 days, they went to a neighbouring village, Bajwa, on the 18th and distributed some leaflets. They then proceeded to Anand in Kaira District (British India), with the ostensible object of paying a visit to the Agricultural Institute there. They got down at Navli railway station and when they were walking towards Anand, accused No. 1 who was a police head constable, and two other constables met them, but they did not interfere with them as they thought they were outnumbered, and accused No. 1 sent for additional police party. It appears that there also some members of the party

distributed copies of Gandhiji's speech. Finally at about 5 p.m. they started to go back to Navli railway station to catch the train to Baroda, On the way they went to Naranbhai's tobacco depot to drink water and were warned by him that a police party had gone to search for them and that the police had given a threat that they would be "bashed" if found. He, therefore, advised them to spend their night in his depot, but as they wanted to go home at any cost they were advised not to go to Navli railway station, lest they might fall into the hands of the police party but to go on foot to the next station Adas and catch the train there. Naranbhai deputed one of his servants to show them the way to Adas. When they were within a short distance of the railway station at Adas, they sighted the train arriving at the station platform from Navli side. They, therefore, began to run to catch the train. When they were thus running through Gemal's field, the accused who were in the train saw them behind the hedge of the field. Accused No. 1 thought that they were trying to conceal themselves behind the hedge. So he ordered his men to get down from the train. As soon as the train came to a stand-still at the platform, the police party got down, ran in the direction of the youngsters, jumped over the hedge and came face to face with them. Some of the accused were armed with lathis and others with rifles. They attacked the youngsters with lathis first and when they sat down, the rifles were loaded and seven rounds were fired. Two of the youngsters, Mohan and Ratilal, were made to stand and shot at. Mohan, Ratilal and Ramanlal died on the spot and eleven others sustained gun-shot wounds. Information was sent to the police station at Anand and Sub-Inspector Mr. Patel arrived at about mid-night. The injured men were then sent to Anand Dispensary in a goods train and inquests were held on the three dead bodies. On the next day the injured persons were removed to the Mission Hospital and one other injured person, Tulsidas, died on the evening of the 19th. The Resident Magistrate Mr. Bhatt recorded the dying declarations of the five injured persons.

57. Accused No. 1, the head constable, filed a complaint against the youngsters for offences punishable under Sections 147, 149 and 353 of the Indian Penal Code and Rules 56(4) and 120 of the Defence of India Rules, for taking out a procession and distributing prohibited leaflets in contravention of the notification of the District Magistrate, Kaira. The case was subsequently withdrawn against those of the accused in that case who tendered an apology before the Magistrate and the remaining five who did not tender an apology were convicted by the Magistrate but were acquitted in the Sessions Court. One of those who were acquitted, Jayantilal Vithaldas, filed a complaint against the present accused for wrongfully attacking them with lathis and opening fire on them, not in the course of carrying out their legitimate duties but out of spite in order to avenge the killing of some police constables at Dakor by a mob.

58. For the purpose of this appeal it may be assumed that the accused were overenthusiastic in starting the lathi charge and opening fire without taking milder steps to disperse the assembly. It is not disputed that at least 30 or 35 youngsters from Baroda had entered the jurisdiction of the police out-post in

charge of accused No. 1 and had distributed offending pamphlets in contravention of the District Magistrate's notification. Accused No. 1 and his party were, therefore, entitled to disperse the assembly. But when accused No. 1 had only two men with him, he did not think it safe to make an attempt to disperse an assembly of 30 or 35 youngsters, especially in view of the recent incident which had taken place at Dakor where some constables had been killed by a mob. He, therefore, sent for additional help from his police station. But thereafter he lost touch with the assembly. Naranbhai's evidence shows that accused No. 1 was looking out for that assembly and according to the prosecution he said to Naranbhai that if those youngsters were found he would make "khokra" of them. All that he meant by using that expression was that he would teach them a lesson by giving them a sound bashing. That itself shows that his object was to disperse them and not to allow them to go in a procession indefinitely, shouting slogans and distributing prohibited leaflets. But he was not able to get into touch with the youngsters who, acting on the advice of Naranbhai, shrewdly avoided Navli Station where the police party was expected to entrain and went to the next station Adas. But as fate would have it, accused No. 1 saw them as they were running along the hedge to catch the train. As they were behind the hedge, accused No. 1 thought that they were trying to conceal themselves there and might have been trying to do some mischief. He and his men, therefore, got down from the train, but when they came face to face, the members of the assembly, instead of dispersing or running away in fright, sat down. There is some dispute as to whether the boys really sat down or defied the police and whether one of them tried to attack accused No. 1 with a big knife. Even assuming in favour of the prosecution that all the boys sat down, yet accused No. 1 rightly thought it to be his duty to disperse them and not to allow them to remain there. The learned Advocate General rightly pointed out that even the accused do not claim to have asked the members of the assembly to disperse, but put forward a false defence that accused No. 1 was attacked by them and that he ordered his men to open fire in exercise of the right of private defence. It does not appear that accused No. 1 was justified in ordering his men to open fire when the members of the assembly sat down, and after going through the evidence I feel no doubt that he acted in haste and used unnecessarily excessive force in dispersing the unlawful assembly. But it cannot be said that he was not acting under colour or in excess of his duty or authority.

59. Sub-section (3) of Section 80 of the Bombay District Police Act, 1890, has to be read along with Sub-section (1) which says:-

No Commissioner, Magistrate or Police-Officer shall be liable to any penalty or to payment of damages on account of any act done in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred on him by any provision of this Act or of any rule, order or direction lawfully made or given thereunder.

Then Sub-section (3) says:-

In any case of an alleged offence by a Magistrate, Police-Officer or other person, or of a wrong alleged to have been done by such Magistrate, Police-Officer or other person, by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted more than six months after the date of the act complained of.

60. In this case the complaint against the accused was filed more than six months after the date of the offence, August 18, 1942. It is not necessary to consider whether the accused would be wholly exempt from liability under Sub-section (1). They would be so exempt only if the act complained of was done in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred on them by any provision of the Act or of any rule, order or direction lawfully made or given thereunder. Assuming that accused No. 1 gave the order to open fire maliciously, that is to say, not in good faith, he would not get the benefit of Sub-section (1), but he would still be entitled to the benefit of Sub-section (3), if he was then acting under colour or in excess of any such duty or authority as aforesaid. The "duty or authority as aforesaid" refers to the duty or authority mentioned in Sub-section (1), viz., any duty imposed or any authority conferred by any provision of the Act, etc. The duties of the police-officer are set out in Section 51 of the Act, and Sub-section (1), Clause (f), of that section, says that every police-officer shall:-

discharge such duties as are imposed upon him by any law relating to revenue or other law at the time in force.

The "law at the time in force" with which we are concerned in this case is that contained in Rule 56 of the Defence of India Rules. Sub-rule (7) of that rule empowers the Central Government or the Provincial Government to prohibit, restrict or impose conditions upon, the holding of or taking part in public processions, meetings or assemblies, and such prohibition had already been notified by the District Magistrate of Kaira, so that the assembly of 30 or 85 young men who had gone out into the District to shout slogans and distribute prohibited pamphlets was an unlawful assembly. Sub-rule (3) of Rule 56 provides:-

Any Police Officer may take such steps, and use such force, as may be reasonably necessary for securing compliance with any order made under this rule.

61. Any one who contravenes any order made under that rule is liable to punishment on a conviction under Sub-rule (4). It was, therefore, the duty of accused No. 1 to see that the unlawful assembly was dispersed and the notification issued by the District Magistrate was not contravened. It is true that Rule 56(3) permits the use of such force as may be reasonably necessary for securing compliance with any order made under that rule and if the force used is

not unreasonable, in other words, the force is used in good faith, then the police officer using such force is exempted from all liability, civil and criminal, u/s 17 of the Defence of India Act, 1939. Sub-section (1) of that section says:-

No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder or any orders under any such rule.

62. This is analogous to Sub-section (1) of Section 80 of the Bombay District Police Act, 1890. Whether the opening of the fire was justified as "the use of reasonable force" to achieve the object is a question of fact. There is no express provision empowering a police officer to open fire. Even Section 128 of the Criminal Procedure Code, which permits the use of civil force to disperse an unlawful assembly does not definitely say whether and when a Magistrate or officer in charge of a police station should open fire. But it is obvious that if an unlawful assembly becomes unruly and it is found necessary to use a rifle to disperse it, then shots might be fired, within reasonable bounds, and instructions have been issued to police officers that in such circumstances shots should be fired effectively (vide Chapter XXXI, Section V, Rule 994, of the Police Manual, at p. 611). If, therefore, the accused acted in good faith in opening fire and killing some members of the unlawful assembly, then they would be exempt from all liability, civil and criminal, both u/s 80, Sub-section (1), of the Bombay District Police Act, 1890, and Section 17(1) of the Defence of India Act, 1939. But if they did not act in good faith, then they would be liable if a complaint be lodged against them within six months provided they were acting under colour of or in excess of their duty or authority.

63. The expression "under colour of" does not mean the same thing as "by virtue of," for instance, proper fees are received "by virtue of" office, while an extortion is "under colour of" office. Any rightful act in office is, "by virtue of" office, and a wrongful act in office may be "under colour of" office.

When an act is unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow and colour, it is said to be done under the colour of office. (Wharton's Law Lexicon).

In general, colour of office is a pretence of official right to do an act made by one who has no such right. (Bouvier's Law Dictionary).

In Stroude's Judicial Dictionary, the expression is thus explained:-

"The colour of office" is always taken in the worst part, and signifies an act evilly done by the countenance of an office, and it bears a dissembling face of the right of the office, whereas the office is but a veil to the falsehood, and the thing is grounded upon vice, and the office is the shadow to it.

64. The distinction between an act done under colour of or in excess of duty and an act not so done is clearly brought out in the full bench case of Narayan Hari Tarkhande Vs. Yeshwant Raoji Naik, . There a Police Sub-Inspector, when

investigating an offence of theft, recorded deliberately incorrect statements of witnesses u/s 162 of the Criminal Procedure Code and in another case *Narayan Hari Tarkhande Vs. Yeshwant Raoji Naik*, another investigating officer abused the witness and pulled him up by holding his moustache. It was held that the former was acting under colour of office, though in excess of his authority, while the latter was not.

65. In the former case it was argued that the accused (police officer) was not entitled to the benefit of Sub-section (3) of Section 80 of the Bombay District Police Act, 1890, as it did not cover acts done mala fide and in wilful disregard of a police officer's proper duty and that the sub-section was only intended to cover acts done bona fide, but in mistaken excess of such duty or authority. Madgavkar J., however, repelled that contention and observed (p. 1044):-

the recording of the statements of the two witnesses was an act which the accused Sub-Inspector could not have performed except under colour of his duty or authority, and whether the record of these statements was accurate or inaccurate and in the latter case whether the inaccuracy was inadvertent or deliberate, and in the last case whether there was in fact mala fide in law, are all, in our opinion, questions which are irrelevant to the question of limitation of six months, so long as the act itself was an act done under colour of his duty, as it was in the first case.

66. As regards the assault on the witness, Madgavkar J. observed (p. 1044):-

In the second case, however, while the acts of the Sub-Inspector from the summoning of the plaintiff and questioning him also fell under colour of his duty or authority by no process of reasoning can the alleged acts of battery and assault be said to fall under such colour or in excess of such duty or authority.

He further explained this by an illustration which is quite pertinent to the present case (p. 1044):-

Hypothetical cases are better perhaps avoided. But in a case where a prisoner is being arrested or while under arrest is being taken to the lock-up and offers resistance, such acts of battery and assault, even if they are in excess of the force necessary to prevent escape, would probably require notice under Sub-section (3) of Section 80.

67. Hence in this case even if the accused could have dealt with the unlawful assembly in a more humane manner, without having recourse to the firing, yet there is no doubt that the firing was ordered under colour of office, however unreasonable it might be.

68. In the case of an assault for the purpose of eliciting information from a witness, the investigating officer is not empowered to use force for that purpose, and hence if he commits an assault for that purpose, he cannot be said to have done so under colour of or in excess of his duty or authority. Whereas in the case of dealing with an unlawful assembly he is specially empowered to use force,

though that force must be reasonable. If it is unreasonable, he would be liable, but any action in respect of such use of unreasonable force must be brought within six months as required by Sub-section (3) of Section 80 of the Bombay District Police Act, 1890.

69. I, therefore, agree with My Lord the Chief Justice that the complaint in this case was filed beyond time and the conviction of the appellants on that complaint cannot be upheld.

70. We order that the convictions and sentences of all the accused be quashed and we make an order for their immediate discharge. The bail bond of accused No. 4 is cancelled.