

(2000) 02 GAU CK 0009

In the Gauhati High Court

Case No : Civil Rule No's. 3809 and 4032 of 1994

Gopal Ch. Sarmah and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 17-02-2000

Acts Referred:

Constitution of India, 1950 — Article 21

Evidence Act, 1872 — Section 114B

Penal Code, 1860 (IPC) — Section 220, 302, 307, 330, 331

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3, 4, 5

Citation : (2000) 1 GLT 643

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : J.M. Choudhury, B.P. Kataky and M. Khataniar, for the Appellant;
Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

D.N. Chowdhury, J.—The issue involved in these proceedings are relatable to custodial death. Since the issues are of similar nature both the petitions were set down for hearing analogously.

2. Civil Rule No. 3809/94 pertains to the death of Thaneswar Sarmah, a young man of 24 years who at the relevant time was studying in Nagaon College, Nagaon. In the writ petition it was alleged, inter alia, that at about 3.00 PM on 6.8.94 some Police personnel and members of paramilitary forces of Morigaon district alongwith some youths surrounded the residence of Late Jogeswar Sarmah at Village Boghera in the district of Morigaon, the father of the Petitioner, and took up Thaneswar Sarmah into their custody in presence of the members of the family. The members of the family of Thaneswar Sarmah was informed by the Morigaon Police on 7.8.94 that Thaneswar Sarmah died in an encounter with the security personnel at Village Mayengia under Mikirbheta Police Station. Petitioner further contended that Police did not hand over the deadbody to the members of the family and he was cremated near Morigaon Civil Hospital under

strict supervision of Morigaon Police and Civil Administration on 7.8.94. The Petitioner, therefore, knocked the door of this Court praying for writ or directions for a judicial enquiry and/or any other appropriate writ or direction for giving full and adequate relief to the members of the family.

3. This Court by order dated 21.9.94 ordered the District Judge, Morigaon to conduct an enquiry after issuing notice to all the persons. The District Judge, Morigaon conducted an enquiry in presence of the parties. The Respondents, namely, the State of Assam, the Union of India, the Deputy Commissioner, Morigaon and others resisted the claim of the Petitioner. According to the Respondents Thaneswar Sarmah died in an encounter with Police at Mayengia Village on 6.8.94. According to the Respondents the deceased Thaneswar Sarmah was a member of the extremist organisation and died in an encounter with the Police at Village-Mayengia. During the enquiry before the District Judge eleven witnesses were examined, seven on behalf of the Petitioner and four on behalf of the Respondents. The learned District Judge, Morigaon on the pleadings of the respective parties framed the following issues:

(1) Whether Thaneswar Sarmah was tortured and gunned down by Police and security personnel resulting his untimely death?

(2) If not, whether Thaneswar Sarmah died in an encounter with Police at Mayengia village on August 6,1994 as he was an active member of the extremist organisation?

4. During the enquiry the learned District Judge, Morigaon amongst others examined Dr Pradip Kumar Saikia (P.W. 5) who conducted the autopsy on the body of deceased Thaneswar Sarmah on 7.8.94 at Morigaon Civil Hospital. The learned District Judge in his report mentioned the findings recorded by the doctor on the basis of the post mortem report as well as the evidence of the doctor and his finding thereto in the following paragraph:

8. P.W. 5 Dr Pradip Kumar Saikia did autopsy over the dead body of Thaneswar Sarmah being identified by C/129 Krishna Hazarika of Morigaon PS and Ghana Kanta Sarmah on 7.8.94 at Morigaon Civil Hospital. The findings recorded by Dr Pradip Kumar Saikia on basis of post mortem examination are as follows:

External appearance - A body of young adult, thinly built, male with rigor mortis present in all the limbs. Mouth half opened, eye half opened, wearing a black long pant and blood stained, black coloured sporting shirt. Findings:

Injury No. 1: A circular wound of 1 cm diameter with charred inverted edge at inner canthus of left eye with a small blood clot.

Injury No. 2: Circular wound of 4 cm diameter with everted lacerated edge above the occipital protuberance, brain matter coming out through the wound.

Injury No. 3: Circular wound just below the right nipple with charred inverted edge, size 1 cm in diameter.

Injury No. 4: Wound of 1 cm diameter in the lateral aspect of left fore-arm 3 cm below the elbow-joint, edge inverted and lacerated.

Injury No. 5: Wound of 3 cm diameter in medial aspect of left fore-arm 4 cm below the left wrist joint, edge everted.

Injury No. 6: Three circular wounds over anterior aspect of lower third of right thigh each measuring 1 cm diameter with inverted charred margin 3 cm apart from each other.

Injury No. 7: Two separate irregular wounds at right popliteal fossa size 4cm x 3cm. Thorax:

A circular wound of 1 cm inverted irregular margin over right chest just below the right nipple.

Right pleura is lacerated. Homo thorax with 300ml of blood. Larynx and trachea - pale. Right lung - lacerated at middle part. Left lung - pale. Pericardium - Pale. Heart - both sides empty, vessels - healthy.

Muscles, bones and joints - Laceration of muscles of lower part of right thigh, both anterior and posterior groups. Fracture. The lower right Femur and upper end of right tibia and fibula and patella were shattered with blood clot in it. A piece of metallic rod-like structure of 2cm length and 1cm diameter found in it. Cranium and spinal canal:

Scalp - fracture on root of nose and frontal bone, fracture of occipital bone missing of 3cm x 3 cm.

Membrane - Laceration of membrane of frontal and occipital area. Brain - Laceration of frontal, left hemisphere and occipital lobe of brain present. Spinal cord - Contusion of spinal cord at 4th thoracic vertebra. A piece of metallic rod-like structure (bullet) of 2 cm length, 1cm diameter found overlying the vertebral body. Liver - pale. Spleen - pale. Kidneys - pale. Bladder - contains 100 ml of urine. Organs of generation - Healthy.

9. According to him, these injuries were gunshot injuries. Injury No. 1 was the inverted and injury No. 2 was everted. Injury No. 1 corresponds to the injury No. 2, i.e. injury No. 1 is the entry of the wound and injury No. 2 is the exit of the wound. Injury No. 3 is the wound of entry and injury No. 4 is also wound of entry. Injury No. 5 is the wound of exit. Injury No. 4 and 5 are corresponding injuries. Three injuries mentioned at Injury No. 6 mentioned above are wounds of entry wound mentioned in injury No. 7 described above, is sound exit are corresponding to injury No. 6.

10. During examination, he found two foreign articles in the body. The foreign articles found inside the body were handed over to the Supdt. of the Hospital. In his opinion, in case of bullet injury, wound of entry is inverted and wound of exit is everted. He found all the inverted injuries as sharp. Distance of firing was at point blank range because edges of all the injuries were charred and most of the

bullets were out of the body. The size of the foreign substance found inside the dead body was larger in size than the point of entry of the wound. It indicates that it was fired at point blank range. These injuries will cause profused bleeding and bleeding leads to coma. These injuries were ante-mortem. In his opinion, the death was due to come and syncope as a result of brain injury and haemorrhage sustained by the deceased. He further opined from die nature of wounds die death was within twenty four hours from the time of his examination.

11. From the evidence of witness No. 6 Dr Pradip Kumar Saikia who conducted the autopsy over the dead body of Thaneswar Sarmah appears that injuries were gun-shot injuries and the firing was at point blank range, because edges of all the injuries were sharp and most of the bullets were out of the body and the size of the foreign substance, i.e. bullet shells found inside the dead body was larger in size than the point of entry of the wound which also indicates that it was fired at point blank range which lent support to the claim of the Petitioner that Thaneswar Sarmah was brutally tortured and ultimately he was gunned down at point blank range. Had it been an encounter as alleged by the Respondents, gun shot injuries found in the body of Thaneswar Sarmah could not be at point blank range.

5. Petitioner, the brother of the deceased, was examined as a witness by the District Judge who stated that on 6.8.94 at about 3.00 PM a team of Police personnel alongwith some surrendered militants, commonly termed as " SULFA", of the banned organisation, namely, United Liberation Front of Assam (ULFA) went to their home. This witness named Shri Nakhyatra Bora, SI of Police who accompanied the team in civil dress apart from a group of CRPF personnel, who surrounded their house. The SULFA boys demanded the whereabouts of Thaneswar Sarmah. His father and mother came out and told them that Thaneswar Sarmah was in the house of his paternal uncle which was near their home. Then the entire team of Police and SULFA members went to the house of his paternal uncle. They also accompanied the team. The SULFA boys brought out Thaneswar Sarmah from the house of his uncle at gun point. All those 6/7 SULFA boys had revolvers in their hands. When the mother of the Petitioner tried to obstruct them they threatened to shot her. Then the party whisked away taking Thaneswar Sarmah in a taxi towards Morigaon. The witness came in a bicycle to Morigaon town. On the way he met Bubumoni Goswami whom he reported the incident. Said Bubumoni Goswami accompanied him. At Hazarika Pharmacy in Morigaon town they met Haren Bora, Nalin Bora, Nimai Kalita and Swaraj Hazarika and all of them discussed the matter. The witness went to Morigaon Police Station. In Morigaon Police Station Lock up he saw his brother Thaneswar Sarmah alongwith 5/6 prisoners at about 4.30 PM. Then Police personnel informed that SP and Addl SP were coming and asked him to leave the place. He came out from the Police lock up and went to Hazarika Pharmacy and thereafter left for home. On the next day he along with his sister Rina Sarmah cousin Rani Bala Sarmah, the daughter of his paternal uncle came to Morigaon town. The witness sent the two sisters to the Police Station for arranging tiffin for

their brother and he went in search of the persons with whom he discussed the matter on the previous day. Haren Bora and Nimai Kalita advised him to meet the DC. At that moment his two sisters came back from Police Station and met him at Hazarika Pharmacy which was about 300 metres from the Police Station. His sisters reported that Thaneswar Sarmah was not in the Police Station and was taken to somewhere. He went to meet the DC but as the DC was absent he met the ADC who was in charge of DC at the moment. It was 9.00 AM. The witness was accompanied by Bubumoni Goswami, Haren Bora and Munin Mahanta. He submitted a written complaint to the ADC who assured him that he would make an enquiry. He came back to the Hazarika Pharmacy. He came to know that his father and elder brother Jadav Sarmah were taken by the Police to Morigaon Civil Hospital. He also went to Morigaon Civil Hospital alongwith others at 10 AM. In front of Morigaon Civil Hospital he found his father and elder brother sobbing who told him that Thaneswar Sarmah was killed after bringing him from home. His father also told him that in some white blank papers Police obtained his signature and showed him the dead body of Thaneswar Sarmah. The dead body was also shown to his elder brother. The Police informed the father of the Petitioner that on the previous night Thaneswar Sarmah died in an encounter at Mayengia Charaibahi village. There were large number of people in front of the Morigaon Civil Hospital but they were not permitted to go near the dead body. The dead body of Thanesvvar Sarmah was not handed over to them. He submitted a petition before the SP demanding handing over of the dead body. The SP refused to meet him and through a peon he was told to go to the Addl SP. He alongwith Haren Bora. Munin Mahanta went to the Addl SP and submitted the application. He was told by the Addl SP that as ordered by the SP the cremation of the dead body would be done by the Police. Addl SP. however, told that some members of the family could be present at the time of cremation. Thaneswar Sarmah was cremated in the public cremation ground situated at a distance of 300 metres from Civil Hospital and at the time of cremation besides him his father mother and his elder brother were present. All the sides of the cremation ground were surrounded by the Police at that time.

6. Sri Tulsi Das. witness No. 2 for the Petitioner narrated about witnessing of dragging away of Thaneswar Sarmah from the house of his paternal uncle by two youths catching his two shoulders and another by pushing a revolver at his back. According to this witness there were 7/8 youths and some police personnel. Parents of Thaneswar Sarmah obstructed but they were threatened that they would be shot at and thereafter Thaneswar Sarmah was whisked away in an Ambassador car towards Morigaon town.

7. PW 3 Sri Jadav Sarmah is the elder brother of the deceased Thaneswar Sarmah. He corroborated the statement of PW 1. PW 4 Birinchi Kumar Sarmah was in the Police Lock up in Morigaon Police Station from 2.8.94 to 17.8.94. According to the witness at about 4 PM oh 6.8.94 Thaneswar Sarmah was put in Police Lock up. At that time Thaneswar Sarmah was weeping and the witness consoled him. At about 6.00 PM Police took him out alongwith Thaneswar

Sarmah of the Lock up and put in a Police van under handcuff. They were taken to Manipur Jail. Police kept him in a room and Thaneswar Sannali was kept outside his room. He heard Thaneswar Sarmah shouting "I am dying, do not beat me". In the Manipur Jail excepting him and Thaneswar Sarmah no other civilian person was present. He could not say whether Thaneswar Sarmah was kept thereafter. After about two hours of their arrival at Manipur Jail, Police interrogated him for hardly 15 minutes and thereafter he was confined in jail lock up at Manipur Jail. Thereafter he did not know what happened to Thaneswar Sarmah. At the time of putting Thaneswar Sarmah into Police lock up at Morigaon he was quite hale and hearty till he was taken to Manipur Jail alongwith him. In the next morning he was taken back to Morigaon Police lock up. At Police lock up he came to know from his family members who visited the Police Station that Thaneswar Sarmah was killed. Haren Bora, witness No. 6 for the Petitioner was a member of Assam Legislative Assembly from 1985 to 1991. According to the witness on 6.8.94 at about 5.30 PM while he was standing in front of Hazarika Pharmacy of Morigaon town one Gopal Sarmah came and informed him and others that his younger brother Thaneswar Sarmah was taken by some SULFA boys and some Police personnel. He advised him to enquire about it at the Police Station. Gopal Sarmah after returning from Police Station informed him that he saw Thaneswar Sarmah alongwith witness No. 4 the President of Morigaon AASU Unit in the Morigaon Police lock up. On 7.8.94 Nalin Bora, Munin Mahanta and others assembled before the Hazarika Pharmacy. Then Gopal Sarmah reported that he did not find his brother Thaneswar Sarmah in the Police Station and in Police lock up. Immediately thereafter the application was made before the ADC since DC was absent. Munin Mahanta and Gopal Sarmah were alongwith the witness. They pressed Mr. Medhi, ADC to enquire into the matter and the ADC assured them to give information immediately after enquiry. At about 12 noon he was informed by Gopal Sarmah that Thaneswar Sarmah died in an encounter with Police in village Charaibahi Mayengia. In the meantime they got information that the dead body was taken to Civil Hospital. They advised Gopal Sarmah to submit an application before the SP demanding the dead body. The SP did not allow him to meet. According to the witness cremation of Thaneswar Sarmah was done under heavy Police cover in presence of some relatives at Morigaon Cremation Ground. The witness expressed that Thaneswar Sarmah was in no way connected with the extremist organisation.

8. Sri Munin Mahanta, MLA was examined as witness No. 7. He corroborated the statement of PW 1, 3 and 6.

9. On behalf of the Respondents Shri Hareswar Brahma, Dy SP, AMr.it Singh Deka (L/Nk), Amulya Deka (SI), Nagen Saikia, OC, Mikirbtheta PS were examined. Dy SP Hareswar Brahma who was examined as witness No. 1 for the Respondents stated that on 6.8.94 he was Dy. SP (Prob) attached to the SP, Morigaon. On that day at about 1.30 mid night he was directed by SP to proceed to Mayengia to search a hide out of some extremist in Mayengia village under Mikirbtheta Police Station. He proceeded to Mayengia with police staff and vehicle provided by the

SP. He was accompanied by SI Nakhyatra Bora, Const AMr.it Singh Deka, Const Phuleswar Kathar, Const Tafazul Ali. They were well equipped with arms. Within 10 minutes i.e. at about 1.40 midnight they arrived at the approach road of Mayengia village. They kept the vehicle at the approach road and on foot proceeded to Mayengia village. While they were proceeding, suddenly, from a nearby bush someone opened fire at them and for their personal safety they dived for cover and replied from their side. When the miscreants stopped firing, they reached the area and found a dead body with bullet injuries lying near the bush. Thereafter they came to Morigaon PS after taking the dead body in their van. They handed over the dead body at the Police Station. Officer in charge of Mikirbheta PS was also informed. They directed the O/C, Mikirbheta PS to search the neighbouring area. Inquest over the dead body was conducted at the Morigaon PS. They also recovered a hand made 22 revolver near the dead body along with six rounds of ammunition. They also recovered some secret documents of the extremists. He seized the hand made revolver as well as the documents found near the dead body. He lodged an FIR immediately after at Police Station. He denied that Thaneswar Sarmah was picked up from the residence by Police personnel and he was shot at and caused his death.

10. AMr.it Singh Deka who was examined as witness No. 2 for the Respondents stated that he was attached to SP as his security. SP directed him, Const Phuleswar Kathar and Driver Krishna Kanta Deka to report at Police Station at about 1.00 AM. From Police Station he alongwith Dy SP Brahma, SI Nakhyatra Bora, Const Phuleswar Kathar and driver Krishna Kanta Deka proceeded towards Barapujia in a Gipsy. When they arrived at approach road of Mayengia village, the got down from the vehicle and the vehicle was left there and the entire team proceeded on foot towards Mayengia village. Hardly, they covered up 400 yards when someone opened fire at them and they took position. They replied them with fire and firing and cross firing lasted for 2 to 3 minutes. When the firing stopped they searched the area and found a dead body with bullet injuries lying by the side of the road near the jungle. They picked up the dead body in their Gipsy and proceeded back to Morigdon PS. After arrival at the PS they were sent back to SP's bungalow.

11. Amulya Deka, SI, witness No.3 conducted the inquest over the dead body of Thaneswar Sarmah in the compound of Morigaon Police Station.

12. Nagen Saikia, SI, O/C of Mikirbheta PS was examined as witness No. 4. He stated mat on 7.8.94 he registered a case on the FIR lodged by Dy SP Brahma being Mikirbheta PS case No. 68/94 u/s 353/307 IPC read with Sections. 3, 4 and 5 of TADA. He also seized one seizure list which was prepared by Dy SP Hareswar Brahma in connection with the case. He seized two numbers of bullets recovered from the dead body of Thaneswar Sarmah which was marked and exhibited at Ext.D. In cross examination he admitted that he received Ext-A the FIR at the Police Station on 7.8.94 at about 11.15 AM. He also admitted that before receiving Ext-A he did not get any information from Police headquarter regarding

the occurrence although Mikirbheta PS was well equipped with VHF and Wireless set

13. The learned District Judge on evaluating the evidence on record rejected the theory of Police encounter. The District Judge in his report pointedly referred to the five men search party who went in search of hide out of extremist at midnight. The learned District Judge referred to the fact that at the relevant time sufficient number of CRPF personnel were present inside the thana compound but strangely in an operation against armed extremists no strong contingent of armed Police and CRPF personnel were sent except the two security guards and the driver of the SP, one Dy SP and one SI. The learned District Judge also took note of the fact about not lodging the FIR in Mikirbheta PS immediately after the occurrence. The learned District Judge also commented about the total ignorance of the O/C, Mikirbheta PS about the encounter till 11.45 AM whereas the alleged occurrence took place at 1.45 AM just a few kilometres from his Police Station. The learned District Judge accordingly rejected the story of encounter and held it to be a fake one and a cock and bull story. The learned District Judge finally came to the conclusion as follows:

31. From the statements of the witnesses it appears that OC Morigaon PS had played a dominant role as everything had happened within his knowledge. So, he cannot escape from liability of causing death of Thaneswar Sarmah. Furthermore, he also filed an FIR to make" the case a case of encounter. So, Mr. Jainal Abedin Khan must be first held responsible for killing Thaneswar Sarmah without any justification. Mr. A.K. Singha Cashyap, IPS, Supdt. of Police played the major role as the head of the police of the district and definitely everything had happened within his knowledge and at his direction and to cover up his misdeed and misdeed of his subordinate officers, he tried to make out a fake encounter to justify the killing of Thaneswar Sarmah. So, Mr. S.K. Singha Cashyap cannot escape from liability of causing death of Thaneswar Sarmah in a brutal manner. Mr. Hareswar Brahma, APS then Dy SP (Prob) also played a major role as according to him, he led the Police parry to Mayengia Charaibahi village and according to him, Thaneswar Sarmah died in the encounter with the Police. But actually as stated above no encounter actually took place, but it was a cock and hull story and nothing but a fake encounter in order to cover up the misdeed and atrocities of Police. He must be liable and responsible for causing death of Thaneswar Sarmah in a brutal manner. SI Nakhyatra Bora must also be held liable for killing of Thaneswar Sarmah because according to Respondents version he was said to be a member of the Police party which said to have an encounter with extremists and as a result of that encounter Thaneswar Sarmah claimed to have died. So, in my view, actual fact was also within his knowledge he also took part in the brutal killing of Thaneswar Sarmah and to cover up the misdeed of Police he assisted to make out a case of fake encounter. Furthermore, it is evident that SI Nakhyatra Bora accompanied the Police and SULFA team who picked up Thaneswar Sarmah from his residence and subsequently he was killed in a brutal manner by shooting him in a point blank range. His involvement

directly and indirectly in killing Thaneswar Sarmah cannot be ruled out. Security guards of Supdt. of Police and driver were used as instruments and they are bound to obey the order of their superior without questioning it. Their fake statement in respect of false plea cannot be presumed as a ground for having active part in brutal murder of Thaneswar Sarmah. Furthermore, they are helpless creatures, there is no use to hold them responsible for brutal murder of Thaneswar Sarmah.

32. To sum up: Thaneswar Sarmah was killed by shooting him at a point blank range after torturing him brutally in the name of interrogation at Manipur CRPF camp by Police personnel at the direction of Supdt. of Police and other top Police officials of the district and in my view, officers responsible for causing his untimely death are Mr. A.K. Singha Cashyap, Supdt. of Police, Mr. Shiva Prasad Sarmah, Addl. SP, Mr. Hareswar Brahma, Dy SP (Prob), SI Jainal Abedin Khan, OC of Morigaon Police Station and SI Nakhyatra Bora.

14. Civil Rule No. 4032/94 relates to the custodial death of Pradip Sarma which was brought to the notice of this Court by an application under Art 226 of the Constitution by Smti Rami Bala Sarmah, elder sister of the deceased. In the writ petition it was alleged that on 21.8.94 at about 3.30 PM some Police personnel came to the office of the North West Morigaon Transport Association where Pradip Sarma was an employee and asked Pradip Sarma that the Superintendent of Police, Morigaon had asked him to visit the SP. Without suspecting any foul play Pradip Sarma went to the Police Station and he was kept confined for a considerable length of time and was interrogated. Due to such mental pressure and physical torture he broke down several times during the interrogation and he was taken to Morigaon Sadar Thana and was kept confined. Later he was taken to the CRPF camp at Manipur where in the name of interrogation he was brutally tortured and finally Pradip Sarma succumbed to the injuries. This Court by order dated 29.9.94 ordered the District Judge, Morigaon to make an enquiry on to the allegations by examining witnesses by following due procedure and after issuing notice on the concerned parties. The learned District Judge, Morigaon conducted an enquiry and submitted his report. During the course of enquiry seven witnesses were examined for the Petitioner and six witnesses were examined for the Respondents. In the aforesaid enquiry Dr Pratap Chandra Sharma, Professor and Head of the Deptt. of Forensic Medicine, Gauhati Medical College was examined as witness No. 7 for the Petitioner. The witness in his testimony referred to the post mortem examination conducted by Dr R Chaliha, Demonstrator of his Department on 24.8.94. As per the post mortem report the following injuries were found on the dead body of Pradip Sharma:

Injury No. 1 - A bruise measuring 3cm x 4cm present over the right elia fossa.

Injury No. 2. - A bruise measuring 4cm x 3cm present over the mastoid process on the right side.

Injury No. 3 - Right hop joint was anterioraly dislocated with haemorrhage in the

surrounding mussels of thigh.

Injury No. 4 - Contusion of right elia fossa and there was haemorrhage within the mussels in front of lower abdominal wall on right side. There was haemorrhage within the mussels of posterior wall on both sides of abdomen. The posterior peritonium was contused on both sides with internal haemorrhage into the mussels.

As per the post mortem report death was due to shock and haemorrhage as a result of the injuries described in the post mortem report marked as Ext.-2. All the injuries were ante mortem and caused by blunt force impact and were homicidal in nature. The report was written by Dr R Chaliha on 14.9.94 which was countersigned by the witness No. 7. The witness denied the defence suggestion that the injuries can be caused by falling from a high place. According to the witness the injures recorded in the post mortem report were sufficient to cause death in the ordinary course. In cross examination he stated that it is absolutely impossible to cause such injuries by fall.

15. Dr Banamali Nath, SM & HO, Morigaon Civil Hospital was also examined on behalf of the Petitioner who examined Pradip Sharma on 21.8.94 at about 9.00 PM on Police requisition whom he subsequently referred to GMCH on 22.8.94. He also exhibited a document Ext-A issued by Dr P. Bora, Chief Medical & Health Officer, Morigaon. As per the Ext-A Pradip Sharma was admitted in the Civil Hospital on 21.8.94 at 9.00 PM vide Indoor Registration No. 592/94 by Dr A.T.M. Yusuf, SM & HO at emergency duty and Dr Yusuf gave the preliminary treatment. The witness in course of his evidence stated that on 21.8.94 at about 9.00 PM he examined Pradip Sharma and found the following injuries:

- (1) Burise over the right inguinal region size 3"x4".
- (2) Tenderness over the right inguinal point
- (3) Ex-ray of the Rt Hip done. X-ray shows (Plate No. 1205 dt. 22.8.94) fracture of the neck of the femur.

The patient was referred to GMCH for better treatment for nailing of the neck of the femur (right). According to him injury No. 1 and 2 were simple and injury No. 3 was grievous. He exhibited his report as Ext-B and Ext-B(1) is his signature. In his cross examination the witness admitted that injuries shown in his report cannot be caused by single fall from height of 3/4 feet. Injury No. 1 was external injury and injury No. 3 was inside injury in the hip portion.

16. Ghanashyam Sharma, the witness No. 1 on behalf of the Petitioner is the nephew of Pradip Shrma. The witness stated mat Pradip Sharma was an office assistant of the North West Transport Association, Morigaon. He was connected with the activity of Asom Gana Parishad (a political party in the State). He was a General Secretary of Madhya (Central) Assam Transport Workers Union. On 21.8.94 while he was attending his office at about 3.30 PM one SI of Morigaon Police Station, namely, Robin Borgohain came to his office and told him that he

was wanted by Supdt. of Police, Morigaon. The SI persuaded him to go immediately to the Police Station. The Police took him to the Police Station in a Police jeep and he was put behind the lock up of the Police Station immediately. Sometime thereafter Addl. SP of Morigaon Shiva Sharma arrived at the Police Station and interrogated Pradip Sarmah for some time. On the same day he was taken to Manipur CRPF camp at about 6.30/7.00 PM. That Police camp is situated at a distance of 4/5 kms from Morigaon town. At CRPF camp he was tortured by CRPF personnel in presence of Supdt. of Police, AK Singh Kaishyap, Addl. SP Shiva Sharma, one Dy SP Hazarika and O/C Khan of Morigaon PS. They also took active part in torturing Pradip Sarmah. He sustained injuries all over his body and sustained fracture in his right leg and waist joint was dislocated. He became senseless and in the same night he was shifted to Morigaon Civil Hospital. After getting all these information he came to Morigaon Civil Hospital on 22.8.94 at about 8.00 AM. He found Pradip Sharma in the hospital in injured condition and even at that time he was surrounded by CRPF and Police personnel. At Morigaon Civil Hospital he asked Pradip Sharma how he got these injuries and he gave a detailed description as stated above. Morigaon Civil Hospital referred Pradip Sharma to Gauhati Medical College Hospital for treatment. He accompanied Pradip Sharma to GMCH. The Police ambulance carried Pradip Sharma from Morigaon Civil Hospital to GMCH and arrived at GMCH at about 4/4.30 PM. After completing the necessary formalities Pradip Sharma was admitted in the TADA emergency ward at about 9.00 PM. On the next day at about 11.00 AM he was taken to the Operation Theatre and the fractured leg was plastered by the Doctor. He was advised for X-ray of his right leg and accordingly he was taken to the X-ray room and at around 12.00 AM he was declared dead. Thereafter Police personnel of the GMCH Out Post called a Magistrate and the Magistrate examined the dead body and a report was prepared by the Magistrate. On 24.8.94 post mortem was done on the dead body of Pradip Sharma at Mahendra Mohan Choudhury Hospital, Guwahati. The dead body was taken to Morigaon by Police and at about 5.00 PM at their request the dead body was handed over to them.

17. Sri Sashi Kanta Hazarika was examined as Petitioner's witness No. 2. The witness stated that he alongwith Munin Mahanta, MLA, Ganesh Saikia, Haren Bora, Ex-MLA and Nalin Bora and others on getting the information that Pradip Sharma was taken by Police went to the Police Station on 21.8.94. They reached the Police Station at about 5/5.30 PM. At that moment all the Police staff were sitting outside the Police Station including Addl SP, Dy SP, CI, and OC. They were known to him. They permitted them to meet Pradip Sharma at Police lock up. They went to the lock up. At that time Pradip Sharma was standing inside the iron gate and they were standing outside the Police lock up. They had close talk with Pradip Sharma. At that time Pradip Sharma was quite hale and hearty and did not see any injury in his body. Pradip Sharma came to the iron gate by himself without anybody's help. On enquiry he said that one Policeman called him from his office on the pretext that SP wanted to talk with him. They also enquired about his health and he replied that he was quite hale and hearty.

Thereafter they came out of the Police Station. At that time Police officers were still sitting there. When he asked Addl. SP as to why Pradip Sharma was arrested, the Addl. SP informed him that Pradip Sharma was arrested at the direction of the SP. He further informed him that SP would come in the evening and would interrogate Pradip Sharma and thereafter SP would decide what to do with Pradip Sharma. Thereafter they left the Police Station. Next day at 10.00 AM they got the information that Pradip Sharma had been hospitalised at Morigaon Civil Hospital. At that time Nalin Bora was Secretary of North West Transport Association. He advised Nalin Bora to visit Morigaon Civil Hospital to enquire about Pradip Sharma's condition. In the evening when he met Nalin Bora he told him that Pradip Sharma was in a precarious condition. Next day at GMCH Pradip Sharma died. He attended the cremation of Pradip Sharma at his own village. He asserted that Pradip Sharma was in no way connected with any extremist group. He stated that as Contractor he constructed the Police lock up of Morigaon Police Station when it was enlarged from its original shape. At that time plinth of Morigaon Police Station was hardly 17 feet in height.

18. Nalin Bora, witness No. 3 for the Petitioner and Karuna Chandra Bora, witness No. 4 for the Petitioner corroborated the statement of witness No. 2. Ranu Bala Sharma, the Petitioner, was examined as witness No. 5. Munin Mahanta, sitting MLA of Morigaon constituency was examined as witness No. 6 on behalf of the Petitioner who corroborated the testimony of Witnesses 2, 3 and 4.

19. On behalf of the Respondents O/C Jainal Abedin Khan, SI Amulya Deka, Const Padma Kanta Bora, Const Tarun Chandra Deka, Const Katiram Das were examined as witnesses. Jainal Abedin Khan in his statement stated that Pradip Sharma was arrested in connection with a case being No. 162/93 U/s 3/4/15(b) (1) of TADA at about 4.05 PM on 21.8.94. He proved the GD entry No. 656 dated 21.8.94 which was marked as Ext-C(1). At about 4.50 PM Sri Shiva Sharma, Addl SP interrogated Pradip Sharma. At about 8.00 PM Pradip Sharma informed the Sentry that he had developed vomiting tendency and felt giddiness. The Sentry accordingly informed the O/C and he directed the Sentry to take him out from the Police lock up. The Sentry took him to the western side of the Police Station and he slipped from the veranda and fell down on the ground and could not stand up thereafter. The Sentry shouted for help and two Literate Constables, namely, Tarun Deka and Padma Kanta Bora rushed to the spot. The witness immediately informed the Supdt. of Police, Morigaon and Addl. SP, Morigaon over phone regarding the incident. He also entered a GD entry being No. 666. The SP and Addl SP came to the Police Station at about 8.05 PM and advised to shift Pradip Sharma to the Civil Hospital for treatment. Pradip Sharma was shifted to Civil Hospital at 8.10 PM. On 22.8.94 at 10.30 AM the Supdt. of Civil Hospital informed him that Pradip Sharma should be immediately shifted to GMCH for further treatment. SI Amulya Deka was deputed with the staff alongwith a van to shift Pradip Sharma to GMCH. On 23.8.94 at about 3.30 PM a WT message was received from I/C GMCH Police Out Post that Pradip Sharma expired at about

12.00 noon on 23.8.94. On 24.8.94 at about 2.25 PM Robin Buragohain and his staff arrived at the Police Station, Morigaon with the dead body of Pradip Sharma. The deadbody was handed over to the elder brother of Pradip Sharma.

20. The learned District Judge on completion of enquiry outrightly rejected the version of the Respondents that the death of the deceased was caused due to the fall from the veranda. The learned District Judge after considering all the evidence on record found that Pradip Sharma died due to Police torture and reached the following conclusion:

24. As per information furnished by present Supdt. of Police, Morigaon, at the relevant time, Mr. A.K. Singha Cashyap, JPS was the Supdt. of Police, Mr. Shiva Prasad Sarmah, APS was Addl. S.P., Mr. Suchen Hazarika, APS was Dy. SP(HQ), Mr. Hareswar Brahma, APS was Dy. SP (Prob) and Sri Hari Prasad Khanikar was the Circle Inspector of Police at Morigaon. Mr. Jainal Abedin Khan, O.C. at the relevant time himself appeared before me and he was examined as one of the witnesses for the Respondents. As per statement of witness No. 1 Ghanashyam Sharma and witness No. 3 Nalin Bora, while Pradip Sharma (deceased) was struggling for life at Morigaon Civil Hospital before shifting him to Guwahati Medical College Hospital for further treatment he told them that he was tortured at Manipur CRPF camp by Mr. A.K. Singha Cashyap, SP, Mr. Shiva Prasad Sarmah, Addl. SP, Mr. Suchen Hazarika, Dy. SP(HQ) and Jainal Abedin Khan, O.C. alongwith other Police and CRPF personnels. I find no reason to disbelieve them. In my view, Mr. A.K. Singha Cashyap, then Supdt. of Police, Morigaon must be held mainly responsible being the Captain of the team that tortured and as without his nod directly or indirectly no Police officer whatever be the rank in the District would dare to torture a person so brutally thereby finishing his life untimely. Other Police officers, namely, Mr. Shiva Prasad Sarmah, Addl. SP, Mr. Suchen Hazarika, Dy. SP(HQ) of Morigaon and Jainal Abedin Khan, O.C. Morigaon Police Station at the relevant time also cannot escape from the criminal and civil liability for killing a promising youth in prime time of his life in mist barbaric and inhuman manner in the name of curbing insurgency.

24. To sum up: That Pradip Sarmah died due to torture in Police custody on 21.8.94 in between 6.00 to 9.00 PM at Manipur CRPF Camp and the officers responsible for causing his untimely death are Mr. A.K. Singha Cashyap, SP, Mr. Shiva Prasad Sharma, Addl. SP, Mr. Suchen Hazarika, Dy. SP (HQ) of Morigaon and Jainal Abedin Khan, O.C. Morigaon Police Station at the relevant time.

21. From the discussion it thus appears that the deceased Thaneswar Sarmah and Pradip Sharma were in the custody of the Police and died while they were in custody. In both the cases, there is no conflict as to the arrest and detention of the aforesaid two persons by the Police. It is also not disputed that a prisoner, whether convict or an under trial, is not divested of his fundamental rights guaranteed under Article 21 of the Constitution of India, save and except the restrictions and constrictions that can be imposed on the enjoyment of fundamental rights by such persons under the Prison Laws or Regulations. In the

Indian polity, even a person convicted or imprisoned under the law does not forfeit his fundamental rights guaranteed by the Constitution save and except those which he or she cannot make use of in view of the incarceration. The State owes a duty towards its citizen and to see that there is no breach of the inalienable rights of a citizen to life and liberty save and except in accordance with law even when a citizen is in their custody. The rights guaranteed under Arts. 20, 21 and 22 cannot be denied to convicts or undertrials or persons in custody since the procedure prescribed by law casts a duty on the part of the State which is total and absolute. The delinquent and malefactor is accountable and the State is answerable and responsible when a person in custody of Police is deprived of his life and liberty save and except by the procedure prescribed by law. The Supreme Court of India, being fully alive to such situation and aptly dealt with such matter in Rudul Sah Vs. State of Bihar and Another, Sebastian M. Hongray Vs. Union of India (UOI) and Others, , Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others, , Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, , Joginder Kumar Vs. State of U.P. and others, , State of M.P. Vs. Shyamsunder Trivedi and Others, In the instant case it would be opposite to refer to one of the most outstanding judgments of the Supreme Court in D.K. Basu Vs. State of West Bengal, and I would like to put to use the following observation of the Supreme Court:

27. It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt of law develops. It was considering these aspects that the Law Commission in its 113th Report recommended the insertion of Section 114-B in the Indian Evidence Act. The law commission recommended in its 113th Report that in prosecution of a Police officer for an alleged offence of having caused bodily injury to a person, if there was evidence that the injury was caused during the period when the person was in the custody of the Police, the Court may presume that the injury was caused by the Police officer having the custody of that person during that period. The Commission further recommended that the Court, while considering the question of presumption, should have regard to all relevant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded. Change of burden of proof was, thus, advocated. In Shyamsunder Trivedi case this Court also expressed the hope that the Government and the legislature would give serious thought to the recommendation of the Law Commission. Unfortunately, the suggested amendment has not been incorporated in the statute so far. The need of amendment requires no emphasis - sharp rise in custodial violence, torture and death in custody, justifies the urgency for the amendment and we invite Parliament's attention to it.

28. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must

be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the Police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

33. There can be no gainsaying 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 for subjected to third degree methods 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 method 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 right 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.

22. The learned District Judge on completion of the enquiry referred to the guilt of the persons who are involved in the custodial death of the aforesaid two persons. The evidence on record unerringly point that the State and its instrumentalities named are responsible for the custodial death of the aforesaid two persons. Indian Penal Code provides the necessary punishment for the violators of the human rights more particularly in Sections 220, 330, 331, 302 etc. It is a responsibility of the State to prosecute the offender in the case of

every crime under the law and I hope and trust, that the State shall undoubtedly set in motion if not already has commenced to proceed with and against the wrongdoers as per law. That apart, a citizen is entitled for remedy under the public law against infringement of fundamental rights. Indian Constitutional system provides such remedy which is reflected in number of judgments of the Courts some of which are already mentioned. Though there is no express provision in any of the Indian law including the Constitution for grant of compensation against the violation of fundamental rights to life and liberty. The Courts in India developed and worked out a mechanism by awarding compensation in cases of unconstitutional deprivation of personal property or life. The Courts in India judiciously evolved a right to compensation against the State for its failure to protect the fundamental rights of the citizen. Indian Constitution guaranteed fundamental rights to the citizen. Right to life and property is one of the sacrosanct rights guaranteed by the Constitution. It cannot be allowed to set at naught or circumvented. Since the rights are guaranteed and assured to the individual no person or institution including the State can trample over those rights or overstep or overreach. The Courts in India in these circumstances took the responsibility as a defender of the Constitution and evolved to award compensation in cases of Constitutional deprivation. This power to compensate is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The entire objective is to award an anodyne only as a paliative measure to be precise in the language of Justice Dr AS Anand "balm to the wounds and not to punish the transgressor or the offender".

23. In the light of the observations made above, in both the cases the Petitioners are to be compensated. In CR 3809/94 the deceased Thaneswar Sarmah was aged about 22/24 years and was studying in College. In CR 4032/94 deceased Pradip Sharma was aged about forty years. Both of them died in Police custody in defiance of the law of the land. In both the cases there is unconstitutional deprivation of personal liberty and life. In the circumstances I am of the view that the award of compensation are to be made to both the Petitioners at the rate of Rs. 2,50,000/- (Rupees two lakh and fifty thousand) with cost of Rs. 15,000/- each which in my view would substantially meet the ends of justice. Accordingly Rs. 2,50,000/- each with a cost of Rs. 15,000/- each would be payable by the Respondents. The State of Assam is directed to pay the compensation as awarded within six months from receipt of this order and deposit the amount before the Registrar General of this Court. On such deposit the Registrar General shall release 50% of the amount to the legal heirs of the deceased and the remaining 50% shall be deposited in any Nationalised Bank in the name of the legal heirs. It would be open for the State authorities to proceed against the erring officers both departmentally and criminally and to realise the

said amount from the erring officers as per law.

24. With this the writ petitions are allowed to the extent above with costs.