
(1997) 08 GAU CK 0043
In the Gauhati High Court
Case No : Civil Rule No. 2622 of 1995

Hemchandra Kalita

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 06-08-1997

Acts Referred:

Constitution of India, 1950 — Article 20(3), 21, 22
Criminal Procedure Code, 1973 (CrPC) — Section 167, 176, 41, 46, 49

Citation : (1999) 3 GLT 605

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : J.M. Choudhury, Kumar Dipak Das and N. Zaman, for the Appellant;
K.H. Choudhury, G.A., for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma, J.—This writ application has been filed claiming compensation for killing one Dulal Kalita (the brother of the Petitioner) by the Police personnel on 23.5.95 at village Mathpara under Chhaygaon police station. Dulal Kalita was a graduate and he was studying LL.B. at Goalpara College. He was aged about 28 years at the time of death. At the time of his death he left his old parents and other members of the family including the Petitioner. It is stated in this writ application that Dulal Kalita was killed by the police personnel in a brutal manner and it is stated that it is a cold blooded murder and it is further stated that after Dulal Kalita was injured at the police firing no adequate treatment was given and as a result Dulal Kalita died. It is alleged that the killing of Dulal Kalita is in violation of human rights and it is also violative of Article 21 of the Constitution of India. Two prayers have been made in this writ application:

(i) To appoint a commission of inquiry under the appropriate Act and to hold an inquiry into the incident of killing of Dulal Kalita.

(ii) To pay a sum of Rs. 5,00,000/- (Five Lakhs) to the members of the family of deceased Dulal Kalita as compensation for the brutal killing of Dulal Kalita by

police personnel.

2. At the time of argument the prayer No. 1 was not pressed and accordingly I am not considering that aspect of the matter. The learned District Judge, Kamrup at Guwahati was asked to hold an inquiry and accordingly the inquiry report was submitted on 17th of May/96 by the learned District Judge. The following witnesses were examined: P.W. 1, Dr. H. Medhi. P.W.2. Shri Ratna Mahanta, P.W. 3 Shri Nripen Das, P.W. 4 Shri Dinesh Das, P.W. 5. Shri Nagen Das, P.W. 6. Nagen Sarma, P.W. 7, Chitra Das, P.W. 8. Shri Hem Chandra Kalita (the Petitioner) P.W. 9. Dr. R. Thengal and P.W. 10, Dr. H.K. Mahanta, D.W. 1 Taiyab Ali Gaonburah, D.W. 2 Shri Surya Kanta Das, D.W. 3. Babul Chandra Das, D.W. 4, Deepak Basumatary, D.W. 5. Tosheswar Phukan, D.W. 6. Asgar Ali, D.W. 7 Pabitra Kumar Baishya, P.W. 8, Shri Udoy Kumar Baruah, D.W. 9, Fazlul Haque Khan, and D.W. 10, Dr. A.K. Sinha. One registered expert was examined by the Court as Court witness. A number of documents were exhibited before the learned District Judge. The learned District Judge in Paragraph-5 of the report found as follows:

5. It is undisputed fact that Dulal Kalita died on 23.5.95 as a result of multiple injuries including a shot injury sustained by him. PW 10 Dr. H.K. Mahanta performing the autopsy on the dead body has found 3 injuries on the left leg caused by rifle firearm and 17 other injuries caused by blunt weapons. The blunt weapon injuries are abrasions and bruises spread over the right elbow, back of left side of chest and neck, back of both sides of abdomen, back of pelvis, middle of left arm, back of right hand, chin and cheek with extensive haemorrhage into the tissues and muscles mostly on the left side of the chest and abdomen and the pelvic wall. There was also fracture of the 9th rib on the left side. According to the doctor all the injuries were ante mortem and the death was due to shock and haemorrhage resulting from the injuries. He has also stated that the extensive haemorrhage on the tissues and muscles of the chest, pelvis and abdominal walls could alone cause the death independent of the leg injury.

3. It is an admitted position that Dulal Kalita was a member of ULFA, a banned organisation and it is also admitted that he was the president of the Kamrup District Committee of ULFA. It is also an admitted position that Dulal Kalita along with Ramani Kalita, the Secretary of Kamrup unit of ULFA was speeding away in a Motor-Cycle and when the police asked to stop them, they did not stop and the police chased them. Thereafter they kept the motorcycle by the side of the road and tried to run away, but at that time also police was chasing them. Ramani Kalita could not be apprehended But Dulal Kalita according to the police version was apprehended and he was shot at not by police but by his colleague Ramani Kalita.

4. On the other hand, the case of the Petitioner is that Dulal surrendered by raising his hands and he was standing in the middle of the field and at that time he was shot at and thereafter he was brutally tortured and adequate treatment was not given to him and as a result he died. It is pertinent to quote a line from "Human Rights and The Law" by Justice V.R. Krishna Iyer wherein he stated,

inter-alia, as follows:

The broad expanse of humanist commitment drives one to diverse fields but the tool of law tidies up one's thought and forbid's operation berserk.

5. In a recent decision reported in D.K. Basu Vs. State of West Bengal, with Writ Petition (Crl) No. 592 of 1987, (Ashok K. Johri, Petitioner v. State of U.P. Respondent), the Supreme Court in a case of custodial death has pointed out that the authority should not resort to violation of human dignity because if that is done, it destroys the very fabric of a democratic society. Further it will lead the society a step backward. It was further pointed out that the abuse of police power is not only peculiar to this country but effect has been approached by all the community to stop it In that Judgment Article 5 of the Universal Declaration Human Rights, 1948 has been quoted that is as follows: "None shall be subjected to torture or to consider the cruelty inhuman or degrading treatment or punishment." It was accepted by the Government of India. But it was pointed out by the Supreme Court in that case that despite this declaration the crimes continued unabated though as civilised society one should show its concern or take steps for its stoppage.

6. In paragraph-17 the law has been laid down by the Apex Court as follows:

17. Fundamental Rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State. In tune with the constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of the Code of Criminal Procedure 1973 deals with the powers or arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41 Code of Criminal Procedure confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest, from a Magistrate. Section 46 provides the method and manner of

arrest. Under this Section no formality is necessary while arresting a person. u/s 49, the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes Clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Sections 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death.

The Supreme Court pointed out that the Government can not be allowed to become law-breaker. If that is allowed it will amount to breeding contempt of law and would encourage lawlessness. The Supreme Court pointed out that in appropriate case the High Court has the power to give appropriate compensation.

Anr. referred case reported in *People's Union for Civil Liberties Vs. Union of India* and another, This is a case from north-east, wherein also the Supreme Court has reiterated the same law. In that Judgment the earlier Judgment referred to was quoted and the Supreme Court pointed out that it is already a well accepted proposition. In matters of the jurisdiction that compensation is an appropriate and sometimes {perhaps only suitable remedy for the redressal for the establishment of the fundamental rights of life of a citizen and the State is vicariously liable for their acts. On the background of this law now let us have a look in this particular case. The findings of the learned District Judge in paragraphs-23, 24, 25 and 26 are quoted below:

23. Learned Counsel for the Petitioner contends that the entire police version of the story is manipulated by making improvements. He submits that the statement of RW 9 Fazlul Haque Khan, the Officer-in-Charge of Chaygaon PS on that date, is clear enough to indicate that the General Diary has been manipulated to make out a false case of police encounter. It is pointed out from his statement that the entire General Diary Ex.3 containing entries 188 to 651 from 8.5.95 to 27.5.95 was written by one constable named Deka although it was not his job. Khan has himself stated that the Sherista of the Police Station during the relevant period was one Bipin Chandra Das who was supposed to write the General Diary. It is also in his evidence that the said Bipin Chandra Das had been present in the Police Station on duty all along during the entire period of the General Diary Ex. 3. Learned PP and the counsel for the Respondents however submit that the direction for writing the General Diary by the Sherista is not mandatory but only directory as per the Police Manual and there is therefore

no bar for getting the General Diary written by any other staff. It is contended that merely because the General Diary has not been written by Sherista no suspicion about its genuineness can be entertained.

24. I find sufficient force in the contention of the learned Counsel for the Petitioner on consideration of the entire situation. The contention of the learned Counsel for the Respondents is found unconvincing. The Officer-in-Charge Khan RW 9 has not explained the reasons as to why on all these dates the General Diary was written by a constable and not by the Sherista entrusted with the job. This would naturally create some sort of suspicion. The Respondents have not also examined the constable who wrote the General Diary for the whole period. It is also not established that the said constable had been present on duty at the police station on all these dates. It is seen that on every day the police staff present at the Thana is mentioned in an entry in the General Diary. Khan has himself said that only the numbers of the constables are mentioned but he has failed to tell the constable number of Sri Deka who wrote the General Diary. I would therefore hold that the General Diary is suspicious and the probability of its manipulation cannot be altogether ruled out.

25. Be that as it may, I do not think that the Respondents' version of the story will be improved in any manner even if the General Diary is accepted as genuine and wholly correct. On consideration of the entire evidence on record it has already been found that Dulal Kalita and Ramani Kalita were pursued by the police party and Dulal was caught and injuries inflicted on him as narrated hereinabove. It has also been found that Dulal received the gun shot injury from police firing and the other injuries from assault by the police party after he was overpowered and apprehended.

26. In view of what had been mentioned and discussed hereinabove, I am of the considered conclusion that the Death of Dulal Kalita was due to the injuries sustained by him from the justified police firing and unjustified and uncalled for police assault and also for inhuman treatment meted out to him thereafter and also on account of negligence and denial to provide possible medical attention and treatment immediately.

Submitted to the Hon'ble High Court for consideration.

7. I have heard Shri J.M. Choudhury, learned Advocate for the Petitioner and Shri K.H. Choudhury, learned Advocate for the Respondents. Shri J.M. Choudhury argues as follows:

(i) Dulal Kalita was shoot at and killed when he surrendered.

(ii) He further pointed out that Dulal Kalita was absolutely unarmed. No weapon was recovered from him. So, it was unnecessary for the police to fire at him and more so when he surrendered by raising his hands.

8. Shri Choudhury further argues that the story or the plea taken up by the police that he was injured by the firing of his colleague also has no legs to stand

upon inasmuch as it was found by the Ballistic Expert that the Bullet which was found was from the gun of the police. He further submits that in this case the whole entry in the general diary was manipulated by the police and that has also been found by the learned District Judge. If the police was innocent and if there was no involvement of the police in the killing of Dulal Kalita there was no necessity to manipulate the General Diary. He further submitted that no adequate treatment was given to Shri Dulal Kalita when he was injured. It is the opinion of the Doctor that the injury was caused from the gun shot and that was also found by the learned District Judge in his enquiry report, and it was the laches on the part of the police that Shri Dulal Kalita was kept in the Verandah of the Police Station for two hours without offering any adequate medical treatment. It is opined by the Doctor that if Shri Dulal Kalita was not kept in the Verandah of the police station for two hours without offering any medical treatment and if he was not allowed to continue profused bleeding for these two hours, he could have survived, as Shri Dulal Kalita died because of the bleeding injury.

9. Shri Choudhury further submits that injuries No. 4 to 20 as found by the doctor in the Post Mortem report are the result of all the police torture. It is the clear and definite opinion given by the two Doctors that these injuries can not be caused by fall as suggested by the police. In this connection, the Doctor opined that these injuries have been caused by the blunt weapons, that is, by the lathis as well as by the Butt of the gun. It is the case of the Petitioner that when the Petitioner was shot at, he was beaten up by the police and the injury in the chest was caused by the butt of the gun and as a result of this, the 9th Rib of the chest of Shri Dulal Kalita was broken. Shri Choudhury submits that this is nothing but brutality on the part of the police. No doubt Shri Choudhury admits that Shri Dulal Kalita was a dreaded ULFA, but that does not mean that when he was shot at and when he was lying in the field, the police will beat him, with lathis as well as by the butt of the gun and thereafter necessary treatment would not be given to him, it was the definite opinion of three Doctors that he would have survived with proper treatment.

10. Shri Choudhury has taken me through the evidences as well as the documents and he submits that it is crystal clear that Dulal Kalita died because of negligence and torture of police and he was shot at by the police and he was tortured by the police.

11. In that view of the matter I accept in toto the paragraphs of the report of the learned District Judge as quoted above.

12. Shri K.H. Choudhury, learned Advocate for the Respondents tried to argue that the report relating to firing by the police, was not justified. But I do not feel that the submission of Shri Choudhury is not correct inasmuch as Shri Dulal Kalita tried to run away and when he tried to run away police fired at him from a very short distance. The action of the police may be partially justified, but after being shot at and lying in the field Shri Dulal Kalita was beaten up by lathis as

well as by the butt of the gun by the police, though it was found by the police that he was unarmed and he was not in a position to fire at the police. This being the position, this Writ Application is allowed. I direct that the authority shall pay a sum of Rs. 2,00,000/- (Rupees Two Lakhs) to the parents of the deceased Shri Dulal Kalita within a period of 6 (six) months. It will be the responsibilities of all the Respondents to comply with the order within the period mentioned above. This amount has been awarded under the facts and circumstances of this case.