

(1987) 08 MP CK 0043

In the Madhya Pradesh High Court

Munna Singh Tomar and Others

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 06-08-1987

Acts Referred:

Arms Act, 1959 — Section 25, 27
Constitution of India, 1950 — Article 14, 19, 20, 21, 22
Criminal Procedure Code, 1973 (CrPC) — Section 125, 154, 159, 161, 167
Evidence Act, 1872 — Section 121, 27
Penal Code, 1860 (IPC) — Section 120B, 302, 307, 395, 396

Citation : (1989) CriLJ 580

Hon'ble Judges : T.N. Singh, J;N.K. Singh, J

Bench : Division Bench

Judgement

T.N. Singh, J.—Petitioners are threesome, brothers, who complain that they have been framed up to resemble mythical figures, Three Musketeers of Alexandra Dumas. But, the question to be decided by us in these two petitions is of direction, if any, to be made on the writ side to ensure fair investigation of the crime allegedly authorised by them because they have claimed enforcement of their fundamental right to a fair trial grounded on such investigation.

2. On 2-4-1987, an under-trial prisoner and a Police constable were shot dead and petitioners have been booked for that offence. A notorious criminal, Ravi Pande, with goriest of track-record, it is admitted, was one of the victims. It is also admitted that the occurrence look place when he was being escorted back from the Court with co-prisoner Bhagwandas Kamaria, of almost equal notoriety. It has also come on record, that Head Constable Ramnand Singh was the other member of the escort party - who was injured in the shoot-out. It is alleged that petitioners came in two cars of which one was stolen from Delhi and they fired at the escort party and that the facts were disclosed in the F.I.R. which the injured Head Constable had lodged at Inderganj Police Station, Gwalior as an eyewitness to the occurrence, on which Crime Case No. 130/87 was registered.

3. On 16-10-1987, the instant petition as also petition in the connected matter,

M. P. No. 818 of 1987, came to be filed in this Court. Both petitions have been heard analogously as an order was made on 2-2-1988 in the connected matter in that regard. On 21-10-1987, on the two petitions respondents were noticed, pursuant where to they filed returns on 18-12-1987. Be it mentioned here that the same grievance is made in the two petitions against the respondents that the Police is acting in a high-handed and partisan manner and that the petitioners have been falsely implicated out of grudge which some high police officers bear against them. They came with the prayer that investigation of the case against them be transferred to the Criminal Investigation Department of the State and that the petitioners be permitted to have a lawyer of their choice to protect them in the course of investigation. When the return came on record, a rejoinder of "reply to return" was filed by the petitioners on 28-1-1988, in which, besides controverting the averments made in the return, they submitted that they apprehended being "liquidated in false I encounters or otherwise" by the police. They prayed for protection of their life and limb and offered to surrender in Court and participate in the investigation to prove that they had been falsely implicated in the case.

4. On 3-2-1988, accordingly, after hearing counsel, an interim order was passed making certain directions. The petitioners were allowed to surrender in the Court of the learned Chief Judicial Magistrate, Gwalior, on 10-2-1988 and the Police was directed not to apprehend them or deal with them in any manner till they came before the Court. Learned Chief Judicial Magistrate was directed to commit the petitioners on their surrender, to be lodged in Gwalior Central Jail until further orders and the Jail Superintendent was directed to ensure that at the time when the petitioners are received for lodgment in Jail, they are examined by the Jail Doctor. The Police was denied access to them in Jail and they were directed to obtain orders from this Court if the petitioners were required to be interrogated in the course of investigation of the crime. On 10-2-1988, an application (LA. II) being filed on behalf of the respondents by the Investigation Officer, the matter was listed in Court for orders on 11-2-1988. However, in the meantime, respondents had preferred a petition for Special Leave to appeal against the order passed by us on 3-2-1988 and, therefore it was submitted before us on 12-2-1988 by learned Counsel appearing for the respondents that he would not press. LA. XI and accordingly, that was disposed of as not pressed. It appears that on the same date, namely, 12-2-1988, by their Order passed in SLP (Criminal) Nos. 417-420 of 1988, their Lordships of the Supreme Court rejected the petition and observed that "If however, any further direction or modification is necessary for effective investigation of the case, the petitioners may move the High Court."

5. Be it, however, mentioned that though in the return it was disclosed that in the aforesaid Crime Case No. 130/87 the petitioners had been booked for an offence u/s 396/302/307/ 120B, IPC, it was for the first time disclosed in LA. II that petitioners had also been booked u/s 25/27 of Arms Act and that they were required to be interrogated in respect "of gun etc." used in the aforesaid crime

and for recovery thereof u/s 27, Evidence Act. In their reply to I. A. II, filed on 12-2-1988, the petitioners stated that the Police was after their blood and they would be most unsafe in Police Custody. They further stated that they did not have any information regarding any weapon of offence and they had no information to be given to the Police for recovery of any weapon. They contended that if they were handed over to "Police Custody" that would tantamount to contravention of Article 20 of the Constitution because they had no information to be given to the place of concealment of any weapon said to be used in the crime. But, I.A. II having aborted the same prayer was repeated vide I.A. V, on 19-2-1988, evidently after the matter was disposed of by the Supreme Court, A "reply" in same terms to the first application was filed by the petitioners complaining that the Police was trying to circumvent the constitutional mandates of Articles 20(3) and 22(1) and the provisions of Section 161(2), Cr. P.C.

6. During pendency of proceedings in this Court in these matters, the petitioners filed on 23-3-1988, I. A. VIII and on 28-3-1988, I. A. No. IX, I.A. No. X on 10-4-1988 and lastly I.A. No. XII on 4-5-1988. In the first mentioned two applications it was complained to us that petitioners' uncle Bare Singh Tomar, aged 74 years, had come to Court to attend hearing in these two matters when the Police arrested him, tortured him and eventually he was committed to Jail where he was medically examined. That matter is being dealt with separately in M.P. No. 32 of 1988. In the last mentioned two applications, the petitioners buttressed this allegation against the local Police of their animus against the petitioners and referred to their acts of "extreme high handedness in demolishing and damaging petitioners' immovable and movable property" and of making unauthorised attachment of petitioners' movable property in violation of the orders passed by the Court in that regard. Indeed with I.A. No. XI, they filed certified copy of the order dated 12-4-1986, passed by learned Judicial Magistrate, I Class, Gwalior, in File No. 130/87 and a certified copy also of the complaint lodged by first petitioner Munna Singh Tomar against the Investigating Officer Subhash Tiwari under Sections 395, 427 and 506B, I.P.C.

7. We have considered it not necessary to refer to the several averements made in the bulky petitions of 32 pages and 12 annexures. Suffice it to say shortly that specific allegation are made against the then District Superintendents of Police in support of the case that at their instance the petitioners have been falsely implicated out of grudge which those officers personally nursed against them. However, it is submitted before us that those officers have been transferred and they cannot, therefore, influence the investigation in any manner. We do not also consider necessary to refer to the facts stated in detail in the petitions and evidence filed with the petitions in the form of annexures to establish that the petitioners are law abiding citizens and possessed good reputation. Still, what has not escaped our notice is the fact that the Police has dealt with the petitioners and members of their family in a high-handed manner and that is relevant to petitioners' grievance that the investigating agency is actuated by malice against the petitioners. Though we are not satisfied that it is necessary in

the changed circumstances to transfer the investigation to some other agency, we are still of the view that it is necessary to consider yet if it is necessary to control and constitutionalise the investigation by making appropriate direction in that regard to prevent infringement of petitioners' fundamental rights.

8. We may first consider the grievance founded on the high-handedness of the Police. in effecting the attachment. It is clear from the copy of the order dated 12-4-1988 annexed to I. A. XI that the Police had not only attached movable and immovable property of petitioners' residential house, but without any direction in that regard, the Police acted arbitrarily in making seizure of valuable movable property of the petitioners therefrom and also from other place in the town where they have been carrying on business, That apart, the police acted with undue and unseemly haste and truly speaking, without jurisdiction, in enforcing the order of attachment only of movable property by springing into action on 18th April 1988, before publication of the proclamation could take place on 19th April 1987, in two local dailies, Bhaskar and Swadesh. Indeed, learned Magistrate had, therefore, acted rightly in ordering on 12-4-1988 for return of the seized movables on or before 28-4-1988 of the order. In I. A. XII, the statement made by the petitioner that the order of return of the movable property to the petitioners had not been complied with till 4-5-1988 has remained uncontroverted.

9. We have perused Annexures R/1 and R/2 filed with the return which show that the relevant order of attachment in proceedings under Sections 82 and 83, Cr. P.C. was made on 16-4-1987 and it also shows that on 18-4-1987 and 19-4-1987, raids were made on petitioners' residential house named "Tomar Building" at Thatipur, Gwalior and at their hotels and restaurants, such as Sagar Hotel, Shere Punjab Hotel and Raju Beer Bar. On 18-4-1987, seizure was made of several items of movables from all those places and it further appears that on 18-4-1987 itself, the petitioner's residential house, Tomar Building, was locked up and tenants of the building were directed to deposit rent in Court. On the same date, Shere Punjab Hotel as also Raju Beer Bar were sealed. From one of the lists only, which forms part of Annexure R/2, it appears that on 19-4-1987, some movables were seized from Sagar Hotel. Although it is not possible for us to accept the case of the petitioners stated in their rejoinder dated 28-1-1988 that a loss to the tune of Rs. 30 lakhs was caused to them by damaging their properties and by seizure of valuables from their residential houses and Hotels and restaurant, it is difficult to resist the conclusion that the Police acted in a very high-handed manner in this matter. As earlier alluded, they acted arbitrarily and illegally in the matter by making seizure of movables without any authority of law, as observed by the learned Magistrate. Lamentably, they have even shown contemptuous disregard to the order of the learned Magistrate for return of the movables as they did not carry out the order and report compliance to the learned Magistrate. Let it be mentioned further in this connection that although grievance about illegal attachment was made in the petition itself, the respondents cared little to satisfy us that the Police had acted legally and in

accordance with law. Although the respondent, failed to produce before us the relevant attachment order aforesaid, dated 16-4-1987, in the subsequent order dated 12-4-1988 passed by the learned Magistrate, the illegalities perpetrated by the Police in respect" to that order have been fully manifested

10. Looking at the provisions of Sections 82 and 83, we are convinced that in the instant case the local Police Officers investigating the offence deliberately chose to disregard the legal safeguard envisaged therein. According to Section 82, by the proclamation issued thereunder, the person absconding is required to appear at the specified place and at a specified time in less than 30 days from the date of publication of such proclamation. Under the proviso to Section 83, the Court issuing the proclamation "may order the attachment simultaneously with the issue of the proclamations" of any movable or immovable property of the proclaimed persons under circumstances contemplated thereunder. Such an order of attachment may be passed when the Court is satisfied that the person in relation to whom the proclamation is to be used is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local jurisdiction of the Court. We have no doubt that without the proclamation being published(tm) the manner contemplated in Sub-section (2) of Section 82, no attachment can be effected even if an order in that regard is made under the proviso. Whether it is an order simpliciter for "proclamations" only made u/s 82(1) or it is a composite order also authorising "attachment", the requirement of publication of the order envisaged u/s 82(2) is obviously mandatory and it is applicable to both types of orders. Because, the object of the "proclamation" or even of "attachment" is to secure presence of the proclaimed person at the specified place, on the date and time specified in the proclamation. By attachment of property of an absconding accused, he is not meant to be destituted and punished before being judicially found guilty. Neither he nor his family is meant to suffer an ex parte order and suddenly thrown on the street without prior notice. The doomsday has to be fixed and notified. The penal consequences following a "proclamation" which is duly notified and published are contemplated in Section 83. Indeed, as per Section 85 the Court is bound to release the attached property if the proclaimed person appears within time specified in the proclamation and only when he does not so appear that the property is said to be "at the disposal of the State Government." Under Sub-section (3), the proclaimed person is entitled to plead want of "notice of proclamation" which, as per, legislature's own language is meant "to enable him to attend within the time specified therein". The intention of legislature in enacting the provision of proclamation or attachment is only to pressurise the absconding accused to appear and submit himself to the process of law so that trial in respect of the crime in which he is said to be involved is speedily conducted. Prior notice in the form of prior proclamation and publication u/s 82 is an essential and indispensable safeguard but other equally effective safeguards are envisaged u/s 83 also to ensure that police officers do not act arbitrarily. They are not authorised to act on their own in any manner concerning an

"attachment". It is clear from Sub-section (3) of Section 83 that the Court passing the order of attachment of movables may order that the attachment be effected in one of the several modes enumerated therein, not necessarily by seizure only. Full discretion is vested in the Court to direct attachment even by appointment of a Receiver and, in the alternative, even by an order in writing prohibiting the delivery of such property to the proclaimed person or to anyone on his behalf. As regards attachment of imovable property also, the discretion of the Court is equally wide in ordering attachment to be effected by the appointment of a Receiver. Although one of the modes of attachment of imovable property is also by taking possession of that property, we do not think if after *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, any order can be made for evicting persons in possession without hearing them and it is doubtful if a running business can be so stalled as right to shelter and right to livelihood are now constitutionally guaranteed. How a premises can be "sealed" and "locked up" as done in this case? Indeed, it has not even been shown to us that in this case, there was an order by the Court for authorising the Police to do so or whether the police could make a direction to the tenants for deposit of rent in Court though the Police did so and made a record in the seizure memo of having done so. If the members of the petitioners' family, their mother and children, were living in the concerned premises, we do not think if they could be thrown out on the street and the residential houses of the petitioners "sealed up". We also do not think if the hotels and restaurants of the petitioners could be "sealed up" likewise in the manner of a hurricane suddenly descending from the heavens to raze everything to the ground. The Constitution, as per *Olga Tellis* (supra) interdicts arbitrary actions of the State impinging on a citizen's right to shelter and livelihood.

11. Besides what we have discussed above, there are other significant aspects of the case which have persuaded us to entertain the view that the local Police, the investigating agency, has not been able to shed its animus against the petitioners. Indeed, we are intrigued by the designed defence of the respondents in those proceedings. We have failed to understand why the investigating agency has deliberately withheld full disclosure of the prosecution case even to us in the Court. In the return, the respondents took the stand that the F.I.R. was a "privileged" document, but that would be produced in Court. That, however, did not happen. In their applications 1. A. II and V, above-referred, they have shown a desperate anxiety to obtain an order for "Police custody" with the view to obtain statement from the petitioners u/s 27, Evidence Act. However, very clearly, in the applications, care was taken to keep vague and indefinite the articles proposed to be recovered pursuant to the statement to be made by the accused u/s 27. In both applications, couched in similar language, in Para 6, it is said that "the articles that is guns etc. used in the aforesaid crime could not be recovered" because of petitioners' abscondence. However, for the first time, it came to be disclosed in Annexure R/5 that the investigating agency has the intention to recover "Government rifles" and "cartridges" which, as per Annexure

R/5, are said to have been snatched away in the course of commission of the crime. We find sufficient material to take the view that the apprehension of the petitioners is justified to the extent that discovery of "Government rifles" etc. may be foisted on them. What is stated in Annexure R/5 has apparently its source in the F.I.R. but that document is suppressed; is said to be a "privileged" one. If that is not done to deliberately mislead the Court, to cover up the designed discovery, why the respondents have failed to explain their unusual conduct is a question that has remained unanswered.

12. How F.I.R. can at all be a "privileged" document? The copy of such a document which is statutorily required to be furnished to the accused u/s 173, Cr. P.C. to enable the trial to commence, cannot, according to us, be treated as a "privileged" document. The nature of the document would not change, in our opinion, merely because the stage has not reached for supply of copies of documents contemplated u/s 173. Indeed, Section 154(2) Cr. P.C. itself contemplates that copy of the F.I.R. has to be given to the informant. Indeed, at that stage itself, secrecy of the F.I.R. is lost because there is nothing in Section 154, Cr. P.C. or in any other provision of the Code to indicate that the informant to whom the copy is given is restrained in any manner from disclosing to others the content of the copy given to him. The law relating to "privilege" has to be read in Section 121 et. Seq. of Evidence Act. We do not read an F.I.R. to be legally clothed in those provisions with the status of a "privileged" document in any manner. The material Section indeed is Section 125, but scope thereof is clear and narrow. It secures privilege for a "Magistrate or Police Officer" to refuse to "say whence he got any information as to the commission of any offence." We have no doubt that the "privilege" contemplated u/s 125 is merely in respect of the source of the information, and not to the content of the information. Besides, the identity of the informant is always disclosed in an F.I.R. u/s 154(2) Cr. P.C. In the instant case the "informant" Head Constable Ramanand Singh is named. Where is, therefore, any sense to claim "privilege" or secrecy in respect of the F.I.R. which he is said to have lodged. In this view of law, we are confirmed that, the defence in these proceedings is designed to frustrate the efforts of the petitioners to insulate them against fake discovery. It is in Annexure R/5 that the design came to light and that happened because we read the brief carefully. Respondents made every effort to shield from our view the object proposed to be discovered because we may be inclined to take the view that foisting discovery of "Government rifles" would be apparently very easy to achieve.

13. We are not at all impressed by the argument of Shri Roman that no direction of any nature on the writ side can be made by us as that would tantamount to usurping the powers of a Magistrate contemplated u/s 167, Cr. P.C. Let it be at once made clear that there is a sea of difference between the two powers and the two jurisdictions. While the magistrate's jurisdiction is created and circumscribed u/s 167, this Court's jurisdiction to act under Articles 226 and 227 is relatable to its constitutional duty to enforce fundamental rights of citizens. This position in law is clearly borne out by the principle that as a "rule of convenience

and discretion" a Writ is not issued under Article 226 when there is an efficacious and adequate remedy available under a statute and forum for that is prescribed. See, *Ram and Shyam Company Vs. State of Haryana and Others*, . Whether the remedy is really effective, it. was held, has to be determined with reference to the statutory provision and the facts and circumstances of the case. Whatever that may be, when the question is of enforcement of a citizen's fundamental rights there can be little scope to object to exercise of this Court's jurisdiction expressly and exclusively vested in it (as also in the Apex Court) for that purpose. It would only be necessary in such a case to consider if the infringement complained has already taken place or there is a real threat of such infringement which has to be relieved against or prevented by an appropriate direction. Otherwise, the Writ Court shall cease to be constitutional guardians of citizen's liberty and the constitutional guarantee as to enforcement of fundamental rights would turn hollow and meaningless.

14. Let, however, the ambit of Magistrate's jurisdiction u/s 167 be examined to consider if any direction made by this Court in these two matters would impinge upon his jurisdiction thereunder. Within 24 hours, any person arrested and detained in custody is required to be produced before the nearest Judicial Magistrate because there is the positive and inexorable constitutional mandate in that regard in Article 22(2). Beyond that what else appears, albeit in Sub-section (2) of Section 167, is vesting of discretion in the Magistrate to deal with the accused in any of the modes contemplated thereunder. If anything has to be read in clause (a) of the proviso to Sub-section (2), it makes clear that the Magistrate's authority to order detention of the accused person "in the custody of Police" is limited to 15 days. There is a strict embargo contemplated under Clause (a) for the period of "police Custody" exceeding 15 days during and for the purpose of investigation. True, the accused is not debarred from opposing the prayer for Police Custody and the Magistrate is authorised to either reject or allow the prayer, but beyond that, he has nothing to do in that regard. He has no jurisdiction, whether u/s 167 or u/s 159 even, to enforce accused's fundamental right to be shielded effectively against torture in Police custody or against infraction during that period, in any other manner of his fundamental right under Article 20(3). Indeed, it may not be possible for the Magistrate to refuse the accused being committed to Police custody during investigation when such prayer is grounded on the likelihood of any discovery being made u/s 27. Evidence Act in the course of the investigation as that would tantamount to interfering with the investigation.

15. In the case of *S.N. Sharma Vs. Bipen Kumar Tiwari and Others*, , the scheme of the relevant provisions of Cr. P.C. were considered by their Lordships and it was held that the "power of police to investigate any cognizable offence uncontrolled by the magistrate and it is only in cases where the Police decides not to investigate the case that the Magistrate can intervene and either direct an investigation, or, in the alternative, himself proceed or depute a magistrate subordinate to him to proceed to enquire into the case." Their Lordships further

held that "in appropriate cases, an aggrieved person can always seeks a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a Police Officer mala fide, the High Court could always issue a writ of mandamus restraining the Police Officer from misusing his legal powers". In a recent decision in the case of Kashmeri Devi Vs. Delhi Administration and Another, , their Lordships found that there were serious allegations against the Police Officer of murder by torture and also noted the haphazard manner in which the investigation was proceeding. A direction, upsetting the decision of the High Court, was issued for fresh investigation to be made by the Central Bureau of Investigation so that an additional charge-sheet, if any, could be submitted. The appellant (Kashmira Devi) had first approached Delhi High Court under Article 226 of the Constitution, but she was rebuffed.

16. Seeking solid support for his contention, Shri R. K. Jain has referred to us the cause celebre, Nandini Satpathy Vs. P.L. Dani and Another, , dealing with the relative scope of Article 20(3) of the Constitution and Section 161(2), Cr. P.C. The right of an accused to be assisted and protected at the time of Police interrogation has been recognised therein to protect the accused against being compelled to answer self-incriminatory questions. It was held that lawer"s presence was a constitutional claim in certain circumstances and, in the context of Article 20(3), it was an assurance of awareness and observance of the right to silence. It was held that the accused is bound to answer questions put in the course of investigation where there is no clear tendency to incriminate him but, he has a right to silence when the tendency to incriminate springs into existence". Evidently, the Constitution Bench, speaking through Krishna Iyer, J., expressed thereby its awareness of what happens sometimes in our country in the name of fair investigation of a crime, lamenting audibly that "torture tactics have not been transported for life from our land". That is why they said that our constitutional perspective has to be conditioned by a vision that will prevent at once proliferation of "torture technology" and "crime acceleration" in the context of other "social variables" affecting application of wholesome principles producing "human justice".

17. Let it not be forgotten that in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , eight Judges of the Supreme Court were first called upon to look at Article 20(3), albeit in the context of Sections 94 and 96, Cr. P.C. 1898. The view expressed therein was that fundamental right contemplated under Article 20(3) embodied the principle of protection against compulsion of self-incrimination and it was held that "every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part". This view was accepted and reiterated in Nandini Satpathy (1978 Cri U 968) (supra). A Division Bench of Gauhati High Court had an occasion, in the case of Phusu Koiri 1986 Cri LI 1057 , to examine the impact of Article 20(3) on Section 27.

Evidence Act in the light of M. P. Sharma (supra). One of us (Dr. T. N. Singh, J.K speaking for the Court, observed that Section 27 can be allowed to be used only in such manner that the possibility of a fake discovery is excluded. It was held that the entire statement of the accused leading to the discovery has to be recorded in the language used by him and duly proved that it was a true and voluntary statement, to exclude the possibility of Article 20(3) being violated.

18. reliance is also placed by Shri Jain on a decision of a learned single Judge of this Court m, the case of State Vs. Santokh Singh, in support of the proposition that under the Code, there is no provision which says that "Police custody" of the accused is essential for the investigation to be carried out. However, in our opinion, counsel's reliance on a decision of V. Khalid, J. (as his Lordship then was) in the case of T.N. Jayadeesh Devidas Vs. State of Kerala, is more apposite. In that case, his Lordship went so far as to advise legislature to delete Section 27 of the Evidence Act and in that regard it was observed as follows:

It has been the experience of Courts dealing with criminal cases to see an unnecessary anxiety on the part of the investigating officer to somehow bring on record a Section 27 recovery, for the fear that in the absence of Section 27 recovery, the entire investigation will be looked at by suspicion by court of law...An accused does not normally unburden himself with the information about the weapon with which he committed the offence. It is only rarely that the accused person voluntarily gives information about such weapon and when such statements are made voluntarily, the Police can make use of them u/s 27.

It that case, an order of the Magistrate directing the petitioner/accused to appear in his Court for the purpose of his being placed in the custody of Police was challenged. The order was quashed and the plea of the petitioner similar to one made by the instant petitioners was upheld. In that case also, the petitioner had submitted to the Court that he had no information to be passed on to the Police in connection with the crime and, therefore, it would not serve any useful purpose to hand him over to Police so as to facilitate the investigating officer to foist a recovery on the petitioner. In Raja Ram Chopra Vs. The State, , also cited by Shri Jain, it was observed that even when an order for "Police custody" is made by a Magistrate, he has to consider whether the prayer was made with an ulterior motive because it was duty of the magistrate to protect the accused from harassment. In Gian Singh 1981 Cri LI 100 , a learned single Judge of Delhi High Court, relying on Nandini Satpathy Vs. P.L. Dani and Another, , made a direction on the Writ side, on the prayer of the accused/petitioner, that he would be allowed to remain in Judicial custody and would be allowed to be questioned by the Police with the permission of the magistrate, in the presence of a lawyer of his choice.

19. The conspectus of judicial opinion is clear pointer of the extent of an under-trial's legal and constitutional rights judicially carved out humanising the extant system of administration of justice in our country. Indeed, law was proclaimed long ago by the Apex Court in the case of The State of Andhra Pradesh Vs. N.

Venugopal and Others, in no uncertain terms to serve as a constant warning to the erring police officers. It was observed, "beating a person suspected of a crime or confining him or sending him away in an injured condition by the Police when they were engaged in investigation" cannot be accepted as "acts done or intended to be done under Cr. P.C. or under any other law conferring powers on the Police". Not only in *Nandini Satpathy Vs. P.L. Dani and Another*, is "torture technology" strictly decried and deprecated, it has been held in *Prem Shankar Shukla Vs. Delhi Administration*, that hand-cuffing of undertrials indiscriminately is serious affront to human dignity of an Indian as such act is per se torturous and is prohibited by Articles 14, 19 and 21 of the Constitution. In *Sunil Batra Vs. Delhi Administration and Others etc.*, , the same view was expressed on the scope of Articles 19 and 21 underlying the duty of Writ Courts to make pre-emptive strikes against torturous treatment of under-trials in confinement, saying - "In our era of human rights consciousness, the habeas writ has functional plurality and constitutional regards for human decency and dignity is tested by this capability".

20. We have analysed sufficiently the facts bearing on the petitioners' grievances. Facts are tell-tale, suggesting the dubious conduct of the investigating agency. The illegalities perpetrated in the course of attachment proceedings, defiance of the directions of the Court ordering the attachment and designed defence in these proceedings by suppressing the F.I.R. have made their impact in no uncertain terms on the bona fides of the investigating agency. For these reasons, we find it difficult to resist the conclusion that there is every likelihood of the petitioners receiving unfair and harsh treatment if they are committed to Police custody and there is also every likelihood of their being made to subscribe to a statement u/s 27, Evidence Act though they stated in this Court that they had no information which can be given to the investigating agency about discovery of any weapon of offence.

21. Now, the question is, if the petitioners are entitled to the directions prayed. In this connection, we need to sum up now the constitutional rights of an under-trial which appear to us to be well-established on a survey of authorities cited. He has a constitutional right of being protected during investigation against being tortured and made to answer self-incriminating questions. He has right to satisfy the Writ Court of existence of positive circumstances pointing to imminent likelihood of his being tortured during investigation and of praying for appropriate direction to keep him out of "Police custody" during such period. He has a right, in such circumstances, to pray to the Writ Court for a direction for allowing him assistance of a lawyer of his choice to ensure that he is not compelled to answer self-incriminating questions. However, when such a direction is made, he shall still be bound to answer all other questions conducive to effective and speedier investigation of the crime. Under these circumstances, we find it pre-eminently desirable to protect the petitioners in the manner that would accord with the constitutional imperatives and at the same time, conduce to proper and speedier conduct and completion of investigation of the crime in question. We direct that

learned Chief Judicial Magistrate, Gwalior shall fix a date for the petitioners to be produced in his Court from Gwalior Central Jail and on that date, he will allow the petitioners to make a choice of their counsel whose assistance they would require when they are interrogated by the Police. Learned Chief Judicial Magistrate shall, on the same date, fix dates of interrogation of the petitioners in presence of their counsel and that shall be done in the Jail where the petitioners are lodged.

22. The interim order passed in this matter on 3-2-1988 accordingly stands modified and the petition is disposed of in terms of the directions aforesaid. This order shall also govern the connected Misc. Petition No. 818 of 1987 (Munna Singh Tomar and Ors. v. State of Madhya Pradesh and Ors.).

Order in Misc. Petn. No. 818/87

T.N. Singh, J.

23. For reasons given in the order passed by us today in Misc. Petition No. 817 of 1987 (Munna Singh Tomar and Ors. v. State of Madhya Pradesh and Ors.), this petition is disposed of as per directions given in that order.