

(1998) 04 RAJ CK 0009

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 98 of 1997

Union of India (UOI) and Another

APPELLANT

Vs

Pannalal and Another

RESPONDENT

Date of Decision : 21-04-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 20(3), 21, 22(1), 22(2), 5
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 163, 167, 173, 190
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 25, 27, 29, 37
Narcotic Drugs and Psychotropic Substances Rules, 1985 — Rule 46
Penal Code, 1860 (IPC) — Section 179

Citation : (1998) CriLJ 3746 : (1999) 1 RCR(Criminal) 46 : (1998) 3 RLW 1444 : (1999) 1 WLC 293

Hon'ble Judges : Amaresh Ku. Singh, J

Bench : Single Bench

Advocate : Vineet Mathur, for the Appellant; Sumer Dan, for the Respondent

Judgement

Amaresh Ku. Singh, J.—Heard the learned counsel for the petitioners and the learned counsel for the non-petitioners.

2. The only question which is to be decided in this petition is whether the Special Judge was competent to give directions to the effect that during interrogation of the non-petitioner No. 1 his counsel shall remain present.

3. By this order dated 31-1-1997 the learned Special Judge directed the Superintendent, Narcotic Control Bureau, Jodhpur to interrogate Panna Lai in presence of his counsel Shri Sumer Dan.

4. The learned counsel for the petitioner has submitted that the learned Special Judge, N.D.P.S. Act, Cases had no jurisdiction to issue the impugned directions to the Superintendent, Narcotic Control Bureau, Jodhpur.

5. The learned counsel for the non-petitioner No. 1 has supported the order

passed by the learned Special Judge, N.D.P.S. Act, Cases, Jodhpur.

6. The facts of the case so far as they are relevant for the purpose of disposing of the petition may be summarised as below :

7. On 31-3-1996 at 11.30 P.M., on the public road situated between Bai Piyao and Badla village, a jeep No. R.J.-19-C-6991 was checked by the Officers of the Narcotic Control Bureau, Jodhpur. There were two persons in the jeep, they escaped when the jeep was stopped. On conducting search of the jeep, 114 Kgs. of opium poppy contained in three gunny bags was recovered. During the search of the jeep the registration certificate and drivers licence were also recovered. These documents revealed that the jeep was registered in the name of Shri Mohan Lal resident of Tiwari. The driving licence was of Shri Dhanraj S/o Mohan Lai. Soon after the recovery of opium poppy inside the jeep, a raid was conducted at the residential house and shop of Mohan Lai. Mohan Lal was found present at his house. A search of his house as well as shop was conducted. Inside the shop gunny bag containing opium poppy powder as well as several bottles of wine were recovered. Mohan Lal did not produce any valid licence for possessing opium poppy powder which was recovered from the shop.

8. Mohan Lal who is alleged to be the owner of the jeep and the house as well as the shop which was searched by the Officers of the Narcotic Control Bureau is the father of Panna Lal; (non-petitioner No. 1). During investigation Mohan Lal was interrogated and his statement was recorded by the Officers of the Narcotic Control Bureau. In his statement dated 1-4-1996 recorded by Intelligence Officer, Narcotic Control Bureau, Jodhpur, Mohan Lal; stated that he had started business of selling opium poppy with his son Panna Lal since April 1995. In short in his Statement dated 1-4-1996 Mohan Lal gave information to the Officers of Narcotic Control Bureau that he and his son Panna Lal were carrying business of selling opium poppy. In spite of this information Panna Lai was not interrogated by the Officers of Narcotic Control Bureau before the filing of the complaint in the Court of the learned Special Judge N.D.P.S. Cases, Jodhpur against Mohan Lal. The complaint against Mohan Lal was filed in the Court of learned Special Judge, N.D.P.S. Cases, Jodhpur on 18-6-1996 and on the basis of that complaint the learned Special Judge took cognizance of the offences punishable under Sections 15, 27(a) and 29 N.D.P.S. Act against Mohan Lal. Charges were framed against Mohan Lal on 12-8-1996. During trial as many as 13 witnesses were examined. Statement of Mohan Lal was recorded u/s 313, Cr.P.C. He examined two witnesses in defence. During the trial the Narcotic Control Bureau did not file any application u/s 319, Cr.P.C. for issuing process against Panna Lal. During the trial of Mohan Lal no investigation was conducted so far as the involvement of Panna Lal was concerned. After conducting trial the learned Special Judge, N.D.P.S. Cases, delivered the Judgment on 15-11-1996. He acquitted Mohan Lal of the charges under Sections 25, 8/15, 27(a) and 29 N.D.P.S. Act. Regarding the disposal of opium poppy which was reported to have been recovered by the Narcotic Control Bureau, Jodhpur the learned Special Judge gave a direction that

according to Rule 46 of N.D.P.S. Act, the same be delivered to District Excise Jodhpur. Regarding the jeep which had been recovered by the Officers of the Narcotic Control Bureau the learned Special Judge gave the direction that separate proceedings be commenced under Sections 60 and 63 N.D.P.S. Act for the forfeiture of the jeep.

9. After the acquittal of Mohan Lal, the Narcotic Control Bureau decided to conduct further investigation in the case regarding the involvement of Panna Lal. Consequently, a summons was sent to Panna Lal asking him to appear in the office of Narcotic Control Bureau on 27-1-1997. In compliance with the directions contained in the summons he appeared and for about two hours he was interrogated by Mr. S.S. Chouhan. He was again summoned to appear on 31-1-1997 for the purpose of interrogation. He, therefore, moved application before the learned Special Judge, N.D.P.S. Cases and submitted application on 31-1-1997. In his application he expressed an apprehension that he may be given a beating and he may be subjected to coercion for the purpose of giving statement and that the Narcotic Control Bureau was bent upon harassing him. A prayer was made that a direction be issued to the Narcotic Control Bureau to conduct interrogation from the applicant Panna Lal in presence of his counsel. Copy was issued to the Special Public Prosecutor and after hearing the parties the learned Special Judge gave a direction to the effect that interrogation from Panna Lal should be made in presence of his counsel.

10. A perusal of the record of the lower Court shows that Panna Lal had filed an application u/s 438, Cr.P.C. on 27-8-1996 in which a prayer was made that direction should be issued u/s 438, Cr.P.C. for his release on bail in the event of his arrest. That application was dismissed by the learned Special Judge on 3-9-1996. Another application for bail was filed on 4-12-1996 u/s 438, Cr.P.C. this application was not pressed. The third application for bail was filed on 20-1-1997 u/s 439, Cr.P.C. Non-petitioner No. 1 Panna Lal surrendered himself before the learned Special Judge on 20-1-1997. After hearing both the parties the learned Special Judge allowed the application filed by Panna Lal vide order dated 22-1-1997 and in consequence of that order Panna Lal was released on bail. These facts show that Panna Lal; had surrendered before the learned Special Judge on 20-1-1997 and he had been released on bail on 22-1-1997 and the impugned order by which it was directed that interrogation from Panna Lal be made in presence of his counsel was passed on 30-1-1997 after the release of Panna Lal on bail in pursuance of the order dated 22-1-1997. These facts further show that after the acquittal of Mohan Lal on 15-11-1996, non-petitioner No. 1 Panna Lal apprehended his arrest because further investigation was commenced by the Narcotic Control Bureau and, therefore, he surrendered before the learned Special Judge on 20-1-1997 and he was released on bail on 22-1-1997. It was after his release on bail that he appeared in the office of the Narcotic Control Bureau on 27-1-1997 for interrogation and he was interrogated for about two hours and he was again required to appear before the Narcotic Control Bureau on 31-1-1997. It is not known why the Investigating Officer did not interrogate

Panna Lai before filing the complaint against his father Mohan Lal. It is also not known why the Narcotic Control Bureau did not conduct any further investigation regarding the involvement of Panna Lal during the period the trial against Mohan Lai was pending in the Court of learned Special Judge. It is also not known why the Narcotic Control Bureau did not move any application u/s 319 Cr.P.C. before the learned Special Judge for proceeding against Panna Lal if there were sufficient evidence to proceed against the accused Panna Lal. Suffice it to say that in the instant case there is unexpected delay in starting further investigation regarding the involvement of Panna Lai in the alleged crime. The apprehension expressed in the application filed by Panna Lal that he might be beaten and subjected to coercion for giving statement has not been controverted by the Narcotic Control Bureau.

11. In view of the facts and circumstances of the case and the submissions made by the learned Counsel for the petitioners and the learned Counsel for non-petitioner No. 1 following questions arise for determination :

(1) Whether a person (who is not formally arrayed as accused) is entitled to any protection against torture or coercion likely to be used by the officers conducting investigation in the case.

(2) Whether Magistrate/Special Judge who has jurisdiction to take cognizance u/s 190, Cr.P.C. of the offence which is being investigated has the legal power to give such directions to the Investigating Officer as may be considered necessary for prevention of torture or coercion to the persons who may be interrogated during the investigation.

(3) Whether the Magistrate/Court before whom a person has surrendered, has the jurisdiction to give such directions as may be necessary for protecting that person from torture or coercion during investigation, if such person is in custody or has been released on bail.

12. In Re Question No. 1 the first question to be decided in this petition is whether a person who is not formally arrayed as accused is entitled to any protection against the torture or coercion which may be used by the Investigating Officer (other than in accordance, with law) for the purpose of obtaining statements against him.

13. The non-petitioner No. 1 cannot be said to be a person accused of any offence as no formal complaint has been filed against him by the Narcotic Control Bureau. No case is pending against Panna Lal in the Court of Special Judge. N.D.P.S. Cases, Jodhpur and therefore, the non-petitioner No. 1 is not entitled to the protection of Article 20(3) of the Constitution. Since, I am, of the opinion that Article 20(3) of the Constitution has no application to this case, it is not necessary to cite the decisions in which the scope of Article 20(3) of the Constitution was laid down.

14. In the instant case non-petitioner No. 1, deserves to be treated as an

ordinary citizen of the country who is sought to be interrogated by the Officers of the Narcotic Control Bureau and, therefore, it is to be found out whether like any other person who is not accused of any offence, the petitioner is entitled to any protection against torture or coercion which he apprehends is likely to be used against him during his interrogation. At the very outset it may be pointed out that so far as the duty as imposed by Section 163, Cr.P.C. (1973) and Section 179, I.P.C. is concerned there is no dispute that if the person who is interrogated by public servant in discharge of his official duties refuses to answer or answer falsely, a question which he is bound to answer truly then he would be liable for prosecution in accordance with law. The inquiry in the present petition is, therefore, restricted to the torture or coercion which may be used by the Investigating Officer otherwise than in accordance with law.

15. Article 21 of the Constitution contains one of the most valuable fundamental rights which is available to every person in the country. The mandate of Article 21 of the Constitution is that no person shall be deprived of his life and personal liberty except according to the procedure established by law, the distinction between Article 21 and Article 20(3) of the Constitution is real and substantial, the fundamental right conferred by Article 21 of the Constitution is available to every person whether he is or is not person accused of any offence but the fundamental right conferred by Article 20(3) of the Constitution is available to those persons only who are persons accused of any offence. Because of this distinction a person may be disentitled to the protection of Article 20(3) of the Constitution if he is not accused of any offence but the protection of Article 21 of the Constitution cannot be denied on the aforesaid ground. I, therefore, hold that every person including a person accused of an offence is entitled to protection of Article 21 of the Constitution.

16. So far as the acts which are punishable under the Indian Penal Code or any other law for the time in force are concerned penal provisions which prescribe punishment for offences by necessary implication, prohibit the doing of that act which is charged as an offence made punishable according to law. The prohibition of those acts which are charged as offences is obvious from the mandate of Article 20(3) of the Constitution which provides that no person shall be convicted of any offence except for the violation of any law charging that act as an offence. The penal provisions prescribing punishment for the offences thus necessarily prohibit the doing of those acts which are charged as offences and, therefore, they are calculated to protect lives and liberties of common people from those acts which are charged as offences. Besides there are several rights of the citizens which fall within the definition of (civil rights) and are, therefore, covered by Section 9 of the CPC and for the enforcement of such civil rights a person can approach a Civil Court if he apprehends invasion on civil rights. In view of the aforesaid reasons the protection which is available to the common people against torture and coercion, which is not permitted by law, may be found in Article 21 of the Constitution, the penal provisions contained in Indian Penal Code and other laws and the civil laws conferring/recognizing civil rights and prescribing

remedies for the enforcement. This shows that persons who are not formally accused of, any offence are not without legal remedy against unlawful torture or coercion which may be applied to them by any private person or the officers of the State either during investigation or otherwise.

17. It is true that Article 20(3) of the Constitution expressly provides that no person accused of an offence shall be compelled to be a witness against himself and that this fundamental right is available only to those persons who are accused of an offence but it does not mean that persons who are not formally accused of any offence can be compelled to be witnesses against themselves by use of torture or coercion which is not legally permissible.

18. In *D.K. Basu Vs. State of West Bengal*, Hon"ble Supreme Court observed para 9 of Cri LJ :

The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock-ups, strikes a blow at the of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society.

19. The Hon"blc Supreme Court further observed paras 13, 14 and 16 of Cri LJ :

Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite the pious declaration, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

In England, torture was once regarded as a normal practice to get information regarding the crime, the accomplices and the case property or to extract confessions, but with the development of common law and more radical ideas imbibing human practices were initially discouraged and eventually almost done away with, certain aberrations here and there notwithstanding. The police powers of arrest, detention and interrogation in England were examined in depth by Sir Cyril Phillips Committee Report of Royal Commission on Criminal Procedure" (Command Papers 8092 of 1981). The report of the Royal

Commission is, instructive.... The power of arrest, interrogation and detention has now been streamlined in England on the basis of the suggestions made by the Royal Commission and incorporated in Police and Criminal Evidence Act, 1984 and the incidence of custodial violence has been minimised there to a very great extent.

20. Regarding the fundamental rights particularly Article 21 of the Constitution the Hon"ble Supreme Court observed para 17 of Cri LJ :

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.

21. Regarding growing incidence of torture the Hon"ble Supreme Court observed para 18 of Cri LJ :

However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and" death in custody has assumed such alarming proportions that it is affecting the credibility of the of law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

22. Regarding importance of fundamental rights guaranteed by Articles 21 and 22(1) of the Constitution the Hon"ble Supreme Court observed para 22 of Cri LJ :

The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These

questions touch the spinal cord of human rights jurisprudence, the answer, indeed has to be an emphatic "No". The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

23. Regarding methods adopted by investigating agencies the Hon''ble Supreme Court observed at page 16 (of JT) : at pp. 750-51 of Cri LJ of the report :

Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest and the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometimes resulted into his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death as the police lock-up where generally torture of injury is caused is away from the public gaze and the witnesses are either police men or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear of retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are incharge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. State of M.P. Vs. Shyamsunder Trivedi and Others, is an apt case illustrative of the observations made by us above.

24. At page 18 (of JT) : at p. 752 of Cri LJ of the report Hon''ble Supreme Court reproduced the observations made by Hon''ble Mr. Justice Anand. His Lordship observed :

The Courts are also required to have a change in their outlook and attitude particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the Majesty of Law has prevailed.

25. In what manner the abuse of the power by investigating agencies can be

checked was also considered by the Hon''ble Supreme Court and at page 19 (of JT) : at p. 753 of Cri LJ of the report the Hon''ble Supreme Court observed :

How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree methods during interrogation.

Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence bureau R.A.W., Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well.

26. At page 22 (of JT) : at pp. 754-55 of Cri LJ of the report the Hon''ble Supreme Court moved as many as 11 directions which are reproduced as below :

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter-signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation, centre or other lock up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed" of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend or the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) the arrestee should, where he so requests be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) the arrestee should be subjected to medical examination by a trained doctor every 48 hours of his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation though not throughout the interrogation.

(11) A police control room should be provided at all districts and State head quarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

In para 37 of the report Hon"ble Supreme Court pointed out that failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of Court and the proceedings for contempt of Court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

27. In paras 38 and 39 of the report Hon"ble Supreme Court gave further directions in following words :

The requirements, referred to above flow from Articles 21 and 22(1) of the

Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the Courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

28. A bare perusal of direction No. 10 shows that even those persons who have been arrested by the police or other investigating agency on charge having committed bailable offence are to be permitted to meet their lawyer during interrogation though not throughout the interrogation.

29. In view of the law laid down by the Hon"ble Supreme Court in D.K. Basu Vs. State of West Bengal, and the directions given by the Hon"ble Supreme Court in that case, even those persons who are arrested are entitled to meet their lawyer during interrogation and this right flows from Article 21 of the Constitution. The object behind permitting the persons of the lawyer during the interrogation of a person is to create transparency in the manner and method of interrogation and to enable the person who is being interrogated to take appropriate steps according to law for the purpose of protecting himself from any torture or other act which may be performed by the interrogating officer for the purpose of extracting any information against the violation of that person. The counsel may not only be a witness of the manner and method of interrogation and the treatment which is meted out to the person who is interrogated, he may take appropriate steps for the purpose of protecting the person if the right to life and personal liberty of that person is imperilled by any act or omission of the investigating officer or of any other person acting under the direction of investigating officer. When even the persons who have committed offences are entitled to above mentioned right by virtue of fundamental right conferred by Article 21 of the Constitution, there is no reason why a person who has not been formally accused of any offence should not be entitled to the same protection of his right to life and personal liberty. I, therefore, hold that in view of the Judgment of the Hon"ble Supreme Court in D.K. Basu v. State of West Bengal, 1977 Cri LJ 743 (supra), the petitioner is entitled to protection of his life and personal liberty and, therefore, he is entitled to the direction that during his interrogation his counsel may remain present for a reasonable time so that so that if any torture is used by the investigating officer against the petitioner, appropriate action for protecting the life and personal liberty of the petitioner may be taken.

30. For reasons mentioned above the submission of the learned Counsel for the petitioner that accused (non-petitioner) is not entitled to meet his lawyer during interrogation is not correct. Question No. 1 is answered accordingly.

31. In Re Questions Nos. 2 and 3 so far as powers of jurisdiction of special Judge, NDPS cases is concerned, under the NDPS, Act the special Judge can take cognizance of the offence without committal of the case by the Magistrate. He

has been conferred with the powers to pass orders u/s 167, Cr.P.C. also. Therefore, it must be said that in respect of the investigation conducted by the police officer or the officer of Narcotic Control Bureau in respect of offence of which cognizance can be taken by the special Judge, the special Judge can exercise the same jurisdiction which is vested under the Criminal Procedure Code in the Magistrate competent to take cognizance of the offence u/s 190, Cr.P.C. It is true that the functions of the police are not overlapping and they are complementary to each other and, therefore, as far as possible the Magistrate/Court should avoid interfering with the functions of the police/investigating agency. But it cannot be ignored that under the Criminal Procedure Code Magistrate has been vested with certain powers which are intended to prevent the abuse of the powers of the police and other investigating agency. As soon as the first information report about a cognizable offence is registered, a copy thereof is required to be sent to the Magistrate/Court competent to take cognizance of the offence. In the matter of investigation Section 156(3), Cr.P.C. empowers Magistrate/Court competent to take cognizance to issue directions to the officer-in-charge of the police station for conducting investigation. Even after submission of report u/s 173, Cr.P.C. the Magistrate/Court empower to take cognizance may direct further investigation in the case. Persons who apprehended their arrest on a charge relating to non-bailable offence, are entitled to move application for bail u/s 438, Cr.P.C. before the High Court and the Court of Sessions and if any person is arrested as soon as his arrest takes place he becomes entitled to the fundamental right guaranteed by Article 22(2) of the Constitution. He is to be informed about the grounds of his arrest. He can make a prayer to the officer who has arrested him to release him on bail u/s 437, Cr.P.C. and after his production before the Magistrate under Article 22(2) of the Constitution the person can exercise his right to be defended by a legal practitioner of his choice by making such submissions as he deems fit. The very object of his production before a Magistrate under Article 22(2) of the Constitution is to ensure that an independent authority exercising judicial power applies its mind to his case without any delay (vide *Re In the Matter of Madhu Limaye and Others*, These provisions clearly indicate that so far as lives and liberties of persons (including the accused persons) are concerned, law has vested in the Magistrate/Court competent to take cognizance u/s 190, Cr.P.C, ample powers so that the lives and liberties of the persons may not be unnecessarily or illegally threatened by any act or omission by the investigating agency.

32. In view of these facts the special Judge who had jurisdiction to take cognizance of the offence u/s 190, Cr.P.C. read with Sections 37/38 NDPS Act, cannot be said to be wanting in jurisdiction to give the impugned directions to the officers of the Narcotic Control Bureau. Question No. 2 is answered accordingly.

33-34. It may also be pointed out that in this case non-petitioner No. 1 had surrendered before the Special Judge on 20-1-1997 and he was released on bail

on 22-1-1997. A person who is released on bail under the orders of the Court does not become totally free to his release on bail, his release on bail is conditional, his bail may be cancelled u/s 439, Cr.P.C. and he may be recommitted to custody if the surety becomes insufficient. During period he is released on bail he is bound to comply with the directions which may be given by the Court at the time of granting bail under Sections 437,438 or 439, Cr.P.C. It is, therefore, proper to say that the person who is released on bail is not totally free person; he continues to be in the custody of the Court which has released him on bail. In view of this legal position the special Judge NDPS, Act cases had the jurisdiction to take every legal step to protect the life and liberty of non-petitioner No. 1 who had surrendered on 20-1-1997 and was released on 22-1-1997. Question No. 3 is answered accordingly.

35. For reasons mentioned above, it must be said that non-petitioner No. 1 was entitled to protection of his life and personal liberty if the same was threatened by any act or omission of the investigating officer and the learned special Judge was not wanting in jurisdiction in giving a direction to the effect that during interrogation his counsel should be permitted to remain present. In any case, in view of the directions given by the Hon"ble Supreme Court in D.K. Basu Vs. State of West Bengal, every person is entitled to meet his counsel during interrogation, even without the order of the Magistrate or of the Special Judge, as a duty has been imposed on all investigating agencies to comply with the directions given by the Supreme Court.

36. However, the words in which direction has been given by the learned Special Judge are likely to create some misunderstanding. It is not as if the interrogation cannot be done if the counsel for non-petitioner No. 1 does not appear in spite of notice to him. Besides the presence of the counsel during entire interrogation is not required according to the direction No. 10 given by Hon"ble Supreme Court. It is, therefore, necessary to make some amends in the direction given by the learned Special Judge so as to avoid misunderstanding. To that extent the petition is partly allowed and it is hereby directed that non-petitioner No. 1 may be interrogated after giving him sufficient notice of the date, time and place so that he may inform his counsel and request him to be present during interrogation. If the counsel for non-petitioner No. 1, after service of above mentioned notice to non-petitioner No. 1, appears, he may be permitted to meet non-petitioner No. 1 during his interrogation, once during each hour of interrogation. He will not be entitled to remain present in the room where non-petitioner No. 1 may be interrogated during the entire interrogation. Nothing will, however, prevent the counsel for non-petitioner No. 1 from remaining present outside the room where non-petitioner No. 1 may be interrogated.,

37. The petition is decided accordingly.