CHRI 2020

JUDICIAL SCRUTINY AT FIRST PRODUCTION OF ARRESTED PERSONS

A Handbook on the Role of Judicial Magistrates

CHRI
Commonwealth Human Rights Initiative
working for the *practical* realisation of human rights in the countries of the Commonwealth

Commonwealth Human Rights Initiative

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CHRI seeks to promote adherence to the Universal Declaration of Human Rights, the Commonwealth Harare Principles and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights.

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A Handbook on the role of Judicial Magistrates

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FOREWORD

The Role of Judicial Magistrates at First Production is a 'must read' for every law student, young lawyer and Magistrate. Legal aid lawyers and their clients particularly will benefit from this booklet. I wish more such handbooks are published in different disciplines of law for the benefit of all of us.

Stylistically simple but extremely informative, this handbook not only explains the obligations of a Magistrate when an accused person is produced before her or him but also informs the accused person of the available constitutional rights. This is vital for the reason that our Constitution values human rights and personal liberties and places them on a high pedestal. Unfortunately, due to extremely heavy caseloads, some Magistrates and lawyers seem to treat the first production of an accused as a more or less routine matter. That should not be because sending an accused to police custody or judicial custody for the asking is not only constitutionally impermissible but also has very serious consequences as far as the accused person is concerned. The accused suffers not only a stigma in society but also that person's psyche gets impacted. Spending even a few hours in police lock-up or an overcrowded jail is certainly not pleasant and anybody would wish to avoid having to undergo such a traumatic experience.

Our Supreme Court has made tremendous strides over the last more than 40 years in various aspects of criminal justice jurisprudence. Humanity and compassion have been introduced gradually but effectively with the law having been laid down that prisoners also have fundamental rights, except for the freedom of movement - but even that is being sympathetically re-considered with the concept of open prisons and liberal grant of parole. But, this is only the second step - the first step being the detention and arrest of a person and production before a Magistrate. The handbook concentrates on this first step which includes, among other things, the right to know the grounds of detention, the right to be released on bail in the event of arrest for a bailable offence, and the right to a medical check-up. Often, the family of a person is not informed of the arrest of a person even though it is the obligation of the arresting officer to do so. These basic requirements are sometimes forgotten, while they should not be. The value of this booklet lies in the dissemination of this information to all concerned of the basic minimum rights recognised by a society governed by the rule of law.

The Commonwealth Human Rights Initiative (CHRI) and its team of dedicated professionals must be complimented for this publication which will surely be a constant reminder for the preservation and protection of basic human rights recognised by our Constitution. It is often said that eternal vigilance is the price we pay for liberty.

Madan B. Lokur,
Retired Justice of the Supreme Court of India

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This handbook would not have been possible without the support, collaboration, and expertise of colleagues, experts, and institutions.

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CHRI gratefully acknowledges the extensive review of drafts and enriching feedback received by Advocate Harsh Bora, Professor Mrinal Satish, and faculty members of the National Judicial Academy, Dr. Amit Mehrotra and Mr. Rahul Sonawane.

It was our fortune to be able to conduct training sessions with judicial officers at the West Bengal State Judicial Academy and the National Judicial Academy while working on this handbook, which in turn enabled us to sharpen and hone the practical suggestions to magistrates prescribed in it, and gain knowledge from the perspectives of judicial officers themselves. We thank all those who played a part in enabling these training sessions to take place, particularly at the West Bengal Judicial Academy and the National Judicial Academy.

Devika Prasad has led the design and delivery of the training sessions with assistance from Pavani. Amrita Paul and Madhurima Dhanuka have pursued CHRI's engagement with judicial magistrates in pressing for effective oversight and protection of constitutional rights of arrested persons. Their abiding support, technical input, and energy to facilitate training sessions has contributed greatly in finalising the handbook.

Finally, we thank Sanjoy Hazarika for his constant support and guidance.

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PURPOSE OF THE HANDBOOK

This handbook aims to outline the role of a Judicial Magistrate[1] during the first production of arrested person/s. First production refers to the constitutional right and necessary procedure that every arrested person is to be produced before the nearest Magistrate within a period of 24 hours of arrest. This is the first interface between an arrested person and a Magistrate from the time of arrest, casting the overarching duty on the Magistrate to safeguard the constitutional and statutory rights of the arrested person.[2] It also presents the first opportunity for independent scrutiny of police actions. The Magistrate is required to scrutinise the circumstances around the arrest and determine the need for ordering further detention. At this stage, the procedure under Section 167 of the Criminal Procedure Code, 1973 (CrPC) is activated. In this critical role, the Magistrate must perform several duties that are inter-linked with each other. S/he must scrutinise if the grounds for arrest are legally justifiable, the correct procedures were followed, the arrested person is safe and secure in custody, and that the arrested person was informed of, and allowed to, access legal rights that are due to him/her. To actualize this scrutiny, it is necessary for the Magistrate to directly interact with the arrested person/s.

This handbook elucidates the Magistrate's role in terms of (i) police oversight, (ii) upholding the rights of arrested persons, and (iii) exercising judicial scrutiny to justify the need to further detain arrested persons. Magistrates can identify procedural lapses and/or rights violations and pull up police officials for these breaches. The observations of the Magistrate during first production are crucial to hold police officials who resort to wrongful practices and violate legal standards accountable. Thus, the Magistrate's scrutiny at first production is crucial both to safeguard legal rights as well as to lay the ground for robust adjudication of each case.

This handbook lays down simple and practical strategies to assist Magistrates to carry out his/her duties at first production effectively. It presents a compilation of a mandatory checklist of duties and responsibilities of the Magistrate at first production of an arrested person. This list derives from judicial duties mandated by statute and landmark Supreme Court and High Court orders and judgments. The Handbook also provides easy reference to relevant recommendations by the National Police Commission and the Law Commission of India, and important precedents of international law.

International Law:

The right to liberty and right against arbitrary detention are found in the Universal Declaration of Human Rights (UDHR),[3] International Covenant on Civil and Political Rights (ICCPR),[4] UN Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment[5] and United Nations Standard Minimum Rule for Non-Custodial Measures (The Tokyo Rules).[6]

1 Under the Code of Criminal Procedure, any reference to the court of a judicial magistrate in a metropolitan area is to the court of the Metropolitan Magistrate of that area.

2 This has been provided under Article 22 of the Constitution of India and Sections 41, 41A, 41B, 41C, 41D, 50, 50A, 54, 56, 57 of the Criminal Procedure Code, 1973.

3 Universal Declaration of Human Rights, adopted by the United Nations General Assembly at its third session on 10 December 1948.

4 International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly by GA Res. 2200A(XXI) on 16 December 1966.

5 United Nations Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly by GA Resolution 43/173 on 9 December 1988.

6 United Nations Standard Minimum Rules for Non-custodial Measures, adopted by the United Nations General Assembly by GA Resolution 45/110 on 14 December 1990; 268th Law Commission Report, pg. 16.

JUDICIAL SCRUTINY OF REQUISITE GROUNDS AND PROCEDURES OF ARREST

To root out the police practice of arbitrary arrests of persons accused of committing cognizable and non-bailable offences, the Supreme Court has progressively laid down mandatory guidelines to be followed at the time of arrest. The intent through these judgements is to standardise, and importantly, condition the law on arrest, by requiring sufficient justification for arrest. The Court repeatedly highlights the need to show the grounds of arrest as required under Article 22(1) of the Constitution of India and Section 41 of CrPC.

Relevant Provisions:

Articles 20, 21 and 22 of the Constitution of India, 1950.

Sections 41, 41A, 41B, 57, and 167 of the Code of Criminal Procedure, 1973.

Special procedures in cases of offences up to seven years

In developing the law on arrest, the Supreme Court has reiterated the increased checks on the police's powers to arrest in cases involving offences up to seven years, brought through legislative amendments to the statute. In this regard, the specific duties of every judicial Magistrate at first production are highlighted below.

Verifying the arrest memo

Section 41B of the CrPC mandates that the police must prepare a memorandum of arrest/arrest memo while arresting a person. The arrest memo must contain the arrested person's name, the signature of at least one independent witnesses (either a relative or a "respectable member of the locality where the arrest is made"), the time, place and date of the arrest, the name of the arresting officer, and the signature of the arrested person.

The police must produce the arrest memo at first production. The Magistrate must scrutinize it to identify any discrepancies. If the contents of the arrest memo seem to be in order, the Magistrate must endorse the documents. In case the arrest memo is absent, or there are discrepancies in the memo, the Magistrate can hold the arrests invalid. Moreover, it is also necessary for the police to furnish the general diary[7] to the Magistrate during first production.[8] This allows the Magistrate to cross-check the recording of the basic details of the arrest by the police. The legal provisions on preparation of an arrest memo must be scrupulously followed by the police and scrutinized by the Magistrates.

Joginder Kumar v. State of UP and Ors.[9]

Background:

In January 1994, Joginder Kumar, a young lawyer aged 28 was called to the office of the Senior Superintendent of Police [SSP], Ghaziabad for assisting with an inquiry. At the time, Joginder was

7 The general diary is an important register to be maintained in every police station in which everything that takes places in the police station is to be properly recorded. Across states, the general diary is called by different names, like station diary or daily diary.

8 R.K. Nabachandra Singh v Manipur Administration 1964 CriLJ 307; Chadayam Makki v State of Kerala 1980 CriLJ 1195 (Ker)

9 1994 SCC 260.

accompanied by friends and his brother. The police told them that Joginder would be released in the evening. Joginder was taken to a police station with the assurance that he would be released the next day. He was not released the next day since the police wanted his help in further queries. Joginder's family visited the police station on the third day and found that he had been taken to an undisclosed location. He was illegally detained over five days.

Joginder's family filed a habeas corpus writ petition with the Supreme Court to demand his whereabouts. The Court issued notices to the State of Uttar Pradesh and to the SSP Ghaziabad to immediately produce him and show cause for detaining him for five days without a valid reason; why his detention was not recorded by the police in its diary; and why he was not produced before a magistrate.

Supreme Court:

The Court rejected the police version that Joginder was cooperating with them out of his own free will. It said "the law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties of the single individual and those of individuals collectively…."

The Court highlighted the 3rd Report of the National Police Commission which identified wrongful use of arrest powers as one of the chief sources of corruption in the police and that nearly 60% of the arrests made by police officers are unnecessary and unjustified. Strongly opposing the practice of carrying out indiscriminate arrests, the Court said that an arrest cannot be made simply because it is lawful for a police officer to do so. "The existence of the power to arrest is one thing… the police officer must be able to justify the arrest…"

"Arrest and detention in police lock up cause incalculable harm to the reputation and self-esteem of a person." Therefore, arrests should not be made in a routine manner on a mere allegation that a person has committed an offence. If police officers do not wish to face legal or disciplinary action, they should see that arrests are made only after reaching a "reasonable satisfaction" about the complaint being true and the case being bonafide. Even then, the Court said that the officer making the arrest must function under a "reasonable belief" about the person's complicity in committing the offence and the need to effect an arrest.

Supreme Court Directives:

a. Arrests must not be made in a routine manner. The arresting officer must be able to justify its necessity on the basis of some preliminary investigation.
b. The accused should be allowed to inform a friend or relative about the arrest and where s/he is being held. The arresting officer must inform the accused when s/he is brought to the police station of this right and is required to make an entry in the diary as to who was informed.
c. It is the duty of the Magistrate before whom the arrested person is produced to satisfy her/himself that the above requirements have been complied with.

Amendments to Section 41 of CrPC

In 2009, Section 41 of the CrPC was amended to ensure that there are reasonable grounds for arresting a person for allegedly committing a cognizable offence without an order or warrant from a Magistrate. The law requires the police officer making the arrest to list reasons for such arrest as stipulated under Section 41(1). The provision further states that, except for reasons mentioned under Section 42 of CrPC, no person accused of the commission of a non-cognizable offence shall be arrested without the warrant or an order of the Magistrate.

Further, Section 41A (Notice of appearance before police officer), 41B (Procedure of arrest and duties of officer making arrest), 41C (Control room at districts) and 41D (Right of arrested person to meet an advocate of his choice during interrogation) were added to the law.

These additions strive to ensure that arrests are not made mechanically, and notice of appearance is served for requiring a person's presence for questioning. At the same time, where arrests are made, this amendment ensures that the actions of the police are transparent and safeguard the constitutional rights of the arrested person.

Arnesh Kumar v. State of Bihar[10]

Background:

In October 2013, the Petitioner apprehended his arrest under Section 498-A of the Indian Penal Code (hereinafter referred as IPC), 1860 and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided under Section 498-A is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided under Section 4 of the Dowry Prohibition Act is two years accompanied with fine. The Appellant preferred an application for anticipatory bail which was earlier rejected by the Sessions Judge and thereafter by the High Court. Therefore, an appeal was filed before the Supreme Court.

Supreme Court:

An accused has a constitutional right to be produced before the Magistrate within 24 hours of his arrest excluding the time necessary for the journey.[11] An accused can be detained beyond 24 hours only when it is authorised by the Magistrate under Section 167 of the Code. The judicial scrutiny of a Magistrate begins when an arrested person is produced before him/her for authorising detention. Firstly, the Magistrate must address whether specific reasons have been recorded for arrest and the relevance of the reasons. Secondly, s/he must check whether a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated are attracted. The detention order must reflect on the reasons for ordering the detention. The Magistrate must ensure that it is never based upon the *ipse dixit* of the police officer. For this, the police officer must furnish the facts, reasons and materials on the basis of which s/he conducted the arrest. These details shall be perused and recorded while authorising detention.

In other words, when an accused is produced before the Magistrate, on scrutiny of the documents, the Magistrate must be satisfied that condition precedent for arrest under Section 41 exists.

Supreme Court Directives:

1. All the State Governments to instruct police officers not to automatically arrest when a case under Section 498-A of IPC[12] is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 of the Code;
2. All police officers be provided with a check list specified under Section 41(1)(b)(ii);
3. The police officer shall forward the filled check list and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

10 AIR 2014 SC 2756.

11 Article 22(2), Constitution of India, 1950 and Section 57, Code of Criminal Procedure, 1973.

12 The Court further added its directions in this judgment shall not apply only to cases under Section 498-A (IPC) but to all cases where the offence is punishable up to seven years.

4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer and only after recording its satisfaction, authorise detention;
5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for reasons to be recorded in writing;
6. Notice of appearance in terms of Section 41A of the Code be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;
7. Failure to comply with these directions shall apart from rendering the police officers concerned liable for departmental action, also be punishable for contempt of court to be instituted before High Court having territorial jurisdiction.
8. Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

Note: In compliance with directive 2 in Arnesh Kumar, Kerala Police Headquarters issued a checklist that the police must fill up and furnish to the Magistrate while producing arrested persons. As a good practice example, the circular, along with the checklist are annexed.

Jagnisha Arora vs. State of Uttar Pradesh and Another[13]

Background: The petitioner filed a writ petition under Article 32 of the Constitution of India challenging the arrest and incarceration of her husband – Prashant Kanojia. Uttar Pradesh Police initiated proceedings against Prashant Kanojia under Sections 500 and 505 of the Indian Penal Code, 1860, read with Section 67 of the Information Technology Act for sharing a tweet commenting on the Chief Minister's personal life. The jurisdictional Magistrate passed an order of remand for 14 days. The respondents argued that the petitioners should have challenged the jurisdictional Magistrate's order at the High Court according to the CrPC before approaching the Supreme Court.

Supreme Court: In ordering bail, the Court held that the arrest was unnecessary for the alleged offence. It expressed that the fundamental rights guaranteed under Article 19 and 21 are non-negotiable.

On Article 32, the Court stated that as a matter of self-imposed discipline and the mounting pressure, litigants are generally directed to approach the High Court in cases of violation of fundamental rights. But, in a case of glaring deprivation of liberty, *Article 32, which is itself a fundamental right cannot be rendered nugatory.* The Court held that it cannot sit back on technical matters if a person is being remanded to custody for 14 days for sharing posts or tweets on social media. Under its powers under Article 142 of the Constitution, it can mould the reliefs to do complete justice.

The Court directed that Prashant Kanojia must be released on bail immediately according to the satisfaction of the Chief Judicial Magistrate.

13 Writ Petition(s) (Criminal) No.s. 164/2019.

National Police Commission recommendations on conditions when arrest is justified during investigation of a cognizable offence:[14]

i. If the case involves a grave offence like murder, dacoity, robbery, rape, etc. and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims;
ii. If the accused is likely to abscond and evade the process of law;
iii. If the accused shows violent behaviour and is likely to commit further offences unless his movements are brought under restraint; and
iv. If the accused is a habitual offender and he is likely to commit similar offences again unless kept in custody.

268th Law Commission Recommendations:

Pre-trial risk assessment is a method of ascertaining whether an arrest must be made. It is the determination of qualitative value of risk related to a pretrial defendant and his specific circumstances.[15] This balances the constitutional rights of the accused with the risk he/she poses, using effective supervision and strategic interventions. In the risk assessment process the arrested person is brought to the station where, after identification, booking, search, questioning, and fingerprinting, community ties are investigated along with a set of pre-determined factors. If the accused is found to be a "good" risk, the officer is authorized to release him on a personal bond with or without sureties. Additionally, this procedure saves the time of police, investigating authorities and Court and minimises the use of detention facilities.

Factors that must be considered when making a risk assessment are:

- Whether there are reasonable grounds for believing that s/he has committed the offence;
- Nature and gravity of the offence charged;
- Severity of the potential punishment if the trial results in conviction;
- Preponderance of evidence;
- The danger of absconding;
- The character, means and standing of the accused;
- Danger of the alleged offence continuing or being repeated if bail is granted;
- Danger of witnesses or evidence being tampered with;
- Community ties;
- Opportunity for the accused to prepare his defence;
- Whether there is any possibility of the trial being delayed;
- Prior convictions and other criminal antecedents; and
- The health, age and sex of the accused.

International Law:

The provisions on arrest and bail are made to manifest the letter and spirit of Article 9 (3) and (4) of the ICCPR. The Convention provides that pre-trial detention must be the exception and any person whose liberty is curtailed due to arrest or detention must be brought before a court without delay to review the lawfulness of his detention and if required, the person must be released.

14 Third Report of the National Police Commission 31 (1980).
15 C. Macmalian C., State of The Science of Pretrial Risk Assessment (Pretrial Justice Institute, 2011).

Shri Subhash Namdev Desai and Ors. v. The State of Maharashtra[16]

Background:

In May 2011, a complaint was registered against the Petitioners under Sections 323 and 504/ 34 of IPC. Although the offences were non-cognizable and bailable, the police showed the arrests of the Petitioners as preventive action under Section 151 of the CrPC. Subsequently, the Petitioners were first produced before the Magistrate nearly 29 hours after the arrest and certain infirmities were present in the station diary. The Petitioners therefore claimed a compensation of Rs. 20,000 each for violations of the D.K. Basu Guidelines.

Bombay High Court:

The memorandum of arrest was not prepared as per the provision. Although a register was maintained by the police station to note down details regarding arrests being made, the preparation of memorandum of arrest is mandatory. Since the directions issued by the Apex Court flow from Articles 21 and 22 of the Constitution of India, these provisions were held to be violated.

The impropriety of falsely showing arrests as preventive action, delayed production before the Magistrate, and untruths in documentation, such as over-written entries, led the Court to award compensation to the arrestees on the following grounds:

- Arrest without complying with the directions issued by the Supreme Court in D.K. Basu
- Illegal arrest since Section 151 of CrPC was not satisfied
- The Petitioners were illegally detained for more than 8 hours in police lock-up

The State Government was also directed to hold an enquiry into the conduct of the police officers by appointing an appropriate higher officer. If any dereliction of duty was found, disciplinary action was directed to be instituted. The State Government was directed to compensate the victims and it was open to the State Government to initiate appropriate proceedings and recover it from the erring police officers.

Quantum of Compensation: The compensation was quantified at Rs. 20,000 each because only one non-cognizable offence was registered against each Petitioner.

Laxmi Sardar and Ors. v. State of West Bengal[17]

Background:

This appeal was filed against the order of conviction under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS). The Appellants were arrested for the possession of certain prohibited substances under the said Act. They contended that there were infirmities in the memorandum of arrest which did not contain the signatures of independent witnesses.

West Bengal High Court:

In acquitting the Appellants, the court held that the mandate under Section 41B of CrPC must be

16 2013(4) Bom CR (Cri) 207.
17 (2015) 3 CALLT 623 (HC).

followed by the authorities while effecting an arrest. Where there are fallacies in the memorandum of arrest, it should not be accepted as a valid piece of documentary evidence. The Trial Court had erred in accepting this as proof beyond doubt for the arrest.

Jamal Ali Mondal and Ors. v. State of West Bengal[18]

Background:

The Appellants were convicted under Section 21C of NDPS Act, 1985. The arrest memo contained discrepancies regarding the time of arrest and articles seized during the arrest. Further, the general diary consisted of over-written entries.

West Bengal High Court:

Due to the infirmities in the investigation, the Court acquitted the accused. The authorities had prepared the First Information Report (FIR) at 21.20 hours, but the arrest memo was prepared prior to the drawing up of the FIR at 20:30 hours. This discrepancy raised a grave suspicion regarding the legality of arrest. The police authorities also admitted to the over-writing in the General Diary. The arrest memo was not produced in the first production and did not bear the endorsement of the Court regarding the production.

Note:
The absence of arrest memo,[19] lack of credibility in the arrest memo due to its preparation by second hand information,[20] production of incomplete arrest memos,[21] and absence of signatures of independent witnesses in the arrest memo[22] are frequent occurrences. However, these issues have not been dealt with elaborately in the appeal stage although they have contributed to the acquittal of the accused for lack of credible evidence.

18 2006 CriLJ 1981.
19 Chhunu Singh Thakur v. State of West Bengal, C.R.A. No. 253 of 2008.
20 Haniph Seikh v. The State of West Bengal, 2015 (2) Crimes 633 (Cal).
21 Md. Tahur & Ors. v. State of West Bengal, (2015) 4 CALLT 591 (HC).
22 Rahul Chakraborty v. Union of India and Swapan Mishra v. State of West Bengal, (2014) 4 CALLT 463 (HC); Also, Sukdeep Singh alias Deepu v. State of West Bengal, (2009) 3 CALLT 52 (HC).

Duties of the Magistrate:

- Check that the arrest is legal, in accordance with the law and all the constitutional and statutory rights have been protected
- Ask for the checklist from the police; scrutinize it carefully to ensure all the necessary documents have been produced
- If the accused is a woman, ask if a female officer was present to carry out the arrest and search of the accused, and there was no breach of the special procedure to be followed when arresting a woman (as per Section 51; and sub-section (4) and proviso to Section 46 of CrPC)
- Check whether specific reasons have been recorded for arrest, the relevance of reasons and whether a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated are attracted for grant of remand
- If the police are seeking remand, clearly record reasons for whether detention is justified or not
- Examine the case diaries prepared by the police to seek corroboration of the grounds of arrest and reasons for seeking remand
- If the arrest does not satisfy the requirements of CrPC provisions, refuse further detention and release the person on bail
- Check that the arrest memo is among the documents produced by the police
- If the arrest memo is absent, censure the police officer present and record reasons for its absence
- Place on record that the arrest memo is absent and question the legality of the arrest and any further detention if requested by the police
- If available, scrutinize the arrest memo carefully to check whether all the mandated information has been collected by the police, including the signature of the arrested person
- Verify with the arrested person if the details recorded in the arrest memo are accurate
- Endorse the arrest memo as seen by the Magistrate after ensuring it contains all the necessary information
- If there are faults or gaps in the arrest memo, clearly mark and record such discrepancies. Consider the appropriate action to be taken against the police officer

Duties of the Police Officer(s):

- Furnish the facts, reasons and its conclusions for arrest to the Magistrate
- Furnish the checklist (specified in Arnesh Kumar) to the Magistrate
- Maintain the relevant details of the arrest in the general diary and arrest memo
- Produce all relevant diary entries, First Information Report, medical report if available, and arrest memo to the Magistrate at first production

PRODUCTION BEFORE THE MAGISTRATE WITHIN 24 HOURS

Accused persons have a constitutional and statutory right to be physically produced before a Magistrate within 24 hours of the arrest[23]. First production of the arrested person must be in person and cannot be done through video conferencing.

Relevant Provisions:

Article 22 of the Constitution of India, 1950.

Sections 57 and 167 of the Code of Criminal Procedure, 1973.

Chiguluri Krishna Rao, President, The Bezawada Bar Association v. Station House Officer, II Town Police Station and Ors.[24]

Background:

P. Sai Babu, an advocate, was arrested in June 2005 under Section 332 of IPC, which is a bailable offence. After the arrest certain members offered bail at the police station, but the request was refused by the police officer. He was produced before the Magistrate who did not grant him bail on the ground that the accused was brought to him at an odd hour. The Magistrate asked the police to produce the accused before him on the next working day, which was after two days due to holidays. This was the usual practice in Andhra Pradesh. The Magistrate cited lack of facilities and infrastructure at his residence and lack of personnel to verify solvencies and prepare bail bonds. He also denied that surety had been offered at his residence. Subsequently, the Bezwada Bar Association wrote a letter to the Andhra Pradesh High Court which was admitted as a writ petition.

Andhra Pradesh High Court:

As per the Constitution and CrPC, any difficulties which the police or the Magistrate might be facing cannot be a reason for violating the mandate of Article 22 of the Constitution. Further, absence of requisite infrastructure is no defense for defeating fundamental rights. Arrested persons are invariably produced before the Magistrate at the end of 24 hours. Even if an accused is arrested at any point of time, during 24 hours he must be produced during working hours before the Magistrates. But the common practice is that the police waits for 23 hours and 45 minutes and utilizes the last 15 minutes for going to the Magistrate.

Article 22 of the Constitution is not being followed in spirit, but in letter. The language of Article 22(2) prescribes that immediately after arrest, the accused must be produced before the Magistrate, but where there are sufficient reasons, the police may delay production but in any case, not beyond 24 hours. It emphasized that police officers concerned must produce the accused immediately after arrest, before the Magistrates and should not wait in all cases for 23 hours and 45 minutes.

The Court expressed its disappointment with the State for not legislating the D.K. Basu guidelines and

23 Iqbal Kaur Kwatra v. The Director General of Police, Rajasthan State, Jaipur and Ors, 1996 CriLJ 2600.

24 2006 (1) ALT 259.

stated that suspecting this inaction, the provisions for departmental action and contempt proceedings against police officers were introduced. The State Government has no option but to produce the detenus within 24 hours before the Magistrates. Similarly, when a detenu is produced before the Magistrate, the matter must be entertained and appropriate orders for remand or bail should be passed. It is impermissible for a Magistrate to ask a person to come after three days to seek bail in a bailable offence due to vacations.

Section 436 of CrPC is clear that the choice to leave the Police Station or the Magistrate's Court on bail is with the accused, and not with the Magistrate or the Police.[25] If the accused offers bail during his custody, he has to be let off by the Court or the Police on a personal bond for appearance if not on sureties.

Law Commission Report:
Section 436 of CrPC is mandatory in nature and the court or the police has no discretion in the matter. Any person arrested for a bailable offence willing to provide bail must be released.[26] The only discretion available with the police is to release the accused either on a personal bond or with sureties. If the accused is unable to provide bail, the police officer must produce the accused person before the Magistrate within 24 hours of arrest as specified under Section 57 of CrPC. Subsequently, when the accused is produced before a Magistrate and is willing to furnish bail, the Magistrate must release the accused person and the only discretion available is to release either on personal bond or a bond with sureties. The Magistrate cannot authorize detention of a person who is willing to furnish bail with or without sureties even for aiding the investigation. Further, the Magistrate cannot issue an order exacting a person so released to appear before the police to aid in the process of investigation of the alleged offence.

Duties of Magistrate:
- Check the date and time of arrest listed in the arrest memo, and verify with the arrested person
- Verify if the production is within 24 hours of arrest
- Mandate the physical production of the accused during first production
- Note down the exact time of production in court while endorsing the arrest related documents
- If the production was after 24 hours of arrest, order the initiation of departmental proceedings against police officials

Duties of Police Officers:
- Produce the arrested persons physically before the Magistrate within 24 hours

25 Also, Rasiklal v. Kishore S/o Khanchand Wadhwani (2009) 4 SCC 446.
26 Sant Prakash v. Bhagwandas Sahni, 1969 MLW (Cri) 88.

SAFEGUARDS AT ARREST TO PREVENT CUSTODIAL VIOLENCE

Arrest safeguards have been framed with a three-fold purpose, 1) to curb custodial torture and deaths, 2) to hold arresting officers accountable for their actions, and 3) to protect the rights of accused persons.

Relevant Provisions:

Article 21 of the Constitution of India, 1950.

Section 41, 41B, 54, 156, 190, 200 and 202 of the Code of Criminal Procedure, 1973.

Arrested persons can inform the Magistrate about being subjected to custodial torture. Magistrates are encouraged to directly engage with every arrested person to find out that they are not being subject to custodial torture. The Magistrate has the discretion to decide what action to take on a complaint of alleged torture. S/he may either order an FIR to be registered and investigation to be conducted by the police, or may take cognizance of the complaint, and proceed to the examination of the complainant/witnesses on oath.

D.K. Basu v. State of West Bengal[27]

Background:

In August 1986, D.K Basu – former Executive Chairman of Legal Aid Services, West Bengal - wrote a letter to the Chief Justice of India, saying that torture and deaths in police custody are widespread and efforts are often made by the authorities to hush up the matter. Due to this, custodial crime is unpunished and therefore flourishes. Some reports published in the Telegraph, Statesman and Indian Express were also attached to support the contention. Basu urged the Supreme Court to examine the issue in depth and (i) develop custody jurisprudence and lay down principles for awarding compensation to the victims of police atrocities (ii) formulate means to ensure accountability of those responsible for such occurrences.

The Supreme Court treated the letter as a writ petition. While the writ was under consideration, the Supreme Court received another report about a death in police custody in Uttar Pradesh. This prompted the Court to issue notices to all state governments and the Law Commission of India to submit suggestions on combatting this endemic problem.

Supreme Court:

Custodial torture is a naked violation of human dignity. This is especially abhorrent when violence occurs within the four walls of a police station by those who are supposed to protect citizens. The police have a difficult task in light of the deteriorating law and order situation; political turmoil; student unrest; and terrorist and underworld activities. They have a legitimate right to arrest a criminal and interrogate her/him in the course of investigation. However, the law does not permit the use of third degree methods or torture on anyone. Actions of the State must be right, just and fair. "Torture for extracting any kind

27 AIR 1997 SC 610.

of confession would be an anti-thesis to rightness, fairness and justice."

The right to life guaranteed by our Constitution includes the right to live with human dignity. The State is obliged to prosecute those who violate fundamental rights. It also has a duty to monetarily compensate the victim as repairs for the wrong done by its agents in not being able to discharge their public duty of upholding peoples' rights. Compensation is not to be paid by way of damages as in a civil case but under public law for breach of duty by the State in not being able to protect its citizens (the victim is free to file a civil case to privately recover damages from the wrongdoer for loss of earning capacity). However, there can be no strait-jacket formula as each case has its own peculiar facts and circumstances. Besides, compensation is based on strict liability and the defense of sovereign immunity will not be available to the State in cases of custodial torture by the police.

The worst violations of human rights take place during investigation when the police use torture and third degree methods to get confessions. In such instances, arrests are either not recorded or disguised as prolonged interrogation. To address this, an elaborate set of guidelines for arrest and interrogation was laid down. This was circulated to the Director General of Police and the Home Secretary of every state and Union Territory. The Court mandated to put up the guidelines in every police station at a conspicuous notice board.

Supreme Court Directives:

(1) The police personnel carrying out the arrest and handling the interrogation of the accused 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 accused must be recorded in a register. *The first part of the directive is incorporated into the CrPC in Section 41B of CrPC, but the second part is not included.*

(2) The police officer carrying out the arrest 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 accused or a respectable person of the locality where the arrest is made. It shall also be counter signed by the accused with the time and date of arrest. *This is codified under Section 41B of CrPC.*

(3) An accused or detainee who is being held in custody in a police station or interrogation center 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. *This is codified under Section 41B of CrPC.*

(4) The time, place of arrest and venue of custody of an accused must be notified by the police where the next friend or relative of the accused 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 the right to have someone informed of his arrest or detention soon after the arrest or detention. *This is codified under Section 41B of CrPC.*

(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 of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the accused is.

(7) The accused 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 accused and the police officer effecting the arrest and its copy provided to the arrestee. *CrPC was amended in 2009 making medical examination of the arrestee mandatory soon after the arrest regardless of the request of the arrestee under Section 54.*

(8) The accused should be subjected to medical examination by a trained doctor every 48 hours during 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 accused may be permitted to meet his lawyer during interrogation, though not throughout the interrogation. This is codified under Section 41D of CrPC.*

(11) A police control room should be provided at all district and state headquarters, 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 in a conspicuous notice board. *This is codified under Section 41C of CrPC.*

Sheela Barse v. State of Maharashtra[28]

Background:

In August 1982, the Petitioner sent a letter to the Bombay High Court on the custodial torture and inhuman treatment of women prisoners in police custody and judicial custody. This was admitted as a writ petition. A one woman commission was set up to conduct a study based on which the Court issued directives regarding safeguards that need to be in place for prisoners, especially, women prisoners.

Supreme Court:

The Magistrate before whom an arrestee is produced shall enquire from the accused on complaints of torture or mal-treatment in police custody and inform him/her that s/he is entitled to medical examination under Section 54 of CrPC. It is a right conferred on the accused. Section 54 undoubtedly provides for examination of an accused by a medical practitioner at his/her request. But very often the accused is not aware of this right. On account of his/her ignorance, s/he is unable to exercise this right even though s/he may have been tortured or maltreated by the police in custody.

It is the duty of Magistrates to inform the accused about the right of medical examination in case s/he has any complaint of torture or mal-treatment in custody.

Supreme Court Directives:

1. Female suspects must be kept in separate lock-ups under the supervision of female constables.
2. Interrogation of females must be carried out in the presence of female policepersons.
3. A person arrested without a warrant must be immediately informed about the grounds of arrest and the right to obtain bail.
4. Soon after the arrest, the police should obtain from the accused, the name of a relative or friend whom s/he would like to be informed about the arrest. The relative or friend must then be informed by the police.
5. The police must inform the nearest Legal Aid Committee as soon as an arrest is made and the person is taken to the lock-up.
6. The Legal Aid Committee should take immediate steps to provide legal assistance to the arrestee at State cost, provided such person is willing to accept legal assistance.

28 AIR 1983 SC 378.

7. The Magistrate before whom an accused is produced shall inquire from him/her for any complaints on torture and maltreatment in police custody. The Magistrate shall also inform such person of the right to be medically examined.

Note:
Subsequent to the arrest guidelines in *D.K. Basu*[29], the Supreme Court delivered several orders for the implementation of the guidelines. In 2015, it issued additional guidelines on prevention of human rights violations, especially by police and prison authorities. Some of these are:

1. The State Governments shall take steps to install CCTV cameras in all prisons in their respective States, within a period of one year from today but not later than two years.
2. The State Governments shall also consider installation of CCTV cameras in police stations in a phased manner depending upon the incidents of human rights violation reported in such stations.
3. The State Governments shall consider appointment of non-official visitors to prisons and police stations in terms of the relevant provisions of the Act wherever they exist in the Jail Manuals or the relevant Rules and Regulations.
4. The State Governments shall launch in all cases where an enquiry establishes culpability of the persons in whose custody the victim has suffered death or injury, an appropriate prosecution for the commission of offences disclosed by such enquiry report and/or investigation in accordance with law.
5. The State Governments shall consider deployment of at least two women constables in each police station wherever such deployment is considered necessary having regard to the number of women taken for custodial interrogation or interrogation for other purposes over the past two years.

Article 9, ICCPR:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that, that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

29 AIR 1997 SC 610

Duties of the Magistrate:

- Check carefully if the safeguards provided by the Supreme Court in D.K. Basu v. State of West Bengal[30] have been complied with
- Ask the arrested person if s/he was subjected to custodial violence. In doing so, as far as possible, instruct the accompanying police officer to leave the Court while interacting with the arrested person
- If the arrested person complains orally of being subjected to custodial violence, facilitate the process of getting the complaint in writing
- On reasonable suspicion of the occurrence of custodial violence against the arrested person, disallow further police custody of the arrested person
- Order the medical examination of the accused to examine him/her physically
- Transfer the arrested person to judicial custody or release him/her on bail
- Summon the Investigating Officer immediately, or at most, within 24 hours, to provide the FIR, case diary, medical examination report and any other relevant documents for scrutiny to put together the facts
- Summon the Station House Officer or any higher supervising officer, as needed
- On receipt of a complaint regarding torture from an arrested person, direct the registration of an FIR or take cognizance of the complaint of the person and proceed against the officials under law

30 AIR 1997 SC 610.

LEGAL REPRESENTATION AND LEGAL AID

Relevant Provisions:

Article 21 of the Article 39-A, 21 and 22 of the Constitution of India, 1950.

Section 41D, Criminal Procedure Code, 1973

The Legal Services Authority Act, 1987

NALSA Model Scheme, 1998

NALSA Early Access to Justice Framework, 2019

According to Article 22(1) of the Constitution of India, the right to a lawyer for every arrested persons begins at the time of arrest. Section 41D lays down that the arrested person is entitled to meet the lawyer during the interrogation, though not throughout it. Police officers and Magistrates have the duty to inform an arrestee about right to legal representation and free legal aid if the arrestee is unable to find a lawyer. The Magistrate is duty-bound to ask the arrested person if s/he has a lawyer. If s/he does not have a lawyer, or is an indigent, the Magistrate must ensure that the arrested person is provided legal representation at the cost of the state. This is reinforced in Section 12(g) of the Legal Services Authorities Act 1987, which states that all persons in custody are entitled to legal aid. Further, the National Legal Services Authority's (NALSA) Model Scheme for Legal Aid Counsels in all Magistrate Courts 1998 mandates the presence of legal aid lawyers in all production courts. The scheme states that legal aid counsels must be appointed by the District Legal Services Authority for each Magistrate's court. Magistrates are required to immediately assign a legal aid lawyer to represent an accused who does not have a lawyer. The scheme further mandates display of the names and contact details of the legal aid counsels assigned to each court. Some states, such as Rajasthan and West Bengal, have adopted the NALSA Model Scheme into state specific schemes. It is important for the Magistrate to be aware of the guidelines issued by the National Legal Services Authority (NALSA) and the State Legal Services Authorities.

NALSA Early Access to Justice Framework 2019 recognises the need for a mechanism to actualise access to legal aid to an accused at arrest and during remand, and also to a suspect called for questioning by the police. The Framework provides a step-by-step blueprint to ensure the presence of a legal aid lawyer to those in the custody of the police. Taking note of the Supreme Court interpretation of Article 22(1) of the Constitution in *Nandini Satpathy v P.L.* Dani, which lays down the right to legal assistance to persons in custody as well as during 'near custodial interrogation', and the parameters on when arrest is justified of Section 41 of the CrPC, the framework enshrines measures towards ensuring access to a legal aid lawyer at questioning of suspects, at arrest and interrogation, and goes up to remand.

The Early Access Framework contains actionable measures towards guaranteeing the presence of a legal aid lawyer to a person in custody, casting duties on both the police and legal aid providers. Some of these are:

- Placing a duty on the police to notify a suspect or arrested person of their right to legal representation/ assistance during questioning and interrogation. In doing this, the police must specifically tell the suspect or arrested person that they can avail legal representation for free through the legal services authorities.
- Legal Services Authorities are to circulate awareness material in the form of a Leaflet of Rights to all police stations which is to explain the legal rights of a suspect/arrested person. The police have to give a suspect or arrested person the Leaflet of Rights when they arrive at the police station, before questioning or interrogation begins.
- If a suspect or arrested person needs legal aid, the police have to inform the district legal services authority and the designated duty legal aid lawyer is to proceed to the police station.
- The legal aid lawyer is to be able to interact with the suspect/arrested person. The Framework lays down the following as the role of the duty lawyer in this regard:
    a. Find out the allegations against the suspect and allegations and grounds of arrest against the arrestee, and explain these to the suspect/arrested person
    b. Provide the needed legal advice and assistance
    c. Not take any measures that obstruct questioning/interrogation
    d. Secure station bail in cases of bailable offences
    e. If the arrestee is a foreigner, tell the police to inform the needed embassy/High Commission
    f. If the suspect or arrestee requires, the DLSA should arrange and pay for a language interpreter
    g. Ensure all special procedures relating to women in custody are complied with
    h. Ensure any juvenile is dealt with through the procedures under the JJ Act and not kept in police custody

The link to NALSA's Early Access Framework is:

https://nalsa.gov.in/uploads//pdf/2019/09/03/03_09_2019_707066637.pdf

Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna[31]

Background:

In 1979, the Supreme Court admitted a writ petition to look into the administration of justice in Bihar after the Indian Express published a series of news items about appalling conditions in Bihar jails. The paper reported that a large number of people, including women and children had been in prison for years without trial. Although some of them were charged with minor offences carrying punishment for a few months or couple of years at best, the suspects had been in jail awaiting trial for periods ranging from three to ten years.

Among the various issues that were dealt with in this case include over-crowding of prisons and over-stay of under-trial prisoners. The judgment elaborately discussed the provision of legal aid to under-trial prisoners by the State through the orders of the Magistrate.

31 (1980) 1 SCC 98.

Supreme Court:

Under-trial prisoners are unable to secure bail due to their financial constraints or lack of awareness of their rights to legal representation and free legal aid. Hence, the Court recommended the following:

- A dynamic policy be laid down in order to provide free legal aid to persons who find it financially unviable to engage legal services.
- All Magistrates shall facilitate free legal aid to under-trials languishing in prisons.

Article 39-A of the Constitution of India mandates the State to secure that the legal system operates to ensure equal justice and free legal aid. It was emphasised that free legal service is an unalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services due to poverty, indigence or incommunicado situation. The State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require.

Khatri and Ors. v. State of Bihar and Ors.[32]

Background:

In 1980, 33 prisoners lost their vision in police custody due to custodial torture in Bihar. Despite the directions in Hussainara Khatoon,[33] no legal representation was available to most of the blinded prisoners at their first production, and remand orders were passed. The records of the judicial magistrates showed that no legal representation was provided, because none of them asked for it and the judicial magistrates failed to enquire initially and at the time of remand whether they wanted any legal representation at the State's cost.

Therefore, barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers. A few prisoners were released on bail after being imprisoned for a considerable amount of time but the rest of them continued to languish in jail.

Supreme Court:

i. Legal aid:

The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for an accused person. Under Article 21 of the Constitution of India, the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided that the accused person does not object to the provision of such lawyer. The State should provide free legal aid to an accused person who is unable to secure legal services on account of indigence. It cannot avoid its constitutional obligation to provide free legal services to an indigent by pleading financial or administrative liability.

It is the duty of the Magistrate before whom the accused is first produced to acquaint him/her of the right to avail free legal services at the cost of the State. The Judge is under an obligation to inform the

32 1981 SCC (1) 627
33 Ibid.

accused that if he/she is unable to engage the services of a lawyer on account of poverty or indigence, there is a right to obtain free legal services. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and fail its purpose.

The State and its police authorities should see to it that the constitutional, and legal requirement to produce an accused before a Magistrate within 24 hours of the arrest is scrupulously observed.

ii. Remand:

Magistrates are enabled to keep a check over the police investigation where persons are detained without remand and it is necessary that this is enforced. Where disobedience to this provision is found, Magistrates should come down on the police heavily.

State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru and Shaukat Hussain Guru v. State (N.C.T. of Delhi)[34]

Background:

The appellant was arrested under several provisions of the IPC for taking part in the attack on the Indian Parliament in December 2001. The investigation began under IPC but it was soon transferred under the Prevention of Terrorism Act (POTA) by bringing the legislation into effect. The investigation was then taken over by the Assistant Commissioner of Police who failed to inform the arrestees regarding their right to consult a legal practitioner and facilitate the provision. POTA required the investigating authority to apprise the arrestees regarding their right to legal representation which was not done due to non-communication to family members regarding arrest.

Supreme Court:

The opportunity of meeting a legal practitioner during the course of interrogation within closed doors of police station will not arise unless a person in custody is informed of his right and further facilitation in establishing contact with a lawyer by the authorities. If the person in custody is not in a position to get the services of a legal practitioner by himself, such person is entitled to seek free legal aid either by applying to the Court through the police or the concerned Legal Services Authority, which is a statutory body.

Although the investigation cannot be postponed indefinitely due to lack of legal representation, the police officer has the duty to request and initiate immediate steps to place it before the Magistrate or Legal Services Authority so that at least at some stage of interrogation, the person in custody would be able to establish contact with a legal practitioner. But, in the instant case, the Court noted that the idea of apprising the persons arrested of their rights under Section 52(2) of POTA and entertaining a lawyer into the precincts of the police station did not figure in the mind of the investigating officer. Although Section 52(2) came into effect after the investigation began, the police officer is under a legal obligation to apply the safeguards to the extent that they could be implemented.

The expression 'the person arrested' does not exclude a person initially arrested for offences other than POTA and continued under arrest when POTA was invoked. It includes the person whose arrest continues for the investigation of offences under POTA as well. It is not possible to give a truncated

34 (2005) 11 SCC 600.

interpretation to the expression 'person arrested' especially when such interpretation has the effect of denying an accused the wholesome safeguards laid down in Section 52.

Section 52(3) of POTA is modelled on the D.K. Basu guidelines and therefore, a difficulty on acting on the confession arose. It mandates police officers to communicate about the arrest to a relative or in their absence, by telegram, telephone or any other means which must be certified by the police officer and the arrestee. However, the Investigating Officer IO merely stated "near relatives of the accused were informed about their arrest as I learnt from the record". The IO was unaware of any record prepared by the police officer regarding the arrest and communication with the relatives. Therefore, the accused persons were not given every possibility to arrange a meeting with the lawyer or seek legal advice.

Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State of Maharashtra[35]

Background:

After the terrorist attack in Mumbai in November 2008, the Appellant, a Pakistani national, was convicted for committing multiple crimes including charges of conspiracy to wage war against the Government of India; collecting arms with the intention of waging war against the Government of India; waging and abetting the waging of war against the Government of India; commission of terrorist acts; criminal conspiracy to commit murder; criminal conspiracy, common intention and abetment to commit murder; committing murder of a number of persons; attempt to murder with common intention; criminal conspiracy and abetment; abduction for murder; robbery/dacoity with an attempt to cause death or grievous hurt; and causing explosions punishable under the Explosive Substance Act, 1908. The judgment elaborates the duties of the Magistrate in informing the arrestee about the right against self-incrimination and legal aid and to facilitate legal aid if needed.

Supreme Court:

The right against self-incrimination of the accused has been elaborated under the Constitution of India and CrPC. The Court referred to the decisions in *Miranda v. Arizona*[36] *and Nandini Satpathy v. P.L. Dani* to elaborate the right against self-incrimination; and the decisions of *Hussainara Khatoon v. Home Secretary, State of Bihar*[37] *and Khatri (II) v. State of Bihar*[38] on right to legal aid.

i. Right against self-incrimination:

A bare reference to the provisions of CrPC indicates that they are designed to afford complete protection to the accused against self-incrimination by disallowing incriminating answers to police interrogation.[39] It makes any statement, in any form, made to police officers inadmissible[40] excepting those that may lead to discovery of any fact[41] and that may constitute a dying declaration.[42]

Section 163 of CrPC prohibits the use of any inducement, threat or promise by police. Section 164 dealing with the recording of confessions and statements made before a magistrate requires the Magistrate

35 (2012) 9 SCC 234.
36 348 US 436.
37 (1980) 1 SCC 98.
38 (1981) 1 SCC 627.
39 Section 161(2) of the Code of Criminal Procedure.
40 Section 162(1) of the Code of Criminal Procedure; Section 25, Indian Evidence Act, 1872.
41 Section 27 of the Evidence Act.
42 Section 32 of the Evidence Act.

to caution the accused regarding the right to make a confession voluntarily and most importantly, the Magistrate shall not authorize the detention of the accused in police custody where he does not make a confession. The Magistrate is obligated to incorporate a post-confession safeguard and make a memorandum at the foot of the confession regarding the caution administered to the accused and certify that the confession recorded is a full and true account of the statement made to the accused.

Moreover, Section 164 of CrPC should be read along with Section 26 of the Evidence Act, to the effect that a confession made by a person in the custody of a police officer shall not be proved against such person unless it is made in the immediate presence of a magistrate.

ii. Legal aid:

The Court upheld the Magistrate's duty to provide legal aid to the arrestee while distinguishing the duty from the standard set by the United States Supreme Court in *Miranda v. Arizona*. The Apex Court of the United States held that the failure to provide legal aid to the accused at the beginning of the trial would render the trial illegal. However, it also observed that legal representation should be given to an accused if s/he requests the lawyer's assistance during the interrogation. In *Kasab*, the Court observed that this rule has to be interpreted as per India's criminal law procedure where confessions made to police officers are inadmissible except under certain circumstances.

Moreover, referring to the decision in *Navjot Sandhu v. State*,[43] it stated that the law under POTA is a major departure from the common criminal law process since it is an exception to the general rule. Mainstream criminal law procedure is fundamentally different and far more liberal where the rights of the individual are protected in a better and more effective manner. Therefore, the standard under POTA cannot be applicable to mainstream criminal law procedure. The accused is eligible to avail legal aid at the expense of the State when s/he is unable to avail a lawyer or unable to bear the expenditure for the same.

The right to access legal aid, to consult and to be defended by a legal practitioner, arises when a person is arrested for a cognizable offence and is first produced before a magistrate. Accordingly, it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner. In case he has no means to engage a lawyer of his choice, one would be provided to him at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced.

The Court directed all the Magistrates in the country to discharge this duty and clarified that any failure to fully discharge the duty would amount to dereliction making the concerned magistrate liable to departmental proceedings.

Commonwealth Human Rights Initiative v. The State of West Bengal And Ors.[44]

Background:

A petition was filed in the High Court of West Bengal in 2013 to issue a writ of Mandamus on first

43 (2005) 11 SCC 600.
44 WP 56 of 2013

production of arrested persons and provision of legal aid. It sought for the following reliefs: 1) the respondents must ensure that all arrested or detained persons are mandatorily produced physically before the Magistrate or concerned court where the remand order is passed; 2) an accused should be apprised of his/her right to consult and be defended by a legal practitioner and where the accused does not have the means to engage a lawyer of his/her choice, one should be provided at the expense of the Legal Aid Services Authority; and 3) legal aid lawyers be made available on a daily basis in all concerned Courts when remand orders are made.

West Bengal High Court:

As per Section 167(2) proviso (b) of the CrPC, an accused must be produced before the concerned Magistrate. Explanation II to Section 167 states that the presence of the accused during the first production may be proved by his signature on the detention order. In subsequent productions, Section 167 allows production through electronic media linkage.

The respondents must follow Section 167 and the D.K. Basu guidelines. It is the duty of the Magistrate to apprise the accused of their rights to be defended. When he/she has no means to engage a lawyer, the State must bear the expense and provide aid through the Legal Services Authority/Committee. The bodies should ensure that a pool of lawyers are available for fulfilling this duty.

Duties of the Magistrate:

- Inform the arrestee about the right to legal representation
- Ask the arrested person if s/he has a lawyer
- If the arrested person does not have a lawyer, immediately assign a lawyer from the list of legal aid lawyers that should be present in the Magistrate's court
- Ensure that the arrestee is represented by the said legal aid lawyer during the remand hearing
- Ensure the list of legal aid lawyers is made available to the arrested person
- Display the names and contact details of the legal aid counsels assigned to each court in full view of all persons who access the court
- Appraise compliance with NALSA's Early Access Framework

Duties of the Police Officers:

- Inform the arrestee about the right to legal representation and legal aid
- Whenever required if a person cannot avail a private lawyer, inform the nearest legal services institution that an arrested person needs a lawyer
- Wait, for a reasonable period, for the lawyer to arrive to assure the lawyer's presence during interrogation of the arrested person (as per Section 41D, CrPC)

RIGHT AGAINST SELF-INCRIMINATION

Relevant Provisions:

Article 20 and 21 of the Constitution of India, 1950.

Section 46, 49, 53, 54, 161, 163, 164 and 165 of the Code of Criminal Procedure, 1973.

Sections 25, 26 and 27 of the Indian Evidence Act, 1872.

A key characteristic of due process is the right against self-incrimination, namely the right not to be compelled to incriminate oneself. Confessions made to police are not admissible as evidence. This means that if the accused confesses to committing a crime, legally, it is not evidence of that person's guilt. However, Section 27 of the Indian Evidence Act is an exception to this rule. It makes admissible, that part of the confession, which leads to the discovery of a fact, and by implication, the accused person's knowledge of that fact. This makes it crucial to ensure that forced confessions are not extracted through violence; or that any measure of coercion is not used to compel an arrested person to give answers that may point towards guilt, during interrogation. The protection of the right against self-incrimination goes hand in hand with the right to have a lawyer during interrogation. It is important to see the protection of rights as inter-connected, reinforcing the key role of the Magistrate to practically guarantee the fulfillment of these rights at first production.

Nandini Satpathy v. P.L. Dani[45]

Background:

A case under the Prevention of Corruption Act was filed against the petitioner, a former Chief Minister of Odisha. The police wanted to interrogate her by giving her a string of questions in writing. She was also directed to appear at a police station for examination. She refused to answer the questionnaire, on the grounds that it was a violation of her fundamental right against self-incrimination. The police insisted that she must answer their questions and filed a complaint against her under Section 179 of the IPC which prescribes punishment for refusing to answer any question asked by a public servant authorized to ask that question. The judicial magistrate took cognizance of the offence and issued summons asking her to appear. She moved the state High Court under Article 226 challenging this order. The High Court dismissed her petition after which she appealed to the Supreme Court.

Supreme Court:

Article 20(3) of the Constitution lays down that no person shall be compelled to be a witness against her/himself. Section 161(2) of CrPC, casts a duty on a person to truthfully answer all questions, except those which establish personal guilt to an investigating officer. Therefore, there is a rivalry between societal interest in crime detection and the constitutional rights of an arrested/accused person. The police has a difficult job especially when crimes are growing and criminals are outwitting detectives. Yet, the protection of fundamental rights is of utmost importance. In the interest of protecting these rights, fear of police torture leading to forced self-incrimination is not written off.

Any statement given freely and voluntarily by an accused person is admissible and even invaluable to an investigation. But the use of pressure whether subtle or crude, mental or physical, direct or indirect but

45 (1978) 2 SCC 424.

sufficiently substantial by the police to get information is not permitted as it violates the constitutional guarantee of fair procedure. The accused has a right to silence during interrogation if the answer indicates the admission of guilt in either the case under investigation or in any other offence. This is because a police officer is a commanding and authoritative figure and therefore, clearly in a position to exercise influence over the accused.

To implement Article 20(3), a mechanism was provided to prevent custodial abuse. After the examination of the accused, where a lawyer of his/ her choice is unavailable, it is the duty of the police officer to take the accused to the Magistrate, doctor or other willing and responsible non-partisan official or non-official and allow a secluded audience where s/he may unburden himself beyond the view of the police relating to any duress in police custody. This would facilitate the accused to be removed from such custody. This information must be communicated to the Magistrate.

The Court observed that *the purpose of these guidelines is not to sterilize the police but to clothe the accused with his right of silence. Article 20(3) is not a paper tiger but a provision to police the police and to silence coerced crimination.*

Supreme Court Directives:

1. An accused person cannot be coerced or influenced into giving a statement pointing to his/her guilt.
2. The accused person must be informed of his/her right to remain silent and on the right against self-incrimination.
3. The person being interrogated has the right to have a lawyer by his/her side if he/she so wishes.
4. An accused person must be informed of the right to consult a lawyer at the time of questioning, irrespective of the fact whether s/he is under arrest or in detention.

Women should not be summoned to the police station for questioning in breach of Section 160(1) of CrPC.

Duties of the Magistrate:

- Explain the meaning of the right against self-incrimination to every arrested person in simple non-legal language
- Direct the accompanying police officer to leave the Court while interacting with the arrested person
- Ask the arrested person if the police used threats (physical and/or verbal) or inducements to extract a confession, or forced him/her to answer questions during interrogation. If yes, consider the appropriate action to take against the police officer(s)
- Ask the arrested person if s/he was subjected to custodial violence of any kind
- Ask the arrested person if s/he had a lawyer at the time of interrogation

RELEASING THE ARRESTEE ON BAIL OR PERSONAL BOND

In *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*,[46] Justice Krishna Iyer observed that refusing bail deprives 'personal liberty' guaranteed under Article 21. Granting bail is "a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community".[47] Courts are obligated to scrutinize whether the presence of the arrested person in custody is required for inves tigative purposes.

Relevant Provisions:

Articles 14, 15 and 21 of the Constitution of India, 1950.

Sections 436, 436A and 437 of the Code of Criminal Procedure, 1973.

Further, if the arrest involved irregularities, the Magistrate must exercise the option of releasing the arrested person on bail/bond. The Court should consider the financial condition of the arrested person and not make monetary sureties the sole factor in determining the grant of bail since a sizeable chunk of the population may be unable to provide the same. Releasing arrested persons on personal bonds will go a long way in preventing prolonged detention of indigent persons.

Motiram v. State of Madhya Pradesh[48]

Background:

Motiram, was an under-trial prisoner who was offered bail on the payment of Rs. 10,000 as surety. Due to his indigence, his brother-in-law, residing in another district offered to pay the surety on his behalf. The Magistrate rejected the payment by Motiram's brother-in-law since he was residing in another district.

Issues:

In this judgment delivered by Justice Krishna Iyer, the Court dealt with the following issues:

(1) Can the Court, under CrPC, enlarge, on his own bond without sureties, a person undergoing incarceration for a non-bailable offence either as under-trial or as convict who has appealed or sought special leave?

(2) If the Court decides to grant bail with sureties, what criteria should guide it in quantifying the amount of bail?

(3) Is it within the power of the court to reject a surety because he or his estate is situated in a different district or State?

Supreme Court:

The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are

46 AIR 1978 SC 429.
47 Ibid.
48 AIR 1978 SC 1594.

imposed on convicted defendants. The accused may lose his/her job and is prevented from contributing to the preparation of his/her defence. Equally important, the burden of such detention frequently falls heavily on the innocent members of the family.

Although the term bail has not been defined in the legislation, the legal literature, Indian and Anglo-American, on bail jurisprudence lends countenance to the contention that bail, loosely used, is comprehensive enough to cover release on one's own bond with or without sureties. Law, at the service of life, must respond interpretatively to raw realities and make for liberties. The Court further emphasized that the law must be lenient with juveniles, females and sickly while granting bail especially when their presence is necessary to prepare their defense. They should be granted bail on sureties at the appellate level because this is an unreasonable restriction on personal liberty with discrimination writ on the provisions.

The hornet's nest of Part III need not be provoked if we read 'bail' to mean what it popularly does, and lexically and in American Jurisprudence is stated to mean, viz., a generic expression used to describe judicial release from *custodia juris*. Bearing in mind, the need for liberal interpretation in areas of social justice, individual freedom and indigent's rights, bail covers both-release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables.

The Court held that an under-trial or convict can be enlarged on bail on his own bond without sureties; surety cannot be rejected because he or his estate are situated in a different district or State; and family ties, roots in the community and membership in stable organisations must be considered so that the bailee does not flee justice.

Hussainara Khatoon v. Home Secretary, State of Bihar[49]

Background:

The Indian Express published a series of news items about appalling conditions in Bihar jails. The Supreme Court admitted this as a writ petition to look into the administration of justice in Bihar. The paper reported that a large number of people, including women and children had been in prison for years without trial. Although some of them were charged with minor offences carrying punishment for a few months or couple of years at best, they had been in jail awaiting trial for periods ranging from three to ten years. Among several issues, the Court discussed imprisonment of several under-trial prisoners charged under bailable offences for long periods of time due to their inability to furnish bail bonds.

Supreme Court:

The Court recognized that our legal and judicial system continually denies justice to the poor by keeping them in pre-trial detention for long years due to a highly unsatisfactory bail system. The bail system is property oriented which proceeds on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. India's criminal procedure continues to adopt the antiquated approach where an accused is to be released on his personal bond containing a monetary obligation.

As if this were not a deterrent to the poor, the courts mechanically and regularly insist that the accused should produce sureties who will stand bail for him and these sureties must establish their solvency to

49 1979 CriLJ 1036.

pay up the amount of the bail in case the accused fails to appear in Court. This system operates harshly against the poor. It is only the non-poor who can take advantage of the system and be released on bail. The poor find it difficult to furnish bail even without sureties because very often the bail amount fixed by the Courts is unrealistically excessive. So in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount. Where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties.

Resultantly, accused persons are either fleeced by the police and revenue officials or by touts and professional sureties. Sometimes they incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the Court is able to take up their cases for trial.

In this case, the Court directed that the state government should provide lawyers to all persons who were accused of bailable offences so that bail applications could be made during the next production. Magistrates were also instructed to release such persons on bail.

Rao Harnarain Singh Sheoji Singh v. The State[50]

Background:

The Appellants were arrested for the commission of rape and murder of a woman and the subsequent disappearance of evidence in April 1957. The Appellants argued that bail should be granted as a matter of right and because they are respectable and well-connected persons, belonging to the higher strata of the society (Additional Public Prosecutor, Superintendent of Prisons).

Punjab High Court:

The case provides determinants for granting bail to an accused of a non-bailable offence. The Court observed that subject to the restrictions in Section 437(1) of the CrPC, the Magistrate's discretion must be exercised judicially. The Court listed the following as non-exhaustive but relevant factors in making bail decisions:

1. the enormity of the charge;
2. the nature of the accusation;
3. the severity of the punishment which the conviction will entail;
4. the nature of the evidence in support of the accusation;
5. the danger of the applicant absconding if he is released on bail;
6. the danger of witnesses being tampered with;
7. the protracted nature of the trial;
8. opportunity to the applicant for preparation of his defence and access to his counsel and;
9. the health, age and sex of the person accused of an offence.

50 AIR 1958 Pun 123.

Dataram Singh v. State of Uttar Pradesh And Anr.[51]

Background:

In January 2016, an FIR was lodged against the Appellant under Sections 419, 420, 406 and 506 of the Indian Penal Code, 1860 and Section 138 of the Negotiable Instruments Act, 1981. The Appellant was not arrested for a period of seven months during the investigation. Apprehending an arrest after the filing of the chargesheet, he moved the Allahabad High Court for quashing the FIR against him. The Appellant was given time to appear before the Trial Judge. On appearing before the Court, he was lodged in judicial custody. His bail applications were rejected by the Trial Court and the High Court. Subsequently, an application was filed before the Supreme Court after six months of the Appellant being in judicial custody.

Supreme Court:

The Appellant was not arrested for a period of one and a half years since the registration of the FIR till he appeared before the Trial Judge. These facts indicate that there was no apprehension that the appellant would abscond or hamper the trial in any manner. Therefore, the Trial Court and the High Court should have judiciously exercised the discretion and granted bail to the appellant. There was nothing on record to indicate that the appellant was earlier involved in any unacceptable or illegal activity.

Criminal jurisprudence postulates that the grant of bail is the general rule and putting a person in prison or correction home is an exception. More persons are being incarcerated for longer periods because these basic principles have been lost sight of. This is based on the principle that a person is innocent until found guilty.

The judge has a discretion in granting or rejecting a bail. But the exercise of this discretion is shaped by the large number of decisions of the Supreme Court and the High Courts. A judge needs to introspect on the facts and circumstances of the bail while granting or denying it.

51 2018 (2) TMI 410

268th Law Commission Report on Bail:

Bail practice should not result in incarceration of the accused person without meaningful consideration to ability to pay, alternative methods of ensuring appearance at trial, and nature of the crime. The grant or refusal of bail on monetary surety, violates Articles 14 and 15 of the Constitution of India and runs contrary to the constitutional ethos. Further, it has no correlation with the objective sought i.e. assurance of appearing at every stage of the trial along with the presumption of innocence until proven guilty.[52] In every case where the indigent is unable to afford bail, the indigent is not being discriminated against. The state only demands some security that such accused person will appear at the trial.[53] The threat of forfeiture of one's goods may be an effective deterrent to the temptation to break the conditions of one's release.[54] Thus, persons of different financial status would find the motivation to appear before trial at varying amounts of bail, it only seems logical that an effective system of bail considers the individual's ability when setting such amount.[55] The current system of bail based on financial control and objective assessment would lead to suspect classification and discrimination. Moreover, it would also impinge on the fundamental right to fair trial.

If the Magistrate is of the opinion that the accused is at risk of absconding, sureties may be imposed. Surety may be personal surety or a third person surety and should be according to the paying capacity of the accused. In determining the conditions of bail, the Court should consider the financial status of the accused, and shall ensure that the conditions of bail are not excessive or unduly onerous. Sureties should not be rejected solely on the ground that they are not locally situated. To alleviate concerns regarding the availability of the surety in case of forfeiture, courts should be allowed to direct that the surety papers be deposited with the court which has jurisdiction where the surety is located, and that such court can proceed against the surety in case of forfeiture.

Some conditions that may be imposed are:

- abide by specified restrictions on personal associations, place of abode, or travel;
- avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offence;
- report on a regular basis to a designated law enforcement agency;
- refrain from possessing and surrender if in possession of any firearm, ammunition, destructive device, or other dangerous weapon;
- undergo available medical, psychological, or psychiatric treatment, and remain in a specified institution if required for that purpose;
- satisfy any other condition that is reasonably necessary to secure the appearance of the person as required, and to ensure the safety of any other person and the community;
- surrender of passport or travel document in the possession of the accused, in case, the accused does not have one, he may be prohibited from obtaining one;
- accused may be mandated to seek or maintain employment or enter into any educational programme;
- refrain from attending such premises or any other place as the court may specify;
- abides by any restriction on his travel or movement; or
- abides by specific restrictions on his speech and expression.

52 Caleb Foote, "The Coming Constitutional Crisis in Bail" 113 U. PA Law Review. 1125, 1180 (1965).

53 Crim. Proc. § 12.2(b) (3d ed.) citing Pannell v. United States, 320 F.2d 698 (D.C.Cir.1963) (Bazelon, C.J., concurring in part and dissenting in part).

54 Bandy v. United States, 81 S. Ct. 197 (1960)

55 A. Hellmann, "The Right to a Pauper's Bail" Bench and Bar, Kentucky Bar Association (2016).

Duties of the Magistrate:

- Check if the arrested person is accused of committing bailable offence/s and release the person on bail if so
- Verify if the police offered the arrested person release on bail
- Assess the financial condition of the arrested person to determine whether s/he has the ability to fulfil monetary conditions to be released on bail.
- Impose personal bond where the arrested person is an indigent
- Release the arrested person on bail/personal bond/surety if:
  - s/he is accused of committing a bailable offence
  - is accused of committing a non-bailable offence but her/his presence in custody is not required
  - the arrest/detention are unjustified or illegal
  - s/he is a permanent resident or ordinarily resident in the area with family/professional obligations
  - it can be reasonably deduced that such person will cooperate with the investigation
  - the person is infirm/old
- If the arrested person is at the risk of absconding, impose obligations and reasoned restrictions

International Law:

The International Covenant on Civil and Political Rights (ICCPR) and the European Court on Human Rights provide that, releasing the accused on reasonable bail is the remedy for failure to decide upon charges in an expeditious manner.

Note:

While entertaining a request for release on bail, there is no need for the complainant or the public prosecutor to be heard in cases where a person is charged with a bailable offence. Moreover, the court has no discretion to impose any conditions except to demand security in these cases.[56] Thus any condition to surrender the passport,[57] directing the accused to appear before the police[58] or the police commissioner,[59] or even directing such accused person not to take part in public demonstration or make any public speech[60] cannot be imposed.

56 Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281.
57 Azeez v. State of Kerala, 1984 (2) Crimes 413 (Ker).
58 Mir Hasim Ali v. Emperor, AIR 1918 Bom 254.
59 T.N. Jayadeesh Devidas v. State Of Kerala, 1980 Cr.LJ 906.
60 Public Prosecutor v. Raghuramaiah (1957) 2 Andh. W. R. 383.

COMPLIANCE WITH REQUIREMENTS OF SECTION 167 CrPC AT FIRST PRODUCTION

Following from the general rule described in the preceding section, an arrested person must be released on bail/bond unless his/her presence in custody is absolutely necessary. A key duty of the Magistrate at first production entails deciding whether further detention (or remand) of the arrested person in police or judicial custody is required and justified. In determining this, the Magistrate must consider various factors surrounding the case and of the arrested person. The CrPC mandates that the Magistrate shall order remand by applying judicial reasoning and only when the circumstances justify custody.

Relevant Provisions:

Article 21 of the Constitution of India, 1950.

Section 167 of the Code of Criminal Procedure, 1973.

When an arrested person is remanded to police custody, this means s/he is placed in the custody of the police for the purposes of investigation. In ordinary criminal cases, remand in police custody can extend up to 15 days after the arrest. Judicial custody remand is the custody of the arrested person in a jail, usually after their police custody remand is over. As the name suggests, an accused in judicial custody is considered to be in the custody of a judge. In ordinary criminal cases, judicial custody can extend up to 60 or 90 days during the course of the investigation.

NALSA's Early Access Framework requires every District Legal Services Authority to depute Remand Advocates in every Magistrate's and Sessions Court. The Framework lays down very specific responsibilities of the Remand Advocate towards effective legal representation of the accused. The Framework can be found at:

https://nalsa.gov.in/uploads//pdf/2019/09/03/03_09_2019_707066637.pdf

Manubhai Ratilal Patel v. State of Gujarat & Ors.[61]

Background:

The Petitioner was arrested on 16.7.2012 and produced before the Magistrate at 4.00 p.m. on 17.7.2012. The police prayed for remand of the accused to police custody which was granted by the Magistrate upto 2.00 p.m. on 19.7.2012. On 18.7.2012, the investigation agency was informed about the stay order passed by the High Court on 17.7.2012 and prayer was made not to proceed further with the investigation in pursuance to the order passed by the High Court. Meanwhile, an application for regular bail under Section 439 of CrPC was filed on 19.7.2012 before the Magistrate. Apart from other grounds, it was highlighted that when a petition was pending before the High Court for quashing of the First Information Report and a stay order had been passed on further investigation, the detention was illegal and the accused was entitled to be released on bail.

61 (2013) 1 SCC 314.

Supreme Court:

Directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in an executive capacity while ordering the detention of an accused. While exercising this judicial function, the Magistrate must ensure that the materials placed before him justify such a remand or, that there exist reasonable grounds to commit the accused to custody and extend his remand. Remand is to be granted under Section 167 if the investigation cannot be completed within 24 hours. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant or need for police or judicial remand at all.

It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner.

Elumalai v. State of Tamil Nadu[62]

Background:

The Petitioner was arrested and detained in police custody. His remand was extended without his production before the Magistrate. Therefore, the Petitioner claimed that such extension was illegal.

Madras High Court:

Section 167 was amended to afford an opportunity to the accused of being heard by the Magistrate in person as to whether he wishes to make any representation and also give him an opportunity of showing cause why he should not be remanded. Therefore, the production of the accused before the remanding Magistrate is a condition precedent for passing an order of remand. Explanation 2 clarified that if any question arises regarding the production of the accused before the Magistrate as required under proviso (b), the production of the accused may be proved by his signature on the order authorising detention. It follows that the Magistrate must order remand only on physical production of the accused. If such an order is made mechanically contrary to the provision, that order of remand or extension of remand is not legally sustainable. The accused cannot be kept in jail custody even for one minute after the expiry of the period of remand already ordered by the court and the jail authorities cannot keep them inside any longer.

The Bar provided instances wherein Magistrates, on requisition, go to jails, hospitals, etc., to make an initial order of remand and also to pass extension of the remand already passed. Proviso (b) of S. 167(2) specifically states that the accused should be produced before the Magistrate. But the Magistrate going to the jails merely because sufficient escorts are unavailable or on apprehension of law and order problem in a turmoil situation when large number of accused persons are to be taken to the Court, for example, persons arrested in agitations, etc., would not satisfy the requirements of S. 167(2), proviso (b). Such a procedure should be highly deprecated as in such circumstances the accused would not be having an opportunity of freely making any complaint or statement before the remanding Magistrates.

High Court Directives:

(1) S. 167(2) of the Code would apply to arrests made under S. 41(1) and in exceptional circumstances, to arrests made under S. 151(1). But the Judicial Magistrates, while remanding or passing extensions

62 1983 LW (Crl) 121.

of remands, should be very watchful to see that the liberty of a citizen is not violated by the police arbitrarily and unreasonably.

(2) S. 167(2) is not at all applicable to arrests made under S. 41(2) of the Code and as such no court can order remand or extension of remand of persons arrested under S. 41(2).

(3) The Courts should not mechanically pass orders of remand without verifying the entries in the diaries and satisfying themselves about the real necessity for granting the remand or extension of remand.

(4) Under no circumstance a Magistrate can order the detention of any person in custody or extend such detention without the production of the accused before him in violation of the provisions of CrPC, viz., proviso (b) to S. 167(2), whatever may be the reason stated by the authorities for not producing the accused before the Court, such as non-availability of police escorts.

(5) The jail authorities, who are responsible for keeping prisoners in cellular confinement, should not keep any person without orders of remand from the concerned Judicial Magistrates even for a moment beyond the period of detention already ordered, because, if the jail staff keep any person inside the prison, without proper orders of the court, such keeping would be an illegal detention.

Satyajit Ballulbhai Desai and Ors. v. State of Gujarat[63]

Background:

The Appellants were accused of creating a fake power of attorney by forgery. The trial court granted them regular bail. Subsequently, an order allowing partial remand was passed by the Principal Civil Judge and Judicial Magistrate First Class.

Supreme Court:

Police remand should be an exception and not a rule. Remand is justified when the investigating agency makes out a strong case and satisfies the Magistrate that it would be impossible for the police authorities to undertake further investigation unless the accused is in police custody. The judgment reiterated that Magistrates should remind themselves that detention in police custody is generally disfavoured by law. Detention/police remand can be allowed only in special circumstances granted by a magistrate for reasons judicially scrutinised and for such limited purposes as the case requires.

Article 22(2) of the Constitution of India and Section 57 of CrPC provide that every person who is arrested and detained in police custody shall be produced before the nearest magistrate within a period of 24 hours of arrest. This excludes the time necessary for the journey from the place of arrest to the court of the Magistrate. No such person can be detained in police custody beyond the said period without the authority of a Magistrate. These two provisions clearly manifest the intention of the law and therefore the Magistrate has to judicially scrutinise circumstances and if satisfied, can order detention of the accused in police custody.

Therefore, the initial period of custody of an accused till he is produced before a Magistrate is not referable. In fact, the powers of remand given to a Magistrate is exercisable only after an accused is produced before him as per Section 167(1) of CrPC.

63 JT 2014 (1) SC 344.

Jairajsinh Temubha Jadeja v. State Of Gujarat[64]

Background:

In a case involving physical assault, the Investigating Officer sought for remanding the accused. The Courts held that there were insufficient grounds for ordering remand.

Gujarat High Court:

The law does not fasten judicial duty on Magistrate to record reasons for not granting remand to police custody, but it is imperative that the Magistrate record reasons for ordering remand to police custody. Section 167 of CrPC makes it obligatory on the police authority to transmit a copy of the diaries relating to the case while forwarding the accused. Passing mechanical orders of remand by the Magistrate has been deprecated by law, since Section 167(3) of CrPC casts a duty on the Magistrate to apply judicial mind to the issue. At this juncture, the Magistrate is bound to ensure that the accusation is well-founded and that the presence of the accused in police custody is absolutely necessary.

The Magistrate shall look into the evidence and material collected by the investigating agency, and therefore, it is imperative for the Police Officer to produce the case diary before the Magistrate. Remand to police custody should not be granted to collect the material and evidence, when there is no prima facie material or at least sufficient material collected by the investigating officer. Once the investigating agency makes out its point, the Magistrate may order remand based on the material collected if he believes that it would be impossible for police authorities to go further in the investigation without police custody.

Gautam Navlakha v. State (NCT of Delhi)[65]

Background:

The Petitioner was arrested under The Unlawful Activities (Prevention) Act, 1967. On the request of the respondent, the Chief Metropolitan Magistrate (CMM) passed an order allowing the transit remand of the petitioner. The transit remand was challenged in a habeas corpus writ petition filed in the Delhi High Court. The challenge is on the grounds that the CMM did not satisfy himself about the existence and adequacy of material to compel the transit remand.

Delhi High Court:

When an arrested person, who is required to be produced before a jurisdictional Judicial Magistrate, is detained in a place which is away from that jurisdiction, and therefore cannot be produced before the jurisdictional Magistrate within 24 hours as mandated both by Article 22 (2) of the Constitution and by Section 57 of CrPC, he will be produced before the "nearest Judicial Magistrate" with "a copy of the entries in the diary". Therefore, a Magistrate before whom a transit remand application is filed, must mandatorily fulfil the requirements under Section 167(1) of CrPC. On that basis, the "nearest Magistrate" must pass an order under Section 167(2) authorising the detention of the arrested person for a term not exceeding 15 days in the whole. Where he has no jurisdiction to try the case and he finds further detention unnecessary, he may order the accused to be forwarded to the jurisdictional Magistrate.

64 (2002) 1 GLR 215.
65 W.P.(CRL) 2559/2018

The Magistrate is required to apply his mind to ensure that there is sufficient material in the case diary to justify the grant of transit remand.

Under Section 41(1)(ba), it is necessary that the arrested person has committed a cognizable offence punishable with imprisonment for a term exceeding seven years. Also, the investigating officer must have "credible information" that such person has committed the cognizable offence. The remand must be sought on the basis of this reasonable suspicion against the arrested person. While it is true that at this stage the Magistrate examining the transit remand application is not required to go into the adequacy of the material, he should nevertheless satisfy himself about the existence of the material.

In the present case, the case documents were in Marathi and it is not established that the Chief Metropolitan Magistrate was conversant in Marathi. The Magistrate would not have been able to appreciate the reasons as required under Section 41(1)(ba) of CrPC. Due to the non-compliance with the mandatory requirements of Article 22(1), Article 22(2) of the Constitution of India, Section 167 read with Section 57, and Section 41(1)(ba) of CrPC, the Court set aside the transit remand of the Petitioner.

Duty of the Magistrate:

- Mandate the physical production of the arrested person
- Make the decision on whether to grant remand only after examining the documents of arrest, reasons of arrest and necessity
- Ensure all the documents given by the police are in a language known to the Magistrate
- Remand the arrested person to police custody only if his/her presence in custody is absolutely necessary for investigation
- While remanding the accused to police custody, the length of the remand should be limited to the period required for the purposes of investigation and no more
- Ensure that Article 22(1) and (2) of the Constitution of India and Section 57 of CrPC have been complied with
- Ensure judicial orders granting, or, rejecting, remand are provided in writing with clear reasons

Note: Arrested person can be produced through video conferencing only while requesting subsequent remand, and due to extenuating circumstances. If video conferencing is used, the court must ensure that all safeguards are followed.[66]

268th Law Commission Recommendations:

The following factors may be considered in the context of remand with respect to Section 167:

a) The non-completion of the investigation shall not, in the absence of a special order of a Magistrate be deemed to be a sufficient cause for the continued detention of an accused person.
b) A remand to Police custody be granted only in cases of real necessity and when it is shown in the application that there is a good reason to believe that the person accused of an offence can point out properly or otherwise assist the Police in elucidating the case. A general statement by the officer applying for the remand that the accused may be able to give further information and aid the investigation cannot be deemed as sufficient reason for requesting remand.
c) The Magistrate shall examine the Case Diary thoroughly, which is placed before him at the time of application for remand.
d) The period for which the person accused of an offence is not in actual/physical custody (e.g. admitted in hospital) of the police, be excluded from the time prescribed.

66 Production of inmates to Court through video-conferencing, http://www.humanrightsinitiative.org/download/Chri's%20Draft%20Note%20on%20VC%20Safeguards.pdf

Transferring remand from judicial custody to police custody

The nature of the custody can be altered from judicial custody to police custody during the first 15 days only. In *Anupam Kulkarni*,[67] reiterating this position, the Supreme Court held that police custody is possible only during the first 15 days. This could be by one order or several orders. Section 167 of CrPC states categorically that, thereafter, the remand can be only to judicial custody or any other custody as ordered by the magistrate.

However, there could be a contingency when the accused, while in judicial custody, is arrested for another occurrence unconnected to the offence for which investigation is underway. The accused can then be remanded to police custody for the purpose of investigation in the case relating to the second occurrence, even after the expiry of the initial period of 15 days of remand in the first case.[68]

67 CBI Special Investigation Cell v Anupam Kulkarni (1992) 3 SCC 141: 1992 SCC (Cri) 554.
68 Id.

TREATMENT OF JUVENILES

Relevant Provisions:

Juvenile Justice (Care and Protection of Children) Act, 2015.

Juvenile Justice (Care and Protection of Children) Act, 1986.

In line with international standards, India has carved out a specialised juvenile justice system to respond to children in conflict with law and in need of care and protection. This is separate from the formal justice or courts system for adult offenders. Specific processes and institutions are in place to care for and respond to children who have to come into contact with the justice system. A major principle that underpins our juvenile justice system is that a child's time in a police station is to be kept to the minimum possible, and this is reflected in legal and procedural provisions. The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) lays down that a child in conflict with law is not to be kept in police lockup (or jail) under any circumstances. Boys and girls under the age of fifteen, cannot be summoned to the police station for questioning.[69] The State is to act in the best interests of the child, and recognise the special needs of children in contact with the criminal justice system. However, this is rarely facilitated since the scrutiny of age is often not done and many juveniles end up in the system assumed to be adults, amounting to grave violation of law and their rights.

The development of law and jurisprudence around the JJ Act has brought in procedures to be followed to determine age at first production. If the arrested person appears to be a juvenile, it is the duty of the Magistrate to order initiation of procedure under the JJ Act and not the formal criminal procedure.[70] This will also substantially change the rules of remand of such person/s.

Note: Parliament has legislated on what is to be the age of a child in 1986, 2000 and 2015. In the JJ Act, 1986, a boy was considered a child if he was aged below 16 years and a girl was considered a child if she was aged below 18 years. According to the JJ Act, 2000 and 2015, a child is a person below the age of 18 years. Due to this, the age at which a person is considered a juvenile also varies in the below-mentioned cases. Currently, JJ Act, 2015 governs matters relating to juveniles who are in conflict with law or in need of care and protection of the law.

Rajinder Chandra v. State of Chhattisgarh[71]

Background:

Pranjal Tiwari, the accused respondent No.2, was apprehended for committing the offence under Sections 302 and 34 IPC. The accused claimed that he was a juvenile, under the age of 16 at the time of the incident in February 1997. Therefore, he would be entitled to the benefit of the Juvenile Justice Act, 1986. Pursuant to an enquiry by the Magistrate, it was held that the claimant was not a juvenile.

Supreme Court:

The Court held that a hyper-technical approach should not be followed while appreciating the evidence adduced on behalf of the accused while determining the age of the accused. In border-line cases, if two

69 Proviso to Section 160, Code of Criminal Procedure, 1973

70 Section 9, Juvenile Justice (Care and Protection of Children) Act, 2015.

71 (2002) 2 SCC 287.

views may be possible on the said evidence, the Court should lean in favor of the accused. In this case, the Court should hold that the accused is a juvenile who must be sent to the Juvenile Justice Board.

Gopinath Ghosh v. The State of West Bengal[72]

Background:

Gopinath was convicted by the trial court along with two others for murder under Section 302/ 34 of IPC. Gopinath is alleged to have caused an injury with a fala which landed on the left side of the chest of the deceased of the deceased in August 1974. He was sentenced to life imprisonment by the trial court. This was also upheld by the High Court of Calcutta. Gopinath filed an appeal by special leave urging that he was aged below 18 years on the date of the offence and was therefore a 'child' under the West Bengal Children Act, 1959. He argued that the Court had no jurisdiction to conduct his trial and sentence him.

Supreme Court:

Whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, the age of the accused on the date of the occurrence of the crime must be determined. This ought to be more so where special Acts dealing with juvenile delinquents are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining creditworthy evidence about age. The Magistrate may also call upon the accused to lead evidence about his age.

Jitendra Singh @ Babboo Singh and Anr. v. State of U.P.[73]

Background:

In May 1988, Asha Devi was killed in a fire which was allegedly set by the appellants and two others. The Appellants were convicted along with two other persons under Section 498A of IPC. The appeal was filed against their conviction on the grounds that they were below the age of 18 thereby governed by the Juvenile Justice (Care and Protection of Children) Act, 2000. Therefore, the trial and detention of these persons is to be guided by the Juvenile Justice Act, 2000 wherein minors are detained only when the ends of justice would be defeated by releasing them on bail. The object of this Act is to try and punish juvenile offenders which would afford them a chance for re-integration in the society.

Supreme Court:

Every Magistrate must appreciate that when an accused is produced before him, it is possible that the prosecution or the investigating officer may be under a mistaken impression that the accused is an adult. If the Magistrate has any iota of doubt about the age of an accused produced before him, Rule 12 of the Juvenile Justice Rules, 2007[74] provides that s/he may arrive at a *prima facie* conclusion on the juvenility, on the basis of physical appearance and record the same. Thereafter, if custodial remand is necessary, the accused may be sent to a juvenile or an Observation Home, and the Magistrate should simultaneously order an inquiry, if necessary, for determining the age of the accused.

72 1984 SCC Criminal 478.
73 2013 (9) SCALE 18.
74 Juvenile Justice (Care and Protection of Children) Rules, 2007

The age determination enquiry must be conducted at the earliest possible time in the best interests of the juvenile. In case the arrested person is a juvenile, s/he would be kept away from adult under-trial prisoners and would not be subjected to a regimen in jail, which is not conducive to a juvenile's well-being. It would also be in the interests of better administration of criminal justice. It is, therefore, the duty of every Magistrate to take appropriate steps to ascertain the age of an accused person brought before him/her at the earliest possible point of time, **preferably on first production.**

The provisions of the Juvenile Justice Act, 2000 provide that the claim of juvenility can be raised by a person accused of committing an offence at any stage at any Court. On proving the same, the court is under an obligation to transfer the case to the appropriate forum. There is no provision in the Act which mandates acquittal if the accused was a juvenile on the day of commission of offence or to not try the matter.

Expressio unius est exclusio alterious[75] clarifies that the law which requires a reference to be made to the Board excludes any intention of the legislature to set aside the conviction recorded by the lower court. Due to this, the Court simply set aside the sentence awarded to the juvenile, but did not interfere with his conviction concerned. This complies with the mandate of Section 7A(2) of the Act.

Smt. Girija Tiwari v. State of Chhattisgarh and others[76]

Background:

In November 2000, four persons were arrested. The arrest memos were prepared the next day by the police. They did not provide any information to the parents/relatives of the arrested persons on the day of arrest regarding such custody. Further, two arrest memos were found regarding one of the arrestees which recorded different timings of arrest. Additionally, the case diary and arrest memo had over-written entries and some of the accused were juveniles who had been treated similar to adult offenders.

Chhattisgarh High Court:

Police Officers must conduct themselves properly. The senior officers must note the insubordination by the police officials to the binding code of conduct prepared by the department. Insubordination not only results in serious lapses in discharge of their duties, but also the contempt of lawful authority of the Supreme Court by ignoring its mandatory directions on determination of the age of accused, communication of arrest to the parents and relations of such accused persons, use of third degree methods etc.

Since some of the accused were minors who were treated as adults, the Court emphasized the need to determine the age of the accused persons at the initial stage. Considering the procedural lapses, compensation was awarded to the families of all arrestees. The Court also ordered an investigation against the erring officials which may also result in departmental proceedings.

75 As a guiding canon in the framing of laws and legal documents, this Latin term indicates that the express inclusion of one or more things of a particular type implies an intention to exclude others of the same type.

76 2001 (1) CGLJ 511.

Juvenile or Child Welfare Officers in police stations

In Sampurna Behrua vs. Union of India and Ors., the Supreme Court ordered that *"one police officer in every police station with aptitude is given proper training and orientation and designated as Juvenile or Child Welfare Officer, to handle the juvenile or child in coordination with the police as provided under sub-section (2) of Section 63 of the Act"*. The DLSA is required to train the designated police officers under the guidance of the NALSA and SLSAs over six months to one year. The Court also ordered all Home Departments and DGPs of all states and Union Territories to set up a Special Juvenile Police Unit, comprising all police officers designated as Juvenile or Child Welfare Officers in every district and city to coordinate and upgrade the police treatment of juveniles and children under Section 63(3) of the Act.

Duties of the Magistrate:

- Ascertain the age of the arrested person on first production if he/she appears to be below the age of 18 or says s/he is below 18
- On suspicion that s/he may be a minor, send such person to an Observation Home immediately until the determination of his/her age and refer the case to the Juvenile Justice Board
- Order an inquiry, including the appropriate medical tests if needed, to establish the age of the arrested person
- Transfer the matter to the appropriate forum, such as the Juvenile Justice Board, if it is found that the arrestee is a juvenile on the date of commission of the alleged offence

ACTIONS AGAINST POLICE OFFICIALS FOR COMMITTING ALLEGED ILLEGAL ARREST/ DETENTION OR CUSTODIAL VIOLENCE

Relevant Provisions:

Article 9(5) of ICCPR.

Article 21 of Constitution of the India, 1950.

Illegal arrest, detention and custodial violence by police personnel lead to public law violations. While payment of compensation for public wrongs was more recently developed, cases reflect that the initiation of departmental proceedings, and subsequent prosecution on the finding of guilt of such police officers, can be ordered to hold police accountable for these illegal acts which violate the life and liberty of the arrestee or detainee. The aim of this section is to provide a brief summary of cases wherein action against police officers has been taken, to provide the accountability actions possible.

S. Nambi Narayanan v. Siby Mathews and Ors.[77]

Background:

On 20.01.1994, a crime was registered at Vanchiyoor Police Station against two Maldivian nationals (Mariam Rasheeda and Fousiya Hasan) under Section 14 of the Foreigners Act, 1946 and paragraph 7 of the Foreigners Order. Mariam was sent to judicial custody on 21.10.1994 and sent to police custody on 03.11.1994. They were interrogated by Kerala Police and Intelligence Bureau (IB) officials. Mariam allegedly made confessions that led to the registration of crimes under Sections 3 and 4 of the Indian Official Secrets Act, 1923, alleging that certain official secrets and documents of Indian Space Research Organisation (ISRO) had been leaked out by scientists of ISRO. Meanwhile, a Special Investigation Team (SIT) was formed. On 21.11.1994, D. Sasikaran (a scientist at ISRO), and on 30.11.1994, S. Nambi Narayanan, the appellant, were arrested. The investigation against the appellant was transferred to the Central Bureau of Investigation (CBI) at the request of the Government of Kerala and decision of Government of India. The CBI submitted a report to the Chief Judicial Magistrate, Ernakulam under Section 173(2) of CrPC stating that the faulty evidence collected indicated that the allegations of espionage against the scientists at ISRO did not stand, including the appellant. The report was accepted by the court on 02.05.1996 and all the accused were discharged.

The CBI report stated that it was unprofessional of the respondent to order indiscriminate arrests of top ISRO scientists who played a key role in successful launching of satellite in the space, causing avoidable mental and physical agony to them. The CBI pointed to the gaps in the investigation. In 2001, the National Human Rights Commission ordered payment of Rs.10 lakh as interim relief to the appellant against a claim of rupees one crore.

77 Civil Appeal Nos. 6637-6638 of 2018.

In 2010, Rajashekharan Nair filed a writ petition before the Kerala High Court on the basis of the CBI report, seeking directions to take action against the erring police officers for conducting malicious investigation. The Government passed an order deciding not to take any disciplinary action against the SIT members. The CBI and the accused-discharged persons approached the Kerala High Court against this action of the Government. The Court upheld the action of the Government. The appellant then approached the Supreme Court through Special Leave Petitions against the action of the Government of Kerala. The Court allowed this prayer and directed that the appellants must be paid Rs. 1 lakh as cost.

The Government decided not to take disciplinary action against the erring police officers since there had been a lapse of 15 years since the arrest. In 2012, the appellant filed another petition in the Kerala High Court. The Court quashed the order of the Government which decided not to take action against the SIT members. The Court ordered that the matter must be reconsidered seriously, and not just as a namesake which makes the administration of justice a mockery. Two of the respondents challenged this order before a division bench of the Kerala High Court. The court held that the decision to not take disciplinary action was substantiated by the reasoning of the state government. This order was challenged by the appellant before the Supreme Court.

Supreme Court:

The Court held that the appellant suffered in custody for almost 50 days where he was harassed and mentally tortured. It observed that the entire prosecution initiated by Kerala police was malicious and it caused tremendous harassment and immeasurable anguish to the appellant. "It is not a case where the accused is kept under custody and, eventually, after trial, he is found not guilty. The State police was dealing with an extremely sensitive case and after arresting the appellant and some others, the State, on its own, transferred the case to the Central Bureau of Investigation."[78]

The Court observed that the criminal law was set in motion on some kind of fancy or notion. Liberty and dignity are basic human rights which were jeopardized when the appellant was taken in custody and compelled to face cynical abhorrence. This situation warrants a public law remedy for grant of compensation for violation of the fundamental right under Article 21 of the Constitution. Life commands self-respect and dignity.

The respondents argued that the appellant did not file a complaint of custodial torture before the judicial magistrate. The Court held that this argument indicates the narrow perspective in which torture is viewed. The importance of *D.K. Basu* was reiterated to emphasise the mental agony a person is subjected to when s/he is confined within the four walls of a police station or lock-up.

The Court pointed at the lackadaisical attitude of the police in arresting and putting people in police custody which results in ignominy. It held that the dignity of a person is shocked when psycho-pathological treatment is meted out. Due to the wrongful imprisonment, malicious prosecution, humiliation and defamation of the appellant, the Court granted compensation of Rs.50 lakh to the appellant.

The appellant argued that the authorities responsible for this must face legal consequences. The Court constituted a Committee headed by Justice D.K. Jain (a former judge of the Supreme Court) to take appropriate steps against the erring officials. The State and Central government were asked to nominate one person each to be a part of the Committee.

78 Ibid, para. 31.

Nilabati Behera v. State of Orissa[79]

Background:

In September 1988, Nilabati Behera, a distressed mother, sent a letter to the Supreme Court claiming monetary compensation for the death of her 22 year old son, Suman Behera in police custody. This was admitted as a writ petition. The Appellant argued that her son was beaten to death at a police post after being detained in connection with a theft. The Supreme Court rejected the police version that Suman Behera was killed by a running train after he escaped from police custody and asserted that the post-mortem report clearly showed that he died due to custodial violence. The question before the Court was whether the Appellant had a right to claim compensation for the wrongful acts of the police who caused her sons death.

Supreme Court:

Article 9(5) of the ICCPR lays down that a victim of unlawful arrest or detention shall have an enforceable right to compensation. By ratifying ICCPR, India has undertaken to abide by its terms. Convicts, prisoners or under-trials are not denuded of their fundamental rights under Article 21 of the Constitution. There is a corresponding responsibility on the police and prison authorities to ensure that persons in custody are not deprived of this right.

The State has a duty of care to ensure that the guarantee of Article 21 is not denied to anyone. This duty of care is strict and admits no exceptions and the State must take responsibility by paying compensation to the near and dear ones of the victim who has been deprived of her/his life by the wrongful acts of its agents. Meanwhile, it has a right to recover the compensation amount from the wrongdoers. Monetary compensation as a remedy is available in public law based on strict liability for violation of the guaranteed basic and indefeasible rights of the citizen. The purpose of law is not only to civilize public power but also to assure people that they live under a legal system which protects their interests and preserves their rights. The High Courts and the Supreme Court as protectors of civil liberties not only have the power and jurisdiction but also the obligation to repair the damage caused by officers of the State to fundamental rights of citizens.

The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law. It is to provide relief by an order of making 'monetary amends' under public law for the wrong done in breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrong doer for the breach of its public law duty. This is independent of the rights available to the aggrieved party to claim compensation under private law in an action based on tort, through a suit instituted in a court of competent jurisdiction. This is also independent of the right to prosecute the offender under the penal law.

Supreme Court Directives:

1. The State has an obligation to compensate a victim or heirs of a victim whose fundamental rights have been violated by its agents.
2. The State has a right to recover the compensation amount from the guilty officials after appropriate proceedings or inquiry.

79 1993 SCC 746.

3. An order of compensation by the State in a criminal case does not prevent the victims or their heirs from claiming further compensation in a civil case (for loss of earning capacity).

Manashi Sinha v. State of West Bengal and Ors.[80]

Background:

In July 2002, Manashi's husband (Abhijit) was arrested by the police at midnight. Manashi asked for a copy of the arrest memo but the police refused to provide it. Abhijit was in police custody where he was mistreated. After the release, he kept being summoned to the police station for questioning on a certain matter. Abhijit committed suicide due to the mistreatment he felt he suffered. The CBI argued that Abhijit was not arrested but taken for investigation in a matter.

West Bengal High Court:

The guidelines of *D.K. Basu* virtually have the force of law, as they were formulated by the Supreme Court after considering various aspects of the matter including the provisions of Article 21 of the Constitution of India. While giving those guidelines it was clarified that they are to be followed as preventive measures in "all cases of arrest or detention" till legal provisions are made in that behalf. The term arrest was interpreted and held that 'arrest' is used in legal sense in the procedure connected with criminal offences which 'consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence'.

Although the petitioner did not seek monetary compensation, the Court directed the State Government to compensate Manashi due to police high-handedness for arresting Abhijit. It observed that this may not heal the wound suffered, but compensation also deters the police from engaging in similar high-handedness in the future. The Court can always mould the prayers and grant appropriate relief which serves the ends of justice in the facts and circumstances of the case. The human rights and fundamental right of privacy under Article 21 of the Constitution had been invaded by the police by raiding a decent family with no criminal antecedents at midnight. Compensation was granted in a public law proceeding following *Nilabati Behera v. State of Orissa*.[81] The Court clarified that the compensation did not prejudice Manashi's right to initiate appropriate proceedings for damages or other reliefs against the wrongdoers before the appropriate forum.

Quantum of compensation: Rs. 1,00,000/-

Ambikesh Mahapatra and Ors. v. The State of West Bengal and Ors.[82]

Background:

In April 2012, the Petitioners were arrested by the police for circulating cartoons of ministers through email and print under IPC and the Information Technology Act, 2000. While the Magistrate released them on bail, an enquiry was conducted by the West Bengal Human Rights Commission (WBHRC). The Commission recommended departmental proceedings against the police and payment of compensation

80 2005 (1) CHN 171.
81 Nilabati Behara v. State of Orissa, 1993 CriLJ 2899.
82 2015 CriLJ 3622.

of Rs. 50,000/- to each of the petitioners for the unlawful arrest and detention of the accused persons. The entries in the General Diary were also questioned for ambiguity and fallacies.

West Bengal High Court:

The High Court accepted the recommendation of the WBHRC for initiation of departmental proceedings against the police officers apart from granting compensation to the Petitioners by the State for violation of their valuable human rights. It agreed with WBHRC in holding that the Petitioners did not commit any wrong and need not be kept in protective custody. It observed that the police was squarely responsible for blowing the incident out of proportion and warned them that they may have to pay heavily for unwarranted, uncalled for and unjustified invasion of human rights of the people at large. Also, monetary compensation is permissible when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers.

Quantum of compensation: Rs. 50,000/- per petitioner.

Md. Salim Akhtar v. The State of West Bengal and Anr.[83]

Background:

In July 1999, Salim was arrested and convicted under Sections 21/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Salim filed an appeal before the High Court of Calcutta for infirmities in the proceedings including questionable entries in the arrest memo and case diary, arrest without a valid reason and extracting false confessions by coercion.

West Bengal High Court:

The Court admitted that there was a discrepancy regarding the amount of substances seized and the time of arrest recorded in the arrest memo and other documents produced as evidence during the trial. Further, the Magistrate before whom Salim was first produced failed to notice that no complaint was filed but a confession was coerced from him. Salim was acquitted and granted compensation for the unlawful arrest and detention.

Fattuji Dajiba Gedam v. Superintendent of Police, Akola and Ors.[84]

Background:

In September 1999, the Petitioner's son died while he was in police custody due to custodial violence. The medical officer who conducted the Post-Mortem of the deceased opined that there were 21 contusions and wounds all over the body which indicate that the deceased was brutally tortured. The injuries altogether resulted in cardiac arrest which led to the homicidal death of the deceased.

Bombay High Court:

The State argued that the deceased was a thief and 17 cases were pending against him at the time of his death. The Court held that the deceased being a habitual criminal cannot be accepted on mere

83 (2008) 3 CALLT 345 (HC).
84 2002 Bom CR(Cri) 371.

allegations made by the police against him. This also does not vest an agent of the State with a power to inflict multiple injuries causing his death, in the manner they have done. Therefore, the State is under an obligation to pay compensation to the deceased legal heirs.

The police also failed to prepare the arrest memo, to obtain signatures of witnesses, to inform the relatives or friends or in their absence, to apprise the arrestee of his right to have his relatives or friends informed, to conduct a medical examination, to prepare an inspection memo and to update the notice board of the Police Control Room. The Court held that apart from initiating enquiry against the official and departmental action, he should also be tried and punished for contempt of law.

Quantum of compensation: Rs. 75,000/- to the daughter and Rs. 50,000/- each for the two sons.

Parbatabai Sakharam Taram v. State of Maharashtra and Ors.[85]

Background:

Parbatabai, aged 13 years, was arrested by the police from her house at midnight by male police officers in 1990. She was brutally assaulted, tortured and treated inhumanely over a period of three years. An FIR was registered against her for offences under IPC and Terrorist and Disruptive Activities Act after three years of the arrest. She was remanded to police custody and judicial custody. After the intervention of an NGO and the National Commission on Women, her matter was transferred to the Juvenile Justice Board where she was released on bail.

She approached the Court seeking compensation from the State and the police department by invoking its extraordinary jurisdiction under Article 226 and 227 of the Constitution of India to issue appropriate writ, order or direction for conducting an inquiry against the erring Police Officers, including the State for her wrongful detention in police custody, false implication in serious offences, custodial torture and for violation of her fundamental and human rights including the protection she was entitled to under the Juvenile Justice Act, 1986, Juvenile Justice (Care and Protection of Children) Act, 2000 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Bombay High Court:

Lack of accountability in the police force is a factor in increasing instances of custodial violence. The victim had been arrested and illegally detained right from 1990 where she suffered inhumane torture. The petitioner could not explain the manner in which she was tortured insulting her womanhood. But the Court held that one can understand the agony the victim might have suffered in police custody. Therefore, compensation was granted to the petitioner. The Court ordered the initiation of criminal proceedings where enquiry established the culpability in custodial deaths or custodial torture, deployment of at least two women constables in each district and compensation for the mental, physical and financial losses.

Quantum of Compensation: Rs. 5,00,000/-

85 2006 Cri LJ 2202.

Prithipal Singh and Ors. v. State of Punjab and Ors.[86]

Background:

The Appellants, Prithipal Singh, Satnam Singh, Surinderpal Singh and Jasbir Singh were convicted of causing the death of Jaswant Singh Kalra, a human rights activist having allegiance to Shiromani Akali Dal. The Appellants picked up Jaswant Singh Kalra from his residence on 06.09.1995. On the same day, his wife, Paramjit Kaur filed a missing person complaint which was registered as an FIR on 07.09.1995. Due to the lack of progress in the case, Paramjit Kaur filed a Criminal Writ Petition before the High Court of Punjab and Haryana. The Court ordered the CBI to investigate into the matter. Despite CBI's efforts and announcing a reward of 1 lakh for information on Jaswant Singh Kalra's whereabouts, he could not be located. On the completion of investigation, the CBI filed a chargesheet accusing the Appellants of committing offences under Sections 120B, 365 and 220 of IPC.

In March 1998, Kuldip Singh (attached as a Special Police Officer to Satnam Singh, SHO, Police Station Jhabal) made voluntary confessions about the ordeal suffered by Jaswant Singh at the hands of the Appellants. Kuldip Singh informed the CBI that he could not reveal the details of the custodial death of Jaswant Singh since he apprehended threat to his safety. In this appeal, the Appellants are challenging the order of the Trial Court which convicts them under Sections 364, 302 and 34 of IPC for causing the death of Jaswant Singh Kalra.

Punjab and Haryana High Court:

The Court discussed matters relating to the nature of evidence required in cases of custodial death and the nature of human rights violations. It observed that police atrocities are violative of Articles 21 and 22 of the Constitution and the tolerance of such atrocities amount to *acceptance of systemic subversion and erosion of rule of law*. It held that any form of torture or cruel, inhuman or degrading treatment is prohibited during investigation, interrogation or otherwise. It stated that the public servant is accountable and the State is responsible when custodial death occurs.

In this regard, it assigned the responsibility of balancing the protection of fundamental rights of an individual and duties of the police to the Courts. The safety of the State and the safety of the people must coexist. The positive and negative obligations attached to the right to life ensure that the state must prohibit arbitrary deprivation of life. The state also has the positive obligation protect the right to life of every person within its jurisdiction which includes taking administrative and other measures to protect life and investigate into suspicious deaths.

The Court categorically held that *"the state must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person, particularly at the hands of any State agency/police force"*. It also flagged the probability of psychological consequences such as acute stress and post-traumatic stress disorder caused by torture.

Evidence of sole eye-witness:

The Court recognized the ground realities in procuring evidence against police officials in cases of custodial death. It stated that when custodial deaths occur, only police officials can explain the circumstances of the case. Due to this, it is difficult to get direct or ocular evidence to prove the complicity of police officials.

86 (2012) 1 SCC 10

As a general rule Courts *can and may act on the testimony of a single eye witness provided he is wholly reliable*. The Court clarified that according to Section 134 of the Indian Evidence Act, 1872 the Court is well within its right to legally convict a person on the testimony of a single witness. Quality of the evidence is more important than plurality of witnesses. In fact, in extraordinary situations, or while dealing with an unprecedented case, the Court must *"innovate the law and may also pass unconventional order…"*

State of Madhya Pradesh v. Shyam Sunder Trivedi and Ors.[87]

Background:

On 13th October 1981, the Respondents brought Nathu Banjara as a suspect in a murder case to Dhabala Deval police station for interrogation. The next day, Nathu Banjara died in police custody. A few residents of the village were aware of the custodial torture and therefore, kept a watch on the police station and also went to the hospital where the post-mortem examination was supposed to be conducted. The residents submitted a letter to the District Magistrate and on this basis, a Magisterial enquiry was conducted by the Additional District Magistrate. Subsequently, a post mortem examination was held which was also signed by Respondent 1, Shyamsunder Trivedi (Sub-Inspector). According to the post mortem report, 14 external injuries were found on Nathu Banjara, who died as a result of shock due to the extensive external injuries. The Respondents were charged under Sections 302/149, 147, 201, 342 and 218 of IPC.

The Trial Court acquitted all the Respondents of all charges. Madhya Pradesh High Court convicted the Respondents, but acquitted them of charges under Sections 147, 149, 218, 201 and 342 of IPC. Respondent 1 filed a revision petition to the High Court challenging his conviction, which was dismissed. In this petition, State of Madhya Pradesh questioned the acquittal of the Respondents of charges under Sections 147, 149, 218, 201 and 342 of IPC.

Supreme Court:

The Court criticized the Trial Court and the High Court for not appreciating the evidence against all the Respondents. It noted the difficulty in getting direct/ocular evidence in cases of police torture/custodial death, and to prove conspiracy in such cases. Police officials are the only persons who can explain the circumstances of custodial death. However, they pervert the truth because of the *"brotherhood"*. Due to this, proof beyond reasonable doubt cannot be provided in cases of custodial death.

The Court noted that the *exaggerated adherence to and insistence upon the establishment of proof beyond reasonable doubt, by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect*. It further observed that this unrealistic approach of the Courts in demanding proof beyond reasonable doubt encourages custodial torture since it reinforces the belief that the police cannot be prosecuted or implicated of torture due to the dearth of evidence. To address this, Courts must deal with such cases in a realistic manner and with the required sensitivity. If Courts do not do this, people will lose faith in the judiciary.

The Court cited the 4th report of the National Police Commission (1980) which describes the dehumanizing effect of custodial torture on the victims. It noted that the public's perception of the police

87 1995(1) MPJR (SC) 346

is low, even of the supervisory ranks since they routinely resort to custodial torture *to achieve quick results by short-cut methods*. The report attributed the lack of convictions for custodial torture to the heavy dependence on ocular/direct evidence.

The Court upheld the conviction of Respondents 1, 3, 4 and 5 for charges under IPC. It sentenced Respondent 1 to rigorous imprisonment of two years (in addition to the sentence imposed by the High Court) and Respondents 3, 4 and 5 to rigorous imprisonment of one year. It also ordered Respondents 1, 3, 4 and 5 to pay compensation to the heirs of Nathu Banjara.

The Court upheld the order of the High Court in acquitting Respondents 6 and 7 since they were not given an opportunity to respond to the evidence given against them under Section 313 of CrPC. It acquitted Respondent 2 due to the lack of evidence regarding (i) his presence in the police station during the torture and (ii) his participation in causing the death of Nathu Banjara.

Quantum of compensation: Rs. 50,000 to be paid by Respondent 1; and Rs. 20,000 each to be paid by Respondents 3, 4 and 5.

Duties of the Magistrate (details are provided in the Master Checklist below):

- Be vigilant and probing to unearth allegations of possible police misconduct
- Act swiftly even on suspicion of torture or inhuman treatment of any kind suffered by the arrested person
- Ask every arrested person directly if s/he has been subjected to torture or inhuman treatment
- Initiate the appropriate proceedings against police personnel when allegations of torture or inhuman treatment are made out prima facie

MASTER CHECKLIST: DUTIES OF THE MAGISTRATE AT FIRST PRODUCTION

Check of the legality of arrest and examine any request for remand

- Check that the arrest is legal, in accordance with the law and all the constitutional and statutory rights are protected
- Ask for the checklist from the police; scrutinize it carefully to ensure all the necessary documents have been produced
- If the accused is a woman, ask if a female officer was present to carry out the arrest and search of the accused, and there was no breach of the special procedure to be followed when arresting a woman (as per Section 51; and sub-section (4) and proviso to Section 46 of CrPC)
- Check whether specific reasons have been recorded for arrest, the relevance of the reasons and whether a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated are attracted for grant of remand
- If the police are seeking remand, clearly record reasons for whether detention is justified or not
- Examine the case diaries prepared by the police to seek corroboration of the grounds of arrest and reasons for seeking remand
- If the arrest does not satisfy the requirements of Section 41 of CrPC, refuse further detention and release the person on bail or personal bond
- Check carefully if the safeguards provided by the Supreme Court in D.K. Basu v. State of West Bengal[90] have been complied with

Scrutinise the arrest-related documents:

- Check that the arrest memo is among the documents produced by the police
- If the arrest memo is absent, censure the police officer present and record reasons for its absence
- Place on record that the arrest memo is absent and question the legality of the arrest and any further detention if requested by the police
- If present, scrutinize the arrest memo carefully to check all the mandated information to be provided is listed, including the signature of the arrested person
- Verify with the arrested person if the details recorded in the arrest memo are accurate
- Endorse the arrest memo as seen by the Magistrate after ensuring it contains all the necessary information
- If there are faults or gaps in the arrest memo, clearly mark and record such discrepancies. Consider the appropriate action to be taken against the police officer

Verify that the arrested person was produced within 24 hours of arrest:

- Check the date and time of arrest listed in the arrest memo, and verify with the arrested person
- Verify if the production is within 24 hours of arrest

1 AIR 1997 SC 610.

- Mandate the physical production of the accused during first production
- Note down the exact time of production in court while endorsing the arrest related documents
- If the production was after 24 hours of arrest, order the initiation of departmental proceedings against police officials

Take on record complaints alleging custodial violence/inquire whether the arrested person was tortured, and issue appropriate directions:

- Ask the arrested person if s/he was subjected to custodial violence. In doing so, as far as possible, instruct the accompanying police officer to leave the Court while interacting with the arrested person
- If the arrested person complains orally of being subjected to custodial violence, facilitate the process of getting the complaint in writing
- On reasonable suspicion of the occurrence of custodial violence against the arrested person, disallow further police custody of the arrested person
- Order the medical examination of the accused to examine him/her physically
- Transfer the arrested person to judicial custody or release him/her on bail or personal bond
- Summon the Investigating Officer immediately, or at most, within 24 hours, to provide the FIR, case diary, medical examination report and any other relevant documents for scrutiny to put together the facts
- Summon the Station House Officer or any higher supervising officer, as needed
- On receipt of a complaint regarding torture from an arrested person, direct the registration of an FIR or take cognizance of the complaint of the person and proceed against the officials under law

Ensure that the arrested person has legal representation:

- Inform the arrestee about the right to legal representation
- Ask the arrested person if s/he has a lawyer. If not, determine whether the arrested person can afford a lawyer on their own
- If the arrested person cannot afford a lawyer, immediately assign a lawyer from the list of legal aid lawyers that should be present in the Magistrate's court
- Ensure that the arrestee is represented by the said legal aid lawyer during the remand hearing
- Ensure the list of legal aid lawyers is made available to the arrested person
- Display the names and contact details of the legal aid counsels assigned to the Magistrate's court in full view of all persons who access the court

Inform the arrested person about the right against self-incrimination:

- Explain the meaning of the right against self-incrimination to every arrested person in simple non-legal language
- Direct the accompanying police officer to leave the Court while interacting with the arrested person.
- Ask the arrested person if the police used threats (physical and/or verbal) or inducements to extract a confession, or forced him/her to answer questions during interrogation. If yes, consider the appropriate action to take against the police officer(s)
- Ask the arrested person if s/he was subjected to custodial violence of any kind
- Ask the arrested person if s/he had a lawyer at the time of interrogation

Ordering release on bail/bond or remanding the arrested person to judicial/police custody:

- Check if the arrested person is accused of committing bailable offence/s
- Verify if the police offered release on bail to the arrested person
- Offer release on bail/bond if the above was not done
- Assess if the arrested person has the ability to fulfil monetary conditions to be released on bail
- Impose personal bond where the arrested person is an indigent
- Release the arrested person on bail/personal bond/surety if
    - s/he is accused of committing a bailable offence
    - s/he is accused of committing a non-bailable offence but her/his presence in custody is not required
    - the arrest/detention are unjustified or illegal
    - s/he is a permanent resident or ordinarily resident in the area with family/professional obligations
    - it can be reasonably deduced that such person will cooperate with the investigation
    - the person is infirm/old
- If the arrested person is at the risk of absconding, impose obligations and reasoned restrictions.
- Mandate the physical production of the arrested person
- Make the decision on whether to grant remand only after examining the documents of arrest, reasons of arrest and necessity
- Ensure all the documents given by the police are in a language known to the Magistrate
- Remand the arrested person to police custody only if his/her presence is absolutely necessary for investigation
- While remanding the accused to police custody, the length of the remand should be limited to the period required for the purposes of investigation and no more
- Ensure that Article 22(1) and (2) of the Constitution of India and Section 57 of the CrPC have been complied with
- Ensure judicial orders granting, or, rejecting, remand are provided in writing with clear reasons

Note: Arrested person can be produced through video conferencing only while requesting subsequent remand, and on extenuating circumstances, while ensuring that all safeguards are followed

Ascertain the age of the accused and taking necessary measures if s/he is a juvenile in all likelihood:

- Ascertain the age of the arrested person on first production if he/she appears to be below the age of 18 or says s/he is below 18
- On suspicion that s/he may be a minor, send such person to an Observation Home immediately until the determination of his/her age and refer the case to the Juvenile Justice Board
- Order an inquiry, including the appropriate medical tests if needed, to establish the age of the arrested person
- Transfer the matter to the appropriate forum, such as the Juvenile Justice Board, if it is found that the arrestee is a juvenile on the date of commission of the alleged offence

Order action against the police personnel when the arrest involves irregularities:

- Grant monetary compensation in cases of unlawful arrest and detention
- Order departmental proceedings against erring police personnel
- Initiate criminal proceedings where illegalities are made out prima facie
- Draft the prayers, if required and grant the appropriate relief which serves the ends of justice and is justified in the facts and circumstances of the case

ANNEXURES

No. U1 /85636/2014
Police Headquarters
Kerala, Thiruvananthapuram
Dated: 13.08.2014

Circular No. 20/ 2014

Sub:- Directions on arrest of persons under Section 498 A of IPC or Section 4 of the Dowry Prohibition Act and for offences punishable which may be less than 7 years imprisonment.

Read.- 1. Judgement of the Hon'ble Supreme Court dated 02/07/2014 in Crl.(A) No. 1277/ 2014
2. PHQ Circular No. 7/2011.
3. PHQ Circular No. 28/2012.

The Hon. Supreme Court vide its recent Judgment dated 02.07.2014 in Crl.(A) No. 1277/2014 observed as follows;

A. "The fact that Section 498 'A' is a cognizable and nonbailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bedridden grandfathers and grandmothers of the husbands, their sisters living abroad for decades are arrested." "The rate of charge sheeting in cases under Section 498A, IPC is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads".

B. "The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption".

02. The above referred Circulars No. 7/2011 and 28/2012 are also relating to the arrest of persons without warrants. Indiscriminate arrests without adequate evidence has always been taken critical/adverse note by various courts in India including the Apex Courts. **In this scenario the latest directions of the Hon. Supreme Court are as below;**

a. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498 A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down in Section 41 CrPC;

b. All police officers be provided with a check list containing specified sub-clauses under Section 41(1) (b) (ii),CrPC;

c. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

d. The magistrate while authorizing detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorize detention;

e. The decision not to arrest an accused be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

f. Notice of appearance in terms of Section 41A of CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

g. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdictions.

h. Authorizing detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

03. The Court also held that the directions aforesaid shall not only apply to the cases under Section 498 – A of the IPC or Section 4 of the Dowry Prohibition Act, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

04. In the light of above directions all Police Officers are instructed that while enforcing arrest under Section 41 CrPC, they must satisfy themselves the following conditions specified in Section 41(1)(b)(ii) CrPC.

- "The police officer is satisfied that such arrest is necessary – to prevent such person from committing any further offence; or for proper investigation of the offence; or
- To prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or
- To prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or
- As unless such person is arrested, his presence before the Court as and whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:
- Provided that a police officer shall, in all cases where the arrest of a person is not required, the police officer shall, record the reasons in writing for not making the arrest".

05. Henceforth while forwarding / producing the accused before the Magistrate for further detention, the police officer shall forward the check list containing specified sub clauses under Section 41(1)(b)(ii) CrPC duly filled. The form of check list is given below:

Form of check list to be furnished while forwarding the accused before the Magistrate

Office Address

1)	Whether the police officer is satisfied that the arrest is necessary?	Yes / No
a	To prevent the person from committing any further offence.	Yes / No
b	For proper investigation of the offence	Yes / No
c	To prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or	Yes / No
d	To prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or	Yes / No
e	Whether his arrest is necessary to ensure his presence in the court	Yes / No
2)	The facts reasons and the conclusions of the police officer for arresting the person.	Furnish details
3)	If arrest is not required state the reasons.	Furnish details

Date

Signature

Name & Designation

All District Police Chiefs of Districts / Cities are hereby instructed to strictly adhere the above Guidelines / Directives of the Hon'ble Supreme Court.

Sd/
State Police Chief

//Approved for issue//

14/8/2014
(LOKNATH BEHERA IPS)
Additional Director General of Police
(Modernisation)

To

All Officers in List 'B' for information and necessary action.

Copy to: CAs to all Officers in Police Headquarters for information
,, LA, Manager, Police Headquarters for information
,, All SSs and JSs, PHQ/RAC/Stock file.
,, SP PCC. Must be uploaded in i-aps also

NOTES

CHRI Programmes

CHRI seeks to hold the Commonwealth and its member countries to high standards of human rights, transparent democracies and Sustainable Development Goals (SDGs). CHRI specifically works on strategic initiatives and advocacy on human rights, Access to Justice and Access to Information. Its research, publications, workshops, analysis, mobilisation, dissemination and advocacy, informs the following principal programmes:

1. Access to Justice (ATJ) *

*Police Reforms: In too many countries the police are seen as an oppressive instrument of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that the police act as upholders of the rule of law rather than as enforcers of a regime. CHRI's programme in India and South Asia aims at mobilising public support for police reforms and works to strengthen civil society engagement on the issues. In Tanzania and Ghana, CHRI examines police accountability and its connect to citizenry.

*Prison Reforms: CHRI's work in prisons looks at increasing transparency of a traditionally closed system and exposing malpractices. Apart from highlighting systematic failures that result in overcrowding and unacceptably long pre-trial detention and prison overstays, it engages in interventions and advocacy for legal aid. Changes in these areas can spark improvements in the administration of prisons and conditions of justice.

2. Access to Information

*Right to Information: CHRI's expertise on the promotion of Access to Information is widely acknowledged. It encourages countries to pass and implement effective Right to Information (RTI) laws. It routinely assists in the development of legislation and has been particularly successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh, Ghana and Kenya. In Ghana, CHRI as the Secretariat for the RTI civil society coalition, mobilised the efforts to pass the law; success came in 2019 after a long struggle. CHRI regularly critiques new legislation and intervene to bring best practices into governments and civil society knowledge both at a time when laws are being drafted and when they are first being implemented. It has experience of working in hostile environments as well as culturally varied jurisdictions, enabling CHRI bring valuable insights into countries seeking to evolve new RTI laws.

*Freedom of Expression and Opinion -- South Asia Media Defenders Network (SAMDEN): CHRI has developed a regional network of media professionals to address the issue of increasing attacks on media workers and pressure on freedom of speech and expression in South Asia. This network, the South Asia Media Defenders Network (SAMDEN) recognises that such freedoms are indivisible and know no political boundaries. Anchored by a core group of media professionals who have experienced discrimination and intimidation, SAMDEN has developed approaches to highlight pressures on media, issues of shrinking media space and press freedom. It is also working to mobilise media so that strength grows through collaboration and numbers. A key area of synergy lies in linking SAMDEN with RTI movements and activists.

3. International Advocacy and Programming

Through its flagship Report, Easier Said Than Done, CHRI monitors the compliance of Commonwealth member states with human rights obligations. It advocates around human rights challenges and strategically engages with regional and international bodies including the UNHRC, Commonwealth Secretariat, Commonwealth Ministerial Action Group and the African Commission for Human and People's Rights. Ongoing strategic initiatives include advocating for SDG 16 goals, SDG 8.7 (see below), monitoring and holding the Commonwealth members to account and the Universal Periodic Review. We advocate and mobilise for the protection of human rights defenders and civil society spaces.

4. SDG 8.7: Contemporary Forms of Slavery

Since 2016, CHRI has pressed the Commonwealth to commit itself towards achieving the United Nations Sustainable Development Goal (SDG) Target 8.7, to 'take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.' In July 2019 CHRI launched the Commonwealth 8.7 Network, which facilitates partnerships between grassroots NGOs that share a common vision to eradicate contemporary forms of slavery in Commonwealth countries. With a membership of approximately 60 NGOs from all five regions, the network serves as a knowledge-sharing platform for country-specific and thematic issues and good practice, and to strengthen collective advocacy.

FRIEDRICH NAUMANN FOUNDATION For Freedom.

South Asia

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