

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO. 3960 OF 2015
ALONGWITH
CRIMINAL APPLICATION NO.92 OF 2016**

Gopal s/o. Ramdas Shetye,
Aged - 40 years,
Occupation - Service,
R/at. Hut No.281, Nityanand Nagar
Hutment, Vaitangwadi, Ghatkopar,
Mumbai.

.. Petitioner

Vs.

The State of Maharashtra,
through its Secretary,
Home Department, Mantralaya,
Mumbai - 32.

.. Respondent

.....

Mr. Nilesh C. Ojha a/w. Mr. Rajesh Panchal and Dr. Preeti
Brahmania, Advocate for the Petitioner.
Mr. J.P. Yagnik, APP for the Respondent - State.

.....

**CORAM : S.C. DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.**

DATE OF RESERVE : MARCH 30, 2017.

DATE OF PRONOUNCEMENT : MAY 5, 2017.

JUDGMENT (PER PRAKASH D. NAIK, J.) :

The petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India and the inherent powers of this Court under Section 482 of the Code of

Criminal Procedure. The principal prayer of the petitioner is to direct the respondent no.1 to pay an amount of Rs.200 crores towards compensation for ruining the life of the petitioner in the matter of his illegal arrest, detention and wrongful confinement for a long period of seven years though he is not responsible for the commission of offence of which he was charged.

2 The petitioner had also preferred criminal application no.92 of 2016 and seeking interim compensation in the sum of Rs.100 crores during the pendency of the petition before this Court.

3 The factual matrix relevant for determining the issues raised in this petition and the reliefs sought by the petitioner is as follows:

(a) The petitioner was arrested in connection with C.R.No.168 of 2009, registered with Kurla Railway Police Station for the offence punishable under Section 376 of the Indian Penal Code (for short "IPC"). According to the prosecution he was arrested on 29th July, 2009 which is disputed by the petitioner as according to him he was arrested prior thereto. The first information report (for short "FIR") was

lodged on the basis of the statement of complainant namely Priti Ashok Dethe, recorded on 19th July, 2009. According to the complainant, on the date of incident she was sleeping on the bridge of the Ghatkopar railway station. At about 3.30 hours, the accused caught hold of her and forcibly had sexual intercourse with her. During the process, she sustained some injuries. The complainant had further stated that the person who ravished her has given his name as Gopi.

- (b) After registration of the FIR, the police machinery commenced the investigation and the accused was arrested purportedly on the basis of the recordings in the C.C.T.V. footage. According to the prosecution, the identification parade was conducted wherein the accused was identified. On completing the investigation, the charge-sheet is filed in the concerned Court. The case was thereafter committed to the Court of Sessions.
- (c) The prosecution examined five witnesses. On completing the evidence, statement of the accused was recorded under Section 313 of the Code of Criminal Procedure (for

short "Cr.P.C.").

- (d) The case was numbered as Sessions case No.594 of 2009. The Ad-hoc Additional Sessions Judge at Sewree, Mumbai by judgment and order dated 31st May, 2010 convicted the accused/petitioner for the offence punishable under Section 376 of the IPC and he was sentenced to suffer R.I. for seven years and fine of Rs.400/- and in default of payment of fine to suffer R.I. for one month. The petitioner - accused was in custody from the date of his arrest during the course of trial.
- (e) The petitioner - accused preferred an Appeal before this Court viz. Criminal Appeal No.525 of 2010. During the pendency of the Appeal, the petitioner had preferred an application for bail which was rejected by this Court and the petitioner continued to remain in custody.
- (f) The Appeal preferred by the petitioner was finally heard and by judgment and order dated 10th June, 2015, the Appeal of the petitioner was allowed and the impugned judgment and order of conviction was set aside and,

thereby the petitioner was acquitted. The petitioner had however undergone the sentence of imprisonment awarded by the trial court.

- (g) The petitioner has thereafter preferred the present petition seeking damages for his arrest and detention in the aforesaid proceedings.

4 During the pendency of this petition on 15th April, 2016, learned APP had submitted before this Court that the State Government is in the process of filing a Special Leave Petition against the judgment and order dated 10th June, 2015 delivered by this Court in Criminal Appeal No.525 of 2010. The said statement was recorded in order dated 15th April, 2016. In the said order it was further directed that the application for interim compensation to be heard at the time of final hearing of main writ petition, hearing of which has already been expedited. On 9th August, 2016, the learned APP again stated before this Court that the State has taken steps to file Special Leave Petition in the Apex Court. The learned APP was directed to intimate the status of the Special Leave Petition. On 21st October, 2016, the learned APP submitted that he had received telephonic instructions that

the SLP preferred by the State challenging the aforesaid decision has been dismissed and the official communication will be placed on record. On 22nd December, 2016 none appeared for petitioner. The petition was adjourned to 16th March, 2017. On 27th January, 2017, the petition was directed to be placed for direction on supplementary board on 17th February, 2017. The petition was thereafter adjourned to 8th March, 2017. On 8th March, 2017, the petition was adjourned to 15th March, 2017 at the request of learned public prosecutor and to enable him to take instructions only on the point of filing a short affidavit so as to oppose the writ petition. It was further directed that the petition be listed for “directions/hearing”. On 15th March, 2017, the petition was placed for Directions. The learned APP appearing for the State prayed for further time to file affidavit-in-reply. He submitted that the affidavit-in-reply could not be filed as the officials are busy in ongoing legislative assembly session. The request was opposed by the petitioner's advocate on the ground that sufficient time was already granted by this Court and in view of the communication made by the petitioner's advocate to the office of the public prosecutor with regards to the filing of the affidavit-in-reply. This Court vide order dated 15th March, 2017 expressed its displeasure with regard to the stand of the respondent-State and

granted adjournment at the request of learned APP till 30th March, 2017, subject to payment of costs which was quantified at Rs.5000/- as condition precedent which is directed to be paid to the petitioner's advocate before the returnable date. The respondent thereafter filed the affidavit-in-reply which is on record.

5 The petition was initially heard on 3rd February, 2016 and Rule was issued. The hearing was expedited. On the same day, the learned counsel for the petitioner sought leave to delete respondent nos.2 to 8 which was granted and the petitioner was directed to carry out necessary amendment. The order reads as follows:

"1 Learned counsel appearing for the petitioner seeks leave to delete respondent nos. 2 to 8. Leave granted. Necessary amendment be carried out within two weeks from today.

2 Heard Mr. Ojha, learned counsel appearing for the petitioner. Rule. Hearing of the writ petition is expedited."

In view of the order dated 3rd February, 2016, the

petitioner carried out the requisite amendment by deleting respondent nos. 2 to 8 and also altering and deleting certain prayer clauses.

6 The petitioner had initially made the following prayers in the petition:

“(i) by suitable Writ, order or direction be pleased to direct the respondent no.1 to appoint an independent agency i.e. C.B.I. in view of law laid down by Hon'ble Supreme Court in the case of 1995 Cri. L.J. 3612 for the purpose of registration of prosecution against the respondents, for the offences punishable under Sections 166, 167, 188, 219, 193, 194, 199, 200, 201, 211, 465, 467, 468, 471, 474 read with Section 120(B) & 34 of the Indian Penal Code, and U.Sec. 145(2), 146, 147 of Maharashtra Police Act and to proceed against them in accordance with law;

(ii) by suitable writ order or direction be pleased to direct the respondent nos.____ for initiating enquiry against the respondent nos.____ in the matter of violation of provisions of law, and to take action against them;

- (iii) *by suitable writ, order or direction be pleased to direct the respondent no.1 to file and initiate contempt proceedings against the respondents police officers for disobeying the law laid down by the Hon'ble Supreme Court of India and this Hon'ble Court from time to time in the matter;*
- (iv) *by suitable writ, order or direction be pleased to direct the respondent no.1 State to forthwith suspend the respondents, including the respondent Adhoc Sessions Judge and Magistrate concerned;*
- (v) *by suitable writ, order or direction be pleased to direct the respondent Commissioner of Police to immediately suspend the police officials and investigating officer for not performing their duties in the manner required;*
- (vi) *direct the respondent no.1 to pay an amount of Rs.200 Crores towards compensation for ruining the whole life of the petitioner in the matter of his illegal arrest, detention, and wrongful confinement for a long period of 7 years, though he is not responsible for the commission of offence of which he was charged with;*
- (vii) *by suitable writ, order or direction be pleased to*

direct the independent agency i.e. C.B.I. to complete the proceedings/enquiry as early as possible and in any case within a period of one month from the date of the order of this Hon'ble Court;

- (viii) pending hearing and final disposal of the present petition by appropriate interim relief be pleased to direct the respondents to deposit an amount of Rs.100 Crores with this Hon'ble Court towards interim compensation to the petitioner, with permission to withdraw the same;*
- (ix) pending hearing and final disposal of the present petition by appropriate interim relief be pleased to suspend the respondent police officers and Magistrate for acting in total derogation of their powers;*
- (x) grant ad-interim relief in terms of prayer clause (vii) and (vii) above;*
- (xi) pass appropriate directions to the home ministry to frame rules so as to avoid such false implications of citizens at the hands of corrupt criminal minded Police personals;*
- (xii) to allow the petition with costs;*

(xiii) *to grant any other reliefs to which the petitioner is found entitled in the facts and circumstances of the case."*

7 Amended prayer clauses of the petition read as under:

"(i) by suitable Writ, order or direction be pleased to direct the respondent no.1 to appoint an independent agency i.e. C.B.I. in view of law laid down by Hon'ble Supreme Court in the case of 1995 Cri. L.J. 3612 for the purpose of registration of prosecution for the offences punishable under Sections 166, 167, 188, 219, 193, 194, 199, 200, 201, 211, 465, 467, 468, 471, 474 read with Section 120(B) & 34 of the Indian Penal Code, and U.Sec. 145(2), 146, 147 of Maharashtra Police Act and to proceed against them in accordance with law;

(ii) by suitable writ order or direction be pleased to direct the respondent nos.____ for initiating enquiry in the matter of violation of provisions of law, and to take action against them;

(iii) by suitable writ, order or direction be pleased to direct the respondent no.1 to file and initiate contempt proceedings against police officers for disobeying the law laid down by the Hon'ble Supreme Court of India and this Hon'ble Court

from time to time in the matter;

- (iv) *..... deleted.....*
- (v) *by suitable writ, order or direction be pleased to direct the respondent Commissioner of Police to immediately suspend the police officials and investigating officer for not performing their duties in the manner required;*
- (vi) *direct the respondent no.1 to pay an amount of Rs.200 Crores towards compensation for ruining the whole life of the petitioner in the matter of his illegal arrest, detention, and wrongful confinement for a long period of 7 years, though he is not responsible for the commission of offence of which he was charged with;*
- (vii) *by suitable writ, order or direction be pleased to direct the independent agency i.e. C.B.I. to complete the proceedings/enquiry as early as possible and in any case within a period of one month from the date of the order of this Hon'ble Court;*
- (viii) *pending hearing and final disposal of the present petition by appropriate interim relief be pleased to direct the respondents to deposit an amount of Rs.100 Crores with this Hon'ble*

Court towards interim compensation to the petitioner, with permission to withdraw the same;

- (ix) pending hearing and final disposal of the present petition by appropriate interim relief be pleased to suspend the respondent police officers and Magistrate for acting in total derogation of their powers;*
- (x) grant ad-interim relief in terms of prayer clause (vii) and (vii) above;*
- (xi) pass appropriate directions to the home ministry to frame rules so as to avoid such false implications of citizens at the hands of corrupt criminal minded Police personals;*
- (xii) to allow the petition with costs;*
- (xiii) to grant any other reliefs to which the petitioner is found entitled in the facts and circumstances of the case."*

8 In view of the earlier directions, the petition was taken up for final hearing and disposal. We have heard Shri Ojha, the learned counsel appearing for the petitioner and Shri Y.P. Yagnik, learned APP appearing for the respondent - State.

9 The learned advocate for the petitioner submitted that the petitioner has been falsely implicated in the case and he had to undergo detention for a period of seven years. He submitted that the petitioner had to undergo mental agony on account of his detention in custody in connection with the criminal proceedings which were subsequently quashed and set aside by this Court. He submitted that this Hon'ble Court had acquitted the petitioner by setting aside the order of conviction. He submitted that the observations made by this Court while acquitting the petitioner from the said prosecution makes it apparent that the petitioner was falsely implicated in the case and had to suffer because of the incarceration of the petitioner in custody for a long period of time. He submitted that the petitioner and his family had to suffer on account of the said criminal proceedings which were launched against him and due to which there was illegal detention in the custody for a long span of time. He submitted that after his arrest he continued to remain in custody as he was not granted bail. He has undergone the sentence imposed on him by the trial court which was set aside by this Court in the Appeal preferred by the petitioner. The order of acquittal confirms that he was innocent and was

deprived of his liberty on account of the false prosecution. He, therefore, submitted that violation of his freedom and mental torture which he had undergone and the suffering of the petitioner and his family, the State should be directed to pay damages to the petitioner as prayed by him in the petition. He submitted that during his custody in the said proceedings, he lost his father, his daughters were required to be kept in the orphanage. His wife had left him and got married to some other person. He lost his family life. He is an educated person and was earning his livelihood by honest means and due to his detention and custody he had lost his employment as well damage was caused to his reputation. He relied upon an observations made by this Court in the Appeal preferred by the petitioner. The learned counsel pointed out the observations of this Court in the judgment dated 10th June, 2015 made in paragraphs 6 and 8 to 17. He submitted that on account of his detention in custody there is violation of petitioner's personal liberty which infringes his fundamental right guaranteed under Article 21 of Constitution of India.

10 In addition to the prayer for compensation, the learned counsel for the petitioner had also prayed that the CBI be

directed to conduct the inquiry with regards to the false implication of the petitioner in the criminal case by the police. He submitted that there was a conspiracy to falsely implicate the petitioner which has to be investigated. During the course of argument he also submitted that the action be initiated against the erring police officers for not performing their duties in the manner required. He also submitted that the conduct of the learned Public Prosecutor appearing in this petition was not fair and that he had committed contempt of the Court.

11 The learned APP submitted that he is discharging his duty as a prosecutor and has assisted the court from time to time. He submitted that he has not committed any act amounting to contempt of the Court. He submitted that the submissions made by the petitioner's counsel are devoid of any merits. He submitted that the petitioner was arrested on 29th July, 2009. He was prosecuted before the trial Court by following the procedure and was convicted by the trial Court. He submitted that it is true that the appellant was acquitted by this Court in the appeal preferred by the petitioner. However, this is not the case where the compensation can be awarded to the petitioner. He submitted that there are no *malafides* on the part of the investigating

machinery in prosecuting the petitioner in the said proceedings. He submitted that as observed by the appellate court in the appeal preferred by the petitioner, the benefit of doubt was given to the petitioner. He placed reliance upon the observations of the appellate court made in paragraph no.17 of the judgment and order dated 10th June, 2015. He further submitted that in the operative part of judgment of trial Court it is stated that C.D. being part of evidence, it be kept in record of proceedings. He relied upon the submissions reflected in the affidavit in reply filed by the State. He placed reliance upon the decision of the Apex Court in the case of ***State of Rajasthan Vs. Jainudeen Shekh & Anr.***¹

12 It would be pertinent to refer to certain averments in the petition while adjudicating the prayer in this petition. In ground "I" of the petition it is stated that because of the false implications of the petitioner he has suffered immensely and irreparably. A loss caused to the petitioner can never be compensated. Father of the petitioner had expired due to the shock that the petitioner has been awarded sentence to suffer seven years of imprisonment for the offence which he has not

1 (2016) 1 SCC 514

committed. The daughters of petitioner were required to be admitted in an orphanage. The petitioner's mother was required to go back to her village and his wife divorced him and married another person, thus, depriving the petitioner of his entire matrimonial life. He lost his job. He was working in a Five Star Hotel and earning Rs.50,000/- salary per month. In ground "O" it is stated that the police officers, learned Magistrate, learned APP have committed serious offences of violating the provisions of law and not performing their duties. In ground "H" it has been stated that the trial court was aware of the fact that the police has fabricated the evidence against the petitioner and it was its duty to direct the prosecution to place all the facts and materials before the court in order to undertake a free and fair trial. The trial judge has entered into the conspiracy by not performing its duties in accordance with law and, therefore, liable to be prosecuted and punished under Section 120B of the IPC. It is further stated that the materials on record were more than sufficient to establish that the police has falsely implicated the petitioner in the said crime. Even though the learned Sessions Judge has convicted the petitioner, therefore, an inference can be drawn from the illegal acts committed by the learned Judge that he had subsequently joined with the conspirators i.e. the police

officers and therefore liable to be prosecuted and punished in accordance with the provisions of Section 120B. In fairness to the petitioner, we must state that the Sessions Judge who was party respondent to the petition has been deleted in pursuant to the order dated 3rd February, 2016. However, these averments were not deleted from the memo of this petition.

13 In ground “Y” it is stated that as per the law laid down by the Hon’ble Supreme Court, the petitioner was required to be released on bail by the Appellate Court since he had suffered more than half of the awarded sentence. This principle is made available to the hardened criminals also and they were released on bail. However, in the instant case, though the Appeal was pending and request was made to grant bail, his Appeal was not heard and he was made to suffer imprisonment of seven years which is violation of Articles 14 and 21 of the Constitution of India.

14 Apart from the oral submissions advanced by the learned advocate for the petitioner, from the tenor of the averments made in the petition the grievance of the petitioner appears to be that the alleged incident had taken place on 19th

June, 2009 and the petitioner was arrested on 29th July, 2009, he was placed for identification parade on 7th August, 2009, he was shown to the victim at the police station before the parade which is also observed by the appellate court which is one of the ground for acquittal. The petitioner has contended that the identity of the accused – petitioner was not established, the C.C.T.V. footage was not produced before the Court and that he was falsely implicated. It is also contended that the petitioner was kept in the custody for three days without producing him before the concerned court and was shown arrested thereafter on 29th July, 2009 thereby violating the provisions of Section 167 of the Cr.P.C. In paragraph 15 of the petition it is also stated that the Magistrate was duty bound to comply with the procedure and provisions in accordance with law and any derogation would make him liable to be dealt with under Section 220 of the IPC. It is also contended that while recording statement under Section 313 of the Cr.P.C., petitioner had disclosed to the Court that offence is committed by some other person which was not verified by the Court by directing further investigation. According to the petitioner, in view of the observations made by the appellate court while acquitting the petitioner, it is clear that the petitioner was falsely implicated in the said case.

15 The learned counsel for the petitioner submitted a compilation of judgments, however, he places reliance upon the following decisions in support of his submissions.

- (i) *Niraj Ramesh Jariwala & Ors. Vs. Mahadeo Pandurang Nikam & Ors.*²;
- (ii) *Ram Sarup (Since deceased) through his LRs- Dharma, Reshma, Ramratti, Sakhtula & Sona Vs. State of Haryana & Ors.*³;
- (iii) *Rudul Sah Vs. State of Bihar & Anr.*⁴;
- (iv) *O.P. Gandhi Vs. Tihar Jail*⁵;
- (v) *Miss Veena Sippy Vs. Mr. Narayan Dumbre & Ors.*⁶;
- (vi) *Uma Shankar Sitani Vs. Commissioner of Police Delhi & Ors.*⁷;
- (vii) *State of Gujarat Vs. Kishanbhai & Ors.*⁸;
- (viii) *Prempal & Ors. Vs. Commissioner of Police & Ors.*⁹;
- (ix) *Nachhatar Singh @ Khanda & Ors Vs. State of Punjab*¹⁰;
- (x) *S. Krishnamurthy Vs. State of Tamilnadu & Ors.*¹¹

2 2013 ALL MR (Cri.) 1

3 CWP No.7697/99 dated 3.2.2016

4 AIR 1983 SCC 1086

5 CIC/SS/A/2016/000884 decided on 27.09.2016

6 2012 ALL MR (Cri.) 1263

7 1995 CRI. L. J. 3612

8 2014 (5) SCC 108

9 2010 ILR 4 Delhi 416

10 2009(4) RCR (Cri.) 409

11 2008 (1) LW (Cri.) 229

- (xi) *Perumal Vs. Janaki*¹²
- (xii) *Jugal Kishor Vs. State of M.P.*¹³;
- (xiii) *Bharat Salvi & Ors. Vs. State of Maharashtra*¹⁴.

16 We have hereinafter referred to the materials on record of the Trial Court as also of this Court (Appellate Court) only because Mr. Ojha learned advocate appearing for the petitioner would read some paragraphs of this Court's judgment and order acquitting the petitioner accused, in isolation. We had to explain the whole background only because the judgment of this court would have to be read as a whole. After reading all paragraphs together, it is not possible to agree with the Petitioner's advocate that the acquittal of the Petitioner was founded on false implication or any deliberate leave alone *malafide* act of the prosecution. It is a judgment acquitting the Petitioner on the grounds and for the reasons indicated by us above.

17 It is in these circumstances that there are limitations on this Court's power to award damages/compensation for that is a remedy ordinarily available when the confinement and detention in custody is wrongful and illegal. We hasten to add

12 (2014) 5 SCC 377

13 1990 Cr.L.J. 2257

14 Criminal W.P. No.1252 of 2015

that such damages may be awarded even after an acquittal from a criminal case, but the grounds for awarding such damages in public law would have to be distinct and clear. A false implication in a criminal case resulting in a person's liberty being taken away contrary to the mandate of Article 21 of the Constitution of India, that such false implication led to his arrest and later on subjected him to a full-fledged trial to await his eventual acquittal could be one of the grounds but then there ought not be any factual dispute. Further, when orders of acquittal in criminal cases are passed based on which claims for compensation and damages are instituted, then, it would have to be decided whether the acquittal is clear and doubtless. A acquittal by giving benefit of doubt is not an honourable acquittal. As held by the Hon'ble Supreme Court in ***Commissioner of Police vs. Mehar Singh***¹⁵ that quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not on merit. Several instances of this nature are set out by the Hon'ble Supreme Court. Even when such acquittals are challenged in higher courts, the challenge fails. In an appropriate case and depending upon several factors and circumstances, such damages can be awarded. However, no general rule can be laid down and

15 (2013) 7 SCC 689

everything depends upon the facts and circumstances of each case. The inherent or summary powers or the summary remedy under Article 226 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1908 cannot be invoked as a matter of right and in every case merely because there is an acquittal of a arrested person accused of a crime, after a full-fledged trial. The reasons for such acquittal together with other factors would have to be taken into consideration.

18 This aspect has been clarified by the Hon'ble Supreme Court of India while discussing and ruling upon this Court's power to issue a writ of mandamus awarding compensation for illegal and wrongful arrest and detention or subjecting a person to such treatment as would deprive him of his life and personal liberty guaranteed by Article 21 of the Constitution of India.

19 Broadly and without being exhaustive, it has been noticed that claims for compensation in monetary terms have been accepted and the amounts awarded in cases of custodial torture, custodial death, police excesses, police atrocities in the sense when police officers are guilty of illegal arrest, torture in

police station etc. In that, the Courts must guard themselves against claims, which are false, motivated and frivolous. Mere allegations of the above nature would not be enough. There have to be satisfactory, cogent and reliable materials placed before the court. Further, the Court exercising powers under Article 226 of the Constitution of India and considering the cases of the above nature cannot be expected to hold a full-fledged trial. Such claims, which can be considered and decided on affidavits, would be possibly entertained. Therefore, even in instances of handcuffing, keeping a person under surveillance by watching his movements may not amount to deprivation of his personal liberty, but in the event there is something tangible and direct, then, the Hon'ble Supreme Court of India has not hesitated to intervene. We have, therefore, to consider such claims carefully. We have also to bear in mind that each and every case of this nature cannot be allowed. More so, when the Hon'ble Supreme Court has already clarified that this remedy does not bar additional claim for compensation in private law or a Criminal Court ordering compensation under section 357 of the Code of Criminal Procedure, 1973.

and Ors.¹⁶, a three Judge Bench of the Hon'ble Supreme Court of India clarified the legal position as under:-

“12 Though illegal detention and custodial torture were recognized as violations of the fundamental rights of life and liberty guaranteed under Article 21, to begin with, only the following reliefs were being granted in writ petitions under Article 32 or 226 :

- a) direction to set at liberty the person detained, if the complaint was one of illegal detention.*
- b) direction to the concerned Government to hold an inquiry and take action against the officers responsible for the violation.*
- c) If the enquiry or action taken by the concerned department was found to be not satisfactory, to direct an inquiry by an independent agency, usually the Central Bureau of Investigation.*

Award of compensation as a public law remedy for violation of the fundamental rights enshrined in Article 21 of the Constitution, in addition to the private law remedy under the Law of Torts, was evolved in the last two and half decades.”

After referring to all the decisions in the field, the

16 AIR 2006 SC 1117

Bench in paragraph 17 concluded as under:-

“17 It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Code of Civil Procedure.”

Thereafter, from paragraphs 18 to 23, the Hon'ble Supreme Court held as under:-

“18 This takes us to the next question as to whether compensation should be awarded under Article 32/226, for every violation of Article 21 where illegal detention or custodial violence is alleged.

Whether compensation should be awarded for every violation of Article 21.

19 In **M.C. Mehta Vs. Union of India**¹⁷, a Constitution Bench of this Court while considering the question whether compensation can be awarded in a petition under Article 32, observed thus :-

"We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the court in a petition under Article 32. The infringement of the fundamental right must be gross and patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should

17 1987 (1) SCC 395

appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue act in the civil courts. Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32.

If we make a fact analysis of the cases where compensation has been awarded by this Court, we will find that in all the cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil court for claiming compensation."

(emphasis supplied)

In Shakila Abdul Gafar Khan V. Vasant Raghunath Dhoble¹⁸ and Munshi Singh Gautam V. State of M.P.¹⁹, this Court warned against non-genuine claims:

"But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence."

In Dhananjay Sharma Vs. State of Haryana²⁰, this Court refused compensation where the petitioner had exaggerated the incident and had indulged in falsehood. This Court held :

"Since, from the report of the CBI and our own independent appraisal of the evidence recorded by the CBI we have come to the conclusion that Shri Dhananjay Sharma and Sushil Kumar had been illegally detained by respondents 3 to 5 from the afternoon of

18 2003 (7) SCC 749

19 2005 (9) SCC 631

20 1995(3) SCC 757

15.1.94 to 17.1.94, the State must be held responsible for the unlawful acts of its officers and it must repair the damage done to the citizens by its officers for violating their indivisible fundamental right of personal liberty without any authority of law in an absolutely high-handed manner. We would have been, therefore, inclined to direct the State Government of Haryana to compensate Dhananjay Sharma and Sushil Kumar but since Sushil Kumar has indulged in false-hood in this Court and Shri Dhananjay Sharma, has also exaggerated the incident by stating that on 15.1.94 when he was way laid along with Sushil Kumar and Shri S.C. Puri, Advocate, two employees of respondents 6 and 7 were also present with the police party, which version has not been found to be correct by the CBI, they both have disentitled themselves from receiving any compensation, as monetary amends for the wrong done by respondents 3 to 5, in detaining them. We, therefore do not direct the payment of any compensation to them."

[Emphasis supplied]

20 *Cases where violation of Article 21 involving custodial death or torture is established or is*

incontrovertible stand on a different footing when compared to cases where such violation is doubtful or not established. Where there is no independent evidence of custodial torture and where there is neither medical evidence about any injury or disability, resulting from custodial torture, nor any mark/scar, it may not be prudent to accept claims of human right violation, by persons having criminal records in a routine manner for awarding compensation. That may open the floodgates for false claims, either to mulct money from the State or as to prevent or thwart further investigation. Courts should, therefore, while jealously protecting the fundamental rights of those who are illegally detained or subjected to custodial violence, should also stand guard against false, motivated and frivolous claims in the interests of the society and to enable Police to discharge their duties fearlessly and effectively. While custodial torture is not infrequent, it should be borne in mind that every arrest and detention does not lead to custodial torture.

- 21 *In cases where custodial death or custodial torture or other violation of the rights guaranteed under Article 21 is established, courts may award compensation in a proceeding under Article 32 or 226. However,*

before awarding compensation, the Court will have to pose to itself the following questions : (a) Whether the violation of Article 21 is patent and incontrovertible, (b) whether the violation is gross and of a magnitude to shock the conscience of the court, (c) whether the custodial torture alleged has resulted in death or whether custodial torture is supported by medical report or visible marks or scars or disability. Where there is no evidence of custodial torture of a person except his own statement, and where such allegation is not supported by any medical report or other corroboration evidence, or where there are clear indications that the allegations are false or exaggerated fully or in part, courts may not award compensation as a public law remedy under Article 32 or 226, but relegate the aggrieved party to the traditional remedies by way of appropriate civil/criminal action.

- 22 *We should not, however, be understood as holding that harassment and custodial violence is not serious or worthy of consideration, where there is no medical report or visible marks or independent evidence. We are conscious of the fact that harassment or custodial violence cannot always be supported by a medical report or independent evidence or proved by marks or*

scars. Every illegal detention irrespective of its duration, and every custodial violence, irrespective of its degree or magnitude, is outright condemnable and per se actionable. Remedy for such violation is available in civil law and criminal law. The public law remedy is additionally available where the conditions mentioned in the earlier para are satisfied. We may also note that this Court has softened the degree of proof required in criminal prosecution relating to such matters. **In State of M.P. Vs. Shyamsunder Trivedi²¹**, reiterated in **ABDUL GAFAR KHAN and MUNSHI SINGH GAUTAM (supra)**, this Court observed :-

"Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available..... Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues..... The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances

21 1995 (4) SCC 262

of a given case....., often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture."

Improving the present situation

- 23 *Unfortunately, police in the country have given room for an impression in the minds of public, that whenever there is a crime, investigation usually means rounding up all persons concerned (say all servants in the event of a theft in the employer's house, or all acquaintances of the deceased, in the event of a murder) and subjecting them to third-degree interrogation in the hope that someone will spill the beans. This impression may not be correct, but instances are not wanting where police have resorted to such a*

practice. Lack of training in scientific investigative methods, lack of modern equipment, lack of adequate personnel, and lack of a mindset respecting human rights, are generally the reasons for such illegal action. One other main reason is that the public (and men in power) expect results from police in too short a span of time, forgetting that methodical and scientific investigation is a time consuming and lengthy process. Police are branded as inefficient even when there is a short delay in catching the culprits in serious crimes. The expectation of quick results in high-profile or heinous crimes builds enormous pressure on the police to somehow 'catch' the 'offender'. The need to have quick results tempts them to resort to third degree methods. They also tend to arrest "someone" in a hurry on the basis of incomplete investigation, just to ease the pressure. Time has come for an attitudinal change not only in the minds of the police, but also on the part of the public. Difficulties in criminal investigation and the time required for such investigation should be recognized, and police should be allowed to function methodically without interferences or unnecessary pressures. If police are to perform better, the public should support them, Government should strengthen and equip them, and men in power should not interfere or belittle

them. The three wings of the Government should encourage, insist and ensure thorough scientific investigation under proper legal procedures, followed by prompt and efficient prosecution. Be that as it may."

Therefore, we are of the considered view that the Hon'ble Supreme Court having laid down these binding principles and applied them to cases of police excess, custodial deaths, custodial torture, illegal and unlawful detention, then, all the more when the petitioner is complaining that he was involved deliberately and falsely in a criminal case and put in prison, tried, but later on found not guilty, he should be compensated by the State. In cases of every acquittal such claims would be raised and without any inquiry or investigation they would have to be necessarily granted. Though such claims are doubtful or disputed and unclear, this public law remedy would be resorted to obtain undue monetary and other benefits. Hence, all the more and as the Hon'ble Supreme Court observes, a balanced approach is necessary. While the Court must be zealous in safeguarding and protecting the fundamental rights and particularly the right to life and liberty guaranteed by Article 21 of the Constitution of India, at the same time, it cannot award

compensation merely because the prosecution fails to establish the guilt of the accused. Every acquitted accused then, upon his release, can resort to such remedies and by relying on the orders of acquittal and their confirmation by higher court, as of right, claim compensation. That, with greatest respect, cannot be the law.

21 The Hon'ble Supreme Court of India has time and again, cautioned that the fundamental right, particularly of a under-trial prisoner, under Article 21 of the Constitution of India, is not absolute. Such a fundamental right is circumscribed by the Prison Manual and other statutes imposing reasonable restrictions on such right. These provisions have equally been upheld. Therefore, in ***Kalyan Chandra Sarkar vs. Rajesh Ranjan Alias Pappu yadav and Anr.***²², the Hon'ble Supreme Court held that a convict or a under-trial cannot insist on being lodged in a particular prison and not transferred. Further, the Hon'ble Supreme Court exercised its power under Article 142 of the Constitution of India so as to render complete justice.

22 Though reliance can be placed on the judgment of the

22 AIR 2005 SC 972

Hon'ble Supreme Court of India in the case of the ***State of Andhra Pradesh vs. Challa Ramkrishna Reddy and Ors.***²³, even in that case, the Hon'ble Supreme Court has not deviated in any manner from the general law. It held that the right to live is one of the basic human rights and it is guaranteed to every person by Article 21 of the Constitution of India. Not even the State has the authority to violate that right. A prisoner when lodged in jail continues to enjoy certain rights on being convicted of a crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.

23 Therefore, it is not every confinement, every detention and every arrest is flawed much less illegal. A person seeking compensation by resorting to public law remedy will have to establish and prove that the constitutional mandate is flouted brazenly, highhandedly and contrary to the scheme of the Constitution of India. Persons picked up at odd hours dragged to the police station confined therein illegally and contrary to the provisions of the Code of Criminal Procedure, 1973, not allowed to seek legal assistance and protection of law would have to be

23 AIR 2000 SC 2083

proved by reliable materials. By resorting to such remedies and without placing any material, none can succeed in obtaining any relief in money.

24 Precisely, these are the guidelines which would enable us to decide this petition.

25 We are not in the process of scanning the evidence before the court as we are exercising the powers under Article 226 of the Constitution of India and this is not the stage to evaluate the prosecution case and the evidence laid before the trial Court. However, to appreciate the submissions made by the petitioner while seeking damages, it would be necessary to touch certain factual aspects of the case for the limited purpose and as stated herein above. The first information report was registered on 19th July, 2009 on the basis of the statement of victim Priti Detha. In the FIR, she has referred to the sexual assault, injuries caused to her and name of the accused as Gopi which was allegedly referred to her by the said accused himself. Supplementary statement of the victim was recorded on 25th July, 2009. According to prosecution, the identification parade was conducted on 7th August, 2009. The memo of test identification

parade has been included in evidence vide Exhibit-30. P.W.1 Kumari Priti Dethe in her evidence has narrated the incident. In paragraph 5 of her evidence, it is stated as under :

"Today, accused is produced in the court after a gap of more than two months. Witness identified accused person before the court. At the time of identification parade, I had identified the accused in jail. Said identification parade was held 17-18 days after the incident. At that time seven persons were standing in a row and I had identified the accused amongst them. Accused had taken me to the hospital as I had sustained injuries while he was pulling me. My clothes were seized by the police. One sealed bundle is opened in the presence of APP and Shri Bankar, advocate for accused."

In paragraph 8 of her evidence it is stated that *"PSI Smt. Sutar had called me in the police station. PSI Smt. Sutar had shown me accused in the police station. It is not true to say that I could not identify the accused in the police station. It is not true to say that I had identified accused in the police station at the instance of PSI Smt. Sutar. Twice I went to the police station. Once for recording my statement and second time, for identifying the accused. It is not true to say that I am deposing*

false on the say of Smt. Sutar."

26 The prosecution has also examined P.W.4 Sainath Mangaonkar, Special Executive Officer. The memo of parade was exhibited in evidence at his instance. He was cross-examined by the prosecution which is as follows:

"02 I went to Byculla jail alongwith P.S.I. Smt. Sutar at 10.55 a.m. P.S.I. Smt. Sutar had called two panchas. Details about the place where identification parade was held, is not mentioned in identification parade panchanama Exh.30. Six dummies were provided by the jail official. Those six dummies were of different colour, height, hair style and built up. PW-1 Priti was present outside Byculla jail. It is not true to say that identification parade panchanama Exh.30 was prepared as per requirement of P.S.I. Smt. Suar. It is not true to say that I did not conduct identification parade on 07/08/2009 at Byculla jail. It is not true to say that I am deposing false."

Investigating officer was examined as P.W.No.5. FIR was exhibited in evidence. She has stated in her evidence that since the accused had seen that he started running and he was

apprehended by them and brought to the police station. The cross-examination of the said witness read as under:

“06 A.S.I. Shri Kale had received message from Rajawadi Hospital about rape on Priti at Vidyavihar railway station. Entry to that effect was taken by A.S.I. Shri Kale in station diary. I did not record statement of A.S.I. Shri Kale. I had not collected entry taken by A.S.I. Shri Kale in station diary. Similarly, I did not collect entry taken by E.P.R. constable in Rajawadi Hospital. I did not record statement of medical officer, who had examined PW-1 Priti in the very beginning.

07 Ghatkopar railway station comes within jurisdiction of Kurla Railway police station. I do not remember the names of police constables, who were on duty at Ghatkopar railway station on the night of 18/07/2009. Now says, I had recorded statements of A.S.I. Shri Kale and E.P.R. constable, who was on duty at Rajawadi Hospital. I had recorded statement of home guard who was on duty at Ghatkopar railway station on the night of incident. Incident had not taken place on the platform, but it was in the corner of over bridge. Doctor had given clothes and swab etc. in three sealed bundles.

As per version of complainant PW-1 Priti, sketch of accused was prepared. Detection staff had informed me about presence of accused in Nityanand Nagar area on 29/07/2009. PW-1 Priti was called in the police station thrice. It is not true to say that clothes of accused seized vide seizure memo Exh.37, do not belong to him. It is not true to say that identification parade was conducted in order to suit the case. It is not true to say that accused has been falsely implicated in this case."

From the cross-examination it is apparent that there was no suggestion to the said witness about the accused being shown to the victim, no suggestion regarding conspiracy to implicate the accused and no suggestion of *malafides* in implicating the petitioner in the said crime.

27 The decision of the trial Court to convict the petitioner was based on the observations made by the said court in paragraphs 23 to 33 of the judgment and the order passed dated 31st May, 2010. The trial court had primarily relied upon the version of the victim and the identification of the accused by her. We are conscious of the fact that the said judgment and order dated 31st May, 2010 has been set aside by this court while

exercising its appellate jurisdiction vide judgment and order dated 10th June, 2015 passed in criminal appeal no.525 of 2010 and that the judgment of the appellate court has attained finality after dismissal of the SLP preferred by the State of Maharashtra. We are aware of the fact that it is not open to this Court now to scan the evidence or to re-appreciate the evidence adduced before the trial court or the findings given by the trial court and the appellate court. However, in order to award public law damages, it would be appropriate to look into the factual aspects, nature of evidence and the reasons assigned by the Court while acquitting the petitioner accused. The appellate court has no doubt acquitted the accused and it is not within the domain of this Court in this proceeding to reassess the finding of the appellate Court. The reasons for acquittal are incorporated in the paragraphs which are highlighted by the learned counsel for the petitioner in support of his submissions that the petitioner was falsely implicated in the proceedings and, hence, for the mental agony suffered by him and being in custody for a long period of time, the compensation be awarded.

28 In paragraph 17 of the judgment and order dated 10th June, 2015, while acquitting the petitioner, it was observed as

follows:

“17 In my opinion, this was a case where the identity of the appellant as the culprit had not been satisfactorily established. In my opinion, there was indeed a real substantial doubt about the identity of the appellant as the culprit. The trial Court ought to have been given the benefit of the doubt to the appellant and should have acquitted him.”

29 Thus, it is apparent that the acquittal is primarily based on the finding that there was indeed a real and substantial doubt about identity of the appellant as a culprit and that the trial court ought to have given benefit of that doubt to the appellant and that he should have been acquitted.

30 The learned judge in the judgment and order dated 10th June, 2015 in paragraph 9 has observed that the incident had taken place on 19th July, 2009. The appellant was arrested on 29th July, 2009 and the identification parade was conducted on 7th August, 2009. However, admittedly the appellant was shown to the victim at the police station before the parade was held. It is further observed that the identification was brought on record as and by way of note made by the learned judge and not a

statement made by the victim. Such a procedure is uncalled for and if victim had identified the appellant, it was the assertion made by her before the court that ought to have been recorded. It is further observed that considering the fact that the appellant was shown to the victim after arresting and before the parade which fact was admitted to be suppressed by the investigating agency as also the fact that social status of the victim and her position was such so as to render her susceptible to the suggestions, it would be unsafe to hold that it must be the appellant who had committed rape on the victim. It is also observed that the incident had taken place on 19th July, 2009 and the appellant came to be arrested on 29th July, 2009. It appears that the victim had learnt the name of the culprit to be "Gopi" and had given that name to the police. The name of the appellant is Gopal Shetye and that his name is "Gopal alias Gopi" appears to have been theory introduced by the investigating agency itself as there is no evidence to indicate that the appellant was known as Gopi. The appellate court has also observed that the C.C.T.V. footage was held back because the images contained in that were not visible or clear which also creates doubt about the correctness of the identification of the appellant as a culprit. The investigation is not satisfactory and there was no serious effort to

find out the truth. It was not safe to convict the appellant on such a piece of evidence because the identification is not satisfactorily reflected from the notes of evidence and finds a place by way of an observations or note made by the learned trial Judge, rather than being reflected as a statement made by the victim before the Court. It was, therefore, concluded that the identity of the appellant as a culprit has not been satisfactorily established and the benefit of doubt ought to have been given to the appellant.

31 On perusal of the aforesaid observations in the judgment of the appellate court, it is apparent that on account of infirmities in the evidence or inaction on the part of investigating agency and for all the reasons stipulated in the judgment, the appellate court was pleased to acquit the accused/petitioner by setting aside the judgment of the trial court with a reasoning that the trial Court ought to have given benefit of doubt to him.

32 It is pertinent to note that the defence has not established that there was no incident of sexual assault upon the victim on 19th July, 2009. The evidence of the victim about the incident of rape has not been discarded. However, on account of the infirmities in the evidence of the prosecution, the Appellate

Court has opined that the benefit of doubt has to be given to the petitioner. The Appellate Court in paragraph no.8 of the judgment of acquittal has observed as follows:

“8 It is not necessary to examine whether that the incident of rape had actually taken place as alleged by the victim was satisfactorily established. It is because the real question that needs determination is whether the identity of the appellant as the person who committed rape on the victim was satisfactorily proved during the trial.”

The appellate court has disbelieved the prosecution case qua identification of the accused on the ground that the appellant was shown the victim at the police station before the parade was held. Thus, the evidence of identification parade was not accepted by the appellate court. It is pertinent to note that the victim had given account of the incident and has also stated the name of the assailant which was allegedly given by the assailant himself. The accused was thereafter arrested. It is pertinent to note that according to the victim, the accused was with her for long period of time. He was identified by the victim in the court. However, the appellate court has criticised the manner of recording of the statements with regard to

identification by the trial court. In the circumstances, it is clear that on account of doubt about the involvement of the accused/petitioner, he was acquitted. It is cardinal principle of criminal jurisprudence that the prosecution has to establish its case beyond all reasonable doubt. In the event of any infirmities in the evidence, the benefit always goes to the accused. It is settled law that even if two views are possible with regard to involvement of the accused, one which favours the accused should be accepted. In the present case, the observation of the appellate court in the concluding paragraph of the judgment of acquittal makes it crystal clear that in view of the discrepancies in evidence, the benefit of doubt being given to the accused/petitioner. The appellate court has clearly stated that the trial Court ought to have given the benefit of doubt to the accused on account of the said infirmities in the case of the prosecution.

33 The petitioner has taken recourse to the remedy of public law damages by invoking the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India for claiming the compensation of Rs.200 crores. It is not established by the petitioner that there were *malafides* or malice on the part

of prosecution in implicating him in the case. Evidence on record do not establish that he was falsely implicated in exercise of *malafides* by the investigating agency. The investigating officer or the other witnesses had no reason to implicate the petitioner. During the course of trial, the defence has not established the *malafide* on the part of the investigating machinery to falsely implicate the petitioner-accused. The petitioner has contended in paragraph 15 of the petition that during the trial, the statement of the petitioner was recorded under Section 313 of Cr.P.C. through video conferencing in jail. It is further stated that the petitioner has specifically disclosed to the learned judge that he has not committed any such offence and the said offence was committed by one "Ambya" working as a loader/coolie at platform no.4 at Ghatkopar railway station. However, the learned judge has not taken any pains to verify the statement made or direct the police machinery to get the same tested by making further investigation assuming that the petitioner - accused had adopted such defence while recording his statement under Section 313 of Cr.P.C. It was not the stage to direct any police investigation to enquire into such an aspect which was taken as an excuse by the accused. There is nothing on record to show that at any point of time the petitioner had made any grievance in that regard about

his false implication and commission of an offence by the aforesaid person, during the course of trial or prior to that. In any case, the said defence was not put to the witnesses in the cross-examination. However, on perusal of the statement under Section 313 of the Cr.P.C. also there is no reference of any such statement being made by the accused/petitioner. The question no.42 recorded in exercise of the powers under Section 313 of Cr.P.C. was put to the accused. Whether he wants to say anything more about this case, which was answered by him by stating that he is falsely implicated in this case. In the other question put to him also there is no reference to the assertion by the accused that the offence is committed by one Ambya. Thus, the said statement is coming for the first time in the form of averments in this petition. On perusal of the statement under Section 313 of Cr.P.C. it is further clear that the accused had not put up the case of *malafides* against the investigating machinery or the victim to falsely implicate him in the said proceedings. A reference can be given to question no.8 which was put to the petitioner accused under Section 313 of the Cr.P.C. with regards to the identification parade which is as follows:

“Q.8 It has further come in t he evidence of PW-1

Priti that identification parade was held after 17-18 days from the incident. At the time of identification parade, she had identified you in the jail. In the court also, she has identified you. What have you to say about it?

Ans. It is true."

The purpose for quoting the aforesaid statement is not to suggest that the petitioner was proved to be guilty of the said offence but only to point out that on account of the deposition of the complainant that the accused was shown to her at the police station, the evidence of identification parade which was under the clouds of doubt was discarded and the petitioner was acquitted. Therefore, this fact also reiterates that the judgment of acquittal is based on the benefit of doubt. The appellate court has extended the benefit of doubt by pointing out circumstances like improper identification parade, lapse on the part of investigating officer to collect the C.C.T.V. footage as observed in paragraph 11,12 and 14 of the said judgment passed by the appellate court. The conclusion in paragraph 17 of the judgment is based on the said infirmities which has resulted into acquittal. It is pertinent to note that the version of the prosecutrix was not shaken. From the examination-in-chief and cross examination it is apparent that she has deposed about

occurrence of incident which is not discarded. The prosecution had adduced evidence of P.W.2 Dr. Ranjit Kale who examined the victim, P.W.3 Narayan Pujari, panch to the spot of incident, who has not supported the prosecution case and was declared hostile, P.W.4 Sainath Mangaokar who conducted identification parade and P.W.5 Smt. Lata Sutar, Investigating officer.

34 As referred hereinabove, the petitioner has raised several contentions in the petition that there was a conspiracy amongst the investigating machinery as well as Sessions Judge who had convicted the petitioner and that they are liable to be prosecuted in accordance with provisions of Section 120-B of the IPC. It is also contended that the APP has failed to perform duty before the trial Court and has violated the provisions of law. The police officers, magistrate, learned Judge, APP have committed serious offences of violating the provisions of law and by not performing their duties have committed several offences including the offences punishable under Section 191, 166, 182, 192, 211, 471, 472, 474 read with Section 120-B and 34 of IPC. As noted hereinabove, the petitioner had sought deletion of the respondent nos.2 to 8 and the said respondents were ordered to be deleted vide order dated 3rd February, 2016. The petitioner

subsequently carried out amendment and by deleting the said respondents, the petitioner has also amended the prayer clause partly. Those deleted included Ad-hoc Additional Sessions Judge, Sewree who passed the judgment and order convicting the petitioner, the Executive Magistrate and Naib Tahasildar, the Commissioner of Police Mumbai, the Police Inspector, Kurla Railway Station, the investigating officer Smt. Lata Sutar and the Additional Public Prosecutor from the trial Court. In view of the order deleting the said respondents, the grievance of the petitioner as against the said respondents in the above mentioned paragraph is not tenable in law. The petitioner had consciously deleted the said respondents. It was submitted by the petitioner that apart from compensation, this Court may direct investigation by CBI. As the police machinery was instrumental in falsely implicating him by hatching conspiracy, which is required to be investigated. We do not find any merit in the said submission as there is nothing to be investigated at this stage. The petitioner was charge-sheeted and prosecuted for the alleged offence which resulted into conviction and subsequent acquittal by the appellate court which is confirmed by the Apex Court. It was submitted that the investigation, to unearth the role of the persons who have implicated the petitioner requires to be investigated. As stated

above, on account of deleting the respondents, such a prayer cannot be entertained. Even otherwise the investigation as sought by the petitioner is not warranted.

35 The petitioner has also contended in the petition that there was violation of Section 167 of Cr.P.C. as he was arrested and kept in police station for three days without producing him before the concerned Court and, he is shown to have been arrested on 29th June, 2009. Thus, according to the petitioner the detention beyond the period of 24 hours by the police was illegal detention and gross violation of the rights guaranteed to a person under Article 21 of Constitution of India. It is also stated that the said fact was disclosed by the petitioner to the Magistrate. But the same was not taken into consideration thereby violating a fundamental right of the petitioner. It is further averred that the Magistrate was duty bound to comply with the procedure enunciated and dictated by law and the derogation is not permissible and thereby the Magistrate is liable to be dealt with under Section 220 of the IPC. Except the bald statement, there is nothing on record to corroborate the version of the petitioner. Apparently, the assertion being made belatedly is after thought. The petitioner has not produced any contemporaneous record to

sustain the fact of the alleged illegal detention. Thus, the said contention is devoid of any substance.

36 The petitioner submitted that there is violation of Articles 21 of the Constitution of India. In paragraph 29 of the petition it is stated that the rights conferred by the constitution of India includes a fundamental right to live a safe and protected life and that is the reason the Apex Court has held that Article 21 of the Constitution of India casts obligation on the State to preserve life. What is guaranteed under Article 21 is a safe life and, therefore, there is a corresponding obligation vesting in the State to protect and save life of citizens on whom fundamental rights have been conferred. In case of deprivation or contravention of fundamental rights by the State, a public law remedy is available for seeking compensation. We have given anxious consideration to the submissions advanced at the instance of the petitioner as we are conscious of the fact that the petitioner had undergone imprisonment for a period of seven years in the prosecution which had resulted into an acquittal. In several judicial pronouncements, it has been laid down time and again that even an accused/convict/prisoner is entitled to certain fundamental rights. Instances like handcuffing of the accused, illegal

detention, assaulting accused while in custody, arresting the accused without following due process of law etc., are settled instances of violation of fundamental rights. In the present case, the petitioner was arrested in connection with the alleged offence, he was produced before the Court, he was remanded to custody by orders of the Court, charge-sheet was filed against him, he was represented by an advocate during the trial. He has exhausted all the remedies available in law. He defended himself by cross-examining the witnesses through his advocate. He was given an opportunity to tender an explanation while recording the statement under Section 313 of the Cr.P.C. It is not his case that he was subjected to ill treatment in custody. Except the bald assertion that he was produced belatedly before the Court which was beyond 24 hours of his detention. There was no evidence to corroborate the same. The petitioner has not made out any case of violation of fundamental rights.

37 Article 21 of the Constitution of India reads as follows:

“21 Protection of life and personal liberty:

No person shall be deprived of his life or personal liberty except according to procedure

established by law.”

Thus, Article 21 guarantees protection of life and personal liberty. No one can be deprived of his life or personal liberty except in accordance with procedure established by the law. As stated hereinabove, the petitioner was subjected to trial by following the provisions of law. It is true that he was acquitted by the Appellate Court which acquittal has been confirmed by the Apex Court. However, the acquittal was based on the cardinal principles of criminal jurisprudence that no person can be convicted unless prosecution proves its case beyond all reasonable doubt. Thus, it cannot be said that he was detained in custody without following the procedure established by law.

38 The origin of Article 21 of the Constitution of India can be traced back to the Magna Carta, 1215 which King John was forced to sign in which it was demanded that “*no man shall be taken or imprisoned, diseased or outlawed or exiled or in any way destroyed, save by the lawful judgment of his peers or by or by the law of land*”. The demand was repeated in the Petition of Grievances of 1610 and the Petition of Rights of 1628 and thereafter the observance of this principle is established as the

Rule of Law of England. In America, the 5th amendment of the Constitution provided that *“No person shall be deprived of his life, liberty or property, without due process of law”*. Similarly, Article 40(4) of the Constitution of Eire stated that *“No citizen shall be deprived of his personal liberty save in accordance with law.”* In many respects, Article 21 of the Constitution is very similar to Article 31 of the Japanese Constitution which is as follows:

“No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law.”

The only difference is that the Japanese provision includes other criminal penalty, which is absent in Article 21.

In the decision of the Apex Court in case of ***Makkhansingh Tarsikka Vs. State of Punjab***²⁴ Chief Justice Patanjali Shashri has observed that person is deprived of his life or personal liberty, the procedure established by law must be strictly complied with and must not be departed from to the disadvantage of the individual affected. In ***Munn Vs. Illinois***²⁵ It was observed by the Field, J. as follows:

²⁴ AIR 39 1952 SCC 27

²⁵ 94 US 113

“ By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.”

39 The Hon'ble Supreme Court has quoted the above opinion in the case of ***Kharak Singh Vs. State of UP***²⁶ and the same was further expanded in ***Fancies Coralie Vs. Union Territory of Delhi***²⁷ wherein it was held that 'any act', which damages or injuries or interferes with the use of any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.

40 The learned counsel for the petitioner relied upon several decisions as referred to herein above. He relied upon the Hon'ble Supreme Court decision in the case of ***State of Gujarat Vs. Kishanbhai (Supra)***. In the said decision, it was observed

26 AIR 1963 SCC 1295

27 AIR 1981 SCC 796a

that every acquittal should be understood as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is, therefore, essential that every State should put in place a procedural mechanism, which would ensure that the cause of justice is served, which would simultaneously ensure the safeguard of interest of those who are innocent. The Court, therefore, directed to Home Department of every State to examine all orders of the acquittal and to record the reasons for the failure of each prosecution case. It was further directed that on acquittal, the concerned investigating agency responsible for such acquittal must necessarily be identified. A finding need to be recorded in each case whether the lapse was innocent or blameworthy. The Home Department of every State was directed to formulate a procedure taking action against erring investigating/prosecuting officer. Thus, the Apex Court has formulated a mechanism which would ensure that the cause of justice is served. The decision does not deal with the issue of grant of public law damages. In another decision of the High Court of Delhi in the case of ***Prempal & Ors. Vs. Commissioner of Police & Ors. (Supra)***, it was observed that the petitioner therein was unreasonably,

unfairly treated by the police and his fundamental rights under Article 21 were violated by the respondents. The respondents were directed to pay the compensation to the petitioner therein. The petitioner had approached the Court for undue harassment caused to him and his family members at the hands of the police. It was observed that after analyzing the evidence, the trial Court come to the conclusion that the petitioner therein was not involved in rape of the child and he was treated unreasonably, unfairly by police and his fundamental rights were violated. It was observed that the police force has persons of criminal characters which damage the institution. It was recommended that all police officers who are involved in framing the petitioner in different cases be given exemplary punishment. From the facts, it is apparent that he was implicated in several cases. After acquittal in one case, he was falsely implicated in another case. His family members were also arraigned as accused and all of them had to undergo imprisonment. It is in this circumstance, the Court was pleased to grant compensation to the petitioner therein. A clear case of false implication was made out. Such is not the position before us. In the case of ***Nachhatar Singh @ Khanda & Ors Vs. State of Punjab (Supra)*** the High Court of Punjab and Haryana had dealt with the issue of false and

fabricated case registered against the appellant therein and a compensation of Rs.1 crore was awarded to the victim. The accused who were implicated in the case of murder were convicted by the trial Court and sentenced to imprisonment for life. The court had observed that a false and fabricated case was registered against the appellant. The victim in the said case was shown to be murdered but in fact he had ran away and was alive and inspite of that the charge under Section 302 was framed against the accused. False evidence was procured and a false story was built up to convict the appellants/accused and a personal enmity was the sole driving force to implicate them. In the said decision it was further observed that going through the statements of the witnesses given in Court it is clear that prosecution witnesses knew that they were stating falsehood before the learned trial Court with the sole purpose to falsely implicate the appellants therein so that they may be convicted which they succeeded in doing so. In the circumstances, it was observed by the court that the prosecution of the offender is an obligation of State in case of every crime. But the victim of crime needs to be compensated monetarily also. It was further observed that the claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty the protection

of which is guaranteed under the Constitution is a claim based on strict liability and is an addition to the claim available in private law for damages for tortures acts of the public servants. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system wherein their rights and interests are protected. In the facts and circumstances of the said case the Court therefore awarded Rs.20 lakhs each to the appellants therein as a compensation to be paid by the State of Punjab within a stipulated time.

41 In another decision relied upon by the petitioners in the case of ***S. Krishnamoorthy and K. Palani Vs. the State of Tamil Nadu***²⁸, it was observed by the Madras High Court that, there was violation of human rights and the accused who were charged for the alleged offences were entitled for compensation to be paid to them by the State. In the said decision, the facts were that the victim girl was allegedly missing from the residence of the complainant. The First Information Report came to be

28 2008(1) LW (Cri.) 229

lodged that she is being kidnapped by the accused persons. The investigating machinery then recorded the confessional statements of the accused wherein they purportedly admitted that they had kidnapped the victim and she was raped and murdered by them. On the basis of the said confessional statements they were charge-sheeted in the court of law. The accused preferred an application under Section 482 of the Criminal Procedure Code before the High Court of Madras and contended that they have been falsely implicated in those proceedings by extorting the confessional statements. They prayed that the compensation may be awarded to them on account of their false implication in the proceedings. It was also pointed out that the victim girl who was allegedly murdered was alive and she is present before the Court. The victim girl thereafter filed an affidavit before the Court and stated that the accused were not concerned with the said crime and on the basis of the said statement and the circumstances that the confessional statements were recorded by the police, the High Court observed that this is in gross violation of the fundamental rights of the applicants therein and, therefore, directed the State to award compensation to the said persons. It is pertinent to note that the alleged role of the petitioners therein was falsified by the victim

girl and the admission of the victim girl completely exonerates the said accused persons from the said proceedings. It is also pertinent to note that the case of the prosecution that the victim was raped and murdered was falsified as the victim was alive and was present before the Court and has also stated that there was no sexual assault on her.

42 In another decision of the Division Bench of this Court in the case of **Niraj Zariwalla** it was observed that the accused were subjected to illegal detention in police custody for 35 hours and it is a gross violation of Articles 21 and 22 of the Constitution of India and gross violation of Section 41-B of the Criminal Procedure Code. This Court, therefore, relying upon several decision of the Apex Court had come to the conclusions that the petitioners who were aged persons were arrested on 2nd December, 2011 at Aurangabad and were brought at Navghar Police Station at Mulund Mumbai from Aurangabad on 3rd December, 2011. They were taken from Aurangabad and they reached Navghar Police Station, Mulund, Mumbai nearly after 22 hours. They were shown arrested in the morning on 4th December, 2011 and were released on bail in the afternoon. Though the said petitioners were arrested just before 20.50 on 2nd December,

2011 at Aurangabad they were shown as arrested in Mumbai at 8.10 on 4th December, 2011. Thus, they were illegally detained by the police nearly for 35 hours and 40 minutes and, therefore, there was gross violation of Articles 21 and 22 of the Constitution of India. In the decision of ***Ram Swarup Vs. State of Haryana*** delivered by the Punjab and Haryana High Court, the Court was considering a review application preferred at the instance of the State to test the correctness of the order passed by the said Court in its jurisdiction under Article 226 of the Constitution of India granting compensation of Rs.5 lakh to the petitioner. In the said Review Petition, it was observed that the petitioner/accused was not responsible for the death of the child but he was the first complainant and a false case had been foisted on him to screen some persons connected to politically strong individuals of the State. In the Review Petition the State had contended that at the time when decision was rendered by the said Court, the petitioner therein had already died and that information had not been suppressed from the Court. The ground for review was that the compensation for personal injury and humiliation is in the nature of personal damages which cannot survive to the legal representatives in terms of Section 306 of the Indian Succession Act. The Court, therefore, in the Review Petition had considered

the issue that whether the compensation can be awarded to the legal representatives after the death of the petitioner therein in view of the fetters of Section 306 of the Indian Succession Act. It was observed that the compensation for violation of human right transcends the frontiers of tort claim and hence the fetters of Section 306 of Indian Succession Act, cannot apply. It was further observed that false imputation of rape and murder and consequential incarceration constitute humiliation to the whole family and violation of human right. It is pertinent to note that the petitioner therein was granted compensation in the circumstances that the said petitioner was falsely implicated in the case with a view to shield certain politically connected strong persons and it is in the said circumstances, the Court was pleased to award compensation which was under challenge by way of Review Petition before the Punjab and Haryana High Court.

43 In the decision of the Supreme Court in the case of ***Rudul Shah Vs. State of Bihar***²⁹ it was observed that the petitioner was detained illegally in the prison for over 14 years after his acquittal in a full fledged trial. He filed a habeas corpus petition in the Supreme Court for his release from illegal

29 AIR 1983 SC 1086

detention. His detention in prison after his acquittal was wholly unjustified. He contended that he was entitled to be compensated for his illegal detention and that the Supreme Court ought to pass an appropriate order for the payment of compensation in the habeas corpus petition itself. Taking into consideration the great harm done to the petitioner by the Government of Bihar, the Supreme Court was pleased to order the State to pay the petitioner a sum of Rs.30,000/- by way of the interim measure in addition to the sum of Rs.5,000/- already paid by it. The order of compensation was in the nature of palliative and it did not preclude the petitioner from filing a suit to recover appropriate damages for the State and its erring officer. In the said decision it was observed as follows:

“10 We

Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any

other method open to the judiciary to adopt. The right to compensation is more palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

The reliance placed on the order passed by the Central Information Commission by the petitioner is misplaced. First of all such an order is not binding on this Court. Secondly, it is pertinent to note that the appellant therein has asked for the compensation for the extra detention in jail which had undergone. The information commissioner therefore placing reliance upon the several decisions of the Apex Court had awarded compensation to the said person for undergoing detention in custody although he was entitled to be released at the earlier point of time. In the case of **Miss. Veena Sippy Vs. Mr.**

Narayan Dumbre and Ors.³⁰, the Division Bench of this Court considered the issue of illegal detention and awarded compensation to the aggrieved person. In the said case the petitioner, a woman was arrested for having committed offence under Section 117 read with Section 112 of the Bombay Police Act which was admittedly bailable. No arrest memorandum or panchanama was drawn, not even an intimation of arrest was given to the petitioner. The petitioner was also not informed about her right of seeking bail. This was a case of gross breach of directions issued by the Apex Court in **D.K. Basu's** case and also case of gross and flagrant violation of fundamental right of life and liberty. The Court further observed that detention of the said petitioner in police custody was totally unlawful which amounts to violation of Article 21 of Constitution of India and for illegal detention the compensation was directed to be awarded to the petitioner. In the case of **Uma Shankar Sitani Vs. Commissioner of Police, Delhi**, the issue was with regards to the false implication of the petitioner therein. The accused had contended that he has been falsely implicated in the case on account of business rivalry. The address of complainant noted in police station was found to be non-existent. The entry in police

30 2012 All MR (Cri.) 1263

diary was supporting the plea of the accused that the complaint was lodged at the instance of business rival. The Supreme Court therefore directed that the matter may be investigated by the CBI to find out the truth.

44 In Perumal's case the Hon'ble Supreme Court observed that it was an appropriate case where High Court ought to have exercised the powers under Section 195 of Cr.P.C. for an action under Section 211 of I.P.C. The police officers therein had filed a charge-sheet against the accused with an allegation that the survivor was pregnant, inspite of definite medical opinion that she was not pregnant. The accused was tried for offences under sections 417, 506(1) of I.P.C. and was acquitted by the trial Court. In the circumstances, it was observed that the power of superintendence like any other impliedly carries an obligation to exercise powers in an appropriator case to maintain the majesty of the judicial process and the purity of legal system. The appellant therein had alleged that he had been prosecuted on the basis of a palpably false statement coupled with the further allegation that the respondent therein did so far extraneous considerations. In the case of Jugal Kishore, the Madhya Pradesh High Court had quashed the criminal proceedings in exercise of

powers under Section 482 of Cr.P.C. It was observed that the proceedings were vexatious, oppressive and based on one sided investigation. The accused was prosecuted for an offence of criminal trespass, whereas, he claimed to be the tenant of the premises. It was thus stated that to put an accused person to long lasting trial on an incomplete and one sided investigation and promise to consider full facts only when they are brought before Court at defence stage amounts to ignoring default of investigating officer and clothe him with authority to harass the accused.

In the case of Bharat Salvi, relied upon by the petitioner, the Division Bench of this Court has dealt with situation where directions of Hon'ble Supreme Court in Arnesh Kumar have not been followed. The petitioner nos. 3 and 4 therein were arrested without ascertaining their complicity and although the offences were bailable, they were produced before Court and were remanded to custody from time to time. Their bail applications were not heard by Sessions Court for long time. It was, further observed that, despite the offences being bailable, the police and courts were responsible for detaining the said accused in custody. The Court, therefore, ordered enquiry against

the errant police officers and concerned judicial officers in accordance with directions of Apex Court in Arnesh Kumar's case. We are of the opinion that the said decisions were rendered in the facts and circumstances of those cases, which are not applicable in the present case.

45 From the observations made by the Courts in all the aforesaid decisions, it is clear that the compensation was awarded to the aggrieved person therein in the facts and circumstances of the said cases. The cases related to illegal detention or undergoing an extra detention, although, some of the petitioners were released by the Court. The cases also related to the false implication of the accused therein which was spelt out by the evidence on record. It is pertinent to note that in some of the cases which are relied upon by the petitioner although it was the prosecution case that the victim was murdered it was revealed that the victim was alive and, therefore, the Court found that there was gross violation of the fundamental right of the petitioner therein and, hence for violation of fundamental rights, the compensation was awarded.

46 In the case of ***D.K. Basu Vs. State of Bengal***³¹, the Supreme Court was pleased to observe that for established breach of fundamental rights, the compensation can be granted under public law by the Supreme Court and by the High Courts in addition to private remedy for tortious action and punishment to wrongdoers under criminal laws. It was further observed that custodial violence including torture and death in the lockups strikes a blow at the rule of law which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizen. It is committed under the shield of uniform and authority in the four walls of the police station or lockup. The victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society. However, in paragraph 31 of the said decision it was observed as follows:

“31 There is one other aspect also which needs out consideration, We are conscious of the fact that the police in India have to perform a difficult

31 1997 SC (Cri.) Page 92

and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals, Many hard core criminals like extremist, the terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot,

however, be worst than the disease itself.”

From the observations made by the Apex Court and this Court in the various decisions referred to hereinabove, it is implicit that gross violation of fundamental rights of the petitioners/ victim/victims therein would result into violation of Article 21 of Constitution of India. For the reasons which are narrated hereinabove it is ample clear that the petitioner herein cannot claim compensation by stating that there is violation of Article 21 of the Constitution of India. There is no infringement of fundamental right. It is already observed hereinabove that the petitioner was acquitted by the appellate court on the ground that there was a doubt in the prosecution case, and, therefore, benefit of doubt given to him. He was subjected to prosecution by following procedure established by law. We have not found that this is a case wherein compensation can be awarded to the petitioner by holding that there is violation of his fundamental right guaranteed under the Constitution of India.

47 In the case of ***Neelabati Behera alias Lalita Behera Vs. State of Orissa and Ors.***³², the Apex Court has observed that the award of compensation in public law

32 1993 SCC (Cri.) page 527

proceedings the object of which is different from compensation in private tort law and action. In case of violation of fundamental right by the State's instrumentalities or servants, Court can direct the State to pay compensation to the victim or his heir by way of 'monetary amends' and redressal. In the said case, the mother of the victim had filed a petition alleging death of his son aged 22 years in police custody in violation of Article 21 and, thus, had claimed compensation for the custodial death which was established. In paragraphs 20 and 22 of the said decision it was observed as follows:

“20 We respectfully concur with the view that. the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf The contrary view would not merely render the court powerless and the

constitutional guarantee a mirage but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. It the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have not, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

21.....

22 *The above discussion indicates the principles on which the Court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was*

indicated in Rudul Sah and certain further observations therein adverted to earlier, which may tend to minimize the effect of the principle indicated therein, do not really detract from that principle. This is how the decisions of this Court in Rudul Sah and others in that line have to be understood and Kasturilal distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son."

In the said case, the deceased was arrested by the police, handcuffed and kept in police custody. The next day, his dead body was found on a railway track.

It would be significant to reproduce the relevant observations of the Apex Court in paragraphs 10 and 35 of the said decision which are as follows:

“10 Award of compensation in a proceedings under Article 32 this Court or **by the High Court under Article 226 of the Constitution of India is a remedy available in public law, based on strict liability for contravention of fundamental rights**, to which the principle of sovereign immunity does not apply, even though it may be available as a defense in private law in action based on tort.

35 **Of course, relief in exercise of the power under Article 32 or 226 of the Constitution of India would be granted only once it is established that there has been an infringement of the fundamental rights of the citizens and no other form of appropriate redressal by the court in the facts and circumstances of the case is possible..... law is in the process of development and the process necessitates developing separate public law procedures as also public law principles.** It may be necessary to identify the situation to which separate proceedings and principles apply and the Courts have to act firmly but with certain amount of circumspection and self restraint, lest proceedings under Article 32 or 226 are misused as a disquisition substitute for civil action in private law.”

In paragraph 31 of the same decision, it is observed that, *“convicts, prisoners or under trial are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can **be imposed on the enjoyment of the fundamental rights by such persons.** It is an obligation of the State to ensure that there is no infringement of indefeasible rights of a citizen to life except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under-trials or other persons in custody, except according to procedure established by law.”*

48 The decision relied upon by the learned APP is very significant in the present case. In the said decision in the case of ***State of Rajasthan Vs. Jainuddin Shaikh***, the Apex Court was pleased to consider the issue of grant of compensation to the accused persons. In the said case, the trial Court had awarded compensation of an amount of Rs.1,50,000/- to each of the accused therein who were prosecuted for the offences under Narcotic Drugs and Psychotropic Substances Act, 1985 (for short “NDPS Act”). The said decision was confirmed by the High Court which was challenged by the State before the Apex Court. The facts as emanated from the said proceedings were quoted in

paragraph 4 of the said decision which is reproduced herein-below:

“4 The prosecution in order to establish the charges, examined six witnesses. Be it noted, the sample that was sent for examination to the forensic science laboratory on 8-11-2011, chemical analysis thereof was done on 9-9—2013 and the report was submitted to the Court on 28-9-2013 and it was exhibited as Ext. P-11. The said document revealed that the sample contained “caffeine” and “Paracetamol” and it did not contain diacety Imorphine (heroin) or alkaloid of “afeem” (opium). As the report indicated that the said items were not covered under the category of intoxicant under the NDPS Act, the trial court came to the conclusion that the charges were not established in any manner.”

49 The trial Court in the aforesaid case observed that the case is not made out against the accused therein and in exercise of the powers under Section 250 of the Criminal Procedure Court, compensation was awarded to him for malicious prosecution and, accordingly, directed the payment of Rs.1,50,000/- each to the accused persons. The trial Court while recording the conclusion observed that, it is a matter of concern that the officer executing

the seizure has no experience with respect to intoxicant material. P.W.5 had found the material as intoxicant merely by checking. It shows ignorance of the officer about identification of intoxicant who executed the seizure. No attempt was made by the officer making seizure that he should have either tested the material, which was seized or same should have been provided to other persons, who were present at the time of seizure, to ensure whether such material is intoxicant or not. It is the responsibility of State Government to send the material for chemical analysis. The report of forensic laboratory was submitted to court belatedly by subjecting it to chemical analysis after two years. It cannot be held as just and proper procedure. The Apex Court set aside the orders passed by the subordinate Courts and was pleased to observe that there is nothing to remotely suggest that there was any malice. It was further observed that nothing has been brought by way of evidence to show that the prosecution had falsely implicated the accused person. There is no material whatsoever to show that the prosecution has deliberately roped in the accused person. Thus, the Apex Court had set aside the order of compensation awarded to the accused persons by the trial Court which was confirmed by the High Court.

50 The observations in paragraph 14 are quoted hereinbelow which are as follows:

“Regard being had to the aforesaid enunciation of law, the factual matrix of the case at hand is required to be appreciated. On a close scrutiny of the judgment of the learned trial Judge, it is evident that he has been guided basically by three factors, namely, that the State Government has not established Forensic Science Laboratories despite the orders passed by this Court; that there has been delay in getting the seized articles tested; and that the seizing officer had not himself verified by using his experience and expertise that the contraband article was opium. As far as the first aspect is concerned, it is a different matter altogether. As far as the delay is concerned that is the fulcrum of the reasoning for acquittal. It is apt to note that the police while patrolling had noticed the accused persons and their behaviour at that time was suspicious. There is nothing on record to suggest that there was any lapse on the part of the seizing officer. Nothing has been brought by way of evidence to show that the prosecution had falsely implicated them. There is nothing to remotely suggest that there was any malice. The High Court, as is noticed, has not applied its mind to the concept of grant of compensation to the accused persons in a case of present nature. There is no material whatsoever to

show that the prosecution has deliberately roped in the accused persons. There is no malafide or malice like the fact situation which are projected in the case of Hardeep Singh (supra). Thus, the view expressed by the learned trial Judge is absolutely indefensible and the affirmance thereof by the High Court is wholly unsustainable.”

51 We have already made observations hereinabove that the petitioner has not succeeded in attributing any malafides or malice to the investigating machinery or to the victim who had impleaded him as an accused in the said proceedings. The attributes of malafides or malice are not reflected either in the cross-examination of the prosecution witnesses at the instance of the defence, nor in the statement of the accused which was recorded under Section 313 of the Criminal Procedure Code. Nor there were any arguments in that regard before the trial Court or before the Appellate Court. It is reiterated hereinabove. We have already observed that the petitioner was entitled for the benefit of doubt as observed by the Appellate Court on account of infirmities in the evidence or the doubt expressed by the Court with regard to the identification of the petitioner – accused. It is well settled that relief in exercise of powers under Article 226 of Constitution of India can be granted only when it is established

that there was or has been infringement of fundamental right of the citizen and no other form of appropriate redressal by the Court in the facts and circumstances of the case is possible. It is well settled that the Courts are empowered to award the compensation where it is a established fact that infringement was patent and incontrovertible and the violation was gross. The petitioner was subjected to trial by following procedure established by law. For all the reasons mentioned hereinabove, we are not inclined to award compensation as prayed by the petitioner and, we are, therefore, of the opinion that the petitioner is not entitled to any relief as prayed in the petition. The grant of compensation or the relief sought by the petitioner seeking investigation is also not warranted in the present proceeding.

52 We, therefore, pass the following order:

:: O R D E R ::

- (i) Writ Petition stands dismissed;
- (ii) Criminal Application No.92 of 2016 is rejected;
- (ii) No order as to costs.

(PRAKASH D. NAIK, J.)

(S.C. DHARMADHIKARI, J.)