

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1188 OF 2016

Aruna Bhimrao Athwale,
Age : 46 years, Occ. Service,
r/o. Dhanora Road, Beed

..Petitioner

Vs.

1. The State of Maharashtra,
Through its Secretary,
Home Department,
Mantralaya, Mumbai – 32
2. The Principal Secretary,
Home Department, Mantralaya,
Mumbai
3. The Additional Secretary (Home),
Government of Maharashtra,
Mantralaya, Mumbai
4. The Director General of Police,
Maharashtra State, Mumbai
5. The Special Inspector General
of Police, Aurangabad Region,
Aurangabad
6. The Superintendent of Police,
Beed
7. The Collector,
Beed
8. The Police Inspector,
Georai Police Station,
Georai, Dist. Beed

9. Champalal Deaulatsinh Shevgaon,
Age : Major,
Occ. Service (Police Inspector),
r/o. Office of the Superintendent
of Police, Beed
10. Rahul Pandurang Deshpande,
Age : Major, Occ. Service
(Assistant Police Inspector),
r/o. Office of the Superintendent
of Police, Beed
11. Vijaykumar Kisanrao Jogdand,
Age : Major, Occ. Service
(Police Head Constable)
r/o. Office of the Superintendent
of Police, Beed
12. Tulshiram Sonaji Jagtap,
Age : Major, Occ. Service
(Police Head Constable),
r/o. Office of the Superintendent
of Police, Beed
13. Jaysing Narsing Wagh,
Age : Major, Occ. Service,
(Police Head Constable),
r/o. Office of the Superintendent
of Police, Beed
14. Bhaskar Gangadhar Kendre,
Age : Major, Occ. Service
(Police Naik),
r/o. Office of the Superintendent
of Police, Beed
15. Babasaheb Murlidhar Dongare,
Age : Major, Occ. SERVICE
(Police Naik),

r/o. Office of the Superintendent
of Police, Beed

16. Laxman Dagadu Jaybhaye,
Age : Major, Occ. Service
(Police Naik),
r/o. Office of the Superintendent
of Police, Beed

17. Vishnu s/o. Ramesh Chavhan
Age : Major, Occ. Service
(Police Peon),
r/o. Office of the Superintendent
of Police, Beed

18. Narayan Limbaji Sabale,
Age : Major, Occ. Service
(Police Constable),
r/o. Office of the Superintendent
of Police, Beed

19. S.H. Gandam,
Age : Major, Occ. Service
(Police Inspector),
r/o. Georai Police Station,
Tq. Georai, Dist. Beed

..Respondents

Mr. R.S.Shinde, Advocate for petitioner

Mr. S.B.Yawalkar, APP for respondent nos.1 to 8

WITH
CRIMINAL APPLICATION NO.6945 OF 2016

The Superintendent of Police,
Beed

..Applicants

Vs.

Aruna Bhimrao Athwale,
Age : 46 years, Occ. Service,
r/o. Dhanora Road, Beed

..Respondent

Mr. S.B.Yawalkar, APP for applicant

Mr. R.S.Shinde, Advocate for respondent

**CORAM : S.S. SHINDE AND
R.G. AVACHAT, JJ.
RESERVED ON : FEBRUARY 18, 2019
PRONOUNCED ON : APRIL 29, 2019**

JUDGMENT (PER R.G. AVACHAT, J.) :

By this petition under Article 226 of the Constitution of India, the petitioner seeks direction for transfer of the investigation of the Crime (C.R. No.171 of 2015), registered with Georai Police Station, Tq. Georai, Dist.Beed, for the offences punishable under Sections 302, 304, 201, 120-B, 326, 323, 506 read with Section 34 of the Indian Penal Code and allied offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, to Central Bureau of Investigation

(C.B.I.)/Special Investigation Team. The petitioner also seeks direction for arrest of respondent nos.9 to 19 and subjecting them to NARCO Analysis Test.

2. Heard Mr.Shinde, learned Counsel for the petitioner and Mr.Yawalkar, learned APP for respondent nos.1 to 8.

FACTS :

3. The petitioner is sister of Sham Athwale (since deceased). The deceased was 40% disabled in leg. The Secretary, Orthopedic Board (R.M.O.D.H.), Beed, had issued him 40% disability certificate in April, 2013. Due to disability, the deceased was unable to walk without help of a stick. One or two offences were registered against him. The police personnel had, therefore, been to the house of brother of the deceased. As the deceased was not found thereat, the police personnel abused the wife and children of the deceased. A complaint against the

police personnel, therefore, was made to the Commissioner of Police, Aurangabad and other higher Officers.

4. On 14.12.2014, the deceased along with his relatives, was on way to Ahmednagar from Beed in car (bearing registration No.MH-14-BC-2923). The car developed snag. They had, therefore, parked the car at a roadside, near village Dhondrai on Umapur road. The deceased and his relative, Mahesh, were engrossed in a chat. All of a sudden, respondent nos.10 to 19 (police personnel) came there from Beed side and surrounded the car. Two of them caught hold the deceased and respondent no.10 fired bullets, resulting into death of Sham (deceased). It was a cold blooded murder committed on the instructions of respondent no.9. The petitioner had immediately lodged a complaint to the Superintendent of Police on 15.12.2014, but of no avail. The police authorities showed it to be a case of encounter. False documents came to be prepared to suit their claim. The

petitioner had to approach the National Human Rights Commission. She also approached the Court of Judicial Magistrate, First Class. The Judicial Magistrate, First Class, issued direction to make investigation under Section 156(3) of the Code of Criminal Procedure ("the Code", for short). The investigation was conducted by the Sub-Divisional Police Officer, Georai. Since the petitioner feared that the incident would be covered-up, she has filed the present petition.

5. An affidavit-in-reply has been filed by the Investigating Officer, stating therein to have recorded statements of twenty five persons. Three of them are stated to be independent persons, who claimed to have had witnessed the incident. The statements of the police personnel, who were eye-witnesses to the incident, have also been recorded. It is stated in the affidavit that on 14.12.2014, the Local Crime Branch, Beed, had received a tip off that the deceased, an accused wanted in C.R.No.141 of

2014, had moved to Georai area. On instructions of P.I. - Shevgan (respondent no.9), A.P.I. - Rahul Deshpande (respondent no.10), along with some police personnel went in search for the deceased. In the meanwhile, they learnt the deceased to have been proceeding in a silver colour car along Georai-Umapur road. The police personnel, therefore, proceeded in that direction to find the deceased to have been in the back-seat of the car. They gave a signal to the driver of the car to stop, but of no avail. The driver of the police vehicle, therefore, tried to overtake the car with a view to block its way. In the process of overtaking, the deceased opened fire towards the police personnel. One of the bullets struck the door of the police vehicle. The deceased was asked to surrender. He did not listen and instead, he started firing towards police-party. In self defence, respondent no.10 - Rahul Deshpande, fired from his service revolver. As a result, the deceased sustained injury and failed down. The FIR,

therefore, came to be registered against the deceased for the offence of attempt to commit murder.

6. In short, it is the case of the State that it was not a case of fake encounter. The deceased attempted to kill the police personnel and in self defence, the Police Officer had to open fire. As a result, the deceased died. The Investigating Officer found the police personnel to have not committed any offence, as has been alleged in the FIR. He, therefore, filed 'B' Summary report before the Court of Judicial Magistrate, First Class.

7. Learned Counsel appearing for the petitioner would submit that there are clear violations of the directions issued by National Human Rights Commission. The petitioner had approached the concerned Police Station to lodge the FIR. Inaction on the part of the police officials, compelled the petitioner to approach the Court of Judicial Magistrate, First Class, which, in turn, directed

registration of the FIR. In support of his contentions, learned Counsel has relied on the following decisions of the Hon'ble Supreme Court :-

(i) People's Union for Civil Liberties and anr. Vs. State of Maharashtra and ors. (Criminal Appeal No.1255 of 1999);

(ii) Narmada Bai Vs. State of Gujarat and ors. [Writ Petition (Criminal) No.115 of 2007].

Learned Counsel for the petitioner, ultimately, urged for allowing the petition.

8. Learned APP, would, on the other hand, submit that investigation has been conducted by a higher ranked police official. On due investigation, the petitioner's claim has been proved to be not true. Learned Judicial Magistrate, First Class, seized with the 'B' Summary report, has every jurisdiction not to accept the report and direct

further investigation. In view of learned APP, there is, therefore, no need to transfer the investigation. Learned APP, ultimately, urged for rejection of the petition.

9. Admittedly, Sham Athwale was killed in police action. There is record to indicate the deceased to have suffered 40% disability in his leg. The deceased along with others was on his way from Beed to Ahmednagar in car. It appears that the deceased had criminal antecedents. The complaints made by the widow of the deceased to the Human Rights Commission, Inspector General of Police, Maharashtra, Commissioner of Police, Aurangabad and the District Collector, Beed, are on record, wherein allegations are made that the police personnel had been to their residence on 24.10.2014 in search of her husband. As her husband (deceased) was not home, the police personnel abused her and forcibly took away her son Sunny. On the next day of the death of Sham Athwale in police action, her widow had approached the

concerned police station to lodge FIR. It appears that her report had not been recorded. Therefore, the petitioner approached the Court of learned Judicial Magistrate, First Class, at Georai, to obtain the order of investigation under Section 156(3) of the Code. As such, the FIR came to be registered on the direction of learned Judicial Magistrate, First Class.

10. In the case of **People's Union for Civil Liberties** (supra), the Apex Court observed - killings in police encounters affect the credibility of the rule of law and the administration of the criminal justice system. In a society governed by rule of law, it is imperative that extra-judicial killings are properly and independently investigated so that justice may be done. The Apex Court also issued following requirements to be followed in the matters of investigating police encounters in the cases of death as the standard procedure for thorough, effective and independent investigation :

(1) Whenever the police is in receipt of any intelligence or tip-off regarding criminal movements or activities pertaining to the commission of grave criminal offence, it shall be reduced into writing in some form (preferably into case diary) or in some electronic form. Such recording need not reveal details of the suspect or the location to which the party is headed. If such intelligence or tip-off is received by a higher authority, the same may be noted in some form without revealing details of the suspect or the location.

(2) If pursuant to the tip-off or receipt of any intelligence, as above, encounter takes place and firearm is used by the police party and as a result of that, death occurs, an FIR to that effect shall be registered and the same shall be forwarded to the court under [Section 157](#) of the Code without any delay. While forwarding the report

under [Section 157](#) of the Code, the procedure prescribed under [Section 158](#) of the Code shall be followed.

(3) An independent investigation into the incident/encounter shall be conducted by the CID or police team of another police station under the supervision of a senior officer (at least a level above the head of the police party engaged in the encounter). The team conducting inquiry/investigation shall, at a minimum, seek:

(a) To identify the victim; colour photographs of the victim should be taken;

(b) To recover and preserve evidentiary material, including blood-stained earth, hair, fibers and threads, etc., related to the death;

(c) To identify scene witnesses with complete names, addresses and telephone

numbers and obtain their statements (including the statements of police personnel involved) concerning the death;

(d) To determine the cause, manner, location (including preparation of rough sketch of topography of the scene and, if possible, photo/video of the scene and any physical evidence) and time of death as well as any pattern or practice that may have brought about the death;

(e)

(f)

(g)

(h)

(4) A Magisterial inquiry under [Section 176](#) of the Code must invariably be held in all cases of death which occur in the course of police firing and a report thereof must be sent to

Judicial Magistrate having jurisdiction under [Section 190](#) of the Code.

(5)

(6)

(7) It should be ensured that there is no delay in sending FIR, diary entries, panchnamas, sketch, etc., to the concerned Court.

(8) After full investigation into the incident, the report should be sent to the competent court under [Section 173](#) of the Code. The trial, pursuant to the charge-sheet submitted by the Investigating Officer, must be concluded expeditiously.

(9)

(10)

In the case of **Md. Anis Vs. Union of India and ors.**, **1994 Supp (1) SCC 145**, it has been observed by the Apex Court that :-

"5.....Fair and impartial investigation by an independent agency, not involved in the controversy is the

demand of public interest. If the investigation is by an agency, which is allegedly privy to the dispute, the credibility of the investigation will be doubted and that will be contrary to the public interest as well as the interest of justice....."

"2.....Doubts were expressed regarding fairness of investigation as it was feared that as the local police was alleged to be involved in the encounter, the investigation by an officer of the UP Cadre may not be impartial....."

11. Learned A.P.P. may be right in submitting that learned Judicial Magistrate, First Class, has every jurisdiction not to accept 'B' Summary report and to direct the Investigating Officer to make further investigation. In support of his contentions, learned APP has relied on the judgment of the Apex Court in the case of **Sasi Thomas Vs. State and ors., (2006)12 SCC 421** and **Vijay Tyagi Vs. Irshad Ali alias Deepak and ors., (2013)5 SCC 762.**

12. There is quite distinction between a fresh/
de-novo investigation and further investigation. In
the case on hand, admittedly, the deceased died in
police action. The Officer in-charge of the police
station appears to have refused to register the FIR
sought to be lodged by the petitioner. It is only on
the direction of learned Magistrate, issued under
Section 156(3) of the Code, the FIR came to be
registered. Investigation has been conducted by the
Sub-Divisional Police Officer, Georai Range. The
police officials (respondent nos.9 to 19) alleged to
have been involved in the alleged fake encounter,
were attached with Georai Police Station at the
relevant time. The Sub-Divisional Police Officer, who
investigated the FIR, had direct supervisory control
over the police personnel attached to Georai police
station. He, therefore, ought not to have entered
into investigation of the FIR. The fact that he
investigated the crime, is in direct conflict with
the direction issued by National Human Rights

Commission and the Apex Court as well, namely, - an independent investigation in the encounter shall be conducted by the Crime Investigation Department or police team of another police station under the supervision of a Senior Police Officer. It is not that the observations herein are reflection on the investigation made by the Sub-Divisional Police Officer, Georai Range. The petitioner had already voiced the apprehension that the investigation would not be impartial, if it is done by local police.

13. We have perused the papers of investigation. We refrain from entering upon the details thereof, as it may prejudice any of the parties to this petition. Since the accusations were directed against the local police, it would be appropriate in the interest of justice, to entrust investigation to an independent agency like Crime Investigation Department or Special Investigation Team. In order to do complete justice, it is always open to the Court to hand over the investigation to such an agency.

14. In the aforesaid backdrop, we allow the petition in terms of the following order:-

- (i) The Respondent no.4 – Director General of Police is directed to appoint, within two weeks from the receipt of this order, a Special Investigation Team (S.I.T.) headed by an I.P.S. Officer of the rank of Superintendent of Police to *de-novo* investigate the crime, vide C.R. No.171 of 2015 registered with Georai Police Station, Tq. Georai, Dist.Beed.
- (ii) The present Investigating Officer is directed to hand over all the records of the crime to the S.I.T., within a week from the date of constitution of the S.I.T.
- (iii) So far as regards rest of the prayers are concerned, it would be within the province of the S.I.T.

- (iv) Learned Judicial Magistrate, First Class, seized of the 'B' Summary report, shall not act upon the said report.
- (v) The Writ Petition is disposed accordingly.
- (vi) Criminal Application No.6945 of 2016 also stands disposed of.

[R.G. AVACHAT, J.]

[S.S. SHINDE, J.]

kbp