

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 1811 of 2019

Manuja Bibi

-vs.-

Central Bureau of Investigation, SC-II, New Delhi & Ors.

Mr. Bikash Ranjan Bhattacharya, Sr. Adv.
Mr. Rabi Sankar Chottopadhyay,
Mr. Uday Sankar Chottopadhyay,
Mr. Suman Sankar Chottopadhyay,
Mr. Santanu Maji,
Mr. Arabinda Maji

...for the petitioner

Mr. Ankit Agarwala,
Ms. Altoriya Mukherjee,
Mr. Robin Basu,

...for the Opposite Party Nos.3 and 4

Mr. Shekhar Kumar Basu, Sr. Adv.
Mr. Anirban Dutta,
Mr. Sayantan Sinha

...for the opposite party nos.5 and 6

Mr. Ayan Bhattacharjee,
Mr. Sharequl Haque

...for the Opposite Party nos. 2, 7 and 8

Ms. Rajashee Venket Kundalia

...for the CBI.

Heard on : 31.01.2022, 15.02.2022, 22.02.2022,
28.02.2022, 30.03.2022, 06.04.2022,
19.04.2022, 04.05.2022, 06.05.2022,
10.06.2022 & 15.06.2022.

Judgment on : 02.09.2022

Tirthankar Ghosh, J:-

The present revisional application has been preferred challenging the order dated 02.08.2017 passed by the learned Chief Judicial Magistrate, Hooghly, in connection with G.R. Case no. 101/2013 corresponding to FIR No.2(S)82013-SUC. V/SC-II/CBI/New Delhi arising out of the Dhaniakhali police station case no. 08/2013 dated 19.01.2013 under Sections 304(A)/324/342/218/34 of the Indian Penal Code against 6 of the accused persons and Section 218 of Indian Penal Code against another accused i.e. Sub-inspector Ashim Mondal.

The background of the case narrated in the revisional application is that the present petitioner lodged a complaint with Dhaniakhali police station in respect of custodial death of her husband namely, Kazi Nasiruddin of village – Joyrambati, Police Station- Dhaniakhali, District- Hooghly on 18.01.2013 which was registered as Dhaniakhali Police station case no. 8/2013 dated 19.01.2013. The said case was transferred to Central Bureau of Investigation (hereinafter referred to as ‘CBI’) pursuant to an order of the Hon’ble High Court, Calcutta in W.P. No. 3800(W) of 2013 (Pratim Kumar Singha Roy –Vs. – Union of India and others). The relevant part of the order is set out as follows:

“The State investigating agency has failed to conduct the investigation in a fair and impartial manner and has abrogated and derelicted its basic sovereign duty to investigate the crime in the following respects:-

(a) The real justification and necessity of arrest of the victim on 18.01.2013 by the police personnel of Dhanikhali police station from Madanmohan Tala has not been investigated at all. The facile and apparently absurd explanation that the arrest was effected as the victim did not disclose his identity has been accepted by the CID as gospel truth. No investigation has been made as to the breach of duty of the police personnel attached to Dhaniakhali P.S. in complying with the mandatory directives laid down in D.K. Basu (Supra) in the matter of informing the relations of the arrestee as to the facture of his arrest and keeping the same under wraps till his custodial death.

(b) First information report with regard to the death of the victim was registered under Section 304 of the Penal Code, 1860 (culpable homicide not amounting to murder) (i.e. murder) instead of Section 302 of the Penal Code, 1860 clearly betraying a compassionate approach of the investigating agency towards the accused persons who are brothers in uniform. CID has also not made any effort to implicate the accused persons by adding the aforesaid graver offence in the cause of its investigation of the crime.

(c) The explanation of Officer-in-Charge of Dhaniakhali police station with regard to manner of treatment of the victim in police custody is wholly contradicted by the post mortem report and the final opinion as to the cause of death. Post mortem report reveals marks of injury on the body of the deceased whereas arrest memo states that he had no visible marks of injury on his person at the time of his arrest. Final opinion as to the cause of death is due to "head injury and ante mortem in nature". The explanation of the Officer-in-Charge that the victim was only slapped. Such explanation is therefore wholly unbelievable in the face of such medical opinion. This give rise to a strong suspicion as to his role in the alleged crime. In spite of that, no investigation by way of further interrogation of the Officer-in-Charge

or otherwise was undertaken by the CID in this regard. The effort of the Officer-in-Charge is to obfuscate the actual incident and to mislead the investigating agency was tamely accepted by the latter and no steps have been taken by the investigating agency to thwart the same.

(d) No investigation relating to the previous animosity between the local MLA Smt. Ashima Patra and the victim has been made by CID. At the time of the apparently frivolous arrest of the victim, Smt. Patra had telephoned the Officer-in-Charge of Dhaniakhali police station. Though her innocuous explanation that such telephonic exchange was in respect of a dispute relating to a neighbour is not borne out on contemporaneous materials, CID refrained from investigation the real motive for the said telephonic conversation at such a crucial juncture.

(e) No investigation as to the circumstances and/or reason for the second telephonic exchange between the Officer-in-Charge and the local MLA immediately after the custodial death of the victim has been made by the CID. The latter has completely shut its eyes to the conspiracy angle in this case involving the Officer-in-Charge and the local MLA particularly in the light of the allegations of previous enmity and the telephonic exchanges between themselves in the course of the alleged incident.

(f) Furthermore, the statement of the Officer-in-Charge of the police station recorded by CID on 09.02.2013 is completely silent as to the aforesaid telephonic exchanges. Such suppression on the part of the Officer-in-Charge makes it apparent that he did not reveal the whole truth with regard to the incident. Still then, the CID chose not to interrogate him further or conduct any other steps for the revelation of truth in the matter, particularly, as to the role of the said Officer-in-Charge and the local MLA in the custodial death of the victim.

In R.S. Sodhi, Advocate v. State of U.P. reported in 1994 SCC (Cri) 248 the Apex Court while dealing with a case of murder involving police personnel held as follows:-

“We have perused the events that have taken place since the incident but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them. It is only with that in mind that we having though in both advisable and desirable as well as the interest of justice to entrust the investigation to the Central Bureau of Investigation forthwith and we do hope that it would complete the investigation at an early date so that those involved in the occurrences, one way or the other, may be brought to book.”

In Rubabbuddin Sheikh v. State of Gujarat (2010) 2 SCC 200 The Supreme Court held as follows:

“It is also well known that when police officials of the State were involved in the crime and in fact they are investigating the case, it would be proper and interest of justice would be better served if the investigation is directed to be carried out by the CBI Authorities, in that case CBI Authorities would be an appropriate authority to investigate the case.

In Ramesh Kumari v. State (NCT of Delhi), this Court at para 8 observed: (SCC p 681)

“8.We are also of the view that since there is allegation against the police personnel, the interest of justice would be better served if the case is registered and investigated by an independent agency like CBI.”

In State of West Bengal v. The Committee For Protection of Democratic Rights, West Bengal (2010) 3 SCC 571 the Apex Court held that there is ample power in this Court under Article 226 of the Constitution to direct an investigation to be conducted by Central Bureau of Investigation to provide “credibility and instill confidence in investigations” or where the incident may have national or international ramifications or where such an order is necessary for doing complete justice and enforcing fundamental rights.

Applying the ratio of the aforesaid decisions to the factual matrix of grave and palpable dereliction of duty to fairly investigate the crime in the face of involvement of high police functionary and local politician we feel it prudent to transfer the investigation to an independent agency like CBI to instill confidence and credibility to such investigational procedure.

Finally, it has been pleaded before us that the accused persons and/or the potential suspects have not been added as a party respondents.

It is settled law that the process of investigation and/or selection of an independent agency to investigate a crime does not involve principles of natural justice.

We, therefore, feel that in view of the nature of the order that we propose to pass it was not necessary to hear the accused persons or other potential suspects.

In Narmada Bai v. State of Gujarat reported in (2011) 5 SCC 79 it has been held as follows:-

“It is trite law that the accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them.”

Similar is the view in the case of Central Bureau of Investigation v. Rajesh Gandhi reported in (1996) 11 SCC 253 (Para 8).

For the aforesaid reasons, we feel that for the purpose of fair and impartial investigation and to ensure credibility and public confidence to such investigation process, the investigation in the instant case being Dhaniakhali P.S. Case No. 8/13 dated 19.01.2013, be transferred to Central Bureau of Investigation. CBI is directed to take charge of investigation within 7 days of communication of this order. Respondent No. 5 is directed to ensure that CID, West Bengal hands over all papers relating to investigation of the aforesaid case to CBI within the aforesaid time. CBI shall thereafter conduct a free and fair investigation in all aspects of matter bearing in mind the deficiencies in investigation as indicated by us in the foregoing paragraphs and take it to its logical conclusion.”

The allegations made in the complaint on 19.01.2013 was that the petitioner/complainant's husband purchased one TATA 107 vehicle in the month of January, 2013 as he was involved in the business of transporting goods. On 18.01.2013 he left his home with a sum of Rs.70,000/- for the purpose of installation of body of the said vehicle. It has been alleged that at the relevant point of time he was wearing three gold rings weighing 2 bhories,

one gold chain of 2.5 bhories and carrying one mobile phone and 3 bank ATM cards. At about 9.30 pm an acquaintance reported to her and informed that Kazi Nasiruddin was purchasing from a shop at Madan Mohantala at Dhaniakhali after parking his vehicle and at that point of time police personnel of Dhaniakhali Police Station arrived and started arguing with him. They assaulted the deceased and took him to the police station where he was stripped of his clothes and was mercilessly beaten by the police who had killed him.

The main thrust of contention in this revisional application is that although the CBI investigated the case and the learned Judicial Magistrate after considering the materials under Section 207 of the Code of Criminal Procedure framed charges under Section 304A/324/342/218/34 of the Indian Penal Code, but on perusal of the documents relied upon by the prosecution the complainant contends that a case either under Section 302 of the Indian Penal Code or under Section 304 of the Indian Penal Code has been made out. To that effect the contention of the Investigating Officer in his report under Section 173 Cr.P.C. (hereinafter referred as the 'report') are referred by the petitioner. At page 23 of the report it has been stated that "thereafter a Police vehicle came there and deceased was forced into the Vehicle by beating". At page 25 of the report it has been contended that "The shirt buttons of Kazi Nasiruddin were open and it appeared from CCTV images that he had been beaten brutally. In the CCTV footages the deceased was seen feeling uneasy and was checking the blood from his ear and cheeks." At page 28 of the report it

has been contended that “At about 11.10 PM, OC Barun Ghosh called Sabed Ali from his mobile phone and asked him to reach the police station immediately. Sabed Ali @ Poltu reached the police station within few minutes and found Kazi Nasiruddin unconscious. Kazi Nasiruddin was wearing nothing in the lower portion of the body and only baniyan was on his body. OC Barun Ghosh asked Sabeb Ali to hold deceased as he became unconscious. Sabed Ali tried his best so that Kazi Nasiruddin could gain his consciousness but in vain.” At page 30 of the report it has been contended that “There are a number of injuries on the person of deceased as appearing in the CCTV footage and Post Mortem Report. However, SI Ashim Mondal prepared false inquest report showing no injury on the body of deceased Kazi Nasiruddin with the objective to save his colleagues from prosecution.” The injury report has been described in page 30 as *“On 19.01.2013 Dr. SS Paul and Dr. Amit Das conducted the post-mortem proceedings as per the order of DM Hooghly. The post-mortem proceedings were also photographed and videographed. The autopsy doctors observed following injuries on the dead body of the deceased Kazi Nasiruddin:-*

- i) ½” X 1” bruise at right zygoma.*
- ii) ½” X ½” bruise at right angle of mouth.*
- iii) Star shaped abrasion ½” above left eye lid.*
- iv) ½” bruise below left eye lid.*
- v) Irregular abrasion 2”X3” below right scapula down to back of trunk”*

The opinion of doctor reflected at page 31 of the report is *“the cause of death in the case is cardiac failure due to coronary insufficiency. Simultaneously, the head injuries could be produced by fall due to syncopal attack”*. The opinion of the Investigating Officer after narration of such facts is that *“the deceased was very well known to most of the officers of Police Station and had even talked to the OC on the mobile phone from Madanmohan Tala. The deceased was not released on bail immediately even after he was identified as per provisions of Sec. 42(2) Cr.P.C. Thus, the deceased was kept in illegal custody/confinement. When his condition started deteriorating instead of taking him to the hospital, the OC of the Police Station, Barun Ghosh tried to contact the friend of deceased Sabed Ali @ Paltu to come to Police Station to take him to the hospital. Such conduct from policemen who are expected to protect the life of citizen is extremely rash and negligent.”*

The Investigating Officer therefore, concluded that ASI Sanat Kumar Karmakar and OC Barun Ghosh have committed offences punishable under Sections 34 read with Sections 304(A), 324, 342 & 218 of the Indian Penal Code. Constable Amit Dey, Constable Somnath Chatterjee, ASI Kingsuk Biswas and ASI Provat Chatterjee have committed offences punishable under Section 34 read with Sections 304(A), 324, 342 of the Indian Penal Code and SI Ashim Mondal committed offences under Section 218 of the Indian Penal Code.

In view of the references made in respect of the charge-sheet so submitted by the CBI an enquiry was directed to be conducted by this Court on

28.02.2022 through the rank of an Officer of DIG, In-charge of Special Crime Branch, CBI, New Delhi. Subsequently report was submitted on 30th March, 2022 by Santosh Chalke, DIG/SBI/SC.II/New Delhi. In the said report the following issues are relevant which are set out as follows:

“6. MATERIAL COLLECTED BY THE INVESTIGATING AGENCY

6.2. During the Course of investigation, IO Collected a total number of 24 documents which include copy of FIR, CD file, General Diary Book, Driver Car Diary of police vehicles, Arrest Register, Injury Report, Forensic Examination Report, CDRs of Mobile phones of deceased & accused police officials of PS Dhanikhali. Apart from this, DVR installed inside Police Station Dhanikhali connected with 04 cameral containing the relevant video footage (without voice) was also analyzed. Details of the same are asunder :-

S. No.	Time	Relevant Footage contents
01.	09:07p.m	Kazi Nasiruddin was slapped by Ct. Amit Kumar Dey and Const. Somnath Chatterjee in the Duty Officer's Room.
02.	09:30 p.m	Kazi Nasiruddin seen requesting ASI Kingsuk Biswas to talk with OC for releasing him.
03.	09:40 p.m	Kazi Nasiruddin himself took water from bottle.
04.	09:54 p.m	Kazi Nasiruddin seen requesting ASI Kingsuk Biswas again to talk with OC for releasing him.
05.	10.30hrs- 10.31.25 hrs	Kazi Nasiruddin complained of chest pain to ASI Rakhohan Pal, Duty officer.
06.	10.32 p.m.	(i) Water and Rantac tablet is offered to Kazi Nasiruddin by Sentry Duty constable Waris Ali but he could not take as he was not feeling well and tablet fell on the ground. Subsequently, deceased also fell down from the wooden bench on the ground and his head hit the ground.

		(ii) ASI Pravat Kumar Chatterjee, OC Barun Ghosh, Const. Amit Dey and Sentry Waris Ali lifted the deceased and made him to sit on the bench again.
07.	10.40 p.m.	Kazi Nasiruddin was given Rantac Tabled with water and allowed to rest.

6.3. That in the Inquest Report conducted by SI Ashim Mondal at 0115 hrs on 19.01.2013, no injury was shown on the person of deceased. However, during the subsequent Inquest Proceedings dated 19.01.2013 conducted by Smt. Suparna Mazumdar, Executive Magistrate, Sadar, Hooghly, it was found that the blood was coming out from the right ear and nose. Further, in the column No.5 of the injury or mark on the body, it is mentioned as under:-

- (i) Blackish red patches below the two eyes and small injury on the right cheek and blood clotting.
- (ii) Blackish mark all over the throat, back and buttock.
- (iii) Relatives of deceased had opined that the death was caused due to the beatings by the police.

6.4. That during postmortem proceedings conducted upon deceased Kazi Nasiruddin by Dr. SS Paul and Dr. Amit Das at District Hospital, Hooghly on 19.01.2013, following external injuries were found on the dead body:-

- (i) ½" X 1" bruise at Zygoma.
- (ii) ½" X ½" bruise for right angle of mouth.
- (iii) Star shaped abrasion ½" above left eyelid.
- (iv) ½" bruise below left eye lid.
- (v) Irregular abrasion 2" X 3" below right Scapula down to the back of trunk.

*The cause of death was opined to be intra-cranial hemorrhage. However, on further examination, in the Histo-pathological report/chemical analysis report, the cause of death was opined **‘due to head injury’**.*

6.5. That the opinion dated 03.07.20214 of Joint Medical Board comprising of Dr. Sudhir K. Gupta, Professor & Head, Department of Forensic Medicine & Toxicology, AIIMS New Delhi, Dr. Millo Tabin, Additional Professor, Department of Forensic Medicine & Toxicology, AIIMS, New Delhi, Dr. SS Paul, Medical Officer ENT, District Hospital Hooghly and Dr. Amit Das Medical Officer, District Hospital, Hooghly District (West Bengal), did not agree with the findings of the Forensic Doctors of the local hospital at Hooghly who conducted post-mortem and concluded that the death was due to Head Injury. Observations of Joint Medical Board are as under:-

- i. That the external injuries found on postmortem are not fatal in nature and could be produced by blunt force/surface.*
- ii. The internal examination showed haemorrhagic spots on the right side of brain.*
- iii. There was no external injury on the head (scalp) and skull was intact.*
- iv. The CCTV footage shows that Kazi Nasiruddin having some discomfort sitting in the bench and then falling from the bench.*
- v. Some of the external injuries on the face could be due to fall as a result of syncope.*
- vi. The haemorrhagic spots on the right side of the brain and blood clots in the nose and right ear could be due to fall in syncopal attack.*
- vii. That the cause of death in this case is cardiac arrest failure due to coronary insufficiency. Simultaneously, the head injuries could be produced by fall due to syncopal attack.*

After being confronted with the conclusion of the AIIMS Board, the Forensic Doctors who conducted the Post-mortem also agreed with the findings of Joint

Medical Board of AIIMS. The findings of the AIIMS Board led to the conclusion that a case of death as they did not provide Kazi Nasiruddin with immediate medical assistance which could have saved his life.

*6.6. In view of the facts and circumstances revealed during investigation, duly supported by scientific/forensic evidence in the form of DVR containing the relevant video footage as well as the opinion expressed by the Board of doctors of AIIMS and the Autopsy Doctors of District Hospital, Hoogly, Investigating Officer came to the conclusion that the cause of death of victim was due to **‘Heart Failure’**. His life could have been saved if the police officials present at that time at PS Dhanikhali had provided him medical assistance immediately. Therefore, in view of the facts and circumstances discussed above, section 304-A IPC was applied in this case.”*

In fact the DIG endorsed the view of the Investigating Officer in respect of the alleged offences under Section 34 read with 304(A)/324/342/218 of the Indian Penal Code which was duly approved by the competent authority, CBI.

As finding of the Investigating Officer was approved by the DIG, CBI certain issues are required to be considered by this Court:

- a) The deceased was picked up from a market place while he was purchasing. After quarrel ensued between Constable Amit Dey and the deceased, the former rang up the police station for deploying extra police force.
- b) At the same time the deceased also called the Officer-in-charge of the Dhaniakhali Police Station namely, Barun Ghosh and informed that he was harassed by the police officials of the local police station.

- c) Police vehicle arrived at the market place and the deceased was forced into the vehicle being assaulted and he was taken to police station along with his newly purchased TATA 107 vehicle.
- d) Investigation revealed that the dispute arose between the deceased and Constable Amit Kumar Dey because of parking of TATA 107 vehicle. The same was informed by ASI Sanat Kumar Karmakar and Constable Amit Kumar Dey over phone to ASI Kingsuk Biswas for deploying further forces. The deceased at the relevant point of time also communicated over his phone to the Officer-in-charge Barun Ghosh. It has been observed in the report that Constable Amit Dey and ASI Kingsuk Biswas on instruction of OC Barun Ghosh left with police jeep along with ASI Provat Chatterjee and Constable Somnath Chatterjee with Driver Nittymananda Ghosh. The mobile numbers of each of the police officers communicating with each other reflects their prompt action. The deceased being forced into the police jeep while being assaulted is also reflected in the report.
- e) The CCTV footages appearing in the report of the Investigating Officer as well as DIG, CBI which was also taken into consideration by the Investigating Officer as well as DIG reflects that the shirt buttons of the deceased were open and he had been beaten brutally. The footages also reflect that the deceased was feeling uneasy and was checking the blood trickling through ear and

cheeks. CCTV footages also reflected that Constable Amit Dey and Constable Somnath Chatterjee slapped the deceased in the duty officer's room.

- f) The DIG in his report has opined that the arrest of Kazi Nasiruddin was due to sudden provocation and scuffle with Constable Amit Dey and the summons of arrest under Section 42 of Cr.P.C. was very flimsy, without any basis as he was known to the police authorities being involved in three other FIRs at the Dhaniakhali Police Station. As per the third opinion by the superior officer the local police violated the provisions of Section 49 of Cr.P.C., Section 50 Cr.P.C., Section 50A Cr.P.C. and Section 51 of Cr.P.C. Fourth opinion in the report refers to the police officers in furtherance of their common intention, arrested the victim to further harass him and negligence on their part led to the death in custody. The other opinion of the superior officer which is relevant is that the police officials of Dhaniakhali police station did try to suppress the fact of injury in the inquest report which was revealed during the inquest conducted by the Magistrate as well as in the Post Mortem. According to the superior Officer the death was because of negligence on the part of the police authorities. However, according to him Barun Ghosh Officer-in-charge, ASI Sanat Kumar Karmakar, Constable Amit Dey and Constable Somnath Chatterjee had beaten the victim/deceased and SI Ashim Mondal prepared

incorrect record in the form of inquest report and as such they have committed offences under the Sections for which the Investigating Officer has charged.

Ms. Rajashee Venket Kundalia learned Advocate appearing for the CBI relied upon Jacob Mathew –Vs. – State of Punjab and Haryana reported in (2005) 6 SCC 1 to establish her contention that the offence herein falls within the ambit of Section 304A of the Indian Penal Code. The present judgment relied upon do set out principles and the guidelines in case of medical negligence. As such factual background of the case relied upon, has hardly any relevance in respect of the subject matter which is addressed in the present revisional application. Learned advocate for the CBI also relied upon Suleman Rehiman Mulani & Anr. –Vs. – State of Maharashtra reported in (1968) 2 SCR 515 wherein the subject matter of ‘rash and negligent act’ was considered in the background of driving a vehicle. In Mohammed Aynuddin alias Miyam –Vs. – State of A.P. reported in (2000) 7 SCC 72, the subject matter relate to a passenger falling down from a moving vehicle. The driver of the bus was fastened with the liability. In Rajan –Vs. – Joseph & Ors. reported in (2015) 8 SCC 436, the fact of the case related to an electric shock being received from a washing machine and the subject matter of ‘rash and negligent act’ being considered under Section 304A of the Indian Penal Code. In Rakesh Ranjan Gupta –Vs. – State of U.P. & Anr. reported in (1999) 1 SCC 188, the interpretation of Section 304A of the Indian Penal Code fell for consideration and it was observed by the Hon’ble Supreme Court that if there was delay on

the part of the doctor to attend the patient that may be a cause of civil negligence and not a culpable negligence falling under the provision of Section 304A of the Indian Penal Code.

After relying upon the aforesaid precedents learned advocate for the CBI emphasized that the proceedings before the learned Magistrate should be allowed to continue under the relevant provisions for which charge was framed by the learned Magistrate and there is no scope for interference with the order dated 02.08.2017.

Mr. Bikash Ranjan Bhattacharya, learned Senior Advocate appearing for the petitioner on the other hand submitted that there are oral evidence reflecting torture being inflicted upon the deceased, such oral evidence is to the extent that there were assault and torture being inflicted upon the deceased, to hold that the deceased who was illegally arrested, assaulted and tortured which resulted in his custodial death as a 'rash and negligent' act would be simply denying justice to the de facto complainant, who from the inception had to fight for justice for approaching this Court on umpteen occasions.

Mr. Ankit Agarwala learned advocate for the Opposite Party No.3 and 4, Mr. Sekhar Kumar Basu, learned Senior Advocate appearing for the Opposite Party No.5 and 6 and Mr. Ayan Bhattacharjee, learned advocate appearing for the Opposite Party Nos. 2, 7 and 8 opposed the contentions of Mr. Bhattacharya and submitted that the police officers have been malafidely implicated in the present case only on public perception and there were no

materials to frame charge against them, however, the learned trial Court has framed charge which calls for interference. Learned Advocates also prayed for discharge on the ground of sanction which is a subject matter of a separate revisional application.

In Gouri Shankar Sharma -Vs. - State of U.P. reported in 1990 Supp. SCC 656 it has been observed as follows:

“.....the offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency.”

In Prithipal Singh -Vs. - State of Punjab reported in (2012) 1 SCC 10, the Hon’ble Supreme Court dealt with facts of torture and custodial death and arrived at a finding that tolerance of police atrocities would amount to acceptance of systematic subversion and erosion of rule of law. The following paragraphs are relevant for the purpose of the present of case, which are set out as follows:

“28. *In addition to the protection provided under the Constitution, the Protection of Human Rights Act, 1993, also provides for protection of all rights to every individual. It inhibits illegal detention. Torture and custodial death have always been*

condemned by the courts in this country. In its 113th Report, the Law Commission of India recommended the amendment to the Evidence Act, 1872 (hereinafter called “the Evidence Act”), to provide that in case of custodial injuries, if there is evidence, the court may presume that injury was caused by the police having the custody of that person during that period. Onus to prove the contrary is on the police authorities. Law requires for adoption of a realistic approach rather than narrow technical approach in cases of custodial crimes. (Vide *Dilip K. Basu v. State of W.B.* [(1997) 6 SCC 642 : AIR 1997 SC 3017] , *N.C. Dhoundial v. Union of India* [(2004) 2 SCC 579 : 2004 SCC (Cri) 587 : AIR 2004 SC 1272] and *Munshi Singh Gautam v. State of M.P.* [(2005) 9 SCC 631 : 2005 SCC (Cri) 1269 : AIR 2005 SC 402])

29. This Court in *Raghubir Singh v. State of Haryana* [(1980) 3 SCC 70 : 1980 SCC (Cri) 526 : AIR 1980 SC 1087] while dealing with torture in police custody observed: (SCC pp. 71-72, para 2)

“2. We are deeply disturbed by the diabolical recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic, torturesome poignancy [when] the violent violation is perpetrated by the police arm of the State whose function is to protect the citizen and not to commit gruesome offences against them as has happened in this case. Police lock-up if reports in newspapers have a streak of credence, are becoming more and more awesome cells. This development is disastrous to our human rights awareness and humanist constitutional order.”

30. Similarly, in *Gauri Shanker Sharma v. State of U.P.* [1990 Supp SCC 656 : 1991 SCC (Cri) 67 : AIR 1990 SC 709] this Court held: (SCC pp. 666-67, paras 15 & 17)

“15. ...it is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third-degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case.

17. ... The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency.”

31. *In Munshi Singh Gautam [(2005) 9 SCC 631 : 2005 SCC (Cri) 1269 : AIR 2005 SC 402] this Court held that peculiar type of cases must be looked at from a prism different from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. The Court observed as under: (SCC pp. 638-39, paras 6-7)*

“6. Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues....

7. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are

themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case ... often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged ... The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'khaki' to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with."

(See also State of M.P. v. Shyamsunder Trivedi [(1995) 4 SCC 262 : 1995 SCC (Cri) 715] .)

32. *In State of U.P. v. Mohd. Naim [AIR 1964 SC 703 : (1964) 1 Cri LJ 549] the State of U.P. filed an appeal before this Court for expunging the following remarks made by the Allahabad High Court: (AIR p. 705, para 2)*

“2. ... ‘...that there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian police force.

... Where every fish barring perhaps a few, stinks, it is idle to pick out one or two and say that it stinks.”

This Court held that such general remarks could not be justified nor were they necessary for disposal of the said case. The Court expunged the aforesaid adverse remarks. (See also People's Union for Civil Liberties v. Union of India [(2005) 5 SCC 363 : AIR 2005 SC 2419] .)

Burden of proof under Section 106

53. *In State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516 : AIR 2000 SC 2988] this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (See also Shambhu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 Cri LJ 794] , Sucha Singh v. State of Punjab [(2001) 4 SCC 375 : 2001 SCC*

(Cri) 717 : AIR 2001 SC 1436] and Sahadevan v. State [(2003) 1 SCC 534 : 2003 SCC (Cri) 382 : AIR 2003 SC 215] .)

75. *In a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence.*

“6. Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues....” (Munshi Singh case [(2005) 9 SCC 631 : 2005 SCC (Cri) 1269 : AIR 2005 SC 402] , SCC p. 638, para 6)

86. *Police atrocities are always violative of the constitutional mandate, particularly, Article 21 (protection of life and personal liberty) and Article 22 (person arrested must be informed the grounds of detention and produced before the Magistrate within 24 hours). Such provisions ensure that arbitrary arrest and detention are not made. Tolerance of police atrocities, as in the instant case, would amount to acceptance of systematic subversion and erosion of the rule of law. Therefore, illegal regime has to be glossed over with impunity, considering such cases of grave magnitude.”*

In *Gulam Hasan Beigh –Vs. – Mohammad Maqbool Magrey & Ors.* reported in 2022 SCC Online SC 913, the Hon’ble Apex Court while dealing with the stage of framing of charge observed that the Courts should not be persuaded by the medical opinion only and should also take into account the ocular evidence and other materials collected by the Investigating Agency. The relevant paragraphs for the purpose of the present case are set out as follows:

“31. *What did the trial court do in the case on hand? We have no doubt in our mind that the trial court could be said to have conducted a mini trial while marshalling the evidence on record. The trial court thought fit to discharge the accused persons from the offence of murder and proceeded to frame charge for the offence of culpable homicide under Section 304 of the IPC by only taking into consideration the medical evidence on record. The trial court as well as the High Court got persuaded by the fact that the cause of death of the deceased as assigned in the post mortem report being the “cardio respiratory failure”, the same cannot be said to be having any nexus with the alleged assault that was laid on the deceased. Such approach of the trial court is not correct and cannot be countenanced in law. The post mortem report, by itself, does not constitute substantive evidence. Whether the “cardio respiratory failure” had any nexus with the incident in question would have to be determined on the basis of the oral evidence of the eye witnesses as well as the medical officer concerned i.e. the expert witness who may be examined by the Prosecution as one of its witnesses. To put it in other words, whether the cause of death has any nexus with the alleged assault on the deceased by the accused persons could have been determined only after the recoding of oral evidence of the eye witnesses and the expert witness along with the other substantive evidence on record. The post mortem report of the doctor is his previous statement based on his examination of the dead body. It is not substantive evidence. The doctor's statement in court is alone the substantive evidence. The post mortem report can be used only to corroborate his statement under Section 157, or to refresh his memory under Section 159, or to contradict his statement in the witness-box under Section 145 of the Evidence Act, 1872. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really*

of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.

32. *The prosecution should have been given opportunity to prove all the relevant facts including the post mortem report through the medical officer concerned by leading oral evidence and thereby seek the opinion of the expert. It was too early on the part of the trial court as well as the High Court to arrive at the conclusion that since no serious injuries were noted in the post mortem report, the death of the deceased on account of “cardio respiratory failure” cannot be said to be having any nexus with the incident in question.*

33. *Whether the case falls under Section 302 or 304 Part II, IPC could have been decided by the trial court only after the evaluation of the entire oral evidence that may be led by the prosecution as well as by the defence, if any, comes on record. Ultimately, upon appreciation of the entire evidence on record at the end of the trial, the trial court may take one view or the other i.e. whether it is a case of murder or case of culpable homicide. But at the stage of framing of the charge, the trial court could not have reached to such a conclusion merely relying upon the post mortem report on record. The High Court also overlooked such fundamental infirmity in the order passed by the trial court and proceeded to affirm the same.*

34. *We may now proceed to consider the issue on hand from a different angle. It is a settled position of law that in a criminal trial,*

the prosecution can lead evidence only in accordance with the charge framed by the trial court. Where a higher charge is not framed for which there is evidence, the accused is entitled to assume that he is called upon to defend himself only with regard to the lesser offence for which he has been charged. It is not necessary then for him to meet evidence relating to the offences with which he has not been charged. He is merely to answer the charge as framed. The Code does not require him to meet all evidence led by prosecution. He has only to rebut evidence bearing on the charge. The prosecution case is necessarily limited by the charge. It forms the foundation of the trial which starts with it and the accused can justifiably concentrate on meeting the subject-matter of the charge against him. He need not cross-examine witnesses with regard to offences he is not charged with nor need he give any evidence in defence in respect of such charges.

35. *Once the trial court decides to discharge an accused person from the offence punishable under Section 302 of the IPC and proceeds to frame the lesser charge for the offence punishable under Section 304 Part II of the IPC, the prosecution thereafter would not be in a position to lead any evidence beyond the charge as framed. To put it otherwise, the prosecution will be thereafter compelled to proceed as if it has now to establish only the case of culpable homicide and not murder. On the other hand, even if the trial court proceeds to frame charge under Section 302 IPC in accordance with the case put up by the prosecution still it would be open for the accused to persuade the Court at the end of the trial that the case falls only within the ambit of culpable homicide punishable under Section 304 of IPC. In such circumstances, in the facts of the present case, it would be more prudent to permit the prosecution to lead appropriate evidence whatever it is worth in accordance with its*

original case as put up in the chargesheet. Such approach of the trial court at times may prove to be more rationale and prudent.”

A cumulative assessment of the documents relied upon by the prosecution leads this Court to address two issues:

- (1) In a case of illegal arrest when the victim/deceased is assaulted by police officials and evidence of blood trickling with bodily injuries followed by custodial death and preparation of fake inquest report is evident – can it be said that the act of police officials are rash and negligent in nature?
- (2) Can the term ‘ground for presuming’ appearing on Section 228 and Section 240 of Code of Criminal Procedure be restricted only to medical evidence?

Having regard to the materials placed on record which includes the report under Section 173 of the Code of Criminal Procedure, the enquiry report submitted by the DIG and the charge framed by the learned Trial Court, I am of the opinion that absolute concentration and emphasis was only on the medical opinion and as such charge was recommended to be framed by the Investigating Officer under Section 304A of the Indian Penal Code and the learned trial Court also framed charge under Section 304A of the Indian Penal Code along with Sections 324/342/34 and Section 218 of the Indian Penal Code. The nature of evidence leading to custodial death were not taken into consideration and were ignored.

It would not be out of place to state that in the present case the arrest of the deceased was on questionable grounds, the assault at the police station was illegal, the CCTV footage was not continuous, the bodily injury appearing in the post mortem were unexplained, the inquest report was manipulated and the statements under Section 161 of the Code of Criminal Procedure reflected regarding the custodial torture of the deceased at the hands of the police.

Relying upon the principles laid down by the Hon'ble Apex Court in Ghulam Hasan Beigh (supra) I am of the opinion that at this stage when the evidence is to commence the charges should be under Section 304 part II of the Indian Penal Code and not under Section 304A of the Indian Penal Code as at this stage an aggravated culpability is to be presumed from the materials on record under Section 228/240 of the Code of Criminal Procedure.

Thus, the order dated 02.08.2017 passed by the learned Chief Judicial Magistrate, Hooghly is hereby set aside. The Chief Judicial Magistrate, Hooghly is directed to commit the records of the case to the learned Sessions Judge, Hooghly who would either conduct the trial himself or delegate the same to another Sessions Judge of his choice. The trial Court would proceed with the case by framing charges under Section 304 part II, 324/342/218 of the Indian Penal Code read along with Section 34 of the Indian Penal Code against the respective accused persons.

Thus, Criminal Revision no. 1811 of 2019 is allowed.

Pending applications, if any, are consequently disposed of.

Interim order, if any, is hereby made absolute.

Department is directed to communicate this order to the Learned Chief Judicial Magistrate, Hooghly as also the Learned Sessions Judge, Hooghly who would take steps for expediting the progress of the trial of the instant case.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)