CUSTODIAL VIOLENCE AND THE ROLE OF A MAGISTRATE

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"Be you ever so high, the law is above you." - Lord Denning

Introduction

A necessary corollary of rule of law is that no one can be deprived of his liberty except with the authority of law; all persons including those accused of offences, thus, claim a right to be handled as per law. Even the Government and its agents have to act according to and within the limits of the law. A person who is arrested for his involvement in a crime may lose his freedom of movement but that does not connote that his other rights have also been extinguished.

Fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides that *"no person shall be deprived of his life or personal liberty except according to procedure established by law"*. Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it also includes within itself a guarantee against torture and assault by the State or its functionaries[1].

Statutory Provisions Pertaining to Arrest

The Criminal Procedure Code, 1973 (hereinafter referred to as CrPC) is the main body of adjective law in India governing all aspects of the three tiers of a criminal proceeding-investigation, inquiry and trial. Police plays a significant role in all three stages of a criminal proceeding but its main role lies in conducting a free, fair and proper investigation into a crime. In the course of such investigation, police officers may arrest criminals and persons accused of offences.

Chapter V of the CrPC deals with the powers of arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41, CrPC confers powers on any police officer to arrest a person without any order or a warrant of arrest from a Magistrate subject to the fulfilment of the parameters prescribed therein. Section 46 provides the mode and manner of arrest. It clarifies that no formality is necessary while arresting a person. Section 49 dictates that police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further required to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a bailable offence. Section 50 A provides that any person held in custody by the police shall be entitled to have one person of his choice informed of his arrest and place of detention so that he can arrange for adequate assistance during investigation and trial. Sections 53, 53A and 54 afford procedural safeguards to an accused person arrested by the police *vis a vis* his medical examination. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant, subject to conditions of bail, to produce the arrested person before a Magistrate without unnecessary delay. Section 57, CrPC is an upshot of Article 22(2) of the

[1] D.K. Basu v. State of West Bengal, (1997) 1 SCC 416

Constitution of India and prescribes production of an arrested person before a Magistrate within 24 hours of his arrest. Consequent to arrest, if investigation cannot be completed within 24 hours, Section 167 (Chapter XII) provides for Magisterial remand of such a person.

The Menace of Custodial Violence

In **Nilabati Behera v. State of Orissa**[2], the Supreme Court pointed out that prisoners and detenues 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 of the arrestees and detenues. The Apex Court observed therein:

"It is an obligation of the State to ensure that there is no infringement of the 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, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law."

In **D.K. Basu v. State of West Bengal**[3]**,** the Supreme Court recognized the alarming trend of custodial violence and prescribed 11 (eleven) guidelines to rule out any possibility of custodial torture. They are enumerated hereinafter.

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

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

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

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town

[2] (1993) 2 SCC 746
[3] (1997) 1 SCC 416

through the Legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

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

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

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

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

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

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

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

The CrPC also was amended in this regard and Sections 41-A, 41-B, 41-C, 41-D and 55-A were inserted in the Code by Act V of 2009. Sections 41-B, 41-C and 41-D are statutory recognitions of **D.K. Basu (supra)** guidelines. Section 55-A, CrPC casts a duty upon the person having the custody of an accused to take reasonable care of the health and safety of the accused.

Yet, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidents of torture (and deaths at times) in police custody have been a disturbing factor. While a section of the population extols this *'Singham Syndrome'*, the fact remains that the criminal justice system cannot condone any police excess and aberration at the expense of the valuable constitutional rights of an arrested person even if he is accused of the most egregious of offences punishable under the law. Custodial violence strikes a blow at the rule of law. It is a matter of concern being aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens under the shield of uniform and authority within the four walls of a police station or lock-up, the victim being totally helpless there.

Role of Magistrates

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. Magistrates, as deciders of remand,

police as well as judicial, have to be extremely vigilant. When a Magistrate authorizes the remand of an accused person to police custody, he must ensure that the constitutional and statutory rights of the accused do not get trampled upon.

And if the same does happen, it is for the Magistrate as a protector of the rights of the accused person to take the first step in this regard. It is the Magistrate before whom the arrested accused is produced by the police, after arrest or after completion of police custody and it is imperative upon the Magistrate to enquire from the accused if he was subjected to any form of custodial violence.

In **Sheela Barse v. State of Maharashtra**[4]**,** the Supreme Court stated:

"We would direct that the Magistrate before whom an arrested person is produced shall enquire from the arrested person whether he has any complaint of torture or maltreatment in police custody and inform him that he has right under section 54 of the Code of Criminal Procedure 1973 to be medically examined. We are aware that Section 54 of the Code of Criminal Procedure 1973 undoubtedly provides for examination of an arrested person by a medical practitioner at the request of the arrested person and it is a right conferred on the arrested person. But very often the arrested person is not aware of this right and on account of his ignorance, he is unable to exercise this right even though he may have been tortured or maltreated by the police in police lock up. It is for this reason that we are giving a specific direction requiring the Magistrate to inform the arrested person about this right of medical examination in case he has any complaint of torture or maltreatment in police custody. We have no doubt that if these directions which are being given by us are carried out both in letter and spirit, they will afford considerable protection to prisoners in police lock ups and save them from possible torture or ill- treatment."

<u>What Procedure Does a Magistrate Follow Once Informed of Torture?</u>

Pertinently, however, in **Sheela Barse (supra)**, the Supreme Court stopped short of prescribing the procedure which is to be followed when an allegation of custodial torture comes to the notice of the Magistrate. The medical examination of an accused person is only a precursor to the actual role of a Magistrate who is informed of maltreatment and torture by the accused. There must be a follow up plan.

The Magistrate must remember that custodial torture is an offence. General provisions of the Indian Penal Code (hereinafter called IPC), which apply in case of any crime, also apply to crimes committed on detainees who are under arrest. However, certain provisions which deal specifically with custodial crimes are also present in the IPC, such as

(a) Section 220 (punishment for an officer who has legal authority to confine a person but who corruptly or maliciously keeps a person in confinement);

(b) Section 330 (punishment for voluntarily causing hurt to extort confession, or to compel restoration of property);

(c) Section 331 (punishment for voluntarily causing grievous hurt to extort confession, or to compel restoration of property);

(d) Section 348 (punishment for wrongful confinement to extort confession, or compel restoration of property): and

[4] AIR 1983 SC 378

(e) Section 376(2) (punishment for custodial rape).

Acts such as 'unwarrantable personal violence to any person' have been made punishable under Section 29 of the Police Act.

These penal provisions often get overlooked by remand Magistrates despite categorical allegations made by accused persons. It is only in a rare case that an arrested accused goes up against the system and files an FIR or a complaint against the police. Most stop at informing the Magistrate of their ordeals.

It is at this juncture that a robust Magistracy can do wonders. A pro-active and a responsive Magistracy can make necessary interventions and ensure that the rights of people including that of an accused person are protected.

Judicial Faux Pas

The scheme of the CrPC is self-contained and a Magistrate must adhere to it. However, he cannot conjure up procedure where no such procedure has been prescribed by the CrPC.

It has very often been seen that whenever an arrested accused makes an allegation of custodial torture, the Magistrate issues a show cause notice to the investigating officer. But is the issuance of a show cause notice legally prescribed? Also what does the Magistrate do if the investigating police officer fails to satisfy the queries of the Magistrate *vis a vis* the allegation of torture?

At the outset, one would do well to understand that issuance of a show cause notice ordinarily precedes a disciplinary action; it is usually given by the employer or the administrative head of an organization in case of a *prima facie* case of misconduct. A Magistrate is not the administrative head or the disciplinary authority for the police. The CrPC which governs the procedural actions of a Magistrate and/or a Criminal Court does not envisage issuance of a show cause notice to a police officer accused of violent conduct. A Magistrate and/or a Criminal Court exercise a judicial function and not an administrative role in this regard.

This practice of issuing show cause notices for custodial abuse is erroneous. The person to whom the notice is issued is a prospective accused. The Magistrate has no right whatsoever to hear a prospective accused prior to deciding whether to prosecute him or not. After all, he has not yet decided to proceed against him. The judgment of the Supreme Court in the case of **Chandra Deo Singh v. Prokash Chandra Bose and Anr.**[5] is very clear on it. The Supreme Court held that *"he (the accused) has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so".* Thus, this issuance of show cause notices to erring police officers for their aberrations is ill founded in law and *ex facie* illegal.

I hasten to add that the Constitutional Courts may, of course, do so while exercising their contempt jurisdiction under the Contempt of Courts Act. However, a Magistrate or a Criminal Court does not have any inherent contempt jurisdiction. Section 345, CrPC is the only enabling provision in this regard. It empowers a Civil, Criminal or Revenue Court to punish any offence under Sections 175, 178, 179, 180 or 228, IPC which is committed in the view or presence of such a Court and the Court may give a reasonable opportunity to an

[5] AIR 1963 SC 1430

offender to show cause as to why the punishment under the Section should not be imposed. However, none of these offences has any bearing to an allegation of custodial violence.

As such, the act of issuing show cause notices to a police officer who is not administratively answerable to a Magistrate and who is accused of torturing a detainee in his custody is a practice not rooted in prescribed procedure.

The Way Forward

As pointed out earlier, custodial violence is a penal offence and a Magistrate on being informed of the same must spring into action. *"Who will police the police?"* as Krishna Iyer, J. once asked is no longer an unanswered question. A Magistrate in hold of and supervising an investigation may, in appropriate cases, hold the police accountable for any offence that may be committed in the guise of an investigation. It is for the Magistrate to see if adequate prosecution may be initiated in respect of a police officer alleged to have tortured an accused person in police custody.

This brings us to the procedure for doing so. I have already pointed out that lodging of an FIR or filing of a written complaint alleging custodial violence is always on the cards for the victim. However, herein, I am concerned with what a Magistrate ought to do in absence of either.

The Bombay High Court has devised a specific and distinct way of dealing with such allegations. The procedure is as follows:

"If any complaint of ill-treatment is made by arrested person, the Magistrate shall then and there examine his body with his consent and shall record the result of his examination. If the arrested person refuses to permit such examination, the Magistrate shall be required to record the refusal and the reason thereof. If the Magistrate finds that there is reason to suspect that the allegation is well founded, he shall at once record the complaint and cause the arrested person to be examined by a Medical Officer or registered Medical Practitioner as provided in section 54 of CrPC and shall make a report to the Sessions Judge. The Sessions Judge should arrange magisterial investigation into the complaint through such Judicial Officer as he may deem most convenient. If the allegation made is found to be true, the statement recorded of the arrested person can be taken as a complaint to take cognizance."[6]

The Bombay High Court in **Union of India through M.B. Suresh v. State of Maharashtra**[7] gave judicial affirmation to this procedure. If the Sessions Judge directs the Magistrate to launch prosecution of the erring police officer, and the Magistrate files a complaint in consequence thereof, such a complaint is maintainable. (**Ashok Yadavrao Chavan v. State of Maharashtra and Others**[8])

It is pertinent to mention here that the aforesaid formula is somewhat alien to the CrPC and has been evolved by the Bombay High Court by invoking its rule making powers and has been subsequently validated by it judicially.

Fortunately, or unfortunately, such a procedure is not available to Magistrates working under the superintendence of the Gauhati High Court and may I say such a circuitous procedure is

[6] Para 3 of Chapter I of the Criminal Manual issued by the Bombay High Court
[7] 2003 All M R (Cri.) 1016
[8] Criminal Application No.1494/2013

not at all necessary. The scheme of the CrPC itself contains in its body the procedure which a Magistrate may invoke to prosecute police officials who are accused of inflicting torture upon persons in their custody.

Cognizance of Offence on Accusation of Custodial Violence

A Magistrate who comes upon an accusation of custodial torture of the arrested accused person at the hands of police officers may take cognizance of offences such as ones under Sections 323, 325, 330, 331, IPC and other similarly placed sections whichever are attracted in the facts of the case.

Now, statutorily, there are three options under which a Magistrate can take cognizance. Section 190, CrPC which empowers a Magistrate to take cognizance of offences reads as:

190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

a) upon receiving a complaint of facts which constitute such offence;

b) upon a police report of such facts;

c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

The act of taking cognizance must stem from any of the three options laid down in Section 190. The CrPC does not contemplate any other provision under which a Magistrate may take cognizance of an offence.

Since this article is exploring the scenario where the victim does not come forward and file an FIR or a written complaint, we have to see what other possibilities are there under which a Magistrate may take cognizance of the penal offences prescribed for custodial abuse.

Cognizance Under Section 190 (1)(a), CrPC

Section 190(1)(a), CrPC envisages cognizance of an offence on receipt of a complaint. I would like to point out here that Section 2(d) of the CrPC stipulates that a complaint may be in writing or it may be oral.

As per Section 2(d), CrPC, *a "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.*

Thus situated, if the accused person who is produced before a Magistrate under Section 57 read with Section 167, CrPC alleges that he was tortured and/or abused in police custody and asks the Magistrate to take an action on his allegation, the allegation so made by him orally to a Magistrate would be a complaint within the meaning of Section 2(d), CrPC and the Magistrate would be empowered to take cognizance thereupon.

Now, the term 'cognizance' has not been defined under the CrPC. However, the Supreme Court in one of its earliest decisions in **R.R. Chari v. State of U.P.**[9] observed:

"..taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of offence."

In **R.R. Chari (supra),** the Supreme Court endorsed the findings of the Calcutta High Court in **Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee**[10] which were to the following effect:

"It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202....."

In **Nirmaljit Singh Hoon v. State of W.B.**[11], the Supreme Court stated that it is well settled that before a Magistrate can be said to have taken cognizance of an offence under Section 190(1)(a) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that section. The Supreme Court added that where a complaint is presented before a Magistrate, he can under Section 200 take cognizance of the offence made out therein and has then to examine the complainant and the witnesses. The object of such examination is to ascertain whether there is a *prima facie* case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such a person.

In **Devarapalli Laksminarayana Reddy and Ors. v. Narayana Reddy and Ors.**[12]**,** the Supreme Court made it unequivocally clear that:

"....when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a)."

In **S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd. and Ors.**[13]**,** the Supreme Court stated:

"The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.... 'Taking cognizance' does not involve any formal

[9] AIR 1951 SC 207
[10] AIR 1950 Cal. 437
[11] (1973) 3 SCC 753
[12] (1976) 3 SCC 252
[13] (2008) 2 SCC 492

action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings."

Explaining what taking cognizance means, the Supreme Court observed in **State of W.B. v. Mohd. Khalid**[14]:

"...In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

A contention may be raised that cognizance on a complaint is taken when the Magistrate decides to issue process against the accused named in the complaint based on the Constitution Bench judgment of the Supreme Court in **A.R. Antulay v. Ramdas Sriniwas Nayak**[15] which stated to the effect that:

"When a private complaint is filed, the court has to examine the complainant on oath save in the cases set out in the proviso to Section 200 Code of Criminal Procedure. After examining the complainant on oath and examining the witnesses present, if any, meaning thereby that the witnesses not present need not be examined, it would be open to the court to judicially determine whether a case is made out for issuing process. When it is said that court issued process, it means the court has taken cognizance of the offence and has decided to initiate the proceeding and as a visible manifestation of taking cognizance, process is issued which means that the accused is called upon to appear before the court."

However, a closer look at the judgment reveals that the essence of the observation therein is not that cognizance on a complaint is taken on issuance of process; rather it suggests that issuance of process is the aftermath of the act of taking of cognizance. This, however, has never been in dispute. While reading **A. R. Antulay (supra),** one must remember that the issue before the Supreme Court was not when cognizance is taken on a complaint. It was deciding whether a Special Judge could entertain a private complaint before him.

As to when cognizance is taken on a complaint, another Constitution Bench judgment of the Supreme Court in **Sarah Mathew v. Institute of Cardiovascular Disease by its Director, Dr. K.V. Cherian & Ors.**[16] reiterated the position that:

"...a Magistrate takes cognizance when he applies his mind or takes judicial notice of an offence with a view to initiating proceedings in respect of offence which is said to have been committed."

Therein, the Supreme Court referred to the leading precedents on cognizance including but not limited to **R. R. Chari (supra), S.K. Sinha, Chief Enforcement Officer (supra)** *et al* while answering what 'taking cognizance' means. It also distinguished the observations of **A. R. Antulay (supra)** in the following words:

[14] (1995) 1 SCC 684
[15] (1984) 2 SCC 500
[16] AIR 2014 SC 448

"In Antulay '1984' Case, this Court was dealing inter alia with the contention that a private complaint is not maintainable in the court of Special Judge set-up under Section 6 of the Criminal Law Amendment Act, 1952 ('the 1952 Act'). It was urged that the object underlying the 1952 Act was to provide for a more speedy trial of offences of corruption by a public servant. It was argued that if it is assumed that a private complaint is maintainable then before taking cognizance, a Special Judge will have to examine the complainant and all the witnesses as per Section 200 of the Code of Criminal Procedure. He will have to postpone issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer and in cases under the Prevention of Corruption Act, 1947 by police officers of designated rank for the purpose of deciding whether or not there is sufficient ground for proceeding. It was submitted that this would thwart the object of the 1952 Act which is to provide for a speedy trial. This contention was rejected by this Court holding that it is not a condition precedent to the issue of process that the court of necessity must hold the inquiry as envisaged by Section 202 of the Code of Criminal Procedure or direct investigation as therein contemplated. That is matter of discretion of the court."

That cognizance is not taken at the time of issuance of process under Section 204, CrPC was also made clear in **Chandra Deo Singh (supra)** wherein the Supreme Court held that the power to dismiss a complaint under Section 203, CrPC rests only with a Magistrate who has taken cognizance of it.

In **Mohd. Khalid (supra)**, the Supreme Court made it clear in unequivocal terms:

"It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in the complaint……. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

The Gauhati High Court also had the occasion to delve into the issue of cognizance in the case of **Rani Narah v. State of Assam**[17] wherein it observed as follows:

"Taking of cognizance, in the case of a complaint, implies application of mind by a Magistrate to the contents of a complaint in order to decide as to whether the complaint discloses commission of offence(s) and whether he shall proceed to examine the complainant and his witnesses, if any, present and, upon such consideration, when he examines the complainant, he can be safely held to have taken cognizance, for, he could not have examined the complainant, under Section 200, without taking cognizance."

In **Pradyut Kr. Das v. Ajit Borah**[18]**,** the Gauhati High Court clarified that the taking of cognizance of an offence must precede the examination of the complainant under Section 200, CrPC.

From a conspectus of the authorities cited above, it is but clear that in a case instituted upon a complaint, when a Magistrate decides to examine the complainant under Section 200, CrPC and proceed under the succeeding Sections of Chapter XV, he has taken cognizance. In other words, once cognizance is taken on a complaint, the procedure is triggered off under Chapter XV and the Magistrate must resort to Section 200, CrPC.

[17] 2008 (1) GLT 688
[18] 2006 (2) GLT 574

Accordingly, a Magistrate who is informed by an accused that he faced custodial torture, with a view to taking of some action on it under the CrPC, may treat the verbal accusation as a complaint, get a complaint case registered and explore the possibility of proceeding as per Chapter XV of the CrPC. The Magistrate may also, instead of taking cognizance, consider directing an investigation on such oral complaint to be conducted by the police under Section 156(3), CrPC.

Cognizance Under Section 190(1)(c), CrPC

There is another possibility which requires to be explored here. Can a Magistrate take cognizance of an offence under Section 190(1)(c), CrPC if he comes across facts which suggest that the accused met with custodial violence at the hands of the police?

Under Section 190(1)(c), CrPC, a Magistrate may take cognizance of any offence upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed. The Magistrate is also empowered under Section 156 (3), CrPC to direct an investigation after receipt of such information or upon his own knowledge. However, as held in **Devarapalli Laksminarayana Reddy (supra)**, this will not amount to taking cognizance of the offence. If the Magistrate chooses not to direct an investigation as aforesaid, he may, in suitable cases, proceed to take cognizance of the offence if the same is made out on the strength of the information received by him or on the basis of his knowledge.

However, if he decides to actually take cognizance under Section 190(1)(c), the Magistrate cannot inquire into the offence, in order to ascertain the facts constituting the offence prior to the act of taking cognizance. No provision of law enacted in the CrPC comes to my mind which empowers the Magistrate to conduct such a preliminary inquiry prior to taking cognizance of the offence. In fact, Section 192, CrPC *(which provides that any Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate to him)* makes it apparent that inquiry comes after cognizance.

An inquiry, one must remember, for the purpose of the CrPC is defined in Section 2(g) as an inquiry under the Code conducted by a Magistrate or Court. A Magistrate or a Court has no inherent power to conduct an inquiry. Such an inquiry must be envisaged under the CrPC. And the CrPC does not provide for any judicial inquiry into an offence prior to the act of taking of cognizance.

Cognizance, as I have made clear, in the preceding paragraphs in relation to complaints is taken when the Magistrate decides to proceed as per Section 200, CrPC. Any inquiry in relation to a complaint case must follow from Section 202, CrPC which comes post cognizance. Even in cases instituted on police reports filed under Section 173, CrPC, the inquiry commences once the Magistrate takes cognizance thereupon. The Supreme Court in **Hardeep Singh v. State of Punjab**[19] made it clear that:

"*The stage of inquiry commences, in so far as the court is concerned, with the filing of the charge-sheet and the consideration of the material collected by the prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused. This has to be understood in terms of Section 2(g) Cr.P.C……"*

[19] (2014) 3 SCC 92

The inquiry commences with the filing of the charge-sheet and continues till framing of charges which signals the commencement of the trial. It is when the police report is laid before the Magistrate, that he first applies his mind to it and in the course of the judicial application of his mind, he takes cognizance of the offence. This very act signifies the genesis of an inquiry by a Magistrate.

So, in either set of cases (whether instituted on a complaint or on a police report), the inquiry cannot commence until the Magistrate takes cognizance. Likewise, in a case where the Magistrate considers the possibility of taking cognizance under Section 190(1)(c), CrPC, he must remember that Section 190(1)(c) also does not contemplate any inquiry prior to taking cognizance. In order to effectively understand as to when and how a Magistrate can be said to have taken cognizance under Section 190(1)(c), a careful reading of Section 191, CrPC is imperative. Section 191 reads as follows:

191. Transfer on application of the accused. -

When a Magistrate takes cognizance of an offence under clause (c) of sub-section (1) of Section 190, the accused shall, before any evidence is taken, be informed that he is entitled to have the case inquired into or tried by another Magistrate, and if the accused or any of the accused, if there be more than one, objects to further proceedings before the Magistrate taking cognizance, the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf.

The Gauhati High Court in **Rani Narah (supra)** discussed the procedure for taking cognizance of an offence under Section 190(1)(c) at length and observed**:**

"From a bare reading of Section 191, what becomes transparent is that in a case, where cognizance of offence has been taken by a Magistrate under Section 190(1)(c), it is obligatory for the Magistrate to inform the accused before the evidence is taken that he (accused) is entitled to have the case inquired into or tried by another Magistrate and if the accused or any of the accused, if there be more than one, objects to further proceedings before the Magistrate taking cognizance under Section 190(1)(c), the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf. These provisions, contained in Section 191, show that the obligation to inform the accused that he is entitled to have the case enquired into or tried by another Magistrate arises only when the stage of taking of evidence is reached meaning thereby that there is no impediment to the issuance of process by the Magistrate on the basis of the 'information' received from any person other than a police officer or upon his own 'knowledge' as contemplated by Clause (c) of Section 190. Thus, when the provisions, contained in Section 190(1)(c), are read in the light of the provisions contained in Section 191, it logically follows that when a Magistrate, upon receiving 'information' or upon his own 'knowledge', as envisaged by Section 190(1)(c), decides to issue process, he can be treated to have taken cognizance. I may, however, hasten to point out that there is a difference between information, which indicates commission of offence, and a complaint, for, a complaint, as defined in Section 2(d), means any allegation made, orally or in writing, to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Thus, in order to be a complaint, the contents thereof must not only disclose that an offence has been committed, but it must also show that the person, who makes accusations, wants that action be taken by the Magistrate on his accusations. If, on the other hand, a mere information of commission of

an offence is received by a Magistrate, it is not a 'complaint'; yet, on the basis of such 'information' too, a Magistrate is entitled, under Clause (c) of Sub-section (1) of Section 190, to take cognizance of the offence(s), which such 'information' may disclose."

Rani Narah's case (supra) makes three things clear:

1) The inquiry into the offence even in case of Section 190(1)(c) will follow the act of taking cognizance. No inquiry into an offence under this clause can be made prior to taking cognizance. The inquiry will commence after the appearance of the accused. This inquiry for the purpose of Section 190(1)(c), CrPC is not intended for the purpose of deciding whether to issue process or not.

2) While cognizance on a complaint is taken before examining the complainant under Section 200, CrPC and definitely much before issuance of processes, the scheme under Section 190(1)(c) contemplates cognizance when the Magistrate decides to issue process on information received from a person other than a police officer or on his own knowledge.

3) Unlike in a complaint, herein the person from whom the information is received may not want that an action be taken in respect thereof. It would be the prerogative of the Magistrate to issue process thereupon.

Let me now proceed to Section 204, CrPC which is the first provision under Chapter XVI. It asserts that process must be issued when the Magistrate is of the opinion that there is sufficient ground for proceeding. It is common to cognizance under any of the clauses of Section 190(1), CrPC.

Now, in case of Section 190(1)(c), CrPC, since cognizance is said to be taken when the Magistrate decides to issue process, the information which is received by the Magistrate must conspicuously make out that an offence has been committed. Thus, if a person who is produced before a Magistrate reveals sufficient information pertaining to custodial violence which *prima facie* makes out an offence and that information alone is sufficient for proceeding against the offending police official, the Magistrate may take cognizance under Section 190(1)(c), CrPC and issue process against him. However, the Magistrate is not statutorily empowered to conduct an inquiry to ascertain this. The information alone must enable the Magistrate to take a considered decision on whether to issue process or not.

The old CrPC of 1898 provided a Magistrate the opportunity of taking cognizance under Section 190(1)(c) on his suspicion of commission of an offence. So, a Magistrate could possibly prosecute a police officer if he suspected him of inflicting violence upon an accused person in his custody. However, this has been done away with in the new Code. From the amendment made in the year 1973 which has taken away the words "on suspicion" from Section 190(1)(c), the legislative intent becomes clear. The information or knowledge, as the case may be, must suffice in helping the Magistrate to conclude that a *prima facie* case is made out. It is not open to a Magistrate to conduct an inquiry into the circumstances of the offence upon his suspicion, no matter how strong that suspicion is.

Section 190(1)(c), CrPC distinguishes itself from the other two modes of taking cognizance. Cognizance on a police report under Section 190(1)(b), CrPC comes after an investigation into an offence. The issuance of process follows immediately. Though cognizance of offence under Section 190(1)(a), CrPC is taken upon the complaint, the issuance of process follows

the examination of the complainant and his witnesses, if any, under Section 200. An inquiry/investigation contemplated under Section 202, CrPC is also there to assist the Magistrate in his decision to issue process against the accused.

However, if the Magistrate is to act on an information into the commission of an offence under Section 190(1)(c) and take cognizance and issue process thereupon, there must be enough material in the information itself to make out sufficient grounds to prosecute the offender against whom the information is given. If and only if the same is available in any case, the Magistrate may take cognizance and prosecute the offender, as for instance, the police officer who subjected an arrested person to custodial violence.

And as far as acting on his own knowledge is considered, the Magistrate is empowered to take cognizance only if it is within the knowledge of the Magistrate that an offence has been committed. All ingredients of the offence must be in the knowledge of the Magistrate and his personal knowledge must be sufficient to make out sufficient *prima facie* grounds to come to a conclusion that an offence has been committed by a certain offender. Only then can he take cognizance and issue process against the offender to stand prosecution. His opinion must not be influenced by factors which are beyond his knowledge.

An Illustrative Understanding of the Discussion So Far

Let me explain the issue illustratively in the context of custodial violence. Suppose an accused is produced before a Magistrate on the completion of police custody and the Magistrate finds injuries on his person. These injuries were not there when the accused was remanded to police custody.

Despite the fact that the injuries must have been caused in the course of the police custody, the Magistrate cannot take *suo moto* cognizance on his knowledge herein as his knowledge cannot possibly inform him as to how the injuries were caused. His knowledge is limited to the fact that the injuries were sustained by the accused in police custody. But the Magistrate does not know if it was the investigating police officer who had caused the injuries or if it had been some aggrieved cell mate or if the accused had perhaps caused the injuries to himself. Hence, the Magistrate cannot take cognizance here on his own knowledge.

If at the time of production of the accused or at any other relevant point of time, the Magistrate receives a medical report of the accused showing the presence of injuries on his person- injuries which were non-existent prior to the period of police custody - such a report would also come within the ambit of information received from a person other than a police officer. However, this information does not make out an offence against any person. Such information does not reveal if it was the investigating officer who had voluntarily caused the injuries to the arrested person. I have already made it clear that Section 190(1)(c), CrPC does not prescribe an inquiry to ascertain the cause of the injuries. As such, this information will also not enable a Magistrate to take cognizance of any offence.

At the same time, however, if the accused informs the Magistrate that the investigating officer beat him up badly causing him the injuries, this allegation made by the accused person will fall in either of the two categories-

(i) An information received from a person other than a police officer; or
(ii) An oral complaint.

If the Magistrate is satisfied that the information gives him enough reason to form an opinion against the police officer that he has committed an offence, the Magistrate may take cognizance under Section 190(1)(c) upon the information and issue process. Here, the willingness of the victim to prosecute the offender is inconsequential. In fact, this clause is mainly intended to cover cases where the victim is hesitant to prosecute. The object of the clause is to enable a Magistrate to see that justice is dispensed with notwithstanding the fact that the persons, individually aggrieved, are unwilling or unable to prosecute.[20]

The Magistrate also has the option of treating the accusation as an oral complaint, take cognizance under Section 190(1)(a), proceed as per Section 200 and its succeeding sections and if he finds sufficient grounds for proceeding, he may summon the police officer for the offence of custodial violence. However, this option will be available only when the person who makes the allegation wants that an action is taken by the Magistrate on such allegation.

The Necessity of Sanction for Taking Cognizance

The act of taking cognizance, however, has a roadblock which requires discussion at this juncture. This encumbrance pertains to the necessity of sanction as per Section 197, CrPC to prosecute a police officer accused of custodial violence.

As per Section 197(1) of the CrPC, no Court shall take cognizance of any offence which a public servant not removable from office save by or with the sanction of the Government is alleged to have committed while acting or purporting to act in the discharge of his official duty without the sanction of that Government. Section 197(2) affords the same protection to members of the Armed Forces of the Union. They cannot be prosecuted for any offence committed while acting or purporting to act in the discharge of their official duties except with the previous sanction of the Central Government. Members of the forces charged with the maintenance of public order have been brought within the ambit of Section 197(2), CrPC by virtue of Section 197(3), CrPC.

Prior Sanction Required for All Police Officers in Assam

The Assam Amendment Act III of 1980 substituted Sub-section (3) of Section 197, CrPC and inserted the following Sub-section in its place.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply-

(a) to such class or category of the members of the Forces charged with the maintenance of public order, or

(b) to such class or category of other public servants (not being persons to whom the provisions of sub-section (1) or sub-section (2) apply) charged with the maintenance of public order

as may be specified in the notification, wherever they may be serving, and thereupon the provisions of sub-section (2) shall apply as if, for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[20] Vol. 2 of AIR Commentaries on the CrPC, 1973

Sub-section (3) of Section 197 CrPC was again amended by the Criminal Procedure (Assam Amendment) Act, (Assam Act XX of 1984) and the following sub-section was inserted as sub-section (3):

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply

(a) to such class or category of the members of the Forces charged with the maintenance of public order, or

(b) to such class or category of other public servants charged with the maintenance of public order

as may be specified in the notification, wherever they may be serving, and thereupon the provisions of sub-section (2) shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

This Act was given retrospective effect and the above amendment came into force on and from the 5th day of June, 1980.

I want to add here that the Legislative Assembly of Assam also enacted The Code of Criminal Procedure (Assam Amendment) Act, 1983 which was published in the Assam Gazette on 8.2.1984.

Sub-Section (5) was inserted in Section 197 which used to read as under:

(5) Notwithstanding anything contained in this Code,-

(a) where a complaint is made to a Court against a public servant belonging to any class or category specified under sub-section (3) alleging that he has committed an offence, the Court shall postpone the issue of process against the accused and make a reference to the State Government; or

(b) where an accused, either by himself or through a pleader, claims before a Court that he belongs to any class or category specified under sub-section (3) and that the offence alleged to have been committed by him arose out of any action taken by him while acting or purporting to act in or in connection with the discharge of his official duty, the Court shall forthwith stay further proceedings and make a reference to the State Government.

Sub-Section (6) was also inserted in Section 197 which provided:

(i) Where a reference is received from a Court under Sub-section (5), the State Government shall issue a certificate to the Court stating that the accused person was or was not acting or purporting to act in, or in connection with discharge of his official duty.

(ii) If the State Government certifies that the accused was acting or purporting to act in or in connection with the discharge of his official duty, the Court shall dismiss the complaint or discharge the accused.

Subsequently, however, the State of Assam enacted The Criminal Procedure Code (Assam Repealing) Act, 1986 and Section 2 thereof repealed the Code of Criminal Procedure (Assam Amendment) Act, 1983. Sub-sections (5) and (6) have, by necessary implication, also been repealed.

Thereafter, by invoking the provisions of Section 197(3), CrPC, the Government of Assam *vide* Notification No. HMA- 280/88/41 dated 29.05.1990 decreed that all members of the Assam Police Force deployed for maintenance of law and order in the State of Assam shall have all the protection as provided under Section 197 (2) CrPC. The above notification still remains in force as clarified by the Gauhati High Court in the case of **Tulumoni Duarah v. State of Assam and Ors.**[21]

Having listed the State Amendments of Section 197, CrPC in case of Assam and Notification No. HMA- 280/88/41 issued by the Government of Assam under Section 197(3), CrPC, let me now try to answer the question as to whether sanction for prosecution under Section 197, CrPC, in appropriate cases, is required for all police personnel in Assam, irrespective of their ranks.

At the outset, I would like to point out that the Supreme Court in the case of **Nagraj v. State of Mysore**[22] examined the provisions of the Mysore Police Act and Sections 132 and 197, CrPC and held that Sub Inspectors are not covered by Section 197(1), CrPC as they can be removed from office by the Deputy Inspector General of Police. Relying on **Nagaraj's case (supra),** the Supreme Court in **Fakhruzamma v. State of Jharkhand**[23] held that since an Inspector General of Police can dismiss a Sub-Inspector, therefore, no sanction of the State Government for prosecution of such a police officer is needed.

However, because of Notification No. HMA- 280/88/41 and the State Amendments to Section 197, CrPC, it is apparent that the benefit of sanction accorded to police officers in Assam is covered by Section 197(3), CrPC read with Section 197(2), CrPC and not Section 197(1), CrPC. As such, the fact that a police officer may be removed from office even without the sanction of the Government does not disentitle him from the benefit of sanction.

I find it pertinent to add here that Notification No. HMA- 280/88/41 accords the benefit of sanction under Section 197(3) CrPC to members of the Police Force "deployed for law and order in Assam". It is interesting to note here that while Section 197(3), CrPC mentions "public order", the Notification qualifies "public order" and suggests that police officers engaged in "law and order" duty will get the benefit.

So, to understand the ambit of Section 197(3), CrPC, it is necessary to understand what "law and order" means. One must bear in mind that there is a subtle difference between "public order" and "law and order".

Immediately after the Constitution came into force, a Constitution Bench of the Supreme Court in **Brij Bhushan & Another v. The State of Delhi**[24] dealt with a case pertaining to public order. The Supreme Court observed that "public order" may well be paraphrased in the context as "public tranquillity".

The distinction between "public order" and "law and order" has been carefully defined in a Constitution Bench judgment of the Supreme Court in **Dr. Ram Manohar Lohia v. State of Bihar & Others**[25]. Relevant portion of the judgment reads thus:

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[21] Crl. Pet. No. 607 of 2016
[22] (1964) 3 SCR 671
[23] (2013) 15 SCC 552
[24] 1950 SCR 605
[25] (1966) 1 SCR 709

"....Does the expression "public order" take in every kind of disorder or only some? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in all of them. Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large."

In **Arun Ghosh v. State of West Bengal**[26], the Supreme Court again had an occasion to deal with the question of "public order" and "law and order". After giving various illustrations to explain the basic distinction between "public order" and "law and order", the Supreme Court observed thus:

"...Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its affect upon the public tranquillity there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society..."

[26] (1970) 1 SCC 98

In **Ashok Kumar v. Delhi Administration & Others**[27]**,** the Supreme Court clearly spelt out a distinction between "law and order" and "public order" in the following words:

"The true distinction between the areas of 'public order' and 'law and order' lies not in the nature or quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order, while in another it might affect public order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order...."

The terms "public order" and "law and order" have often been used interchangeably in common parlance. But as explained by the authorities cited above, public order has a finer undertone to it. Any form of delinquent conduct which contravenes law comes under a law and order situation but it is the gravity of its impact on the society at large that may turn the law and order problem into a public order problem. While every public order situation would also be a law and order situation, every law and order situation may not affect the public at large. Public order is the species, with law and order being the genus thereof. So, in essence, the ordinary engagement of police officers and criminal investigating agencies in crime detection, prevention and investigation is part of maintenance of law and order though not necessarily of public order.

Coming back to Assam Police, Section 3 of the Assam Police Act makes it clear that there shall be one police force for the State of Assam. The entire police department is deemed to be this single police force. It is pertinent to mention here is that though Section 28 of the Assam Police Act provides for creation of District Armed Reserves and State Armed Police Battalions, these units have been set up to assist the civil police to deal with law and order situation. These units only assist the civil police to handle law and order. But it is the Assam Police as a single force which is responsible for law and order. There is no separate compartmentalization of "investigative" and "law and order" duties for police officers in Assam. Per contra, as explained above, the maintenance of law and order includes in its ambit crime prevention and detection. Thus, Assam Police, being responsible for law and order, Notification No. HMA- 280/88/41 will apply to its members.

Though there exists a subtle distinction between public order [mentioned in Section 197(3), CrPC] and law and order [mentioned in Notification No. HMA- 280/88/41], the relevance of this distinction *qua* the protection under Section 197, CrPC has been negated by the Gauhati High Court in **Tulumoni Duarah (supra).** The High Court accepted the contention that in view of the interpretation given by the Supreme Court in the case of **Rizwan Ahmed Javed Shaikh and Ors. v. Jammal Patel and Ors.**[28]**,** the applicability of the Government Notification *vis a vis* being in charge of maintenance of public order and maintenance of law and order is of no importance.

In **Rizwan Ahmed Javed Shaikh (supra)**, it was contended that the accused police officers had arrested the appellants, kept them in confinement and assaulted them which are acts referable at the most to the duty of a police officer related to maintenance of law and order

[27] (1982) 2 SCC 403
[28] (2001) 5 SCC 7

but not the maintenance of public order. The Supreme Court negated the contention by holding that:

"The person on whom the protection is sought to be conferred by the State Government notification is to be determined by reading the notification and once it is found that the State Government notification applies to the member of the force which the accused is, the scope, purview or compass of the protection has to be determined by reading sub-section (2) of Section 197 of the Code, i.e., by asking a question whether the act alleged to be an offence was done or purports to have been done in the discharge of the official duty of the accused. Such official duty need not necessarily by one related to the maintenance of public order."

After a threadbare analysis of Section 197(3), CrPC and the accompanying Government Notification, the Gauhati High Court in **Tulumoni Duarah (supra)** held in unequivocal terms that *".....all members of the Assam Police Force have been brought within the ambit of Section 197 of the Cr.P.C."*

Sanction under Section 197, CrPC- Its Ambit

Having discussed the aforesaid, let me now explore the ambit of Section 197, CrPC in general and the extent of protection that it accords to public servants and police officers in respect of offences committed by them in their official capacities.

Public servants have been treated as a special category under Section 197 CrPC which lays down procedure to protect them from malicious or vexatious prosecution. Such protection is given in public interest but the same cannot be treated as a shield to protect all actions of public officials.

The Federal Court in a decision on Section 270 of the Government of India Act, 1935 in **Dr. Hori Ram Singh v. Emperor**[29] observed thus:

"As the consent of the Governor, provided for in that Section, is a condition precedent to the institution of proceedings against a public servant, the necessity for such consent cannot be made to depend upon the case which the accused or the defendant may put forward after the proceedings had been instituted, but must be determined with reference to the nature of the allegations made against the public servant, in the suit or criminal proceeding. If these allegations cannot be held to relate to "any act done or purporting to be done in the execution of his duty" by the defendant or the accused "as a servant of the Crown," the consent of the authorities would, prima facie, not be necessary for the institution of the proceedings. If, in the course of the trial, all that could be proved should be found to relate only to what he did or purported to do "in the execution of his duty," the proceedings would fail on the merits, unless the Court was satisfied that the acts complained of were not done in good faith. Even otherwise, the proceedings would fail for want of the consent of the Governor, if the evidence established only official acts."

While analysing Section 197, CrPC, in **H.H.B. Gill v. The King**[30], the Privy Council approved the view expressed in **Dr. Hori Ram Singh (supra)** and held:

"In the consideration of S.197 much assistance is to be derived from the judgment of the Federal Court in 1939 F.C.R. 159, and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar, J. Their Lordships, while

[29] 1939 FCR 159
[30] AIR 1948 PC 128

admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

In **Amrik Singh v. State of Pepsu**[31], the Supreme Court of India observed:

"It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1), Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution ... If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under Section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required."

In **Parkash Singh Badal v. State of Punjab and Ors.**[32], the Supreme Court held:

"The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity."

In **Rajib Ranjan and Ors. v. R. Vijaykumar**[33]**,** the Supreme Court observed:

"...even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted."

One must understand that the use of the expression, "official duty" in Section 197, CrPC implies that the act or omission must have been done by the public servant, member of the Armed Forces or the police officer, as may be the case, in course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to

[31] AIR 1955 SC 309
[32] (2007) 1 SCC 1
[33] (2015) 1 SCC 513

every act or omission done by him in service but restricts its scope of operation to only those acts or omissions which are done in discharge of official duty. Official duty, in essence, implies that an act or omission must have been done by the public servant or the police officer in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature.

To what extent an act or omission occurred in discharge of duty can be deemed to be official was explained by the Supreme Court in **Matajog Dobey v. H.C. Bhari**[34] as follows**.**

"[T]he offence alleged to have been committed (by the accused) must have something to do, or must be related in some manner with the discharge of official duty ... there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable (claim) but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

In **Pukhraj v. State of Rajasthan and Another**[35], the Supreme Court held:

"The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty."

In **Shreekantiah Ramayya Munipalli v. State of Bombay**[36], while dealing with the scope of Section 197, CrPC, the Supreme Court held as thus:

"Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of course it is no part of an official duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning."

In **B. Saha v. M.S. Kochar**[37]**,** the Supreme Court added to this by stating:

"The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are

[34] (1955) 2 SCR 925
[35] (1973) 2 SCC 701
[36] (1955) 1 SCR 1177
[37] (1979) 4 SCC 177

capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision."

In **Gauri Shankar Prasad v. State of Bihar & Anr.**[38], the Supreme Court laid down the test to determine the necessity of sanction- the alleged action which constitutes an offence must have a reasonable and rational nexus with the official duties required to be discharged by the public servant. It was observed thus:

"What offences can be held to have been committed by a public servant while acting or purporting to act in the discharge of his official duties is a vexed question which has often troubled various courts including this Court. Broadly speaking, it has been indicated in various decisions of this Court that the alleged action constituting the offence said to have been committed by the public servant must have a reasonable and rational nexus with the official duties required to be discharged by such public servant…..

……Coming to the facts of the case in hand, it is manifest that the appellant was present at the place of occurrence in his official capacity as Sub-Divisional Magistrate for the purpose of removal of encroachment from government land and in exercise of such duty, he is alleged to have committed the acts which form the gravamen of the allegations contained in the complaint lodged by the respondent. In such circumstances, it cannot but be held that the acts complained of by the respondent against the appellant have a reasonable nexus with the official duty of the appellant. It follows, therefore, that the appellant is entitled to the immunity from criminal proceedings without sanction provided under Section 197 CrPC. Therefore, the High Court erred in holding that Section 197 CrPC is not applicable in the case."

In **Om Prakash and Others v. State of Jharkhand and Anr**[39], the Supreme Court, after referring to various decisions pertaining to police excesses, explained the scope of protection under Section 197 of the CrPC as follows:

*"The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (**K. Satwant Singh [AIR 1960 SC 266]**). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection **(Ganesh Chandra Jew [(2004) 8 SCC 40])**. If the above tests are applied to the facts of the present case, the police must get*

[38] (2000) 5 SCC 15
[39] (2012) 12 SCC 72

protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood."

What follows, thus, is that the prosecution of a police officer can be initiated for commission of an offence and every offence committed by a police officer does not attract Section 197, CrPC. The protection is available only when the alleged act done by the police officer is reasonably connected with the discharge of his official duty and the official duty is not used to disguise the objectionable act. While sanction to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing retaliatory and frivolous proceedings so as to give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, it is necessary that the act which constitutes the offence must have been committed in the colour of office.

In **D. Devaraja v. Owais Sabeer Hussain**[40]**,** the Supreme Court made the following observations in this regard:

"An offence committed entirely outside the scope of the duty of the police officer, would certainly not require sanction. To cite an example, a police man assaulting a domestic help or indulging in domestic violence would certainly not be entitled to protection. However, if an act is connected to the discharge of official duty of investigation of a recorded criminal case, the act is certainly under colour of duty, no matter how illegal the act may be. If in doing an official duty a policeman has acted in excess of duty, but there is a reasonable connection between the act and the performance of the official duty, the fact that the act alleged is in excess of duty will not be ground enough to deprive the policeman of the protection of government sanction for initiation of criminal action against him. The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority. To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law."

In the context of custodial violence, the question of necessity of sanction will have to be answered in light of the authorities cited above. The discussion makes it evident that sanction is not required in all cases; the issue of requirement, however, is a mixed question of facts and law to be decided in the peculiar factual matrix of each case.

If violence is caused to a person in the custody of a police officer during the course of an investigation while the police officer was discharging his official duty, then even if violence is caused because of the excesses of the police officer, he will still be entitled to the protection under Section 197, CrPC. If the police officer beats up an arrested accused person

[40] 2020 SCC OnLine SC 517

during investigation and causes injuries to him, such actions of the police officer, though amounting to an offence, will lead to his prosecution only when the State Government accords the necessary sanction under Section 197 to prosecute him.

As held in **Shreekantiah Ramayya Munipalli (supra),** if Section 197, CrPC is construed too narrowly, it can never be applied. It is only in respect of illegal acts or omissions constituting offences that prosecution will lie but the advantage that a public servant, or in the context of this article, a police officer has is that he will face prosecution only if his prosecution is sanctioned by the Government. This is, of course, if the act of violence was committed in the course of the discharge of or purported discharge of his official duty as such public servant or police officer, as the case may be.

If a police officer had legally arrested an accused or had legal custody of an accused person and subsequently in his legal custody, he beats up the accused or keeps him wrongfully confined for an extended period; his actions though not part of his official duties, were committed while he was discharging his official duties. Despite the fact that the act of abusing a person in his custody is in excess of his official duty, there is a reasonable connection between the illegal act and the performance of the official duty of the police officer. As such, the fact that the alleged act of custodial violence is in excess of duty will not deprive the erring police officer of the benefit of sanction under Section 197, CrPC.

As for instance, in **Rizwan Ahmed Javed Shaikh (supra)**, the Supreme Court held that where the gravamen of the charge was failure on the part of the accused policemen to produce the complainants, who were in their custody, before the Judicial Magistrate, the offence alleged was in their official capacity, though it might have ceased to be legal at a given point of time, and the accused police officers would be entitled to the benefit of Section 197 of the CrPC.

However, having said that, a police officer who wrongfully confines and beats up a person while not discharging or purporting to discharge his official duty cannot claim this benefit of sanction. Excesses prompted by malafides and instituted with ulterior motives or actions or omissions not rooted in any official duty of a police officer will not give rise to this protection.

In **Sushil Kumar Barua v. Golok Chandra Kalita**[41]**,** the Gauhati High Court examined the necessity of sanction in case of prosecution of two police officers who assaulted a *thelawala* and the opposite party (the complainant in the trial) in order to extort a confession out of them that they had received looted properties. While negating the necessity of sanction, the Gauhati High Court held as thus:

"In order to seek and receive protection under Section 197 Cr.P.C. the public servant, if questioned, shall be able to claim that whatever he did was done by him by virtue of his office and in discharge of his official duties. In short, the act, constituting the offence must directly or reasonably be connected with the official duty and must have been done in the discharge or purported discharge thereof. Section 197 Cr.P.C. does not extend its protective cover to every act or omission done by a public servant in service, but restricts its scope of operation to only those acts or omissions, which are done by a public servant in the discharge or purported discharge of official duty.

[41] 2008 (1) GLT 714

A close analysis of the provisions of Section 161 and 163 Cr.P.C. read with Section 24 of the Evidence Act clearly indicates that a police officer is prohibited from beating or confining any person with a view to, inter alia, induce and threaten such a person to make statement or confession. In fact Section 330 IPC makes the act of causing hurt, aimed at extorting confession, an offence punishable with imprisonment for a term, which may be extended to seven years. In view of such statutory prohibition, it cannot be argued that the acts complained of, in the present case, are acts done by the accused-petitioner under the colour of his duty or authority. There is no legitimate and perceptible connection between the acts, which the accused-petitioner has allegedly done, and the duties and obligations cast upon him by law. When the law has prohibited an officer from doing what he has done, he cannot be heard to say that what he had done was in exercise of his duties or even purported exercise of his duties. It is no part of a duty of a Police Officer to beat a person at the Police Station to extort confession from him nor is it a part of the duty of a Police Officer to confine a person at the Police Station without having arrested him, for in the case at hand, the complaint discloses that the complainant was allegedly taken into custody as early as on 15.07.1994, but was produced before the Chief Judicial Magistrate as late as on 19.07.1994 and that too, when a report was called for, in this regard, by the Chief Judicial Magistrate on the basis of a complaint made by the complaint's (sic) brother-in-law to the effect that the complainant and the said thelawalla had been kept detained illegally and were being tortured at the said Police Station."

The following year, the Gauhati High Court in **Rajen Singh v. State of Assam**[42], elaborately discussed the issue of sanction under Section 197, CrPC with special reference to the judgment of the Supreme Court in **Sankaran Moitra v. Sadhna Das and Another**[43] and held in the facts and circumstances of the said case as follows:

*"When beating of a person and/or killing of a person by use of allegedly excessive force has been held to be, in the light of the decision in **Sankaran Moitra (supra)**, as acts done in the discharge of official duty or as acts purportedly done in the discharge of official duty under section 197 CrPC, the crucial fact that the accused petitioner, in the present case, had allegedly beaten the son and husband of the complainant would also be acts protected under section 197, when the use of force was a part of a police officer's duty, though, in the present case, such use of force might not have been honest and bona fide. If the acts were bona fide, they were protected as acts done in the discharge of official duties; but if the acts were mala fide or dishonest, the acts were still done in the purported discharge of the official duty. Since the acts allegedly done by the accused petitioner were acts done, while acting in the discharge of official duty or purported discharge of official duty, necessity to obtain sanction cannot be avoided by merely making the remark that beating a person by a police officer or setting fire to the house of a person is never a part of a police officer's duty. Considered thus, the alleged acts of the accused petitioner, which amounted to commission of offences under sections 436 and 427 IPC, were protected under section 6 of the said Act and as far as the act, which amounted to an offence under section 323 IPC is concerned, the same too was protected under section 6 of the said Act read with section 197 CrPC. In the case at hand, therefore, sanction for prosecution of the accused petitioner was essential both under section 6 of the Assam Disturbed Areas Act, 1955 and also under section 197 CrPC."*

[42] 2006 (4) GLT 625
[43] (2006) 4 SCC 584

The case of **Amitava Sinha v. State of Assam and Anr.**[44] also requires to be mentioned here. Therein the Gauhati High Court was considering a case where a police officer besides assaulting an accused person in custody, allegedly poured petrol into his private parts. The Gauhati High Court observed that the medical reports supported the allegations of torture in custody. *"The alleged acts had nothing to do with official duty. Such inhuman act could not be remotely connected with official duty."* Therefore, the Gauhati High Court held that the protection under Section 197 CrPC was not applicable in the case. Therein too, the Gauhati High Court relied upon **Sankaran Moitra (supra).** I am reproducing Paragraph 56 of the Gauhati High Court's judgment which reads as follows:

*"Now the question is whether the criminal proceeding, against the petitioner is bad for want of sanction under Section 197 Cr.P.C. In the case of **Sankaran Moitra (Supra)**, the allegations brought against the Police Officer (appellant), was that the husband of the complainant was beaten to death. The appellant took the plea of sanction under Section 197 Cr.P.C. and prayed for quashing the proceeding. The High Court dismissed the quashing petition, observing that it was a case of merciless beating by the Police Officer and causing death of a person and that it could not be said to be an act in the discharge of official duty and held that no sanction under 197, Cr.P.C. was necessary. On appeal, the Supreme Court upheld the High Court's decision."*

Interestingly, however, that was the minority dissenting view of C.K. Thakker, J. that the Gauhati High Court relied upon. The majority view of Y.K. Sabharwal, P.K. Balasubramanyan, J.J. as authored by P.K. Balasubramanyan, J. which affirmed the necessity of sanction and which was not considered by the Gauhati High Court is as follows:

"The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted. Such a reasoning would be against the ratio of the decisions of this Court referred to earlier. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction, people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection. Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without delay. Dispensing with of jurisdictional or statutory requirements which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197(1) of the Code of Criminal Procedure. We are therefore satisfied that the High Court was in error in holding that sanction under Section 197(1) was not needed in this case. We hold that such sanction was necessary and for want of sanction the prosecution must be quashed at this stage."

The case of **Om Prakash (supra)** where five police officers were accused of killing the complainant's son was also cited before the Gauhati High Court and it was stressed that even in that case, the necessity of sanction was insisted upon. But the Gauhati High Court held that its facts were distinguishable and it did not apply to the case in hand. The judgments of

[44] 2015 (3) GLT 1

Amrik Singh (supra), Matajog Dobey (supra) and **Shreekantiah Ramayya Munipalli (supra)** which subscribed to the necessity of sanction were also cited but did not influence the Gauhati High Court. These judgments, however, were considered and approved by the majority opinion of the Supreme Court in **Sankaran Moitra (supra)**. The High Court cited the cases of **D.K. Basu (supra)** and **Munshi Singh Gautam (Dead) and Others v. State of MP**[45]**.** However, both of them only decried and castigated the use of custodial violence. They did not lay down the law on the necessity of sanction. Thus, **Amitava Sinha (supra)** cannot be read as a precedent on the requirement of sanction under Section 197, CrPC.

The two judgments of **Sushil Kumar Barua (supra)** and **Rajen Singh (supra)** must also be read in the context in which they were delivered. First of all, **Sushil Kumar Barua (supra)** came in before **Sankaran Moitra (supra)** was pronounced by the Supreme Court. The High Court did not have the opportunity to consider the Apex Court's considerable extension of the ambit of Section 197, CrPC. Secondly, in **Sushil Kumar Barua (supra)**, the offending police officers confined the victims in the police station without arresting them and physically assaulted them. So, the High Court held that there was no reasonable nexus between their actions and the lawful discharge of their duties. And thirdly, in **Rajen Singh (supra),** the Gauhati High Court recognized that it was part of the duty of the appellant to prevent any breach of law and maintain order on the polling day and if he had acted dishonestly or *mala fide* while taking the victims into custody, beating them up and setting fire to the house, he was still acting in the discharge of his official duty and his acts were covered by the expression 'purporting to act in the discharge of his official duty'. Also, Sections 4 and 5, Assam Disturbed Areas Act, 1955 empowered the accused petitioner to use force to the extent of causing death of any person and to destroy any structure and Section 6 accorded him the protection from any criminal prosecution without sanction of the Government.

Thus situated, from the discussion made above, it becomes evident that the question whether an offence was committed in the course of official duty or under colour of office cannot be answered hypothetically, and it depends on the facts of each case. Even in cases of allegations of custodial violence, the Magistrate who receives an information or a complaint in respect of the same must ask himself if the offence alleged to have been committed by the offending police officer had something to do or was related in some manner, with the discharge of or purported discharge of official duty of the offender. There must be a perceptible connection between the act of violence and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable claim that he did it in the course of the performance of his duty.

Hence, if on the face of the information received or the complaint made, it appears to the Magistrate that the alleged act of custodial violence had a reasonable relationship with official duty of the offending police officer, such information or complaint cannot be acted upon by the Magistrate without sanction under Section 197, CrPC from the State Government.

In fact, without sanction, the Magistrate, in such cases, would be precluded from even referring the matter for investigation under Section 156(3), CrPC as per the dictum in **Anil Kumar v. M.K. Aiyappa**[46]. This requirement of sanction even for the purpose of invoking

[45] (2005) 9 SCC 631
[46] (2013) 10 SCC 705

Section 156(3), CrPC has been questioned and the matter has been referred to a larger bench in **Manju Surana v. Sunil Arora & Ors**[47]. But till the larger bench authoritatively decides the issue, a Magistrate has to abide by **Anil Kumar (supra).**

Now, in cases where the accusations of the complainant or victim do not show a reasonable nexus between the offence committed by a public servant or a police officer, as the case may be, and the discharge or purported discharge of the officer's official duty, in such cases, the discussion made above suggests that sanction under Section 197, CrPC is not necessary.

But if a Magistrate takes cognizance and summons the offender and subsequently during the course of inquiry or trial, the offending public servant or the police officer comes up and pleads that the alleged offence took place while he was discharging or purporting to discharge his official duty, what does the Magistrate then do? Can the Magistrate re-visit and re-adjudicate the issue of requirement of sanction under Section 197, CrPC?

In **Devinder Singh & Ors. v. State of Punjab through CBI**[48]**,** the Supreme Court delved into this issue at length and came up with the following solution:

"Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court……Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to accused to place material during the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.... In some case it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial……..

.....The trial court has prima facie to proceed on the basis of prosecution version and can re-decide the question afresh in case from the evidence adduced by the prosecution or by the accused or in any other manner it comes to the notice of the court that there was a reasonable nexus of the incident with discharge of official duty, the court shall re-examine the question of sanction and take decision in accordance with law. The trial to proceed on the aforesaid basis."

As such, it becomes clear that while prior sanction is a condition precedent for prosecuting a police officer for offences committed in the discharge or purported discharge of his official duties, the issue of previous sanction can be pleaded and agitated at any stage including at the appellate stage and cognizance taken without considering the issue does not preclude a Court from re-visiting it.

The authorities cited above, I hope, paint a somewhat clear picture of the necessity of sanction *vis a vis* prosecution of a police officer accused of custodial abuse in appropriate cases. It is evident that the scope for Magisterial intervention in cases of custodial violence has its own share of limitations especially in light of Section 197, CrPC. The fetters put in by

[47] (2018) 5 SCC 557
[48] (2016) 12 SCC 87

the requirement of sanction indeed make it difficult to prosecute a police officer who is accused of custodial violence.

The Suggestions of the Law Commission

The Law Commission recognized this limitation quite early and in its 152nd Report recommended adding an Explanation to Section 197, CrPC to the following effect:

"Explanation- For the avoidance of doubts, it is hereby declared that the provisions of this Section do not apply to any offence committed by a Judge or a public servant, being an offence against the human body committed in respect of a person in his custody, nor to any other offence constituting an abuse of authority."

The Law Commission in the same report also suggested that in case of a complaint of torture or injury caused in police custody, the Chief Judicial Magistrate who is head of the Magistracy in the District should have the power to hold enquiry into the complaint and for that purpose he may obtain the assistance of the police officers of his own choice. If on enquiry by the Chief Judicial Magistrate, a *prima facie* case is made out, the Chief Judicial Magistrate should be competent to direct for the registration of cases against the delinquent officers.

Since a case, thus registered, would again face the encumbrance of sanction, the Law Commission suggested that a proviso would be necessary to be inserted under Sub-section (1) of Section 197 in the following manner:

"Nothing contained in this section shall apply in case of custodial offence where a court on an enquiry is prima facie of the opinion that the accused public servant committed an offence of penal nature within his custody."

Unfortunately, the recommendations of the Law Commission on the point of sanction have not yet been adopted by the Legislature. As such, the Magistrate does not have unbridled power to initiate prosecution of an offending police officer accused of custodial violence.

Prosecution Possible Without Sanction in Certain Cases

Having said that, the IPC does recognize the possibility of prosecuting a police officer accused of custodial violence by invoking Section 166A, IPC. Section 166A, IPC lays down three kinds of derelictions of law by a public servant which would amount to an offence thereunder. A public servant is liable for punishment under Section 166A, IPC who

(a) knowingly disobeys any direction of law prohibiting him from requiring attendance at any place of any person for the purpose of investigation into an offence or any other matter;

(b) knowingly disobeys, to the prejudice of any person, any direction of law regulating the manner in which he is to conduct such investigation; and

(c) fails to record FIR in relation to offences under certain sections specified therein.

If a police officer abuses his office either by commission or omission of acts during his investigation and it results in an injury to any individual, an action may be maintained for an offence under Section 166A, IPC against such an officer. A police officer having custody of

an arrested person is statutorily obligated to ensure his safety as per Section 55-A, CrPC. The judgment of **D.K. Basu (supra)** has imposed additional obligations upon him. So, if such a police officer performs his duties arbitrarily or capriciously, or the exercise of his power results in harassment, agony and injury upon the person in his custody, then responsibility can be fastened upon him and he may be liable to be punished under Section 166A, IPC.

The Criminal Law (Amendment) Act, 2013 which inserted the offence under Section 166A into the IPC, also inserted an Explanation to Section 197, CrPC which mandates that no sanction shall be required in case of a public servant accused of an offence alleged to have been committed under Section 166A, IPC.

In such a situation, if a Magistrate receives a complaint or information in light of Section 190(1)(a) or 190(1)(c) of the CrPC respectively alleging custodial violence, he, in appropriate cases, will be empowered to either direct an investigation under Section 156(3), CrPC or take cognizance by himself of the offence under Section 166A, IPC.

Civil Contempt of Court

In addition to the option of prosecuting a police officer for custodial violence, a Magistrate also has the option of referring any allegation of custodial torture to the High Court for initiating contempt of Court proceedings against the delinquent police officer.

A police officer who inflicts torture upon a person in his custody is liable to face proceedings for civil contempt under Section 2(b) of the Contempt of Courts Act.

As per Section 2(b), civil contempt means wilful disobedience to any judgment, decree, direction, order, writ or other process of a Court or wilful breach of undertaking given to a court. The term "wilful" is reflective of an act or omission which is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done. It signifies a deliberate action or inaction motivated by a bad purpose either to disobey or to disregard the law.

The Supreme Court has repeatedly decried the use of custodial violence by police officers. In **D.K. Basu (supra),** the Supreme Court, in addition to laying down guidelines to fetter future acts of custodial violence, observed that failure to comply with the requirements mentioned in the judgment would apart from rendering the concerned official liable for departmental action, would also render him liable to be punished for contempt of Court in any High Court of the country, having territorial jurisdiction over the matter.

As such, a Magistrate who finds enough conspicuous materials to suggest that a police officer has violated the guidelines of **D.K. Basu's case (supra)** may make a reference to the High Court to initiate contempt proceedings against the concerned police officer for his alleged aberrations. In addition, if the police officer subjects an accused person to custodial violence in direct contravention of a Magistrate's order not to torture the accused, such wilful disobedience of the Magistrate's directions will also amount to civil contempt and the High Court, in addition to punishing contempt of itself, is empowered under Section 10 of the Contempt of Courts Act to punish the contempt of Courts subordinate to it.

As such, a Magistrate may also refer such wilful disobedience of his orders to the High Court with a view to initiate contempt proceedings against the offending police officer.

Complaint to the State Police Accountability Commission

In addition, the Magistrate may also make a formal complaint to the State Police Accountability Commission which is empowered under Section 78 of the Assam Police Act to enquire into serious misconducts by police officers. Any act or omission, on the part of a police officer leading to custodial death or custodial torture resulting in grievous hurt, is viewed as serious misconduct as per Section 78.

Conclusion

Ends do not always justify the means. Police officers have a legal duty as well as a legitimate right, in suitable cases, to arrest a criminal and to interrogate him during the investigation of an offence. But this interrogation/investigation must be within the ambit of law. Police cannot subject an accused person to abuse, humiliation and torture in the name of investigation. The virtues of "third degree" methods are only seen in movies. A welfare state cannot condone such practices. Custodial violence is an affront to human dignity. It tarnishes the image of a civilized nation. Stern measures must be taken to check the malady which has the potential to shake the edifice of the criminal justice system.

The victim, in cases of custodial abuse, may opt for prosecuting the police officer who subjected him to such abuse by either filing an FIR or a written complaint. The discussion made in this article, however, primarily traces out the role of a Magistrate when the same does not happen which is often the case.

While concluding, I would like to point out here that India is one of the few signatory nations that have failed to fulfil their international commitments towards ratifying the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.[49]

Though there are penal provisions under the IPC and the Police Act, but the same have proved to be insufficient to eradicate the menace of custodial violence. The penal provisions do not encompass all acts of custodial police abuse. Accused persons mostly from the lower stratum of society are at the receiving end of custodial violence. They are hesitant to take recourse to the available procedure at their disposal and antagonize the police. The prosecution of delinquent police officers is also not possible in all cases because of the statutory requirement of sanction. Limited prosecution is possible, of course. And so is the option of contempt. But to adequately deal with this menace, I feel that there is need for a special legislation which defines torture and provides for an independent agency to investigate allegations of police brutality. The legislation must also prescribe a special procedure for inquiry and trial of such accusations of custodial torture.

Multiple Reports of the Law Commission such as the 113th, 152nd, 185th, 273rd and 277th Reports have made worthwhile suggestions to tackle this malady. Unfortunately, most of the suggestions and recommendations remain on the paper, being relegated to academic discussions. These must be taken into consideration.

India did initiate attempts to make some legislative changes but none of them has yielded efficacious results till date. The Prevention of Torture Bill, 2010 was passed in the Lok Sabha

[49] https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en

on May 6th, 2010. However, after being referred to the Select Committee of the Rajya Sabha on December 6th, 2010, it lapsed following inaction.

Former Law Minister, Mr. Ashwani Kumar, filed a Public Interest Litigation before the Supreme Court of India in 2018. But the Supreme Court left the onus to pass such a Bill with the Legislature.

On 13th of July 2020, Dr. Abhishek Manu Singhvi, Senior Advocate, Supreme Court of India who was the *amicus curie* in **D.K. Basu's case (supra)** filed a miscellaneous application in the case asking the Supreme Court to make further interventions to prevent custodial violence. Dr. Singhvi relied on the NHRC Annual Reports and Crime in India Statistics Reports illustrating increasing instances of custodial violence and death and its attached impunity. The application supposes to be *'an attempt to further expand and enhance the institutional framework for minimizing custodial death and custodial torture, provide intrinsic and substantial safeguard to citizens and public to minimize such transgressions; and ensure a reform that is case neutral, event neutral and state neutral and focuses on issues, principles of human and civil rights, safeguards and methodologies'.*

So, we wait in anticipation for further developments on this issue, both on the legislative and the judicial side. Till then, any Magistrate who encounters an allegation of custodial violence may take recourse to the procedure discussed above.

Through this article, I have attempted to delineate and highlight the law as far as the role of a Magistrate in this regard is concerned, as can be culled out from the CrPC as well as the precedents laid down by the Supreme Court of India and the Gauhati High Court. I regret any inadvertent error that might have crept into the article despite the best of efforts.

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