JOGINDER KUMAR

v.

STATE OF U.P. AND OTHERS

APRIL 25, 1994

[M.N. VENKATACHALIAH, CJ., S. MOHAN AND DR. A.S. ANAND, JJ.]

Criminal Law : Arrest by police—Violation of human rights because of indiscriminate arrest—Protection of persons from the oppression and abuse by police—Enforcement of fundamental right to life and liberty—Requirements to be followed in all cases of arrests—Laid down.

Cr. PC. 1973—Guide lines laid down for arrest with or without warrant depending upon the circumstances of a particular case. Constitution of India—Art. 21—Protection of life and personal liberty—Protection against arrest and detention in certain cases—No detention without information of the grounds for such arrest—Right to consult and to be defended by a legal practitioner—Not to be denied.

Need for balance between law enforcement on one hand and the protection of citizen from the oppression and injustice at the hand of law enforcement machinery on the other—Effective enforcement of the fundamental rights—Requirements to be followed in all cases of arrest laid down in addition to the rights of the arrested persons found in various police manuals.

The appellant, a young man, detained by the police authorities on the pretext of making some inquiries in a case, was assured to be released after making inquiries. Being apprehensive of the intention of the authorities, appellant's brother made several efforts to know the whereabouts of the appellant but appellant could not be located. However, it was learnt that appellant was in illegal police custody. So the appellant's brother made enquiries about the well being of the appellant but it was found that the appellant had been taken to some undisclosed destination. Hence this writ petition praying for the release of the appellant.

Disposing the petition, this Court

A HELD : 1. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand and individual duties, obligations and responsibilities on the others; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively, of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first, the criminal or society, B the law violator or the law abider. No arrest can be made merely because it is lawful for the police officer to do so. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock up of a person can cause C incalculable harm to the reputation and self esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuine- D ness and *bonafide* of a complaint and a reasonable belief both as to the person's complicity and even so, as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the police commission merely reflect the constitutional concomitants of the fundamental rights to personal liberty and freedom. [665-D-E, 670-E-G]

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2. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police F officer issues notice to person to attend the Station House and not to leave station without permission. [670-H, 671-A]

3.1 The above rights are inherent in Art. 21 and Art.22(1) of the Constitution and require to be recognized and scrupulously protected. For effective enforcement of these fundamental rights, the following directives G are issued. [671-D]

3.2. An arrested person being held in custody is entitled if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare, told as far as is practicable that H he has been arrested and where is being detained. [671-E]

3.3. The police officer shall inform the arrested person when he is brought to the police station of this right. [671-F] A

3.4. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Art. 21 and Art. 22(1) and enforced strictly. [671-F]

B

3.5. It shall be the duty of the Magistrate before who the arrested person is produced, to satisfy himself that these requirements have been complied with. These requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various police manuals. [671-G-H] C

3.6. The above requirements are not exhaustive. The Directorate General of Police of all the states in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instructions shall also be issued to the effect that a Police Officer making an arrest should also record in the case diary, the reasons for making the arrest. [672-A-B] D

Smt. Nandini Satpathy **v.** *P.L. Dani*, **AIR (1978) SC 1025, referred to.**

People **v.** *Lefore*, **242 N.Y. 13, 24, 150 N.E. 585, 589 (1926) : Re Fried, 161 F. 2d 453, referred to.** E

Third report of the National Police Commission, P. 32, referred to.

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (CRL.) No. 9 of 1994. F

(Under Article 32 of the Constitution of India).

Yunus Malik and L.R. Singh for the Petitioner.

A. S. Pundir for the Respondents. G

The following Order of the Court was delivered :

This is a petition under Article 32 of the Constitution of India. The petitioner is a young man of 28 years of age who has completed his LL.B. and has enrolled himself as an advocate. The Senior Superintendent of H

A Police, Ghaziabad, respondent No. 4 called the petitioner in his office for making enquiries in some case. The petitioner on 7.1.1994 at about 10 O'clock appeared personally along with his brothers Sri Mangeram Choudhary, Nahar Singh Yadav, Harinder Singh Tewatia, Amar Singh & others before the respondent No. 4. Respondent No. 4 kept the petitioner in his
B custody. When the brother of the petitioner made enquiries about the petitioner, he was told that the petitioner will be set free in the evening after making some enquiries in connection with a case.

On 7.1.1994 at about 12.55 p.m., the brother of the petitioner being apprehensive of the intentions of respondent No. 4, sent a telegram to the
C Chief Minister of U.P. apprehending his brother's implication in some criminal case and also further apprehending the petitioner being shot dead in fake encounter.

In spite of the frequent enquiries, the whereabouts of the petitioner could not be located. On the evening of 7.1.1994, it came to be known that
D petitioner is detained in illegal custody of 5th respondent, SHO P.S. Mussorie.

On 8.1.1994, it was informed that the 5th respondent was keeping the petitioner in detention to make further enquiries in some case. So far as
E petitioner has not been produced before the concerned Magistrate. Instead the 5th respondent directed the relative of the petitioner to approach the 4th respondent S.S.P. Ghaziabad for release of the petitioner.

On 9.1.1994, in the evening when the brother of petitioner along with relatives went to P.S. Mussorie to enquire about the well-being of his
F brother, it was found that the petitioner had been taken to some undisclosed destination. Under these circumstances, the present petition has been preferred for the release of Joginder Kumar, the petitioner herein.

This Court on 11.1.1994 ordered notice to State of U.P. as well as
G S.S.P. Ghaziabad.

The said Senior Superintendent of Police along with petitioner appeared before this Court on 14.1.1994. According to him, the petitioner has been released. To question as to why the petitioner was detained for a period of five days, he would submit that the petitioner was not in detention
H at all. His help was taken for detecting some cases relating to abduction

and the petitioner was helpful in co-operating with the police. Therefore, there is no question of detaining him. Though, as on today the relief in *habeas corpus* petition cannot be granted yet this court cannot put an end to the writ petition on this score. Where was the need to detain the petitioner for five days; if really the petitioner was not in detention, why was not this Court informed are some questions which remain unanswered. If really, there was a detention for five days, for what reason was he detained? These matters require to be enquired into. Therefore, we direct the learned District Judge, Ghaziabad to make a detailed enquiry and submit his report within four weeks from the date of receipt of this order.

The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligation and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because, the constable blundered. In *People* v. *Lefore*, 242 N.Y. 13, 24, 150 N.E. 585, 589 (1926), Justice Cardozo observed :

> "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of offence. There are dangers in any choice. The rule of the Adams case *People* v. *Adams* 176 N.Y. 351, 68 N.E. 636 (1903) strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the courts

A that change has came to pass."

To the same effect is the statement by Judge Learned Hand, In Re Fried, 161 F.2d 453, 465 2d Cir. (1947):

> "The protection of the individual from oppression and abuse by
> B the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise."

C The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law.

This Court in *Smt. Nandini Satpathy* v. *P.L. Dani*, AIR (1978) SC 1025 at page 1032 quoting Lewis Mayers stated :

D The paradox has been put sharply by Lewis Mayers :

> "To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on
> E the other is a perennial problem of statecraft. The pendulum over the years has swung to the right."

Again in paragraph 21 at page 1033 it was observed :

> "We have earlier spoken of the conflicting claims requiring reconF ciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since Miranda (1966) 334 U.S. 436 there has been retreat from stress on protection of the accused
> G and gravitation towards society's interest in convicting law-brakers. Currently, the trend in the American jurisdiction according to legal journals, is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws .....' *Couch* v. *United*
> H *States*, (1972) 409 U.S. 322, 336. Our constitutional perspective has,

> therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice."

The National Police Commission in its Third Report referring to the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. The said Commission in its Third Report at page 31 observed thus :

> "It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all."

As on today, arrest with or without warrant depending upon the circumstances of a particular case is governed by the Code of Criminal Procedure.

Whenever a public servant is arrested that matter should be intimated to the superior officers, if possible, before the arrest and in any case, immediately after the arrest. In cases of members of Armed Forces, Army, Navy or Air Force, intimation should be sent to the Officer commanding the unit to which the member belongs. It should be done immediately after the arrest is effected.

Under Rule 229 of the Procedure and Conduct of Business in Lok Sabha, when a Member is arrested on a Criminal charge or is detained under an executive order of the Magistrate, the executive authority must inform without delay such fact to the Speaker. As soon as any arrest, detention, conviction or release is effected intimation should invariably be sent to the Government concerned concurrently with the intimation sent to the Speaker/Chairman of the Legislative Assembly/Council/Lok

A Sabha/Rajya Sabha. This should be sent through telegrams and also by post and the intimation should not be on the ground of holiday.

With regard to the apprehension of juvenile offenders Section 58 of the Code of Criminal Procedure lays down as under :

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> "Officers in charge of police station shall report to the District Magistrate or, if he so directs, to the Sub-Divisional Magistrate, the cases of all persons arrested without warrant, within the limit of their respective stations whether such persons have been admitted to bail or otherwise."

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Section 19(a) of the Children Act makes the following provision :

> "the parent or guardian of the child, if he can be found, of such arrest and direct him to be present at the children's court before which the child will appears;"

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In England, the police powers of Arrest, Detention and Interrogation have been streamlined by the Police and Criminal Evidence Act, 1984 based on the report of Sir Cyril Philips Committee ("Report of a Royal Commission on Criminal Procedure, Command-papers 8092 19811).

E It is worth quoting the following passage from Police Powers and Accountablilty by John L. Lambert, page 93:

> "More recently, the Royal Commission on Criminal procedure recognised that "there is a critically important relationship between the police and the public in the detection and investigation of
F crime" and suggested that public confidence in police powers required that these conform to three principal standards : *fairness, openness and workability.*"
>
> (Emphasis supplied)

G

The Royal Commission suggested restrictions on the power of arrest on the basis of the 'necessity of principle'. The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the Commission of offences, to investigate crime. The Royal Commission
H was of the view that such restrictions would diminish the use of arrest and

produce more uniform use of powers. The Royal Commission Report on Criminal Procedure - Sir Cyril Philips at page 45 said : A

> "..... we recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:
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> (a) the person's unwillingness to identify himself so that a summons may be served upon him; B
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> (b) the need prevent the continuation or repetition of that offence;
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> (c) the need to protect the arrested person himself or other persons or property; C
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> (d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him ; and D
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> (e) the likelihood of the person failing to appear at court to answer any charge made against him."

The Royal Commission in the abovesaid Report at page 46 also suggested : E

> "To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issued what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for F example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case....."

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In India, Third Report of the National Police Commission at page 32 also suggested:

> "..... An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances : H

A (i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

B (ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

C (iv) the accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in D the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines....."

The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to E arrest is one thing. The justification of the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of F an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest be made without a reasonable satisfaction reached after some investigation as to the genuineness and *bona fides* of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of G his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the Officer effecting the arrest H that such arrest is necessary and justified. Except in heinous offences, an

arrest must be avoided if a police Officer issues notice to person to attend to Station House and not to leave Station without permission would do. A

Then, there is the right to have someone informed. That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognised by Section 56(1) of the Police and Criminal Evidence Act, 1984 in England (Civil Actions Against the Police- Richard Clayton and Hugh Tomlinson; page 313). That Section provides: B

> "where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there." C

These rights are inherent in Articles 21 and 22(1) of the Constitution and require to be recognised and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements : D

> 1. An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained. E
>
> 2. The Police Officer shall inform the arrested person when he is brought to the police station of this right. F
>
> 3. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with. G

The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police H

A Manuals.

These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In additions, departmental instruction shall also be issued that a police officer making an arrest should also
B record in the case diary, the reasons for making the arrest.

R.A. Petition disposed of.