CASE NO.:
Appeal (crl.) 857 of 1996

PETITIONER:
Smt. Shakila Abdul Gafar Khan

RESPONDENT:
Vasant Raghunath Dhoble and Anr.

DATE OF JUDGMENT: 08/09/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

"If you once forfeit the confidence of our fellow citizens you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time", Said Abraham Lincoln. This Court in Raghubir Singh v. State of Haryana (AIR 1980 SC 1087), took note of these immortal observations while deprecating custodial torture by the police.

Custodial violence, torture and abuse of police power are not peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948 which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Despite this pious declaration, the crime continues unabated, though every civilized nation shows its concern and makes efforts for its eradication.

If it is assuming alarming proportions, now a days, all around it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of peoples' rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviours of citizens' rights.

Article 21 which is one of the luminary provisions in the Constitution of India, 1950 (in short the 'Constitution') and is a part of the scheme for fundamental rights occupies a place of pride in the Constitution. The Article mandates that no person shall be deprived of his life and personal liberty except according to the procedure established by law. This sacred and cherished right i.e. personal liberty has an important role to play in the life of every citizen. Life or personal liberty includes a right to live with human dignity. There is an inbuilt guarantee

against torture or assault by the State or its functionaries. Chapter V of the Code of Criminal Procedure, 1973 (for short the 'Code') deals with the powers of arrest of persons and the safeguards required to be followed by the police to protect the interest of the arrested person. Articles 20(3) and 22 of the Constitution further manifest the constitutional protection extended to every citizen and the guarantees held out for making life meaningful and not a mere animal existence. It is therefore difficult to comprehend how torture and custodial violence can be permitted to defy the rights flowing from the Constitution. The dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of rule of law and administration of criminal justice system. The community rightly gets disturbed. The cry for justice becomes louder and warrants immediate remedial measures. This Court has in a large number of cases expressed concern at the atrocities perpetuated by the protectors of law. Justice Brandies's observation which have become classic are in following immortal words:

"Government as the omnipotent and omnipresent teacher teaches the whole people by its example, if the Government becomes a law breaker, it breeds contempt for law, it invites every man to become a law into himself". (in (1928) 277 U.S. 438, quoted in (1961) 367 U.S. 643 at 659).

The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because guardians of law destroy the human rights by custodial violence and torture and invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences against them, in reality perpetrate them. The concern which was shown in Raghubir Singh's case (supra) more than two decades back seems to have fallen to leaf ears and the situation does not seem to be showing any noticeable change. The anguish expressed in Gauri Shanker Sharma v. State of U.P. (AIR 1990 SC 709), Bhagwan Singh and Anr. v. State of Punjab (1992 (3) SCC 249), Smt. Nilabati Behera @Lalita Behera v. State of Orissa and Ors. (AIR 1993 SC 1960), Pratul Kumar Sinha v. State of Bihar and Anr. (1994 Supp. (3) SCC 100), Kewal Pati (Smt.) v. State of U.P. and Ors. (1995 (3) SCC 600), Inder Singh v. State of Punjab and Ors. (1995(3) SCC 702), State of M.P. v. Shyamsunder Trivedi and Ors. (1995 (4) SCC 262) and by now celebrated decision in Shri D.K. Basu v. State of West Bengal (JT 1997 (1) SC 1) seems to have caused not even any softening attitude to the inhuman approach in dealing with persons in custody.

Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues â\200\223 and the present case is an apt illustration â\200\223 as to how one after the other police witnesses feigned ignorance about the

whole matter.

The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact-situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under- trial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading, towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which if it happens will be a sad day, for any one to reckon with.

Though Sections 330 and 331 of the Indian Penal Code, 1860 (for short the 'IPC') make punishable those persons who cause hurt for the purpose of extorting the confession by making the offence punishable with sentence up to 10 years of imprisonment, but the convictions, as experience shows from track record have been very few compared to the considerable increase of such onslaught because the atrocities within the precincts of the police station are often left without much traces or any ocular or other direct evidence to prove as to who the offenders are. Disturbed by this situation the Law Commission in its 113th Report recommended amendments to the Indian Evidence Act, 1872 (in short the 'Evidence Act') so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the court may presume that the injury was caused by the police officer having the custody of that person during that period unless the police officer proves to the contrary. The onus to prove the contrary must be discharged by the police official concerned. Keeping in view the dehumanizing aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and

others don't, the Government and the legislature must give serious thought to the recommendation of the Law Commission and bring about appropriate changes in the law not only to curb the custodial crime but also to see that the custodial crime does not go unpunished. The courts are also required to have a change in their outlook approach, appreciation and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the truth is found and guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed.

But at the same time there seems to be disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence. The case in hand is unique case in the sense that complainant filed a complaint alleging custodial torture while the accused alleged false implication because of oblique motives.

Respondent-Vasant Raghunath Dhoble (hereinafter referred to as the 'accused') faced trial on the basis of a private complaint filed by the appellant Shakila. The Additional Sessions Judge, Greater Bombay, found the accused guilty of offence punishable under Section 302 Part II IPC and sentenced him to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.1,00,000/-. In default of payment of fine he was to undergo 21 months imprisonment. In appeal, the Bombay High Court found that the prosecution has failed to establish the accusations and directed acquittal. The complainant has filed this appeal.

Accusations of the complainant sans unnecessary details are as follows:

On 14.10.1983 Abdul Gafar (hereinafter referred to as the 'deceased'), the husband of the complainant was arrested in respect of CR.No. 559/83 at D.N. Nagar Police Station on the allegation that he had caused grievous hurt to one Vishnu Sone Bhuwas. The deceased informed his wife (complainant) that he was required to go to the police station in connection with a case, as he had scuffle with some persons. On 15.10.1983, the complainant having found that deceased had not returned home in the night of 14.10.1983 came out of her house to search for her husband. Around 8.30 a.m., she noticed that police van on the main road vis. Link Road was being parked on the road side. The accused who was then attached to the D.N. Police Station came out of the van along with some police constables and they were dragging the deceased. The complainant noticed that the condition of her husband was not very sound, and he was not even able to stand up. The complainant was sure that he had been assaulted in the previous night, apparently in police custody. The accused was carrying a hockey stick in his hands and continued to beat the deceased in the presence of complainant and other persons. The other constables were holding the hands of the deceased and tried to make the

deceased stand. The accused continued to give blows by the hockey stick. The constables pulled the hair of the deceased while he was being beaten by the accused. Having been informed about the assaults, Smt. Khairunissa, mother of the deceased (PW-2) and Shamsunissa, sister of the deceased (PW-5) came to the spot. They had also witnessed the assaults on the deceased. When the complainant (PW-1), PW-2 and PW-5 tried to intervene, they were also threatened. The assaults continued for a very long time for more than an hour and when one of hockey sticks which was being used by the accused broke, another hockey stick was brought out from the van and assaults continued. In the evening, PWs 1 and 2 made attempts to move the police authorities at D.N. Nagar Police Station and met one Assistant Commissioner of Police (Mr. Irani) and senior Police Inspector (Mr. Chaglani) and requested them to render medical assistance to the deceased. But there was no cooperation and although the deceased was in a bad physical condition, he was taken to the hospital on 16.10.1983 around 11.00 a.m. The deceased was produced before the Remand Magistrate and was released on bail. After his release the deceased was taken to the hospital and was admitted in Cooper Hospital at about 4.00 p.m. and as his condition worsened he was transferred to K.E.M. Hospital on 17.10.1983. Subsequently, he expired. PWs. 1, 2 and 5 made complaint to the police officials against the accused holding him responsible for the death due to the assaults during the period from 14.10.1983 to 16.10.1983. Their statements were recorded, but no action was taken. Though the complainant made the representations to various authorities including the Commissioner of Police on 20.10.1983 that also did not yield any result. The complainant (PW-1) claims to have been made representations to the Prime Minister and the President of the country. As a last resort, a private complaint was made before the Metropolitan Magistrate, 10th Court, Andheri on 12.12.1984. The case was committed for sessions trial by an order dated 5.1.1987.

Nine witnesses were examined to prove the prosecution version. The accused pleaded innocence and false implication. He produced three witnesses to substantiate his plea of innocence. Three witnesses were examined as court witnesses. They were the police officials attached to the D.N. Nagar Police Station. On consideration of the materials on record, as noted above, the trial Court found the accused guilty but the judgment of conviction and sentence was set aside by the High Court, which found certain circumstances to be of great importance corroding the credibility of complainant’s version. Essentially the circumstances are as follows:

The complaint was lodged after more than one year of the alleged date of occurrence without any plausible explanation for the delay. The version given by PWs 1, 2 and 5 regarding the merciless assaults by the accused were incredible inasmuch as the doctor who conducted post mortem found 16 injuries on his body and had opined the cause of death to be acute renal failure. Certain documents were not supplied to the accused and thus caused great prejudice to the accused and use of those materials by the trial Court to find the accused guilty did not meet the requirements of law. The evidence of PWs 1, 2 and 5 when read together improbabilises the stand that they had seen the beatings alleged to have been given by the accused to the deceased. In the first report there was no mention about the assaults

on 14.10.1983. The doctor who had examined the deceased had noted the medical history of the accused, but the name of the accused was not specifically indicated though the accused and the deceased were known to each other intimately. In the report as alleged, name of the accused did not figure. The claim of oral dying declaration to have been made by the deceased was not indicated in the first report. The original post mortem report having not been placed on record, the evidence of PW-7 who admittedly did not conduct the post mortem is inadmissible. It was highly improbable that after having given a thorough beating to the deceased, the police officials would bring the deceased in a pathetic condition to a spot near his house and would continue the assaults in the presence of people of the locality. Opportunity was not granted to cross-examine the court witnesses. Accordingly, High Court set aside the conviction.

In support of the appeal, Mr. S.B. Sanyal, learned senior counsel submitted that the case involved police officials and the evidence brought on record by the complainant should not have been lightly brushed aside by conclusions which are not supportable in law. In case of a custodial torture, the onus is on the police official to prove his innocence. At every stage an attempt was made to shield the accused and investigation was not done properly. The complainant's plea for justice was very casually dealt with and ignored. It is not that the complaint was inactive, and on the contrary she had moved the high dignitaries and finding that no justice has been done filed a private complaint. The oral dying declaration has been erroneously kept out of consideration and by making surmises presence of PWs 1, 2 and 5 has been doubted and their evidence has been discarded. The evidence of PWs 2 and 5 have been discarded because one Shamin who was sent by PW-1 was not examined. It was clearly explained in evidence that she was absent from the locality and therefore was not examined. Another conclusion of the High Court that PW-2 does not refer to the presence of PW-1 at the spot is an erroneous conclusion and has been arrived at by mis-reading of the evidence. The credible evidence of PWs 1, 2 and 5 has been totally discarded without any plausible basis. The medical evidence has also been misread by High the court. No prejudice has been caused by the non-supply of the documents; and on the contrary, cross examination has been conducted on the basis of documents which were supplied belatedly. Merely because there were some exaggerations in the evidence of PWs 1, 2 and 5, that cannot affect the credible evidence tendered by them and even keeping out the exaggerations the residual evidence is sufficient to sustain conviction. Merely because the court witnesses were not permitted to be cross examined, that is really of no consequence because their evidence was not considered by the trial Court for recording conviction. Merely because casualty medical register was not produced, that is also not a factor to discard the register containing the original reports of which a copy of the report was produced. Non-supply of the copies of the statement did not per se cause prejudice. Strong reliance was placed on a decision of this Court in Noor Khan v. State of Rajasthan (1964(4) SCR 521) for the said purpose.

It was also submitted that the entire object of the State machinery was to protect the police officials. Even if it was not possible to collect more material, even the evidence on record was sufficient to find the accused guilty

and by adopting a technical approach, contrary to the principles laid down by this Court, the acquittal should not have been directed.

Mr. Arun Pednekar while adopting the arguments of Mr. Sanyal took the stand that even if the materials more or less fell short of the required standard, one factor cannot be over â\200\223looked that the police officials did not take any action as required under law. Even if for the sake of arguments it is conceded that the materials are not sufficient to convict the accused, yet the State has a duty to explain as to under what circumstances a particular person in custody suffered injuries and in appropriate cases its functionaries can be directed to bring it to the notice of the State Government to pursue the matter further.

In response to the stands taken by the complainant, Mr. V.S. Kotwal, learned senior counsel appearing for the accused-respondent No.1 submitted that the complainant has not come to the Court with clean hands. Instead she tried to abuse the process of the Court by bringing false accusations. Accused and the deceased were friends and there is no reason as to why he would assault the deceased, and instead he would have tried to protect him in the connected case where the deceased was an accused. What is alleged is not in line with the normal human conduct. The belated complaint without any explanation for the delay has been rightly thrown out by the High Court. The injuries noticed by the doctor who examined the deceased before his death did not show the involvement of the accused. In fact, at no stage at the beginning the complainant has particularly named the accused. Even in the history sheets recorded by the doctor, name of the accused did not figure. Interestingly, it was stated that the police had assaulted. Even in the initial reports given by PWs. 1,2 and 5 name of the accused was not indicated, though he is known to PW1 and the deceased intimately. Further, accusations were not against the accused alone, two other police officials were allegedly there giving beatings to the deceased. Interestingly, in the private complaint filed, no definite role is ascribed to others and they have not been arrayed as accused. It is not a case of mere exaggeration or embellishment; it is a totally false plea advanced. One significant factor is that the accused was granted bail on 16.10.1983. The complainant has stated in the complaint petition that when the deceased was produced in Court, he was in a pathetic condition. If that be so, it is unbelievable that the Magistrate who granted bail would not have noticed this and would not have required the deceased to undergo medical treatment or examination. It is not the case of the complainant that any grievance was made before the Magistrate about police torture.

In the complaint petition, there is one significant statement about one Surya Prakash Singh witnessing the assaults on 14.10.1983. Though his name is indicated in the list of witnesses strangely his evidence has not been tendered by examining him as a witness. Though a writ petition was filed by the complainant before the High Court, in that there was no allegation of the torture. Dr. Pankaj Joshi (DW-3) who examined the deceased on 15.10.1983, did not notice any injury of serious nature except three superficial injuries. Before him also the deceased has not made any statement about having been assaulted by the accused.

The court witnesses who were police officials were not permitted to be cross examined by the accused. This is clearly contrary to the law as laid down by this Court in Mohanlal Shamji Soni v. Union of India and Anr. (1991 Supp (1) SCC 271). Had the opportunity been granted, the truth would have been revealed.

The so-called oral dying declaration has rightly been discarded. If the witnesses knew that it was the accused who had assaulted the deceased, there was no necessity of asking the deceased as to how he came to be injured. In the statement recorded on 18.10.1983, the name of the accused as assailant has not been indicated. In short the stand was that the accused has rightly been acquitted.

Learned counsel appearing for the State of Maharashtra submitted that the prosecution has not been partisan. It has produced all the materials which were required to be produced before the Court, and inferences were drawn from the materials available on record.

Before coming to the innocence or otherwise of the accused, two disturbing features which have attracted our notice needs to be noticed. Firstly, no explanation has been offered as to why no FIR was registered. Learned counsel for the State of Maharashtra submitted that the statements given by PWs 1, 2 and 5 were treated to be in terms of Section 174 of the Code and, therefore, no FIR was registered. To say the least, the stand is fallacious. It needs no reiteration that if it is brought to the notice of the police that somebody had beaten the deceased, the FIR was to be registered. An interesting explanation has been given by CW-1. He has stated that the statements were recorded in terms of Section 174 of the Code and in order to report to the coroner as regards the circumstances of the death. At that point of time the sentiments were high. The allegations were looked into and the matter was reported to the higher authorities to order independent Crime Branch inquiry. This witness also stated that he had also made enquiries from the accused and other police officials and tried to obtain their version. The witness stated that he had personally questioned the accused and two other PSI, and he perused the papers, medical certificate and station diary etc. and submitted his report through ACP Irani. The official acted as if he was deciding the guilt or otherwise of an accused. The permissible area of application of mind is limited to finding out existence of a cognizable offence, and nothing beyond that.

It is a fairly well settled position in law that even at the time of taking cognizance the Court is not required to find out which particular person is the offender, and the cognizance is taken of offence. The course adopted by the official certainly tends to make a mockery of law. The official stated that he had requested the higher authorities to conduct crime branch enquiry. It has not been shown as to what was the outcome of such enquiry, if any. We will revert back to this aspect after dealing with the question whether accused is guilty.

The High Court has rightly observed that the private complaint was filed after a long lapse of time. If there was inaction to deal with information lodged with the police in October 1983, there was no reason for the complainant to

wait for more than one year to approach the Court by making a private complaint. Though, delay per se may not affect credibility of complainant's version, each individual case has to be tested to see whether delay has been properly explained. Mr. Sanyal referred to the explanation given about the complainant having approached the Prime Minister and the President. It was submitted that the complainant was not aware of the legal modes to be adopted, and therefore in good faith was writing to the Prime Minister and the President. This plea is clearly unacceptable. In the complaint petition itself it has been stated that legal advise was sought in the matter immediately after the occurrence and the legal notices were sent by advocates. That being so, plea that the remedies available in law were unknown to the complainant is unbelievable. The High Court has, therefore, rightly held this to be a vulnerable circumstance.

Coming to the acceptability of the evidence of PWs 1, 2 and 5 it is not merely a case of exaggeration or embellishment.

It is the duty of Court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Alli v. The State of Uttar Pradesh (AIR 1957 SC 366).

The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh (1972 (3) SCC 751) and Ugar Ahir and Ors. v. The State of Bihar (AIR 1965 SC 277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only

available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and Ors. v. The State of Punjab. (AIR 1975 SC 1962). As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and Ors. v. State of Bihar etc. (JT 2002 (4) SC 186), Gangadhar Behera and Ors. v. State of Orissa (2002 (7) Supreme 276) and Rizan and Anr. v. State of Chhattisgarh (2003 (2) SCC 661).

It is a case where it is really difficult to separate the grain from the chaff. If really there was merciless beatings with such brutal force that a hockey stick broke and the beating was given for more than one hour, the result would not have been 16 simple injuries with no fractures or internal rupture. There is another vital factor which corrodes complainant's plea. If the condition of the accused was so severe that he was not able to even stand on 15.10.1983 morning as claimed, it is not explained as to how the Magistrate who granted bail did not notice the condition or how even no grievance was made by the deceased before him. There is a requirement under Section 54 of the Code which deals with a right of an arrested person to bring to the notice of the Court about torture or assault. The provision provides for an examination of an arrested person by medical practitioner at the request of the arrested person and it is a right conferred on the arrested person. As this Court had noticed that in many cases the arrested persons are not aware of the right, and on account of ignorance are unable to exercise that right even though they have been tortured or mal-treated by the police in lock up, a direction was given in Sheela Barse v. State of Maharashtra (1983 (2) SCC 96) to the Magistrates requiring them to inform the arrested persons about this right in case he has any complaint of any torture or maltreatment in police custody. This apparently was not done by the deceased and it is a serious flaw to the complainant version. It is not the case of the complainant that such a grievance was made and the Magistrate did not take note of it. There are several inferences noticed by the High Court; and one of them is non supply of documents. Section 208 of the Code deals with the requirements of furnishing documents to the accused. Of course, it has rightly been submitted by Mr. Sanyal that mere non supply of documents may not be considered prejudicial but the Court has to give a definite finding about the prejudice or otherwise. This aspect was highlighted in Noor Khan's case supra.

Coming to the plea that refusal to grant permission to cross examine was impermissible in law, the parameters have been indicated in Mohanlal Shamji's case supra. If the Court has permitted the accused to lead the evidence the mere denial of cross-examining the man by the accused cannot be per se a vulnerable factor. In the present case, the three police officials were not required to speak about the

case at hand in general. They were in fact required to state about certain documents in terms of Section 174 of the Code. It is of course true that when the permission has been granted to cross examine, the accused could have produced some materials to support his case. We need not go into this aspect in detail because the trial Court itself has permitted the accused to lead rebuttal evidence.

Though the High Court was not justified in saying that the register which contained the original entries regarding the post mortem examination was not to be taken note of, learned counsel for the accused submitted that copy of the post mortem report cannot be accepted in evidence. Strong reliance was placed on a decision of this Court in Vijender v. State of Delhi (1997 (6) SCC 171) where the original post mortem report was not produced and the doctor was not examined. A close reading of the decision shows that it was referred in a different factual context and on the facts of the case it was held that the production of the original post mortem report and the examination of the doctor was necessary. While saying so, the principles of Section 32 of the Evidence Act were recognized and it was noted that it was an appropriate case where logic of the said provision can be applied.

Coming to the evidence of PWs 1, 2 and 5 it is to be noted that apart from the exaggeration about the assaults, evidence shows even some doubtful features about their presence.

In the initial statement given on 18.10.1983 PW-1 has stated that after seeing the beatings by the accused she sent one person to call her mother-in-law to the spot and returned to her home. If that be so, it is quite improbable that she saw PWs 2 and 5 together to witness the assaults. Though the High Court was not justified in doubting the version of PWs 1, 2 and 5, because one Shamin was not examined, that actually would not dilute the conclusion regarding evidence of PWs 2 and 5 about the alleged beatings on 15.10.1983 being extremely fragile. So far as the beating on 14.10.1983 is concerned, the complainant's case is based on what one Surya Prakash Singh allegedly told her and the oral dying declaration. As rightly submitted by learned counsel for the accused, Surya Prakash Singh has not been examined and there is no material to otherwise link the accused with the alleged beatings on 14.10.1983. The oral dying declaration also is unbelievable if the PWs 1, 2 and 5 had really seen the assaults they would not have asked the deceased as to how he sustained injuries. This improbabilises the claim of oral dying declaration. Coupled with this fact is the non mention of the accused's name in the medical report. The doctor who examined the deceased stated that he did not implicate the accused, specifically did not tell his name. Non-mention of accused's name may not in all cases be a vulnerable factor. But in the factual background, it certainly assumes importance. Deceased made omnibus statement about assaults by the police. It is not brought on record that the accused alone had assaulted the deceased. On the contrary, according to the evidence of PW-1, two constables had accompanied the accused and also had assaulted the deceased. Surprisingly they were not made accused in the complaint.

Taking totality of the circumstances it is clear that the High Court was right in directing acquittal of the

accused. We decline to interfere with the judgment of acquittal.

But before we part with the case, there are several factors which have, at the threshold, drawn our attention. There are several loose ends, which as admitted by the prosecution, were not taken note of. Even according to the version of the accused, the deceased was taken to the hospital and was examined by DW-3. What was the occasion for this being done still remains shrouded in mystery. The post mortem report reveals 16 injuries, though of simple nature. If none of these injuries was sustained by the deceased in police custody, there was no necessity of bringing the deceased to the hospital on 15.10.1983 at 11.00 a.m. CW-2 has admitted that he had taken the deceased for examination by DW-3. The Court could have asked him as to what was the necessity for doing so. That admittedly has not been done.

The Courts exist for doing justice to the persons who are affected. The Trial/First Appellate Courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The Court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue.

As pithily stated in Jennison v. Backer (1972 (1) All E.R. 1006), "The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope". Courts have to ensure that accused persons are punished and if deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the deficiencies, deal with the same appropriately within the framework of law. Justice has no favourite, except truth. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.

Though justice is depicted to be blind, as popularly said it is only a veil not to see who is the party before it while enforcing law and administrating justice and not to ignore or turn the mind/attention of the Court from the cause or lis before it, in disregard of its duty to prevent injustice being done. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or slumber will tend to paralyse by such inaction or lethargic action of the Courts and erode in stages the faith, ultimately destroying the justice delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diverted by manipulative red herrings. We consider this to be a fit case for exercise of our jurisdiction under Article 142 of the Constitution. We direct the State Government to pay compensation of Rs.1,00,000/- to the mother and the children of the deceased. We are not granting any compensation to the widow because she appears to have re-married. A sum of Rs.25,000/- be given to the mother and balance to the children. The amounts are to be paid kept in fixed deposit, and only the interest shall be allowed to be drawn by the mother and the children. If the children are minors, the

fixed deposit shall be made in their names through a proper legal guardian till they attain majority. This amount of compensation shall be as a palliative measure and does not preclude the affected person(s) from bringing a suit to recover appropriate damages from the State Government and its erring officials if such a remedy is available in law. The suit it goes without saying, if filed, shall be decided in accordance with law, uninfluenced by any finding, observation or conclusion herein. We further direct that an enquiry be conducted by the Head of the Police force of the State under the direct control of the Chief Secretary of the State, to find out as to who were the persons responsible for the injuries on the body of the deceased. The starting point of course would be the enquiry as to the necessity for taking the deceased to the hospital on 15.10.1983 where DW-3 examined him. If on further enquiry and on the basis of materials collected it appears that the accused who is being acquitted had a role to play, it shall be open to the authorities to initiate proceedings for action and the same shall be taken notwithstanding the order of acquittal passed by the High Court and affirmed by us. This is so, because on the materials now placed on record the acquittal was justified. Action will also be taken against the officials who did not register the FIR and the authorities who were requested to conduct the crime branch enquiry but yet do not appear to have done anything in the matter. Our awarding compensation also shall not be considered as a factor to decide either way as to whether any particular official was responsible for custodial torture. The appeal stands dismissed with the aforesaid observations.