

56 DLR (HCD) (2004) 324

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL MISCELLANEOUS JURISDICTION)**

Criminal Miscellaneous Case Nos. 9145 and 9146 of
2002.

IN THE MATTER OF:
Saifuzzaman (Md)

-----Petitioner.

-VERSUS-

State and others

-----Opposite
Parties.

Mr. M Amirul Islam with
Ms. Tania Amir, Advocates

-----For the Petitioner.

Mr. Abdur Rezaque Khan, Additional Attorney General
with
Ms. Fazilatunnesa, Assistant Attorney General.

-----For the Opposite Parties.

Judgment on: The 4th August, 2003.

Present :

Mr. Justice S. K. Sinha.

And

Mr. Justice Sharifuddin Chaklader.

SK Sinha J:

These two Rules arise out of the same proceedings and therefore, these Rules are disposed of by this judgment. These Rules were issued calling upon the opposite parties to show cause why the detainees Liakat Sikder and Md Rafiqul Islam Kotwal should not be brought before this Court to be dealt with in accordance with law or pass such other or further order or orders as to this Court may seem fit and proper.

It is stated in the petitions that the detainee Liakat Sikder is a student of Dhaka University and President of Bangladesh Chattra League and the detainee Md Rafiqul Islam

Kotwal is also a student of Dhaka University and Vice President of Bangladesh Chattra League. They have long political background and are involved in active politics of Bangladesh Chattra League and played major role in all movements, serving the cause of liberty, democracy and in achieving those, they served their party with dedication. On 25-2-2002 while the detainees were coming out of Sudha Sadan, of Road No. 5, Dhanmondi Residential Area, they were arrested by the Dhanmondi Police under section 54 of the Code of Criminal Procedure, shortly the Code, in connection with DB Office GD Entry No. 1356 dated 26-2-2002 along with other activists of Bangladesh Chattra League. The detainees were forwarded to the Chief Metropolitan Magistrate, Dhaka on the same day with a prayer for taking them on police remand for 7 days. It was stated in the police forwarding report that a proposal for their detention under the Special Powers Act, 1974, shortly the Act, had been made to the authority. The Chief Metropolitan Magistrate enlarged them on bail to be effective on 4-3-2002, if no detention order had been made in the meantime. They were, however, remanded to the judicial custody. In the meantime, the detainees were communicated with the order of detention on 27-2-2002, against which, they moved this Court in Criminal Miscellaneous Case Nos. 2400 of 2002 and 2405 of 2002 respectively. This Court declared the orders of detention illegal and directed for release of the detainees by judgment and order dated 23-3-2002. During the pendency of the said Rules, the detainees were shown arrested in Ramganj Police Station Case No. 13 dated 23-9-2001 on the basis of a wireless message made by the officer-in-charge, Ramganj Police Station.

The detainees submitted their bail bonds before the Chief Metropolitan Magistrate on 5-3-2002. The learned Chief Metropolitan Magistrate subsequently discharged the petitioners of the GD Entry No. 1356 dated 26-2-2002 on the prayer of the Investigating Officer. Again, they were shown arrested in GR Case No. 343 of 2002 arising out of Ramna PS Case No. 26(2)/02 by an order the learned Chief Metropolitan Magistrate on 27-3-2002. The learned Sessions Judge enlarged them on bail in that case on 1-4-2002 on Criminal Miscellaneous Case No. 1484 of 2002. Before they were released from the jail custody, the Dhanmondi Police prayed for showing them arrested in Dhanmondi Police Station Case No. 71 dated 29-1-2001 before the learned Chief Metropolitan Magistrate. The learned Chief Metropolitan Magistrate by order dated 4-4-2002 allowed the prayer and showed the detainees arrested in that case. The detainees were thereafter enlarged on bail by an order dated 23-5-2002 of the learned Metropolitan Sessions Judge, Dhaka in Criminal Miscellaneous Case No. 1901 of 2002.

In the meantime, on the prayer of the Ramna Police, the learned Chief Metropolitan Magistrate showed the detainees arrested on 4-4-2002 in Ramna PS Case No. 57 dated 26-1-2002. The detainees obtained an ad-interim bail from this Court in Criminal Miscellaneous Case No. 6440 of 2002. Before the said order was communicated to the Court below, the Demra Police prayed for showing the detainees arrested on 3-7-2002 in Demra. PS Case No. 76 dated 22-2-2002 corresponding to GR Case No. 762 of 2002. The learned Magistrate allowed the prayer by order dated 6-7-2002. Thereafter, the detainees were enlarged on bail on 4-8-2002 by an order of the learned Metropolitan Sessions Judge in Metropolitan Criminal Miscellaneous Case No. 2953 of 2002. The Mohammadpur Police again prayed before the learned Chief Metropolitan Magistrate on 7-8-2002 for showing the detainees arrested in Mohammadpur PS Case No. 38 dated 12-2-2002 corresponding to GR Case No. 708 of 2002. The learned Chief Metropolitan Magistrate by order dated 7-8-2002 issued custody warrant in the above case. The learned Metropolitan Sessions Judge by order dated 11-8-2002 in Metropolitan Criminal Miscellaneous Case No. 3395 of 2002 enlarged them on bail. Thereafter, the Tejgaon Police prayed before the learned Chief Metropolitan Magistrate for showing the detainees arrested in Tejgaon PS Case No. 98 dated 28-12-2001 on 12-8-2002 which prayer was allowed. The detainees thereafter, moved this Court and obtained the above Rules.

The GD Entry, with which, the detainees were initially arrested was dropped by an order of the learned Chief Metropolitan Magistrate on 30-3-2002 and there was no existence of the said GD Entry on and from that date but while the detainees were shown arrested in Dhanmondi PS Case No. 71 dated 29-11-2001, Ramna PS Case No. 57 dated 26-1-2002, and in Demra PS Case No. 76(2) of 2002, the learned Chief Metropolitan Magistrate observed in his orders dated 4-4-2002 and 6-7-2002 respectively that the detainees are in custody in connection with GD Entry No. 1356 dated 26-2-2002. This shows that the learned Magistrate did not at all apply his judicial mind in making orders for showing the detainees arrested in those cases and made mechanical orders on the mere asking by the police officers. In making those orders, the learned Magistrate did not assign any reason and made laconic orders observing "cÖv_@bv gÄyiÖÖ No counter affidavit has been filed by the State controverting the statements made in the petitions. Learned Additional Attorney-General has not disputed the facts stated in the petitions.

Mrs. Tania Amir, appearing on behalf of the detainees, contends that in the absence of any ground for believing that the detainees had been concerned in any cognisable offence, the use of section 54 of the Code as an instrument for putting them in detention and also showing them arrested in different cases are unauthorised and without jurisdiction. She further contends that the orders of the Magistrate remanding the detainees in the judicial custody on the prayer of the police that they have complicity in those cases without satisfying as to the prima facie materials on the basis of the entries in the diary are contrary to section 167 of the Code. Lastly, she contends that those orders were made mechanically without application of judicial mind, which should be quashed for ends of justice.

Learned Counsel has taken us through section 54 of the Code and section 3 of the Act, and submits that a person cannot be put in preventive detention after arrest under section 54 of the Code, inasmuch as, a police officer has the power to arrest a person under this section on any of the grounds contained therein whereas, an order of detention of a person can only be made by the Government or a District Magistrate or Additional District Magistrate, as the case may be, if the said authority is satisfied that such person has indulged in prejudicial activities within the meaning of section 2(f) of the Act. In support of her contention, she has referred a decision in the case of *Bangladesh Legal Aid and Services Trust (BLAST) and others vs Bangladesh and others*, 55 DLR 363.

Mr. M Amirul Islam, learned Counsel like Mrs. Tania, stresses upon the police excesses and the violation of fundamental rights of the detainees in the hands of the police. He submits that no action detrimental to the life, liberty, body and reputation of a person shall be taken away except in accordance with law. He further contends that the detainees were denied to enjoy the protection of law, as they were not informed at any point of time the cause of their arrest by the police officer. He further contends that the police used section 54 of the Code and section 3 of the Act, as instruments to harass the detainees and that as soon as they had realised that those devices did not suit their purpose, they were shown arrested in series of cases one after another without being informed as to the accusations for which they were shown arrested and even the Magistrate did not know on what allegation he was making the order, which is not the intention of the law. He further contends that if such processes were

allowed, there would be no end of harassment of detainees who would end up for rest of their lives incarceration. He submits that these actions of the law enforcing agencies are not only deprecatory but also contrary to Articles 27, 31, 32 and 33 of the Constitution.

In the aforesaid background a pertinent question arises whether the provisions of the Code authorise a Magistrate to make such orders of custody in different cases on a mere asking by the police officers in the absence of the detainees. Another pertinent question is whether a police officer has power to apprehend any person under section 54 of the Code for the purpose of putting him in preventive detention and for showing him arrested in pending cases. In the alternative, whether a police officer can use section 54 of the Code for collateral purposes of detention and some other purposes as has been done in the present case.

Recently, in many cases we have noticed that the law-enforcing agency after making arrest of a person under section 54 of the Code produces him before the Magistrate with a report stating that a proposal for putting him in preventive detention has been made to the authority. The Magistrate under such circumstances sends him in judicial custody on rejecting his prayer for bail with the observation that a proposal has been made for his detention. Similar order has been made in respect of these detainees. This being a fundamental question, we would like to address this point since the right of a citizen is involved on this point. In a democratic society, where the rule of law prevails, it is an obligation of the State to ensure that there is no infringement of the rights of a citizen to liberty except in accordance with law. The horizon of human rights is expanding. Crime rate, at the same time is also increasing. There are complaints about violation of human rights because of indiscriminate arrest of innocent persons by law enforcing agency in exercise of powers under section 54 of the Code and put them in preventive detention on their prayer by the authority and sometimes they are remanded to the custody of the police under the orders of Magistrate under section 167 of the Code and they are subjected to third degree methods with a view to extracting confessions. This is what is termed by the Supreme Court of India as "state terrorism" which is no answer to combat terrorism.

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 other: of weighing and balancing the rights, liberties and privileges of the single individual and those of the 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. It is generally said that when the crime goes unpunished, the criminals are encouraged and the society suffers. Whenever a criminal offence is committed then, irrespective of whether it also involves a civil injury, the offender becomes liable to punishment by the State, not for the purpose of affording compensation or restitution to anyone who may have been injured but as a penalty for the offence and in order to deter the commission of similar offences and in some cases, for the reform of the offender. Here the matter is one of public law, the proceedings against the offender may be instituted by the State without the consent of any person who has been injured, and the State alone can remit the punishment.

Section 54 of the Code gives a police officer wide powers of arresting a person without warrant under certain conditions, i.e. if such person has been concerned in any cognisable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned or so on. There are nine circumstances which empower a police officer to apprehend a person without a warrant issued by a Magistrate, of them, the first clause gives a police officer unlimited power to exercise his discretion. This power being an encroachment on the liberty of the subject, an arrest purporting to be under this section would be illegal unless circumstances specified in the various clauses of the section exist. The expression "credible information" used in the section includes any information which, in the judgment of the officer, to whom it is given, appears entitled to credit in the particular instance. The word "reasonable" has reference to the mind of the person receiving the information. The "reasonable suspicion" and "credible information" must relate to definite averments, which must be considered by the police officer himself before he arrests a person under this provision. What is a "reasonable suspicion" must depend upon the circumstances of each particular case, but it should be at least founded on some definite fact tending to throw suspicion on the person arrested and not on a mere vague surmise.

The words "credible" and "reasonable" used in the first clause of section 54 must have reference to the mind of the person receiving the information which must afford sufficient materials for the exercise of an independent judgment at the time of making the arrest. In other words, the police officer upon receipt of such information must have definite and bona fide

belief that an offence has been committed or is about to be committed, necessitating the arrest of the person concerned. A bare assertion without anything more cannot form the material for the exercise of an independent judgment and will not therefore amount to credible information. The abuse of police power is not only peculiar to our country but it is widespread. Section 60 of the Code contains a mandatory provision requiring the police officer making an arrest without warrant for producing the arrested person before a Magistrate without delay. The precautions as laid down in sections 60 and 61 of the Code seem to design to secure that within not more than twenty-four hours of arrest a Magistrate shall have *seisin* of what is going on to apprise him the nature of the charge against the arrestee. If the reasonableness in the complaint or suspicion and credibility of information is not found on investigation within the period of twenty-four hours of arrest, the arrested person must be released by the police officer under section 169 of the Code on taking a bond for his appearance before a Magistrate if and when required. Section 61 of the Code enjoins that no Police Officer shall detain in custody the person arrested under section 54 for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours. There are safeguards as to arrest and detention of a person under Article 33 of the Constitution, which reads:

"33(l) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty- four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate and no such person shall be detained in custody beyond the period without the authority of a Magistrate.....
.....

Article 33 embodies a rule, which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the rule of law prevails. There are two requirements in this Article, which are to be complied with to afford the earliest opportunity to

the arrested person to remove any mistake and misapprehension in the minds of the arresting authority and also to know objectively what the accusation against him is, so that he can exercise the second right of consulting a legal practitioner. This Article provides the safeguard that the arrested person must be produced before a Magistrate within twenty-four hours of arrest, so that an independent authority exercising judicial powers may without delay apply his mind to his case. Though the Criminal Procedure Code contains analogous provision but our Constitution makers were anxious to make this safeguard an integral part of fundamental rights.

The requirements of this Article are meant to afford the earliest opportunity to the person arrested on suspicion to remove any mistake in the minds of the arresting authority, and also to know exactly what accusation against him is so that he can exercise his right of consulting a legal practitioner of his choice. It is now established that even where a person is convicted or is in custody on certain allegations of commission of a cognisable offence, he does not lose all the fundamental rights belonging to all the persons under the Constitution, excepting those which cannot possibly be enjoyed owing to the fact of incarceration. His fundamental right is subject to Article 32 i.e. before a person is deprived of his personal liberty, the procedure established by law must be strictly followed and in conformity with the provisions of law. Section 61 of the Code echoes clause (2) of Article 33 of the Constitution. Despite such protections, there are reports of arrest of persons on suspicion, assaults and death in police custody. In the case of *Joginder Kumar vs State of UP and others*, AIR 1994 SC 1349 the Supreme Court of India voiced its concern regarding complaints of violations of human rights during and after arrest. It said:

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The jurisdiction 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. 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 should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fide of a complaint and a reasonable belief both as to person's complicity and even so as to the need to effect arrest. Denying a person his liberty is a serious matter."

Article 33 of our Constitution is in *pari materia* with Article 22 of the Constitution of India. While inserting this Article in the draft bill of the Constitution of India, which corresponded to Article 15A in the draft bill, Dr BR Ambedkar said:

"Article 15A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilised country follows as principles of international justice. It is quite true that these two provisions contained in clause (1) and clause (2) are already to be found in the Criminal Procedure Code and thereby probably it might be said that we are really not making any very fundamental change. But we are, as I contend, making a fundamental change because what we are doing by the introduction of Article 15A is to put a limitation upon the authority both of parliament as well as of the provincial legislature not to abrogate these two provisions, because they are now introduced in our Constitution itself".

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence with a view to solving the crime. The interrogation and investigation into a crime should be purposeful to make the investigation effective as per sanction of law. "The protection of the individual from oppression and abuse by 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." Observed by Judge learned Hand, in *Re Fried*, 161 F 2(1453, 465(2d Cir 1947).

In *People vs Defore*, (1926) 242 NY 13, 24: 150 NE 585, 589 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 not be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams case* (*People vs Adams* (1903) 176 NY 351: 68 NE 636) strikes a balance between opposing interest. 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 that change has come to pass."

In the case of *Smt Nandini Satpathy vs PL Dhanni*, A1R 1978 SC 1025, quoting Lewis Mayors, stated:

"To strike the balance between needs of law enforcement, on the one hand, and the protection of the citizen from oppression and injustice at the hands of law-enforcement machinery, on the other, is a perennial problem of statecraft. The pendulum over the years has swung to the right. Even as long ago as the opening of the twentieth century, Justice Holmes declared that 'at the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny'. As the century has unfolded, the danger has increased."

In England, the police powers of arrest, detention and interrogations has been streamlined by the Police and Criminal Evidence Act, 1984 based on the report of Sir Cyril Philips Committee. In general a police officer is free to put any question to any citizen, but no citizen has a duty to answer the question of the police or to remain where the police wish him or her to remain (*Rice vs Connely (1966) 2 QB 414*). Many citizens will answer questions and this may result in the police officer terminating the inquiry, or informing the suspect that a summons will be issued in respect of the offence, or deciding to arrest the suspect. Whether or not the person answers questions, a police officer is entitled to arrest any person whom he or she has reasonable grounds to suspect of having committed or being about to commit an arrestable offence. When the suspect is brought to the police station, the custody officer has to decide whether the suspect should be released without charge, charged or (if it is thought necessary to obtain further evidence by questioning) detained for questioning.

That detention may be for up to six hours in the first place and there are procedures for renewals. The custody officer must record these and other decisions on a custody sheet and the suspect must be informed of the right to free and confidential legal advice.

The Royal Commission Report on Criminal Procedure, Command Papers 8092 19811 at page 45 said:

"We recommend that detention upon arrest for an offence should contain only one or more of the following criteria:

- (a) the person's willingness to identify himself so that a summons may be served upon him.
- (b) the need to prevent the continuation or repetition of that offence.
- (c) the need to protect the arrested person himself or other persons or property.
- (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
- (e) the likelihood of the person failing to appear at Court to answer any charge made against him."

Both in England & Wales and in the United States, the law relating to remand has developed in two distinct phases. The first phase in both countries focused chiefly on the problem of securing the attendance of the accused at the trial. In *Rose, (1898) 78 LT 119*, Lord Russell stated that "it cannot be too strongly impressed on the Magistracy that bail is not to be withheld as a punishment but that the requirements as to bail are merely to secure the attendance of the prisoner at his trial." Similar phase can be discerned in the American Law. Until 1960s the law and practice tended to concentrate on the problem of securing the attendance of accused at trial: Courts usually using financial bonds as the means to this end and that the result was the pretrial imprisonment of people too poor to raise the money for such a bond. Congress passed the Federal Bail Reform Act 1966, legislating for release on recognisance rather than financial bonds as the normal pretrial order. The relevant law for England and Wales

is now contained in the Bail Act, 1976. In essence, a Court has four main alternatives, (a) release on unconditional bail, (b) release on conditional bail (c) release on bail subject to surety or security and (d) remand in custody.

As regards our Code is concerned, a bail may be taken in case of non-bailable offence under section 497 of the Code. Sub-section (1) of section 497 applies to a stage where the accused is first brought before the Court. This provision says that when a person accused of a non-bailable offence is arrested or detained, he may be released on bail but he shall not be so released if there appear reasonable grounds (*underlined by me*) for believing that he has been guilty of an offence punishable with death or imprisonment for life. Sub-section (2) of section 497 provides that if the Court at any stage of investigation or trial finds that there are not reasonable grounds for believing that the accused has committed a non-bailable offence but that there are sufficient grounds for further inquiry into his guilt, pending such inquiry, he may be released on bail. This section speaks of "reasonable grounds" for believing, that the accused is guilty of the offence is a question which must be decided by the Court judicially, that is to say, there should be some tangible evidence offered by the investigating officer on which, if un rebutted, the Court may come to the conclusion that the accused is not entitled to bail.

In India the third report of the national police commission referring to the quality of arrests by the police mentioned power of arrest as one of the chief sources of corruption in the police. In the said report the following suggestions made, *inter alia*, are; an arrest during the investigation of a cognisable case may be considered justified in cases which involve a grave offence like murder, robbery, rape, etc. or other circumstances, that the police officer making an arrest should also record in the case diary the reason for making the arrest, that a person is not liable to arrest merely on the suspicion of complicity in an offence, that there must be some reasonable justification in the opinion of the officer effecting the arrest, that such arrest is necessary and justified, that except in heinous offences, an arrest must be avoided if a police officer issues notice to the person to attend the police station and not to leave the station without permission would do and that these rights are inherent in Article 22 of the Constitution and required to be recognised. The recommendations merely reflect the constitutional concomitant of the fundamental right to personal liberty and freedom. For effective

enforcement of these fundamental rights, the Supreme Court of India in the case of *Joginder Kumar* issued the following guide lines:

"(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.

(2) The police officer shall inform the arrested person when he is brought to the police station of this right.

(3) An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power of arrest must be held to flow from Articles 21 and 22(1) and enforced strictly."

VR Krishna Iyer J. in the case of *Srimati Nandini Satpathy* observed:

"here we must remember, concerned as we are in expounding an aspect of the Constitution bearing on social defence and individual freedom, that humanism is the highest law which enlivens the printed legislative text with the life breath of civilised values. The Judge who forgets these rules of law any day regrets his nescient verdict some day."

In the case of *BLAST*, Md Harnidul Haque J observed:

"As section 54 now stands, a police officer is not required to disclose the reasons for the arrest to the person whom he has arrested. Clause (I) of Article 33 provides that the person who is arrested shall be informed of the grounds for such arrest. It is true that no time limit has been mentioned in this Article but the expression "as soon as may be" is used. This expression "as soon as may be" does not mean that furnishing of grounds may be delayed for an indefinite period. According to us, "as soon as may be" implies that the grounds shall be furnished after the person is brought to the

police station after his arrest and entries are made in the diary about his arrest. ... The power given to the police officer under this section, in our view, to a large extent is inconsistent with the provisions of Part III of the Constitution."

The aforesaid observation as regards the abusive exercise of power by the police, in our view, enunciates the legal position correctly.

In this case detainees were arrested under section 54 of the Code and they were remanded to the judicial custody. Now the vital question is, whether the Magistrate has power to pass an order of remand of a person arrested under section 54 of the Code either to the police or in the judicial custody without the registration of any case and also Without production of the entries in the diary relating to the case or whether the registration of a case is *sine-qua-non* for a Magistrate authorising the detention of the accused in such custody as he thinks fit and that whether that person should be assimilated to the characteristic of an accused of an offence against whom a Magistrate can pass an order under section 167 of the Code. If a Magistrate passes an order under section 167 of the Code on the basis of a police forwarding report, was it sufficient compliance of the constitutional direction contained in Article 33 of the Constitution? If a case is registered against the person arrested and a follow-up investigation is initiated or if an investigation has emanated qua the accusation levelled against him, the Magistrate can exercise his judicial discretion conferred on him under section 167(2) in making appropriate order authorising the person under judicial custody or under police custody, in case he is not inclined, to admit him to bail.

Section 167 of the Code requires the police officer who apprehends the person to forward him to the nearest Magistrate, if the investigation could not be completed within the period of twenty-four hours fixed by section 61 and if there are grounds for believing that the accusation or information is well founded with a report to such Magistrate. Section 167 reads.

"167. (1) Whenever investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police-station shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary

hereinafter prescribed relating to the case, and shall at the same time forwards the accused to such Magistrate."

"(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days on the whole. If he has not jurisdiction to try the case or send it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction."

.....

Section 167 of the Code is aimed at affording procedural safeguard to a person arrested by the police. This section provides a provision that the accused person shall be forwarded to the Magistrate with a copy of the entries in the diary. This clearly indicates that the purpose of producing the accused before a Magistrate is to ensure that the arrest and the detention of the accused person is, at any rate, prima facie justified. Therefore, an obligation, the law placed on the Police who will produce the person for an order of the Magistrate under section 167 of the Code. It is for the Magistrate to decide prima facie on certain materials placed before him, namely, the material contained in the diary relating to the case, whether or not the detention of the accused either by the police or in prison was necessary. In coming to the conclusion the Magistrate has to exercise his judicial mind and only when the Magistrate could and did apply that mind, it could be said that the order made by the Magistrate for the detention of the accused is a valid order.

Sub-section (2) of section 167 shows that the Magistrate to whom the accused person is forwarded can remand him to police custody or jail custody for a term not exceeding 15 days on the whole. Even the Magistrate who has jurisdiction to try the case cannot remand the accused to any custody beyond the period of 15 days. There is no other provision in the Code which in clear or express language confers this power of remand on the Magistrate beyond the period of 15 days, during the pendency of the investigation and before the taking of cognisance on the submission of police report under section 173 of the Code. The second stage of remand begins when the police cannot complete the investigation within 15 days. It is then that under section

344 of the Code, if the police apply to the Court to postpone the commencement of the proceeding, giving its reason for such prayer and the Court, after examining those reasons and stating its own reason, can adjourn the Proceedings till such time as the investigation is completed. From this, it would be clear that in the first stage under section 167 of the Code that is usually called remand of the police or in the prison. The second stage comes when the investigation is not completed within 15 days and more time is needed for collecting further evidence. The only limit on the exercise of the power of the remand under section 344 is that Court cannot give a remand for a term exceeding 15 days at a time.

Though section 344 of the Code falls in chapter XXIV of the Code dealing with general provisions as to "Inquiries And Trials" could be applied to a case which is at the stage of investigation and collection of evidence, for there is nothing therein that such provision is not applicable to cases in which the process of investigation is still going on. The explanation to section 344 makes it clear beyond doubt that the only provision under which the Magistrate can remand the accused in judicial custody if the investigation of the case could not be completed within 15 days. Explanation to section 344 reads as follows:

"Explanation-If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand."

The express language appears in subsection (1) in section 344 that if from the absence of the witness or any other reasonable cause (*underlined by me*), it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. The language used therein and the explanation given mentioned above clearly refer to the stage prior to the commencement of the inquiry for obtaining further evidence during investigation by securing remand. Further the custody, which it speaks of; is not in such custody as the Magistrate thinks fit as in section 167 of the Code but only in jail custody. Under this section a Magistrate can remand an accused person to custody for a term not exceeding 15 days at a time provided that sufficient evidence has been

collected to raise a suspicion that such an accused person may have committed an offence. Similar views are expressed in the case of *Gouri Shanker Jha vs State of Bihar*, AIR 1972 SC 711, the case of *SK Dey vs officer-in-charge Sukchi PS*, AIR 1974 SC 871 and the case of *Natobar Parida and others vs State of Urishaw*, AIR 1975 SC 1465.

Section 167 is one of the provisions falling under Chapter XIV of the Code under the heading "Information to the Police and their Powers to Investigate" commencing from the provisions falling under section 154 and ending under section 176. Though section 167 refers to the investigation by the police and the transmission of the case diary to the nearest Magistrate as prescribed by the Code, the main object is the production of the arrestee before a Magistrate within 24 hours as fixed by section 61 when the investigation cannot be completed within that period so that the Magistrate can take further action as contemplated under subsection (2) of section 167. After the deletion of Chapter XVIII by Ordinance No XLIX of 1978, we are of the view that necessary amendments should be made to sections 167, 344 and chapter XX of the Code in order to remove inconsistency. In India there is legislative change in this section 167 of the Code with the object to eliminate the chronic malady of protracted investigation. A time limit with a provision for extension under certain circumstances is fixed by adding a proviso to subsection (2). This proviso makes it obligatory to produce the accused before the Magistrate at the time of making remand. These changes are made with a view to affording protection to the accused against unnecessary harassment at the hands of the investigating agency.

The expressions "investigation" and "accusation or information is well founded" and "entries in the diary" are used in sub-section (1), section 167 of the Code. The word investigation is defined in section 4(1) of the Code, which is an inclusive definition as including all the proceedings under the Code for the collection of evidence conducted by a police officer or any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. The first and foremost consideration of the Magistrate is when an accused person is forwarded on arrest by police on suspicion he was required to see whether "the accusation or information" relating to the said accused is well founded or not. The Magistrate has to scrutinise the act of the police officer and see whether his act was proper and legal. This section is intended to prevent any possible abuse by the police officer of his power in trying to make discoveries of crime by means of wrongful confinement and not intended to protect the illegal act of the police

officer. The said expression "investigation" runs through the entire fabric of the Code. There are decisions explaining in detail what the word "investigation" means and is? In *HN Rashbud vs State of Delhi*, AIR 1955 SC 196, it has been held that under the Code, investigation consists generally:

"(1) Proceeding to the spot,

(2) Ascertainment of the facts and circumstances of the case.

(3) Discovery and arrest of the suspected offender,

(4) Collection of evidence relating to the commission of the offence, which may consist of (a) the examination of various persons (including the accused) and the reduction of their statement into writing, if the officer thinks fit (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and,

(5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under section 173."

Similar views are expressed in the case of *State of MP vs Mobarak Ali*, AIR 1959 SC 707 and *Directorate of Enforcement vs Deepak Mahajan*. AIR 1994 SC 1775.

In this connection, we may refer to certain observations in the case of *Abhinandan Jha vs Dinesh Mehra*, AIR 1968 SC 117 quoted with approval from the earlier decision.

"Investigation usually starts on the information relating to the commission of an offence given to an officer-in-charge of a police station and recorded under section 154 of the Code. If from information so received or otherwise, the officer-in-charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts

and circumstances of the case and if necessary to take measures, for the discovery and arrest of the offender. Thus investigation primarily consists in the ascertainment of the facts. By definition it includes all the proceedings under the Code for the collection of evidence conducted by the police officer."

According to *Hamlyn's Encyclopedic word dictionary (1972) page 836*, the word "investigation" is a systematic, minute and thorough attempt to learn the facts about some thing complex or hidden: it is often formal and official. A full fledged criminal case is a drama in three acts (i) information; (ii) investigation or inquiry and (iii) trial. The first act has two scenes- information or complaint. Section 154 of the Code prescribes the mode of recording the information received orally or in writing by an officer-in-charge of a police station in respect of a cognisable offence. Section 156 authorises such an officer to investigate it. This is the second scene. There are four different reports made by a police officer to a Magistrate, such as, (i) a preliminary report under section 157 (ii) a subordinate police officer's report under section 168 to the officer-in-charge of a police station (iii) the forwarding of the accused with a report to the Magistrate empowered to take cognisance if there is sufficient evidence or a reasonable ground to take cognisance of the offence, under section 170 and (iv) a final report under section 173.

This information under section 154 is one of the modes by which a person aggrieved may set the criminal law in motion. This information is the basis upon which the investigation is commenced. But the receipt of an information is not a condition precedent for investigation, inasmuch as, an officer in-charge of a police station can start investigation under section 157 either on "information" or "otherwise". The difference between sections 154 and 157 is that the information covered by the former section must be reduced to writing which is a condition precedent but in case of the later section, it is only that information which raises a reasonable suspicion of the commission of a cognisable offence within the jurisdiction of the police officer to whom it is given. Section 169 of the Code authorises a police officer to release a person from custody on his executing a bond to appear, if and when so required before a Magistrate in cases when, on investigation under chapter XIV of the Code it appears to the officer-in-charge of a police station or to the police officer making the investigation, that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the person to a

Magistrate. The terms of this section applies only to the case of an arrested person who has never been forwarded to a Magistrate.

Section 44 of the Police Act, 1861, lays down that "It shall be the duty of every officer-in-charge of a police station to keep a diary in such a form as shall, from time to time, be prescribed by the Government and to record therein all complaints and charges preferred, the names of persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of witnesses who shall have been examined". This diary is different from the one mentioned in section 172 of the Code. Where the police officer makes a false entry in the diary regarding any incident, it is an offence punishable under section 177 of the Penal Code. His duty is to record "all complaints" and "names of the complainants" in the diary.

The "diary" contemplated under section 172 of the Code and Police Regulations has really two parts, (1) relating to the steps taken during investigation by the police officer with particular reference to the time at which the police received information, the time at which the police officer began and closed the investigation, the place or places visited by him and (ii) the statement or the circumstances ascertained by the police officer through the investigation.

Edge, CJ in *Mannu 19 All 390* expressed the object of the 'case diaries' under this section.

"The early stages of investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the police and until the honesty, the capacity, the discretion and judgment of the police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or the judge before whom the case is placed for investigation or for trial should have the means ascertain what was the information, true, false or misleading, which was obtained from day to day by the police officer who was investigating the case and what were the lines of investigation upon which the police officer acted." Same views were expressed in 16 CWN 145.

Regulation 263 of Police Regulations, chapter 1 speaks of case diary, which is in the verbatim language of section 172 of the Code. It is said that the police officer is bound by law to keep record of the proceedings in connection with the investigation of each case, (a) the time at which the information was reported to him, (b) the time at which he has closed his investigation, (c) the place or places visited by him and (d) a statement of the circumstances ascertained through his investigation. Nothing, which does not fall under the above heads, need be entered. It has been instructed that the diary shall mention every clue obtained and every step taken by the investigating officer. As regards house searches and arrest, particulars shall be noted in the diary. The diary shall contain full and unabridged statements of persons examined by the police officer so as to give the Magistrate on perusal of the said diary a satisfactory and complete source of information which would enable him to decide whether or not the accused should be detained in such custody as he thinks fit. This clearly indicates the purpose of production of an accused before a Magistrate to ensure that the arrest without warrant and the detention of the accused is at any rate prima facie justified.

From a combined reading of sections 54, 60, 61, 157, 167, 169 and 172 of the Code, it becomes clear that the police officer on examination of the person arrested on suspicion for commission of a cognisable offence, finds that there is no sufficient evidence or reasonable ground of suspicion to justify the sending up of accused to the Magistrate releases him taking a bond from him with or without sureties for his appearance before a Magistrate empowered to act on a police report under section 170 of the Code. If, however, the police officer forwards an accused with a report before a Magistrate, the Magistrate shall determine, as he thinks fit, either to take no further steps or to take cognisance of the offence under section 190 (b) of the Code. If the police officer without order of a Magistrate, arrests a person and prays for remanding the arrestee such person has the constitutional right under Article 33 to consult a legal practitioner concerning his arrest. It is also clear that the arrested person has the constitutional right to be defended by a legal practitioner. Section 340 of the Code also provides that any person accused of any offence before any criminal Court may, as of right, be defended by a pleader. But, against what is he to be defended if the causes for such arrest are not reduced into writing? The word 'defended' clearly includes the exercise of the right so long as the effect

of the arrest continues. Therefore, the registration of the case is *sine-qua-non* before making an order under section 167 of the Code by the Magistrate.

In the case of *Dr Mohiuddin Khan Alamgir vs Slate*, 7 BLC 249, it was observed that (a) after deletion of the expressions "under this chapter" in sub-section (1) of section 167, the scope of subsection (1) in the exercise of powers by Magistrates has been "rendered much more wider"; (b) the expression "investigation" in section 4(1) is not confined to judicial proceeding, (c) whenever an investigation in respect of a person arrested under section 54 CrPC cannot be completed within twenty-four hours, the Magistrate can make an order for further investigation, (d) section 167 contemplates a remand during investigation of a case, while section 344 contemplates remand after initiation of the proceedings in the Court and (e) the Magistrate gives complete freedom to remand the accused to whatever custody he thinks who has even been arrested in pursuance of a General Diary Entry. These observations are made while disposing of a motion summarily without consideration of the relevant provisions of law as discussed above and, as such, the said decision is *per-incuriam*. We would only like to point out here that the expressions "under this chapter" in sub-section (1) of section 167 have been deleted by Act XVIII of 1923, following the decisions reported in 8 CWN 779, 13 CrLJ 65, 23 IC 496, 18 CrLJ 403, in which cases, some persons had been arrested by the police on the basis of warrants issued by the Magistrates under sections 107 and 112 of the Code and they were taken in judicial custody. The arrest had been made prior to the said amendment and the arrestees had challenged the authority of the Magistrates in remanding them in the judicial custody under section 167 in view of the expressions "under this Chapter" used in the section. The High Court quashed the orders of remand holding that the Magistrate had no power to remand the arrestees under section 167 of the Code.

In this case the police officer apprehended the detainees under section 54 of the Code and they were taken in the judicial custody and on the following day they were communicated with the orders of preventive detention. This has become a practice developed now-a-days. The Magistrates should not accede to the request of the police officers and they should not make themselves subservient to the police officer. In our view, this sort of exercise of abuse of power by the police officers can be checked to a great extent if the Magistrates are conscious of their statutory responsibility of doing justice in accordance with law. As observed above, an arrest of

a person under section 54 of the Code can only be made by a police officer under the circumstances specified therein without an order of a Magistrate. Whereas, an order of detention is made if the authority 'satisfied' that the detainee has acted or is acting or is about to act in prejudicial activities within the meaning of "prejudicial act" under the Special Powers Act. This 'satisfaction' as referred to is that of the authority and its satisfaction cannot be replaced by that of a police officer. This 'satisfaction' of the authority is subject to judicial review and this Court can look into this subjective satisfaction of the authority objectively. In respect of these detainees, the authority made the orders of detention, the moment the police officer made proposal for detention after arrest under section 54 of the Code. This shows that the report of the police officer replaced the "satisfaction" of the authority in making an order of detention. Therefore, it is beyond the scheme of the detention law that an order of detention can be made in respect of a person on the basis of a report of the police officer after he was arrested under section 54 of the Code.

In the case of *Mokbul Hossain vs Government of Bangladesh and others*, 54 DLR 118 Md Hamdul Haque, J speaking for the Division Bench observed: "In any case, we cannot accept the argument of Mr Islam that the arrest was made only with a view to detaining him under section 3(2) of the Special Powers Act. We are, further of the view that after arresting a person under section 54 of the Code of Criminal Procedure, there is no bar that the same person cannot be detained under "preventive detention." However, in a subsequent decision of another Division Bench presided over by the said Judge on the said point in the case of *BLAST*, different views were expressed which appear to be in conformity with the law than the views expressed in the case of *Mokbul Hossain*. In the case of *BLAST* said Bench opined: "So, there is no doubt in our mind that a police officer cannot arrest a person under section 54 of the Code with a view to detaining him under section 3 of the Special Powers Act, 1974. Such arrest is neither lawful nor permissible under section 54."

Mr M Amirul Islam has taken us to the order sheet of the cases and submits that at no point of time the detainees were produced in Court when the prayers for remanding in custody showing, them arrested in different cases were made. They were totally denied of their right to consult and be defended by a legal practitioner of their choice. He contends that the actions of the police seeking remand in custody of the detainees showing them arrested in different cases

are nothing but devices to detain the detainees with mala fide intention of mala fide object to frustrate the orders of this Court directing for release of the detainees from the orders of detention which are contrary to the fundamental rights guaranteed in Part 111 of the Constitution. He further contends that such repeated exercise of abusive power amounts to subjecting the liberty of the individual to a never-ending game of "snakes and ladders" which cannot satisfy the test of procedural and substantive rule of law nor the "due process". He further contends that the orders of the Chief Metropolitan Magistrate allowing the prayers for showing the detainees arrested in all cases are not only mechanical but also colourable exercise of power which are liable to be quashed.

The learned Additional Attorney-General, on the other hand, submits that the police officer has inalienable right to apprehend a person under section 54 of the Code if such person has been concerned in any cognisable offence. He further contends that if his complicity in any case is detected in course of the investigation of the case the investigating officer has the power to implicate him in that case, which has been done in respect of these detainees, whose complicity have been revealed in course of investigations made by the investigating officers and accordingly, they were shown arrested in accordance with law. He further contends that the learned Magistrate having satisfied that the detainees have complicity in those cases, allowed the prayers in exercise of powers under section 167 of the Code, which cannot be said to be illegal nor unlawful. He further contends that section 167 of the Code enjoins a Magistrate to make orders on the basis of the prayers made by the investigating, officers and in support of his contention; he has referred a decision in the case of *Aftabur Rahman @ Jongi vs State*, 45 DLR 593.

From the order-sheet of the cases, we have noticed that detainees were not produced in Court when they were shown arrested in those cases. They were shown arrested in their absence merely on the basis of prayers made by the police officers without producing any papers in support of their complicity in those cases. The Magistrate passed order relying upon the forwarding reports stating that their complicity in those are being collected. There is no dispute that the learned Magistrate made those orders under section 167 of the Code and he authorised the detention of the detainees in the judicial custody in those cases. Such remand order should be made in presence of the accused in view of the expression "forwarded" used in

sub-section (2) of section 167 of the Code. References in the connection may be made to the cases of *Aftabur Rahman @ Jongi vs State*, 45 DLR 593, *Khandkar Mustaque Ahmed vs Bangladesh*, 34 DLR (AD) 222, *Lakshmanrao vs Judicial Magistrate, 1st Class. Parivati Puram*, AIR 1978 SC 186. *Gouri Shankar Jira (Supra)* and *Natbor Parida and others (Supra)*. Under section 344 of the Code the Magistrate can make such order of remand in the absence of the accused and this can be done if the accused is seriously ill that the trial has to be adjourned and he cannot be produced in Court or in other circumstances to which it was impossible to expect the production of the accused in Court, the Magistrate may extend the order of remand of the accused without producing him in Court and such order will not be invalid. Reference in this connection may be made to the case of *Raj Naravan vs Superintendent of Central Jail*, AIR 1971 SC 178, the case of *Lakshmanrao* and the case of *SK Dey*. In the case of *SK Dey (supra)* it was observed:

"Orders of remand ought not to be passed mechanically and even though this Court has ruled that the non-production of' the accused will not vitiate an order of remand, the Magistrate, passing an order of remand, ought, as far as possible, to see that the accused is produced in the Court when the order of' remand is passed."

In the case of' *Gouri Sharrkar Jha* it was observed:

"The object of the section is two-fold, one that the law does not favour detention in police custody except in special cases and that also for reasons to be stated by the Magistrate in writing, and secondly, to enable such a person to make a representation before a Magistrate. In cases falling, under section 167, a Magistrate undoubtedly call order custody for a period at the most of 15 days in the whole and such custody can be either police or jail custody. Section 344, on the other hand, appears in Chapter XXIV, which deals with inquiries and trials. Further, the custody which it speaks of is not such custody as the magistrate thinks fit as in section 167 but only jail custody, the object being that once on inquiry or a trial begins it is not exceeding 15 days at a time provided that sufficient evidence has been collected to raise a suspicion that such an accused person may have committed an offence and it appears likely that further evidence may be obtained by granting a remand."

In respect of an accused person who has been shown arrested in a case while in custody on the prayer of the police officer, a Magistrate does not assume jurisdiction to pass such an order unless the accused is produced before him. In the case of *Aftabur Rahman @ Jongi*, this Court observed that the whole purpose of production of the accused is to make the accused aware of the charge levelled against him, the place, the period, the purpose of remand and to see the physical condition of the accused. Once it is shown that the arrest of the accused is illegal, it was necessary for the State to establish that at the time of remand the Magistrate directed the judicial remand of the accused after applying his mind to all relevant matters. Mr Md Fazlul Karim, J in the above reported case observed:

"Under section 167 CrPC an accused is to be forwarded to the Magistrate whether he is in police custody or in jail custody and any deviation against this clear intention is likely to create an impression that the Magistrate has made himself subservient to the police in utter disregard to the determination of the question of liberty of the citizens."

In *Khandker Mustaque Ahmed's* case, the Appellate Division observed:

"The requirement of the law is that the accused must be produced before a Magistrate after his arrest but the appellant was not produced before any Magistrate. Section 167 of the Code of Criminal Procedure was holding the field and the Regulation 2(a) was promulgated on 28-12-1976, that is after a month. Section 167 CrPC required the production of the accused before a Magistrate whether he has jurisdiction to try the case or not. This was to check any highhandedness in the executive and as Khandker Mushtaque Ahmed was not produced before any such Magistrate, the circumstance adds to the dimension of the contention that the arrest and subsequent proceeding was mala fide."

In this particular case, we find that the Magistrate merely passed mechanical orders, which do not conform to minimum requirements of law. The orders of remand are not such as would cure the constitutional infirmities. The consistent views of the Supreme Court of India,

our Appellate Division and the High Court Division are that before making an order of remand either to the police custody or in the judicial custody, the accused must be produced before the Magistrate and unless the Magistrate is satisfied, the orders should be made judicially on examination of the entries in the case diary. The underlying principle is that every person is entitled to be informed as to what the state commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards. The facts of the given case lead us to believe that the Magistracy should be free from actual or apparent interference or dependence upon the executive arm of Government. The independence of judiciary is the only solution to check this sort of abuse and in our view the *Masdar Hossain's case* should be implemented without any further delay. Section 54 is a powerful weapon in the hands of police officers empowering them to arrest a person without a warrant and they always transgress their jurisdiction. Section 167 should be read as supplementary to those contained in section 61 of the Code and this provision is intended for the protection of the accused against unnecessary harassment.

From the record we have noticed that the cases, in which the detainees were shown arrested had been instituted prior to their arrest and the investigation of those cases started long before their arrest. The investigating officers did not find complicity of the detainees till 27-3-2002, on which date, they were shown arrested in the first case. Thereafter they were shown arrested in successive cases one after another. The orders show that the learned Magistrate had performed routine works and he made orders without satisfying as to the complicity of the detainees in those cases and also without affording them any opportunity to know the accusations made against them. The Magistrate has concomitant responsibility to check the abuse of power exercised by the law enforcing agencies. We would like to reiterate the views consistently held by this Court that those who feel called upon to deprive other persons of liberty in the discharge of what they conceive to be their duty must, strictly and scrupulously, observe the forms and rules of law. Whenever that is not done, the detainees would be entitled to a Writ of *Habeas Corpus* directing their release. We find that the detainees were detained improperly, unjustly and without sanction of law. Similarly, the orders of the learned Chief Metropolitan Magistrate are arbitrary, mala fide and without jurisdiction. The manner, in which

the detainees have been implicated in those cases are deprecatory and cannot be countenanced. Accordingly, in exercise of *suo moto* powers under section 439 of the Code, we are inclined to interfere with those orders.

The protection of the citizens from abuse in the exercise of power by the law enforcing agencies is a matter of deep concern in a democratic society. It is even committed in the police lock-up. In the case of *DK Basu vs State of WB, AIR 1997 SC 610*, the Supreme Court of India directed all the States' Governments and the police authorities to follow some requirements in all cases of arrest or detention to check police abusive power till legal provisions are made in that behalf as preventive measures. In the similar line of directives given in the case of *DK Basu* and *Joginder Kumar* as quoted above, Md Hamidul Haque, J, in the case of *BLAST* has given some directives for compliance till the proposed recommended amendments of the relevant sections of the Code are made for the purpose of safeguarding the liberty and fundamental rights of the citizens. In the case of *DK Basu*, the directions were given in accordance with sections 41, 42, 43, 46, 49, 50, 53, 54, 56 and 57 of the Code of Criminal Procedure, as re codified in 1973 and Articles 21 and 22 of the Constitution. Sections 50, 53 and 54 are new provisions inserted in the Code providing the person arrested to be informed the grounds of arrest and of his right of bail and the examination of the arrestee by a medical practitioner at the request of the police officer and the arrested person. These provisions are made in conformity with the provisions of Article 22(2) of the Constitution and as per recommendations of the Law Commission of India. Sections 41, 42, 43, 46, 49, 56 and 57 as re codified closely followed sections 23, 24, 27, 15, 19, 25 and 28 respectively of the Malaysian Criminal Procedure Code. There is no corresponding section in our Code similar to sections 50, 53 and 54 of the Indian Code.

The old order has changed yielding place to new, and we must have new need for the new hour. Our procedural law is more than a century old, this piece of legislation has stood the test of time and it is felt that necessary amendments are required to be introduced to this law to bring it in line with India and Malaysia. We are told that amendments to sections 54 and 167 of the Code are under implementation as per recommendation of the Law Commission. Before such change is made, the Legislature should consider whether a new section similar to section 50 of the Indian Code might be inserted which will bring the law in conformity with the

provisions of Article 33(1) of the Constitution. This change in the provisions of the Code is necessary to remove anomalies and ambiguities, brought to light by the extensive amendments of, 1978. We cannot direct the Government to make necessary amendments of the relevant provisions of the Code without declaring the relevant provisions of the Code as unconstitutional. The provisions of the Code are applicable in this country over a century and after lapse of decades, it would be improper if we declare those provisions as unconstitutional without having a comprehensive revision of the entire Code.

In the case of *Narmada Bachao Andolan vs Union of India*, AIR 2000 SC 3751, similar views are expressed. The said views are approved in a recent case, *BALCO Employees Union (Reed) vs Union of India*. 2001 AIR SCW 5135. In the earlier case it was observed:

"While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is in our constitutional framework a fairly clear demarcation of powers. The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction. At the same time, in exercise of its enormous power the Court should not be called upon to undertake governmental duties or functions. The Courts cannot run the Government nor can the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the Constitution casts on it a great obligation as the sentinel to defend the values of the Constitution and the rights of Indians. The Courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court would not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words, the Court itself is not above the law."

This is why in the case of *Secretary, Ministry of Finance vs Masdar Hossain* 52 DLR (AD) 82, the Appellate Division declared the creation of BCS (judicial) cadre along with other BCS executive and administrative cadres by Bangladesh Civil Service (Reorganisation) Order 1980

with amendment of 1986 is *ultra vires* the Constitution." Accordingly, it was directed, among others, that "either by legislation or by framing Rules under Article 115 or by executive order having the force of Rules a judicial Services Commission be established forthwith with majority of members from senior judiciary...."

In the light of the above discussion, we are of the view that if the Magistrates perform their responsibilities within their judicially permissible limit the abuse of police power can be checked to a great extent. The Magistrates are required to see whether any unnecessary harassment is committed to the accused but unfortunately, sometimes they forget their responsibilities. It is the duty of the Magistrate to ensure that the right and the guarantee of a citizen under section 167 of the Code and Article 33 of the Constitution are not rendered illusory and meaningless. There are decisions on the point but the Magistrate ignores them. In order to overcome this eventuality and to check the abuses, we are of the view that some binding guidelines should be given to the law enforcing agencies and the Magistrates. In the case of *BLAST* some directions were given in this regard but, in our view, some further directions are required to be given for protecting liberty of the citizens from police excesses as noticed in these rules.

Therefore, in accordance with sections 54, 60, 61 and 167 of the Code and Article 33 of the Constitution, we give the following guidelines to be followed in all cases of arrest. We hope that these guidelines would eliminate harassment of citizens to a great extent. In the light of the above views, the following guidelines are issued:

- (i) The police officer making the arrest of any person shall prepare a memorandum of arrest immediately after the arrest and such officer shall obtain the signature of the arrestee with the date and time of arrest in the said memorandum.
- (ii) The police officer who arrested the person must intimate to a nearest relative of the arrestee and in the absence of the relative, to a friend to be suggested by the arrestee, as soon as practicable but not later than 6(six) hours of such arrest notifying the time and place of arrest and the place of custody.

(iii) An entry must be made in the diary as to the ground of arrest and name of the person who informed the police to arrest the person or made the complaint along with his address and shall also disclose the names and particulars of the relative or the friend, as the case may be, to whom information is given about the arrest and the particulars of the police officer in whose custody the arrestee is staying.

(iv) Copies of all the documents including the memorandum of arrest, a copy of the information or complaint relating to the commission of cognisable offence and a copy of the entries in the diary should be sent to the Magistrate at the time of production of the arrestee for making the order of the Magistrate under section 167 of the Code.

(v) If the arrested person is taken on police remand, he must be produced before the Magistrate after the expiry of the period of such remand and in no case he shall be sent to the judicial custody after the period of such remand without producing him before the Magistrate.

(vi) Registration of a case against the arrested person is *sine-qua-non* for seeking the detention of the arrestee either to the police custody or in the judicial custody under section 167(2) of the Code.

(vii) If a person is produced before a Magistrate with a prayer for his detention in any custody, without producing a copy of the entries in the diary as per item No (iv) above, the Magistrate shall release him in accordance with section 169 of the Code on taking a bond from him.

(viii) If a police officer seeks an arrested person to be shown arrested in a particular case who is already in custody, the Magistrate shall not allow such prayer unless the accused/arrestee is produced before him with a copy of the entries in the diary relating to such case.

(ix) On the fulfilments of the above conditions, if the investigation of the case cannot be concluded within 15 days of the detention of the accused under section 167(2), the Magistrate having jurisdiction to take cognisance of the case or with the prior permission of the Judge or Tribunal having such power can send such accused person on remand under section 344 of the Code for a term not exceeding 15 days at a time.

(x) The Magistrate shall not make an order of detention of a person in the judicial custody if the police forwarding report discloses that the arrest has been made for the purpose of putting the arrestee in the preventive detention

(xi) It shall be the duty of the Magistrate, before whom the accused person is produced, to satisfy that these requirements have been complied with before making any order relating to such accused under section 167 of the Code.

The requirement Nos (i), (ii), (iii), (iv), (v) and (vi) be forwarded to the Secretary, Ministry of Home Affairs and it shall be his obligation to circulate and get the same notified to every police station for compliance within 3 months from date. The requirements No (v), (vii), (viii), (ix), (x) and (xi) be forwarded to all Chief Metropolitan Magistrates and District Magistrates and it shall be their obligation to circulate the same to every Metropolitan Magistrate and the Magistrates who are authorised to take cognisance of offence for compliance within 3(three) months from date. The Registrar, Supreme Court of Bangladesh is directed to circulate the requirements as per direction made above. It is hoped that these requirements would curb the abusive power of the police and harassment of citizens to be apprehended by the police. If the police officers and the Magistrates fail to comply with above requirements, within the prescribed time as fixed herein, they would be rendered liable to be punished for contempt of Court, if any application is made by the aggrieved person in this Court. The police officers and the Magistrates shall follow the requirements strictly so that no citizen is harassed nor his fundamental right guaranteed in part III of the Constitution at any event is curtailed.

In the result, these Rules are made absolute with the above observations. The orders dated 27-3-2002 in GR Case No. 343 of 2002 arising out of Ramna PS Case No. 26 dated 7-2-2002, the order dated 4-4-2002 in GR Case No. 2889 of 2001 arising out of Dhanmondi PS Case No. 71 dated 29-11-2001, the order dated 4-4-2002 in GR Case No. 57 of 2002 arising out of Ramna PS Case No. 57 dated 16-1-2002, the order dated 6-7-2002 in GR Case No. 762 of 2002 arising out of Demra PS Case No. 76 dated 22-2-2002, the order dated 7-8-2002 in GR Case No. 708 of 2002 arising out of Mohammadpur PS Case No. 38 dated 12-2-2002 and the order dated 13-8-2002 in GR Case No. 4730 of 2001 arising out of Tejgaon PS Case No. 98 dated 28-12-2001 are hereby set aside. The detenus are released of their bail bonds.

SK Sinha.

Sharifuddin Chaklader J

I agree.

Sharifuddin Chaklader