



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/CRIMINAL APPEAL NO. 1509 of 2003
With
R/CRIMINAL APPEAL NO. 1195 of 2003**

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE GITA GOPI

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Approved for Reporting	Yes	No
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CRIMINAL APPEAL NO.1509/03

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STATE OF GUJARAT

Versus

SHABBIRHUSEIN SHEKHADAM KHANDVAWALA & ORS.

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Appearance in CR.A 1509/03:

MS JYOTI BHATT, APP for the Appellant(s) No. 1

MR JAL UNWALA, SENIOR ADVOCATE assisted by MR NANDISH H THACKAR (7008) for the Respondent(s) No. 1

ABATED for the Respondent(s) No. 3,4

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CRIMINAL APPEAL NO.1195/03

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SHABBIRHUSEIN SHEKHADAM KHANDVAWALA & ORS.

Versus

STATE OF GUJARAT

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Appearance in CR.A 1195/03:

MR JAL UNWALA, SENIOR ADVOCATE assisted by MR NANDISH H THACKAR (7008) for the Appellant(s) No. 1

ABATED for the Appellant(s) No. 2,3

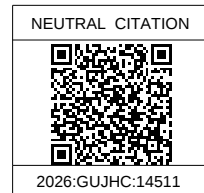
MS JYOTI BHATT, APP for the Respondent(s) No. 1

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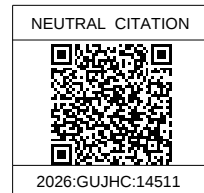
CORAM:HONOURABLE MS. JUSTICE GITA GOPI

Date : 24/02/2026

COMMON ORAL JUDGMENT



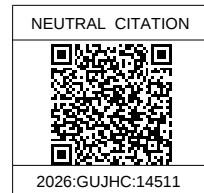
1. Criminal Appeal no.1195 of 2003 had been filed by the appellants – original accused, whereby the challenge is to the judgment and order of conviction and sentence dated 30.09.2003 passed by the learned Additional Sessions Judge, 5th Fast Track Court, Junagadh in Sessions Case no.76 of 1982. The accused persons were charged under Sections 331, 336, 337, 344, 346, 348, 352, 356, 365 read with Sections 34 and 114 of the Indian Penal Code, 1860 (hereinafter referred to as “IPC” for short) for voluntarily causing grievous hurt to the complainant with a view to extort confession and for causing hurt by endangering life and personal liberty of the complainant and for wrongful confinement at Porbandar Police Station and for use of criminal force etc.
 - 1.1 Accused no.2 – Shri P.A. Raol had died during the course of the trial proceedings and therefore, the case was abated against him.
 - 1.2 Appellant – accused no.1 – S.S. Khandwawala was sentenced to undergo five years rigorous imprisonment



with fine of Rs.2,000/- and in default of payment of fine, to further undergo rigorous imprisonment of two months for the offence punishable under Section 365 of the IPC.

1.3 Accused no.1 – S.S. Khandwawala, accused no.3 – Bhupatsinh Devubha Vaghela and accused no.4 – Rampalsingh Hardansinh Pawar were sentenced to undergo one year rigorous imprisonment with fine of Rs.1,000/- and in default of payment of fine, to further undergo simple imprisonment of one month for the offence punishable under Section 348 of IPC and were sentenced to undergo one month simple imprisonment for the offence punishable under Section 352 of IPC and further were also sentenced to undergo five years rigorous imprisonment with fine of Rs.2,000/- and in default of payment of fine, to further undergo rigorous imprisonment of two months for the offence punishable under Section 331 of IPC.

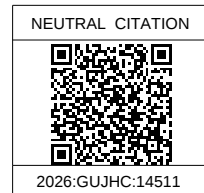
1.4 The substantive sentences for each accused were ordered to run concurrently.



1.5 During the pendency of the appeal, the names of the accused no.3 – Bhupatsinh Devubha Vaghela and the accused no.4 – Rampalsingh Hardansinh Pawar were ordered to be deleted from the cause title, since deceased, thus, the appeal stood abated against them by order dated 26.03.2025. Likewise, in the State appeal, their names were deleted as respondents. Hence, now the matter would be considered only for accused no.1 – S.S. Khandwawala who came to be convicted under Sections 365, 348, 352 and 331 of the IPC.

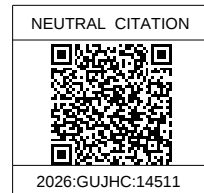
1.6 Criminal Appeal no. 1509 of 2003 under Section 377 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") has been filed by the State praying for enhancement of the sentence passed in the judgment and order of conviction and sentence dated 30.09.2003.

1.7 Criminal Revision Application no.615 of 2003 was filed by the original complainant as petitioner under Section 397 and 401 of the Cr.P.C. for enhancement of the sentence. By order dated 20.07.2009, the Criminal Revision Application stood disposed of, by observing that the

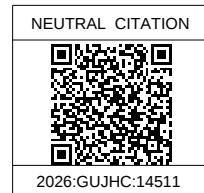


State of Gujarat has preferred the appeal and no fruitful purpose would be served in keeping the Revision Application pending.

2. The brief facts of the prosecution case is that on 07.10.1976 at about 04.00 p.m. at Village Sutrej, Taluka Keshod, the complainant house was searched and thereafter was taken at Porbandar Police Station. On 08.10.1976 at about 08.00 a.m., the complainant – Merag Haja was allegedly beaten by accused and other 4-5 persons and the complainant had become unconscious. It is alleged that the complainant had sustained fracture of left leg femur. It is stated that the proceedings commenced on 02.11.1976 being Inquiry Case no.2 of 1976 registered as a private complaint against the accused named therein. It is alleged that the house of the complainant was searched for possession of unauthorised weapons on 07.10.1976. The search was made by DSP – Shri Jani, PSI – Shri Upadhyaya and some other police personnel. Nil panchnama was drawn. At that time, one Rabari Bhikha Deva was present at the



house of the complainant. It is alleged that the appellant no.1 had come in a police vehicle and told the complainant to deliver the weapon. The complainant is said to have told the accused no.1 that he was having one 12 Bore gun, for which, he had a valid licence and he had deposited it in the month of July, 1976 at Keshod Police Station and that he was not in possession of any illegal weapon. It is further alleged that the complainant was called upon to sit in the police van and thereafter, other houses at Village Khirsara and Sarsali were searched and the complainant was thereafter asked to sit in the SRP Van, the SRP personnel along with the accused no.1 is said to have taken possession of the complainant and the said Bhikha Deva who was also arrested from the house of the complainant and having reached Porbandar Police Station at about 11.30 p.m. Bhikha Deva and the complainant were allegedly confined at Porbandar Police Station. It is the case of the complainant that on the next day at about 08.00 a.m., accused no.1 and other accused came to the police station and asked the complainant to hand over the



weapon. The complainant denied and thereafter, the complainant alleged that he was beaten and that he had become unconscious and that he had suffered fracture of left leg femur. The complainant was under lock up, who requested that he should be sent to the hospital and further requested for arrangement of an easy chair at the cost of the complainant, which was accordingly provided as per the say of the complainant.

- 2.1 Moreover, it is stated that on 08.10.1976, a Vaidhya was called for the treatment of the complainant in the lock up and at about 06.00 p.m. Shri Bhargav, a Police Officer along with Porbandar Civil Surgeon – Shri Vora came to visit the complainant and moved the complainant to Bhavsingji Hospital, Porbandar at about 09.00 p.m. where he remained indoor patient upto 10.10.1976. Thereafter, the complainant was instructed to go to Jamnagar for the treatment of his leg fracture and on 14.10.1976 was released on bail. The complainant remained in hospital until 23.10.1976. Thereafter, he was under treatment of Dr. Sarvaiya from 25.10.1976 to



29.11.1976 and was referred to Jashlok Hospital at Bombay for further treatment.

2.2 On 02.11.1976, the complainant on stretcher came to the Court and his statement on oath below the complaint came to be recorded and the matter was sent for inquiry under Section 202 of the Code of Criminal Procedure, 1973. It is alleged there has been a chequered sequence of petitions being filed against the complainant. Thereafter, on 14.12.1981, cognizance came to be taken and on 16.09.1982, matter came to be registered as Sessions Case no. 76 of 1982.

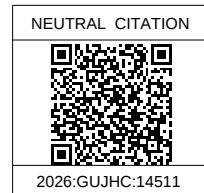
3. Heard learned Senior Advocate Mr. Jal Unwala assisted by learned advocate Mr. Nandish Thackar for the accused and Ms. Jyoti Bhatt, learned APP for the State.

4. Learned Senior Advocate Mr. Unwala for the accused has submitted that the charge against the appellants, all being police officers, was of kidnapping the complainant and keeping in illegal confinement and during the said period, the accused persons have been alleged to have beaten the complainant causing grave injuries for the



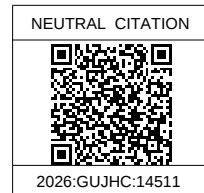
purpose of extorting confession out of the complainant. Learned Senior Advocate Mr. Unwala submitted that the evidence on record proves that the allegations are totally false, frivolous and concocted.

- 4.1 Learned Senior Advocate Mr. Unwala has submitted that the prosecution has examined PW1 – Bhupen Kanakshankar Vora at Exh.103, Doctor at Bhavsinhji and MR Hospital, Porbandar. The said witness had deposed relying upon a refer note dated 11.10.1976 that the complainant was referred to a Irvin Hospital, Jamnagar, as there was a fracture on the femur bone of the left leg of the complainant. Learned Senior Advocate Mr. Unwala stated that the said witness did not have any medical papers and it was further established during the cross examination that in the situation of the medico-legal cases, it was necessary to inform the police station, which the witness failed to do so. Learned Senior Advocate Mr. Unwala has also submitted that it was further established in the further cross examination that even if a person falls from a height of 10 to 15 ft., such



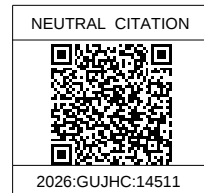
injuries are possible. According to Mr. Unwala, no history of custodial torture had been given by the complainant to this witness. No Doctor had certified it as medico-legal case. Mr. Unwala contended that the injury could have been sustained while trying to run away from the police custody, which eventuality could not be ruled out in the background of the facts and circumstances of the case.

4.2 Learned Senior Advocate Mr. Unwala while referring to the evidence of PW2 – Vipin Mohanlal Shah at Exh.105, Orthopedic Surgeon at Irvin Hospital, Jamnagar, has submitted that the said witness, relying upon the certificate at Exh. 106, had given his testimony but had failed to give evidence of alleged torture, the said witness stated that the complainant was admitted on 08.11.1976 and was discharged on 24.11.1976, it was established during the cross-examination that the said witness does not remember as to what treatment was given to the complainant, as the said witness did not have any medical papers of the complainant. Learned Senior Advocate Mr. Unwala has also submitted that it



was further established that normally in situation of medico-legal cases, it is to be reported to the police station, however, whether it is done in the present case or not, has not been certainly told by the witness.

4.3 Referring to PW3 – Digvijaysinh Sajjansinh Sarvaiya at Exh.117, Doctor at Bhagwat Hospital, Keshod, Learned Senior Advocate Mr. Unwala has further submitted that the said witness, relying upon the medical certificate issued by him, had deposed that the said witness had treated the complainant from 25.10.1976 to 08.11.1976. Learned Senior Advocate Mr. Unwala submitted that the said witness has not produced a single document, wherein any history was recorded and on asking the same during the cross-examination, the said witness stated that he had the medical papers, however, the same were not produced. Learned Senior Advocate Mr. Unwala has submitted that the Trial Court had summoned the said witness and re-examined on the point of the said medical papers; inspite of that, the said witness had informed that the said medical papers were



not traceable.

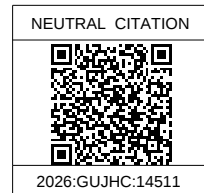
4.4 Learned Senior Advocate Mr. Unwala thus submitted that it becomes clear that the prosecution has failed to establish the nature of injuries, the cause of injuries and treatment given to the complainant at the relevant point of time. Learned Senior Advocate Mr. Unwala has further submitted that none of the said witnesses have produced any medical papers to support the version of the complainant.

4.5 Learned Senior Advocate Mr. Unwala contended that the prosecution had recorded the evidence of PW5 – Samatbhai Devabhai Ranavaya at Exh.136, advocate of the complainant, who had deposed that he had prepared and file the bail application on behalf of the complainant which was granted by the concerned Court, and during the cross-examination, the said witness has stated that the offence, in which, the complainant was arrested, was under the Arms Act, which was registered by the Porbandar Police and the charge-sheet was also filed against the complainant. Thus, learned Senior Advocate



Mr. Unwala has submitted that it becomes clear from the deposition of the said witness that the complainant was lawfully arrested for the offence under the Arms Act and therefore, there would not be any question of kidnapping or illegal confinement by the appellants. Learned Senior Advocate Mr. Unwala has submitted that when the said witness met the complainant in the hospital, there was no information given by the complainant with regard to the injuries allegedly caused by the appellants and therefore, the entire version given by the complainant is nothing but an afterthought and falsehood.

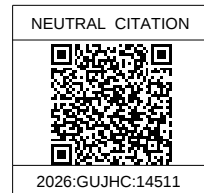
- 4.6 It was the contention of learned Senior Advocate that the complainant, in his deposition, has narrated a completely concocted version. Learned Senior Advocate Mr. Unwala has further submitted that as per the complainant, on the date of incident along with the complainant, one Bhikha Deva was present at the residence of the complainant, and PW7 and another police officer had visited the house of the complainant for a search, and at the end of the search, they could not find anything and



therefore, they had left drawing NIL Panchnama and after that, the complainant alleges that the appellants along with other officers had visited the complainant and asked him about carrying any illegal weapon.

4.7 Learned Senior Advocate Mr. Unwala has submitted that considering the deposition, cross-examination of the complainant along with other medical evidences, it becomes clear that the complainant has created a false version of confinement, only with a view to save himself from the offence under the Arms Act. Learned Senior Advocate Mr. Unwala has further submitted that the offence under the Arms Act was registered against the complainant, and the beating alleged by the complainant is not corroborated with the injuries reported on record.

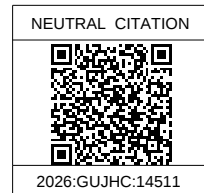
4.8 Learned Senior Advocate Mr. Unwala's submission was that the best witnesses to the incident could have been one Bhikha Deva and Jusab Habib. Since Bhikha Deva had passed away, Jusab Habib could have been examined by the prosecution to know the true facts, since all the three were in the same room of the Police



Station as per the complainant.

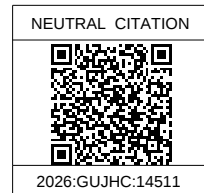
4.9 Learned Senior Advocate Mr. Unwala contended that the Trial Court failed to appreciate weekly diary produced on record at Exh.162 of accused no.1, which records the details, which clearly negates the version of the complainant. The relevant part as relied upon is reproduced hereinbelow for the ready reference of this Hon'ble Court:-

"Left Mangrol at 7:00 hrs and reached Khirasara at 8-00 hrs. Attached one double barrel tamancha country-made from Rabari Bhikha Deva and he was arrested at 9:50 hrs. Left Khirasara at 10-00 hrs. and reached Sutrej at 10-15 hrs. Attached one revolver and five cartridges from Merag Haja. He was arrested at 12:00 hrs. As per the information received carried out, a raid on the residence of Sindhi Jusub Habib and seized one country-made ML Gun. (Keshod PS. CR No.II 93/76-u/s. 25-1(a). Left Khirasara at 15:15 hrs. and reached Zariyavada at 1500 hrs. and searched the house of Lohar Jaga. He was brought to Porbandar for interrogation. Left Zariyavada at 15:00 hrs. and reached Porbandar as per DSP's instructions at 1900 hrs. and reached Mangrol at 2100 hrs. Total Kms. 268."



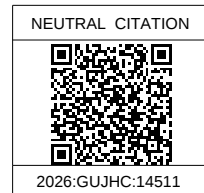
4.10 Learned Senior Advocate Mr. Unwala hence contended that the alleged incident, as per the case of the prosecution, had occurred on 07.10.1976 and the complainant had approached the learned Magistrate only on 02.11.1976. Learned Senior Advocate Mr. Unwala, thus, contended that the said delay clearly goes to show that the complainant was filed as an afterthought, with a view to protect himself from the offence under the Arms Act and/or for other ulterior motive best known to the complainant.

4.11 In totality of the facts and circumstances, it was contended by learned Senior Advocate Mr. Unwala that the prosecution has clearly failed to establish the case beyond reasonable doubt, and submitted that the version of the complainant is not supported by either the medical evidence or by the advocate of the complainant. Learned Senior Advocate Mr. Unwala's contention was that the deposition of the complainant is not reliable as there is no corroboration from any other evidences, which are placed on record.



4.12 Learned Senior Advocate Mr. Unwala has submitted that the appellants have in fact substantiated the defence by bringing on record the corroborative evidence, which goes on to show that the appellants were only doing their duties as there was a high profile murder case to be investigated in the said area and therefore, the appellants had conducted raids with a view to seize illegal weapons and lodge the complaints against such miscreants. Learned Senior Advocate Mr. Unwala has, stated that there was no kidnapping or illegal confinement of the complainant in view of the legal arrest for the offence under the Arms Act, nor the injuries as alleged are corroborated by supporting medical evidences. Senior Advocate Mr. Unwala has, therefore, submitted that the judgment and order of conviction and sentence deserves to be quashed and set aside and the appellants may be acquitted from all charges.

5. Per contra, Ms. Jyoti Bhatt, learned APP for the State, while opposing the order of sentence, pressed for

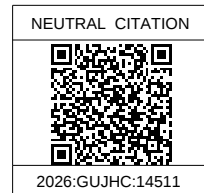


enhancement of the sentence, and submitted that the learned Judge ought to have imposed the maximum sentence, as the victim has suffered a lot and that he became unconscious on account of beating and has suffered fracture of left leg femur. Learned APP submitted that on account of inhuman act of the accused, the victim has become lame forever and therefore, maximum sentence of ten years ought to have been imposed on the accused and that the amount of fine should also be increased substantially so that out of the said amount of fine, the Court could pass appropriate order for compensation to the victim. Learned APP further submitted that the learned Trial Court Judge ought to have appreciated that the accused is a high-ranking police officer who ought not to have acted mercilessly while inflicting blows on the victim knowing well the law of the land. Learned APP further submitted that considering Sections 331, 348, 352 and 365 of IPC, the learned Trial Court Judge ought to have imposed maximum sentence to the accused persons. On the aforesaid grounds, Ms. Bhatt, learned APP submitted that



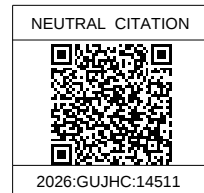
the sentence imposed by the learned Trial Court Judge is inadequate and deserves to be enhanced, in the interest of justice.

5.1 Ms. Jyoti Bhatt, learned APP submitted that the appellants preferred application for protection under Section 197, which came to be dismissed on 10.05.1983. Being aggrieved, Revision Application no. 894 of 1983 came to be preferred before this Court, which came to be withdrawn. The accused moved the Sessions Court with an application for discharge at Exh.18 and the same was dismissed, against which, Criminal Revision Application no. 223 of 2001 came to be filed. It is stated that Criminal Misc. application no. 3661 of 2000 had also been preferred seeking necessary direction to hear Exh.18 on merits. The accused also preferred Criminal Revision Application no. 568 of 2001, which came to be dismissed by this Court on 29.07.2000, against which, Special Leave Petition no. 3533 of 2002 came to be preferred before the Hon'ble Supreme Court and the same was withdrawn on 13.08.2002.



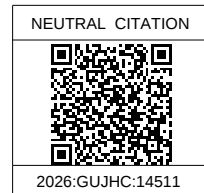
5.2 Learned APP Ms. Bhatt has submitted that to support the charge, the prosecution relied on the evidence of PW1 to PW3, who were Doctors, PW4 - the complainant, PW5, who is the advocate of the complainant and other documentary evidences in the nature of medical case papers.

5.3 Learned APP Ms. Bhatt submitted that even when the complainant had denied of having any illegal weapons, the complainant was taken in the police jeep along with Bhikha Deva, and was made to sit in the jeep, the complainant was taken in police custody and was beaten on hands, back and legs so much so that the complainant had become unconscious. Learned APP Ms. Bhatt has submitted that upon complaint of the complainant, the Vaidhya was called to examine the complainant, however, as the Vaidhya could not treat the complainant, the complainant was taken to the Civil Hospital by the police personnel, which itself proves the police torture in the custody.

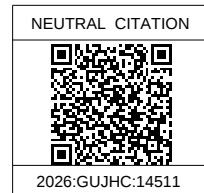


5.4 Ms. Bhatt, learned APP had placed reliance on the decision of this Court in the case of **Bhavsing Chhaganbhai Bilval, Police Sub-Inspector since deceased through his legal heirs v. State of Gujarat, 2025 (0) AIJEL-HC 251301** and submitted that the case of illegal detention and torture for extorting confession was proved by examining witnesses who have given evidence of physical injuries suffered by the complainant in police custody. Learned APP Ms. Bhatt stated that the learned Trial Court Judge has given consistent reasons with the analysis of evidence, however, the sentence is not proportionate to the gravity of offence and hence, urged for enhancing the sentence to set down an example and to have deterrent effect on the police persons.

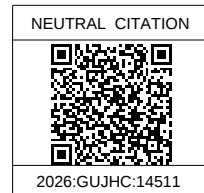
6. The proceedings and the dates, prior to the trial between the parties, would be required to be noted. On 28.10.1976, the complainant – Merag Haja had filed the private complaint before the JMFC, Keshod through his lawyer against the accused persons for the offences punishable under Sections 331, 336, 337, 334, 346, 348,



352, 255, 265, 34 and 114 of the IPC. On 02.11.1976, Merag Haja was brought to the Court on stretcher for recording of his statement on oath. On 12.04.1979, the order under Section 203 Cr.P.C. was passed stopping the inquiry on the ground of want of jurisdiction noting that the complainant was beaten at Porbandar Police Station. So, Criminal Revision Application no.21 of 1979 was preferred by the complainant – Merag Haja and the learned Sessions Judge was pleased to remand the matter back to JMFC, Keshod for further inquiry. The learned JMFC, Keshod conducted the inquiry and dismissed the complaint under Section 203 of the Cr.P.C. Against the order of dismissal, the complainant preferred a Revision Application before the Sessions Court, Junagadh, which came to be allowed and the Magistrate was directed to conduct further inquiry. On 14.12.1981, the learned Magistrate took cognizance of the case and on 16.09.1982, the case was committed to Sessions Court numbered as 76 of 1982.



- 6.1 On 10.05.1983, the accused preferred an application for protection under Section 197 of Cr.P.C., which was dismissed by the learned Sessions Judge, Junagadh. Against the order of dismissal, the accused preferred Special Criminal Application no. 894 of 1983 before this High Court, which came to be withdrawn. Thereafter, accused moved application Exh.18 for discharge before the learned Sessions Judge, which was dismissed. Aggrieved by the order, the accused filed Criminal Misc. Application no.3661 of 2000, High Court remanded back directing the Sessions Court to hear the matter afresh on merits. On 07.05.2000, the learned Sessions Court dismissed the application EXh.18 on merits. Thereafter, the accused approached the High Court by filing Criminal Revision Application no. 568 of 2001, which came to be dismissed. Against that order of dismissal, the accused filed SLP (Cri) no.3533 of 2002 before the Hon'ble Supreme Court and it was dismissed as withdrawn.
7. In this background of the matter, having heard learned Senior Advocate Mr. Unwala for the accused and Ms.



Bhatt, learned APP for the State, perused the record and proceedings and the testimony of the prosecution and the Defence Witnesses.

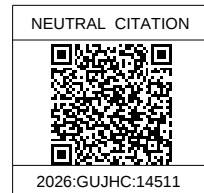
8. The injured complainant, as a witness, was examined as PW4 at Exh.134. The deposition of the complainant – Merag Haja was recorded on 02.01.2003 before the Court of 6th Fast Track Judge, Junagadh. At the time of giving the deposition, he was aged about 73 years and referred himself as retired person, resident of Sutrej, Junagadh. According to his evidence, the incident had occurred on 07.10.1976. On the day of the incident, he was at his home and along with him was his labourer – Bhikha Deva, who he stated died 15 years ago. The police had come to his house, the police was Deputy Superintendent of Police – Shri Jani (PW7) and Shri Upadhyay. They started making search of his house for weapons. Along with them, were SRP personnel. They came and told him that his house was to be searched and therefore, he asked for the reason and informed them that he was not having weapons without licence. PW4 stated that those people started searching his house, but



they had no warrant for the search. He, respecting the law, allowed them to search his house. He had in total eight houses, which included compound wall and fence. After three hours of search, NIL Panchnama was drawn. The witness stated that nothing could be found from his house. In the NIL Panchnama, the panchas were Bavaji Keshavdas Jamnadas and another Arvind @ Bhupendra Naranbhai Joshi of Khirsara.

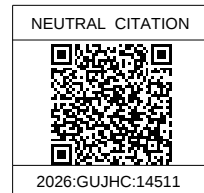
8.1 The complainant witness – PW4 further stated that in the evening at about 7 O’Clock, one SRP man came with the bottle of liquor at his house, and since no weapon was found from his house, SRP man told Shri Jani (PW7) to show that liquor bottle in the Panchnama. Shri Jani stated that he would do no wrong and therefore, Shri Jani and Shri Upadhyay went away drawing NIL Panchnama.

8.2 PW4 – complainant then further stated that the vehicles were on the road and Shri Khandwawala (A-1) came down from the vehicle near the road adjoining his house. Shri Khandwawala (A-1) asked him to give the weapon,

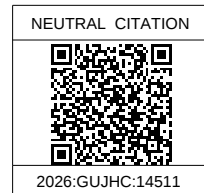


so the complainant replied that he had no weapon. He further informed Shri Khandwawala (A-1) that he had one country-made licence Joto (Pistol), and three months prior, he had already deposited the same to the police. According to the witness, Shri Khandwawala (A-1) replied that if he would not give the weapons, then, they would beat him, so he replied that he had no weapon and if they wanted to beat him, they could do so. Thereafter, Shri Khandwawala (A-1) made him sit in his vehicle. From there at the outskirts of Village Khirsara, a search was made in a field, then, the search was in Sarsali Village and from there, the vehicle stopped at Antroli crossing, where from, one road was heading towards Mangrol and another towards Porbandar. At that place, Shri Khandwawala (A-1) made him and Bhikhabhai sit in the SRP vehicle, while Shri Khandwawala, on his own, headed towards Mangrol and he was taken to Porbandar and at 11:30 p.m., they were kept in police custody.

8.3 According to the testimony of PW4 in the morning at about 8 O'Clock, Shri Khandwawala (A-1) came there



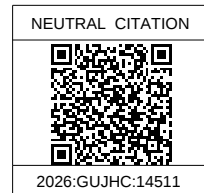
and asked him to give the weapon. He replied that he had no weapon. The witness stated that accused no.1 told that he was to be beaten. Thereafter, the complainant's both hands were held at a distance and he was beaten severely. He was beaten on the hand, waist and back. Thereafter, he was made to lie down and both his legs were broadened and with the heels of the shoes, his legs were crushed and both the legs were heavily rolled with the stick. Thereafter, he was made to stand outside in the Osri, where below both his hands, keeping a stick, with the rope, both his upper arm were tied and the rope was pulled up on the ceiling from a hole and he was dropped down. Thereafter, he got unconscious. According to the witness, the incident had occurred at Porbandar Police Chowky. The person who had beaten him were Shri Khandwawala (A-1), another Shri Raol, third Shri Waghela and Shri Rampal and other persons whom he could identify, but does not remember the name. He stated that apart from these four persons, there were another about 4-5 persons. The witness identified Shri Khandwawala (A-1), Shri Waghela and



Shri Rampal as accused in the Court, while Shri Raol was recorded as dead.

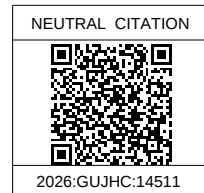
8.4 The incident, which the complainant witness stated, was of 07.10.1976. Initially, PW7 – Shri Jani and Shri Upadhyay had come to his house for the search of weapon. It appears that a team had come, while Shri Khandwawala (A-1) was sitting in the vehicle outside the house and Shri Jani and Shri Upadhyay along with SRP team were making the search. The houses of the complainant in total were eight in number. According to him, NIL Panchnama was drawn. The search was for about three hours. According to the witness, an attempt was made at about 7 O’Clock in the evening by one SRP personnel to show a liquor bottle, as seized from his house, while Shri Jani (PW7) denied to do anything wrong.

9. The prosecution had examined Shri Prataprai Laljibhai Jani (PW7) at Exh.139, the officer who had come for the search. According to his deposition, he served lastly as an Inspector General, Rajkot. In October, 1976, he was



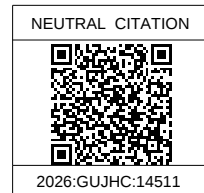
having his duty as Divisional Police Officer, Nadiad. The police stated that during the time of this incident, there was murder of the President of the Nagarpalika of Porbandar – Dhanjibhai Kotiyawala and he was ordered to investigate and therefore, he had come from Nadiad to Porbandar on 04.10.1976. He reported to the Range DIG and started his investigation.

9.1 PW7 stated that on 07.10.1976, along with the Police Sub-Inspector – Kanakbhai Upadhyay of Keshod, he started from Porbandar to Mangrol and had made a raid under prohibition at Village Khirsara and Sutrej. At Village Sutrej, they searched the house of Merag Haja (complainant) from 16:45 to 20:00 hrs., and drew a Panchnama, but since no objectionable thing was found, he drew NIL Panchnama. The Panchas were Bavaji driver and one another person from Village Sutrej and the second Panch was from Khirsara. He stated that almost about three hours, he searched the house of Merag Haja. According to the witness, he had conducted the legal search, as per his duty. The witness also stated that



Police Sub-Inspector – Kanakbhai Upadhyay was no more and that he was deceased. After completing the Panchnama, he went to Porbandar. The witness, in the deposition, clarified that during this period, no incident had occurred, nor any other person had come there, nor it has so occurred of anyone saying anything. The witness stated that he had not taken Merag Haja, and Merag Haja had voluntarily allowed the search and had raised no objection.

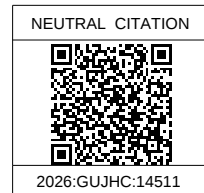
- 9.2 From the evidence of this witness, it transpires that he was ordered for the investigation in connection with the murder of the President of the Municipality – Dhanjibhai Kotiyawala. The witness had not clarified as to why he had to go for a search at the house of Merag Haja (complainant) under the Prohibition Act when he was investigating the murder. Whether Merag Haja was a suspect in the murder and what was the reason for the search in the house under Prohibition Act, does not become clear from the evidence of this police witness. This police witness had not produced any documentary



evidence regarding the order, which he had received in connection with the murder, nor had he produced any connecting evidence to show that the search, which he had made on 07.10.1976 at the house of the complainant, was legal. The only question was asked in the cross-examination to the witness by the advocate of the accused no.1, to which, the police witness affirmed that on 07.10.1976, after drawing the Panchnama, when he left for Porbandar at 8 O'Clock night, at that time, Merag Haja was present at his house.

10. As per the deposition of PW4 – complainant, when PW7 – Shri Jani along with Shri Upadhyay had come to his house for search, the search was for the weapon, while PW7 – Shri Pratapray Laljibhai Jani stated that it was the search under the prohibition raid, while Shri Jani was ordered for investigating the murder of Municipality President – Shri Dhanjibhai Kotiyawala. How the three aspect got interconnected, does not become clear in the testimony of PW7 – Shri Jani.

10.1 The evidence of the complainant – Merag Haja (PW4)

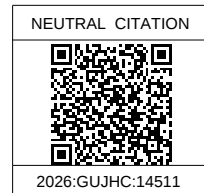


discloses the fact that he was not alone. He was along with Bhikha Deva and in the cross-examination, presence of one Jusab Habib has also been brought by the defence whose farm was in the outskirts of Village Khirsara. All the three i.e. Merag Haja, Bhikha Deva and Jusab Habib were made to sit in the SRP vehicle at Antroli crossing. At the time of the search, which was conducted throughout the houses of the complainant to the house of Jusab Habib, it also comes on record that the farm of Sarpanch–Premdas was also searched. PW7 has not disclosed any fact about all the search made at different places. It does not become clear as to why PW7 had shown the raid at the house of the complainant on 07.10.1976 under prohibition. PW7 stated that he had along with the PSI – Kanak Upadhyay had raided Village Khirsara and Village Sutrej under prohibition. The person who was found from Khirsara was Jusab Habib and even the house of the Sarpanch – Premdas Narandas, resident of Sarsali was raided, while PW7 had nothing to say about this raid at Village Khirsara and Village Sarsali. Was this police witness Shri Jani trying to hide some

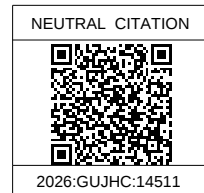


facts camouflaging the search for the murder? According to the complainant, the search, which was made by Shri Jani in his house was for weapons, while Shri Jani (PW7) stated that it was under prohibition. PW7 has not clarified about Shri Khandwawala (A-1) and his team present there at the house of Merag Haja. The persons, who were investigated for the weapons, were Merag Haja, Bhikha Deva, Jusab Habib and Premdas Narandas. Bhikha Deva, Jusab Habib and Merag Haja all the three were together in the SRP vehicle. The presence of SRP at all these places becomes clear, who according to the complainant SRP team was with PW7.

10.2 The complainant, in his deposition, further stated that after the police torture, as described by him, Bhikha Deva had informed him that he was brought in a room and after bringing him down was made to sleep in the room. There was fan running and further they were fanning him. He became conscious after two hours. The police thereafter informed Shri Khandwawala (A-1) that Merag Haja got conscious and therefore, Shri

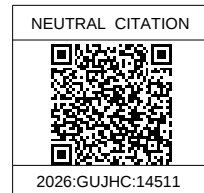


Khandwawala (A-1) came near him and asked him to stand up, at that time, he informed that he was not knowing as to what was happening to his hands, legs and body and that he was in excessive pain. He had asked for water. After giving him water, Shri Khandwawala (A-1) went away. The witness – PW4 stated that he was lying down there. Before that, he had informed Shri Khandwawala (A-1) that he was not in a position to sit or sleep and because of excessive pain, he asked for relaxing chair. So Shri Khandwawala (A-1) told him that if he had money, he could buy it and therefore, the witness gave Rs.52/- for the purchase of chair. According to him, Bhikha Deva and SRP man picked him up and made him lie on the relaxing chair. The witness stated that his left leg got separated and was broken. Shri Khandwawala (A-1) again came back at 05.00 p.m., at that time, along with him was Shri Raol (A-2) and he had asked those officers to send him to the Hospital. The witness stated that Shri Raol threatened him that he was not to be sent to the hospital, but to Sabarmati jail. After they left, CID Inspector – Shri Sharma came and asked



him 'as to what it was'. Therefore, he informed him and thereafter, he told him that he would try to send him to the Hospital and in the evening, Deputy Bhargav and Civil Surgeon of Porbandar had come there.

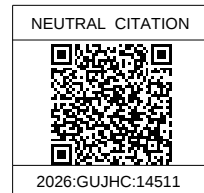
11. The prosecution has not examined CID Inspector – Shri Sharma as witness. According to the complainant, Civil Surgeon, Porbandar Shri Vora had visited him with Deputy Bhargav. Civil Surgeon – Shri Vora was examined as PW1. The evidence of the complainant was that he was beaten on the hands, back, waist. His legs were crushed by the shoes as well as stick. He was hanged up at the ceiling and was dropped down. The evidence of the complainant states that after informing – Shri Sharma in the evening, Civil Surgeon, Vora of Porbandar had visited him with Deputy Bhargav, which could be 08.10.1976. The witness further stated that after examining him, they conversed in English, which he could not understand and thereafter, one local Vaidhya was called who informed that the case was serious and therefore, during the night approximately about 9 to 9.30 hrs., he was taken in an



Ambulance or police car to Bhavsingji Hospital, Porbandar.

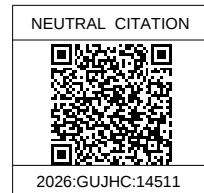
11.1 Dr. Bhupen Kanakshankar Vora – PW1, in the year 1976, was serving as a Civil Surgeon at Bhavsingji and M.R. Hospital, Porbandar. In the deposition, he stated that he has no information as to which patient had come to him in October, 1976. Since he received the summons, he went to the Hospital to procure the papers, however, the Civil Hospital told him that no information was available. The witness Doctor had not inquired the reason for non-availability of the papers and stated that the Civil Surgeon too had not informed him and he had not taken any written report for that purpose from them.

11.2 He was shown Mark 1/2 – Inquiry no.2/76. He had examined the original victim on that day and he referred to the certificate of 1976 dated 11.10.1976, where the certificate showed the name of Merag Haja, aged about 46, with the femur bone fracture of left leg and he had referred him to Orthopedic Surgeon at Irvin Hospital, Jamnagar. The witness identified his signature on the



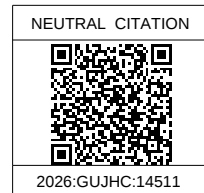
certificate, which was produced in the evidence at Exh.104, referred as inward no. 1/E/Refer/5/4993/76 dated 11.10.1976.

11.3 The witness – Dr. Vora, Civil Surgeon was the person who had visited the complainant along with Deputy Bhargav in the custody of the police. According to the complainant, Civil Surgeon Vora and Deputy Bhargav talked in English, which he could not understand and thereafter, a local Vaidhya was called who considered it as a serious case and thereafter, at 9.00 to 9.30, he was sent to Bhavsinh Hospital, Porbandar, where he stayed for two days. PW1–Shri Vora was a Civil Surgeon at Bhavsing Hospital. This Doctor had not stated during the trial as to what he had medically observed with regard to the complainant in the police custody. Though the complaint was of beatings on the hands, waist and back, both the hands were tied and the rope was pulled up to the ceiling and from there, he was dropped down nothing about any injury on hand wrist, waist, back were reported. Whether the complainant had made any such



complaint before PW1, at that relevant time, when PW1 visited the complainant in the police custody, has not come on record. The sequence of the incident would record that PW1 – Dr. Vora visited the complainant on 08.10.1976, but the certificate, which he refers is of 11.10.1976 and being a Civil Surgeon, he had referred him to Irvin Hospital. The Doctor has no knowledge as to how many days, Merag Haja was an indoor patient in his hospital, while Merag Haja stated that he stayed for about two days in Bhavsing Hospital.

11.4 Dr. Vora further clarified that since records were not available, he could not say whether the patient had come on his own or with the police yadi. Dr. Vora, in his deposition, stated that the fracture on the thigh could occur by falling down or by direct beatings. He also stated that such kind of injury is possible even if the person is beaten by hard and blunt substance and when the person is dropped down hanging from the height of 15 ft., such kind of injuries are possible, explaining that if a person is raised to a roof and released, then, can



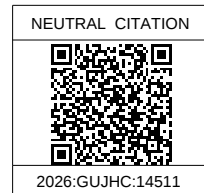
sustain such injury if a person is forcefully dropped down. The Doctor further stated that if the person is tied up at the wrist of both the hands and thereafter, raised to a roof and suddenly, the end of the rope is released, then, such injuries are possible. The Doctor also stated that he does not remember as to what treatment he had given, since long time had passed.

11.5 In the cross-examination, the Doctor affirmed that in the document Exh.104, no reference has been made of the name of the Village of Merag Haja. The Doctor affirmed that he could not identify a person, named, Merag Haja on the day of the deposition. The Doctor also affirmed that if a person is beaten by hard and blunt substance and if a person is raised upto a roof and forcefully thrown down, then, it becomes a medico-legal case. The Doctor also affirmed that if there is a medico-legal case, then, they have to inform the nearest Police Station; while denied the suggestion that even in a medico-legal case whenever the patient is referred for further treatment, at that time, a slip has to be appended referring to the

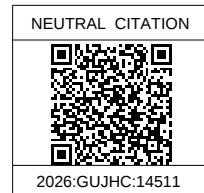


injuries. The Doctor affirmed that if a person falls down from the stairs at the height of 10-15 ft. or his legs suddenly slips down, then, the injuries, as described in Exh.104, are possible. The Doctor also affirmed that he would have certainly written in Exh.104 of any serious injury to Merag Haja. The Doctor further stated that if a person is beaten with hard and blunt substance, then, there are possibilities of external injuries. The witness also stated that the injury, which he has shown in Exh.104 on the side of the neck with the hard and blunt substance, then, he has not to write about the external injury of the patient in the referred letter, but such reference would be in the case papers. The witness stated that he does not recollect whether in the present case, he had informed Porbandar City Police Station.

11.6 The witness, who had seen the complainant prior to his arrest, was Shri Jani (PW7), the officer who had raided the house of the complainant under the prohibition, and PW1–Dr. Bhupen Kanakshankar Vora who had seen the complainant in the police custody, where PW1–Dr.



Bhupen Kanakshankar Vora was called to examine him as a Civil Surgeon, Porbandar. Though PW1 had seen the complainant in the police custody inspite of that fact, PW1 has not stated of the injuries, which the injured complained, as beaten by the accused no.1 - Shri Khandwawala and rest of the accused. PW1–Dr. Bhupen Kanakshankar Vora had not given any description of the injuries, which the complainant stated that he had sustained by the atrocious act of the accused in the police custody. If the complainant is to be believed, then, PW1 has very surreptitiously not made any mention in his deposition of his visit in the police custody to examine the complainant – Merag Haja. The complainant stated that he was taken to the police custody on 07.10.1976. As per his allegation, he was beaten on 08.10.1976 and if the evidence of the complainant, as referred hereinabove, is analyzed, then, it was on 08.10.1976 that PW1 has visited the complainant in the police custody. Even if it is considered that PW1 was not the person who visited the complainant in the police custody, then, it was before him at the first, complainant was



brought for treatment, this witness PW1 does not record any history of police torture in the police custody. While the evidence of PW1 speaks of 11.10.1976, where he had only referred to left leg femur bone fracture. A local Vaidhya was also called and if that has been so, his name could have been found out from the entry made in the police station record. No such Vaidhya has been examined in the matter.

11.7 The complainant stated that after the Vaidhya informing that the case was serious, at about 9.00 to 9.30 p.m., he was taken to Bhavsing Hospital, Porbandar in Ambulance or police vehicle. If that fact has to be correlated to the evidence of PW1, then, PW1 – Dr. Vora, having examined the patient, should have recorded of any injuries on any other part of the body of the complainant, apart from left leg femur bone fracture.

11.8 It is not the case of the complainant that in the police custody, he was not given the service of Doctors or inspite of his complaint, he was not taken to the hospital, rather the facts suggest that accused no.1 – Shri



Khandwawala, on the insistence of the complainant, had also provided him the relaxing chair. On complainant's demanding water, it was provided to him and when he asked to take him to the hospital, PW1 was called for as a Civil Surgeon as well as a local Vaidhya also visited him and from there, in an Ambulance or in a police vehicle, he was taken to Bhavsing Hospital, Porbandar. This treatment by the police in the police custody does not show that the act of the police was inhuman. Along with Merag Haja, there were Bhikha Deva and Jusab Habib. Bhikha Deva and Jusab Habib have not made any complaint of police torture in custody to extort any confession. All the three were in the same room.

12. In the case of **D.K. Basu v. State of West Bengal**, with **Ashok K. Johri v. State of U.P., (1997) 1 SCC 416**, it was observed in Paragraph 28 as under:-

"Custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. The expression 'life or personal liberty' in Article 21 includes the right to live with human dignity and thus it would



also include within itself a guarantee against torture and assault by the State or its functionaries. The precious right guaranteed by Article 21 cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. It cannot be said that a citizen 'sheds off' his fundamental right to life the moment a policeman arrests him. Nor can it be said that the right to life of a citizen can be put in 'abeyance' on his arrest. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen. The Supreme Court as the custodian and protector of the fundamental and the basic human rights of the citizens cannot wish away the problem. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair".



Using any form of torture for extracting any kind of information would neither be “right nor just nor fair” and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated — indeed subjected to sustained and scientific interrogation — determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. The challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to “terrorism”. That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.”

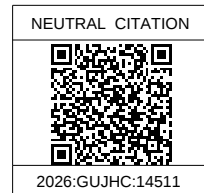


13. The examination of the evidence must be in regard to the facts and circumstances of the case. The primary burden is on the prosecution, which shifts on the accused, as being a police person to disprove the prosecution case. The complainant has to prove beyond all reasonable doubt and with evidence of certainty that the bodily injury was caused in custody of accused as police. The evidence of the complainant as PW4 further records that at Bhavsing Hospital, Porbandar, he stayed for two days. Thereafter, it was Sunday and on Monday in the newspaper, he read the news of police finding revolver from Merag Haja of Sutrej and a case was filed against him and therefore, he inquired about the lawyer, but he did not find any lawyer and thereafter, Punja Karshan of his Mer community of Kotda Village was called and the complainant informed him to search for a lawyer and he brought Vakil Samatbhai Ranavaya, examined as PW5 during the trial. The complainant stated that through him, he had filed bail application and thereafter, with the permission of the Court, he had gone for treatment at Jamnagar under police Bandobast and he was admitted



in V.M. Shah Hospital, where he was operated on 13.10.1976 for the fracture of his left leg. He was released on bail on 14.10.1976. From there, the police left him. The complainant stayed for 9-10 days at Jamnagar. He further stated that from Jamnagar Hospital, he had also made applications to I.G., Panch and five applications to various other places. From there, he came back to Keshod, where he took the treatment of Dr. Sarvaiya – PW3.

14. The evidence of advocate – Samatbhai Devatbhai Ranavaya (PW5) would be relevant to be noted at this stage, where he stated that he was practising at Porbandar Court in 1976 and he had filed bail application for Merag Haja of Sutrej, whom he was knowing. One of his acquaintance had taken him to the Hospital and he had received the signature of Merag Haja on the bail application as well as Vakalatnama. The bail application was under the Arms Act. PW5 – advocate stated that he had come to Bhavsing Hospital, Porbandar. The advocate does not recollect the date of the bail application, which



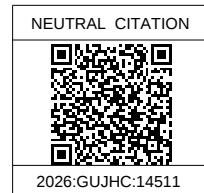
was moved before the learned JMFC. The advocate stated that the Court granted bail and also stated that some other application for treatment was also moved, but he does not recollect the same. He does not also recollect that prior to the signature on the bail application, whether any permission was granted on any application for treatment.

14.1 The advocate – PW5 stated that the bail application was decided four days after its filing and during that period, the applicant was in Bhavsing Hospital as an indoor patient and when the bail application was granted, he still was in Bhavsing Hospital. The advocate does not recollect whether after filing of the bail application, the complainant – Merag Haja was taken to any other place for treatment from Bhavsing Hospital. The advocate also clarified that he does not remember whether any permission was granted for the treatment of the complainant at Jamnagar, when he had filed the bail application. He also does not remember whether Merag Haja was at Jamnagar for treatment at the time of the



order on the bail application. The advocate stated that he had undertaken all the procedures for releasing him on bail. He does not recollect whether the personal bond of Merag Haja was taken at Jamnagar and the witness also does not recollect whether he was advocate of only Merag Haja. He was not having any record of the bail application and had not tried to make any efforts to procure the record from the Court after receiving the summons.

14.2 Here, the vital evidence would have been the bail application, which could have been crucial and relevant to decide whether the allegation made by the complainant of custodial torture was true. The advocate on record would certainly had informed the Judicial Magistrate First Class about the ill-treatment if at all by the police in the police custody. Further, the JMFC himself would have inquired from the accused of any ill treatment as within twenty-four hours of arrest, the accused is required to be produced before the concerned JMFC, as provided under Section 57 of the Code of



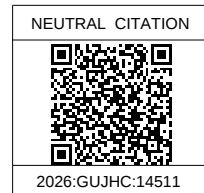
Criminal Procedure, 1973.

14.3 Section 54 of the Cr.P.C. gives the right to the arrested person on production before the Magistrate to make a request for examination by the Medical Practitioner. Section 54 of the Cr.P.C., as it stood at the relevant time, reads as under:-

"54. Examination of arrested person by medical practitioner at the request of the arrested person.—

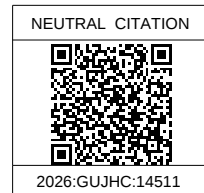
When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice."

14.4 The evidence of the advocate – Shri Ranavaya (PW5), thus, becomes relevant to know that no such application was made by the complainant as an accused under the



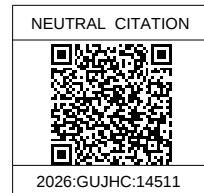
Arms Act before the Magistrate to get himself medically examined by the Medical Practitioner. Section 54 confers an important right on an arrested person. It is the right of an arrested person to have his medical examination done. Since the provision made is with an object that the examination of the accused's body would afford evidence, which will disprove the commission by him of any offence or which will establish the commission by any other person or any offence against his body.

14.5 Here, in this case, Advocate Shri Ranavaya appears to have not made any such application before the JMFC. A copy of the bail application had not been produced by the advocate, nor the bail order. In the cross-examination, the advocate had affirmed that he had got Merag Haja released on bail under the Arms Act, which was registered by Porbandar Police and charge-sheet was also filed for that offence. Thereafter, he was not the lawyer for Merag Haja. The advocate also stated that when he had filed the bail application, he had not seen the FIR and he does not recollect whether he had filed bail



application of other accused apart from Bhikha Deva in that matter.

15. The evidence of the complainant was that the police had, on his request, sent him to the Hospital by Ambulance or police vehicle when he was in custody for interrogation. If custodial torture would have been the case, then the accused would have exercised his right under Section 54 of Cr.P.C.
16. The evidence, as could be observed and analysed comparatively with the testimony of Shri Prataprai Lalji Jani (PW7) - the police, Samatbhai Devabhai Ranavaya (PW5) - advocate, Shri Bhupen Kanakshankar Vora (PW1) - Doctor with the evidence of the complainant- PW4. The incident alleged is of 07.10.1976 and on the next day, i.e. on 08.10.1976, the complainant alleges of police torture and on that day, at night at about 9.00 to 9.30 p.m., he was sent to the Bhavsing Hospital, Porbandar in an Ambulance or police vehicle. PW7 refers to the incident only of 07.10.1976, though the complainant states that PW1 - Doctor had seen him in



the police custody on 08.10.1976; however, the Doctor does not make mention of the said date while his evidence is for 11.10.1976, and the advocate – PW5 does not refer to any date, but states that the Vakalatnama and the bail application was signed by the complainant at Bhavsing Hospital, Porbandar, in which, PW1 was serving as a Civil Surgeon, so only on 11.10.1976 or thereafter, the complainant could have signed the bail application. According to the complainant, he was under police Bandobast while having the treatment at Jamnagar and thereafter, he was admitted in V.M. Shah Hospital and on 13.10.1976, he stated that he was operated for the fracture of the left leg, and on 14.10.1976, he was released on bail. At Jamnagar, he stayed for about 9-10 days. From there, he had gone to Keshod, where he took treatment from Dr. Sarvaiya who was examined as PW3. The provisions of Section 54 Cr.P.C. and Rule 14 of the Criminal Manual would certainly had been followed during the process of production of accused in connection with the arrest of the complainant.



17. Rule 14 as provided under Chapter-II under the heading
"Arrest and Investigation" of the Criminal Manual
provides as under:-

"14.(1) If any allegation of ill-treatment is made by a prisoner, the Magistrate shall then and there examine the prisoner's body, if the prisoner consents, to see if there are any marks of injuries as alleged and shall place on record the result of his examination. If the prisoner refuses to permit such examination, the refusal and the reason therefore shall be recorded. If the Magistrate finds that there is a reason to suspect that the allegation is well founded, he shall at once record the complaint and cause the prisoner to be examined by a Medical Officer, if possible, and shall make a report to the Sessions Judge, through the Chief Judicial Magistrate or to the Chief Metropolitan Magistrate, as the case may be. If he has no jurisdiction to hold a necessary inquiry himself or he is not empowered to take cognizance of the offence, he should forward the prisoner with the record to the Judicial Magistrate or the Metropolitan Magistrate having jurisdiction to hold the inquiry and empowered to take the cognizance of the offence.

(2) A Medical Officer, to whom a person in police custody is brought for examination, should examine the person or the prisoner, and even though no suspicious marks of injury are found, should at once report to the Magistrate authorising notice custody that he has done so.



(3) (i) Medical Officer in charge of jail must carefully examine the body of the every under-trial prisoner on the day of his arrival in jail, or at least on the day following.

(ii) Similarly, in the case of third class subsidiary jails, if there is a Sub-Assistant Surgeon or other Medical Officer in local charge of the place, every under-trial prisoner should be examined by him, if present at the station, within 24 hours of admission.

(iii) In the case of lockups and subsidiary jails at places where there is no Medical Officer, the Officer in charge in all suspicious cases should send under-trial prisoners in custody to the nearest Medical Officer for examination.

(4) In all such cases the Medical Officer should record the result of the examination.

(5) If any marks or symptoms at all indicative of recent violence or ill-treatment are found, the Medical Officer concerned should immediately make a report to the concerned Judicial Magistrate or the Metropolitan Magistrate and to the Sessions Judge or to the Chief Metropolitan Magistrate, as the case may be. The report should specify the nature of the injuries and their position, together with the opinion of the Medical Officer as to their causation, and should state whether the prisoner makes any allegations in regard to them against the Police or others responsible for his arrest or custody.

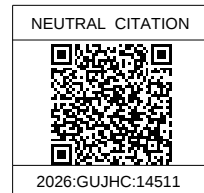
(6) If such allegations have been made,



the Sessions Judge or the Chief Metropolitan Magistrate, as the case may be, should arrange for an immediate Magisterial inquiry into the complaint through such Magistrate as he may deem most convenient, unless he is satisfied by the Magistrate's report under subparagraph (1) above, that adequate inquiry is proceeding.

(7) The result of the inquiry, so far as it ascertains the truth or falsehood of the allegations made, must be communicated as soon as possible to the Court seized of the substantive case. If it considers it desirable or necessary, the Court may summon the Medical Officer to give evidence in the case."

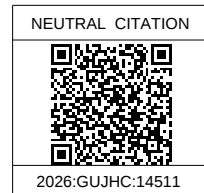
18. There is no such evidence on record of any complaint of custodial torture and injury before the concerned Magistrate, nor had the Magistrate sent the accused for medical examination. The witness – Vipin Mohanlal Shah (PW2) has given the evidence of the complainant – Merag Haja visiting him on 13.10.1976 as patient. The witness was running the Hospital at Jamnagar in the name of 'Orthopedic'. The witness stated that the patient had sustained fracture of the right side thigh, while the complainant stated that it was his left leg operation. PW2 could also state that there were bruises on the upper



part of the elbow of both hands and the patient was under treatment from 13.10.1976 to 23.10.1976, as indoor patient. He had given advise for rest.

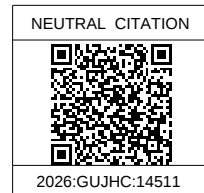
18.1 PW2 was referred to Mark 1/1 in his handwriting, which was produced in the Inquiry Case no.2/76; thus, was put in evidence at Exh.106. The Doctor stated that the injuries, as shown in Exh.106, could occur if any person is hanged down with the rope tied on the upper part of the hands and the fracture on the thigh was possible because of the fall. The Doctor also stated that if the person is beaten with hard and blunt substance, then, such injuries are also possible and if a person falls down from the top, then too, such injuries are possible. The Doctor further stated that if both the hands of any person is tied and is dragged up high and from there, the person falls down, the injury was possible. These are the possibilities the Doctor stated, but no such complaint was made by the patient to him.

18.2 The Doctor, apart from Exh.106, stated that he had no other record. The Doctor was referred to Mark 18/1 of



Inquiry Case no.2/76, which is the original document. Seeing the document, the Doctor stated that on 08.11.1976, Merag Haja was admitted in his Hospital for treatment and on 24.11.1976, he was discharged and he had advised for three months rest. The Doctor stated that again osteotomy operation was done and a plate was inserted and for that purpose, certificate Exh.107 in his handwriting was given. The witness was also shown Mark 102/3, which was in the handwriting of the receptionist of his Hospital about the operation charges dated 23.10.1976 produced in evidence at Exh.108. The prescription in his handwriting was placed in evidence at Exh.109. Exh.110 dated 09.11.1976 the Doctor referred as laboratory report from Bharat Laboratories with the signature of the Doctor, which was on his advise. The prescription Exh.111, in his handwriting, was also introduced in evidence during the trial.

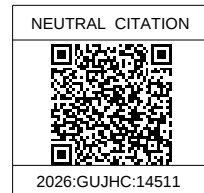
18.3 The documents in relation to second admission of patient in the Hospital, the Doctor referred the bill Exh.112 as charges. Exh.113 in the handwriting of the receptionist



as charge for the indoor patient of the Hospital. Exh.114– charge bill for the x-ray with the signature of the technician, Exh.115 was the consultation bill under the signature of the receptionist dated 24.11.1976 and Exh.116, the construction fee prepared by the receptionist. The Doctor stated that since it was the fracture on the thigh, there would be possibility of permanent disablement.

18.4 This Doctor was put to cross-examination, where he stated that in October, 1976, he was serving both at Irvin Hospital as well as had private hospital. The treatment of the complainant – Merag Haja was given in his private Hospital. The Doctor does not remember whether he had received any forwarding letter of this patient from Bhavsing Hospital, Porbandar. The Doctor also cannot say as to what treatment was given to Merag Haja at Irvin Hospital. Merag Haja had come to his Hospital for treatment, but the papers, which were prepared for his treatment, were not available with him.

18.5 The Doctor affirmed that if there was any medico-legal



case in his Hospital, then, the police would be informed. He could not say whether he had informed the Police Station for the medico-legal case of Merag Haja who had come for treatment in his Hospital.

18.6 The witness was shown the certificate at Exh.106 and the Doctor affirmed that the history of the patient does not reflect of any assault. The Doctor also affirmed that in the certificate Exh.106, the injuries were shown on both the hands. The colour of the injury has not been stated. Therefore, the Doctor stated that it could not be decided as to how old the injuries were. The Doctor also stated that in MLC cases, whenever the certificate is issued, they would write on the top as MLC and he affirmed that in this case, it has not been written so.

18.7 The evidence of Dr. Vipin Shah (PW2) does not refer to the case as medico-legal case. From 08.11.1976 to 24.11.1976, Dr. Shah stated that Merag Haja was in his Hospital. It appears that Merag Haja had immediately come to the Hospital of this witness after his treatment at Keshod from Bhagwat Hospital, where he was treated



from 25.10.1976 to 08.11.1976, where Dr. Digvijaysinh Sajjansinh Sarvaiya (PW3) stated that because of infection, Merag Haja was suffering from fever and therefore, he had advised him to come to the Hospital. It appears that the treatment with Dr. Sarvaiya was not fruitful and therefore, Dr. Sarvaiya had referred him to PW2 – Dr. V.M. Shah’s Hospital, Jamnagar.

19. PW3 – Dr. Digvijaysinh Sajjansinh Sarvaiya had a Hospital in Keshod, which was named as Bhagwat Hospital. Prior to the treatment on 25.10.1976, the Doctor had visited Merag Haja at his home at Sutrej. He had examined Merag Haja who was suffering from fever and as the treatment was not possible at home, he had advised him to be admitted in the Hospital. According to the Doctor, the fever was because of infection. So, on the next day, Merag Haja was admitted in his Hospital. The certificate Mark 5/1 in Inquiry no.2/76 was referred to affirm that Merag Haja was treated in his Hospital from 25.10.1976 to 08.11.1976 produced at Exh.118.

19.1 Till 08.11.1976, he was at the witness’s Hospital and



thereafter, was referred to Jamnagar to Dr. V.M. Shah – PW2. Dr. Sarvaiya stated that he too had gone along with Merag Haja to the Hospital. After discharge from Jamnagar Hospital, again Merag Haja came to him and then, he advised him to go to Jaslok Hospital, Bombay.

19.2 According to Dr. Sarvaiya, he got the information that Merag Haja was operated at Jaslok Hospital, Mark 18/2 was referred to the patient, which was report of Jaslok Hospital.

19.3 Dr. Sarvaiya stated that when Merag Haja had come to him for the treatment, at that time, Merag Haja had informed him that he was taken to Porbandar Police Station and had also informed him that he suffered injuries.

19.4 Dr. Sarvaiya stated that in the history before him, Merag Haja had informed that he was tied with rope and was smashed and thereafter, he was sent to Porbandar Civil Hospital. The Doctor was referred to 102/1 and 102/2, the prescriptions, which were in his handwriting placed in

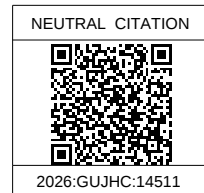


evidence at Pages-119 and 120. Even the document at Exh.121 was placed in evidence.

19.5 The Doctor stated that his testimony was recorded in Inquiry Case before Keshod Court and he had produced vide Mark 18/2, the certificate from Jaslok Hospital.

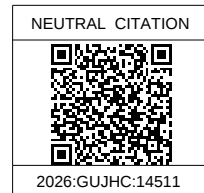
19.6 The witness had started his private practice since 1972. He had attended many medico-legal cases prior to the present one. The witness stated that in medico-legal cases, he would inform Keshod Police Station.

19.7 In the cross-examination, the Doctor witness stated that he was not aware whether it was medico-legal case of Merag Haja, when he was admitted in his Hospital. The Doctor affirmed that from 25.10.1976 till 08.11.1976, he was having no information that it was medico-legal case of Merag Haja. He does not recollect the date of admitting Merag Haja again in his Hospital after 08.11.1976 and also affirmed that even when Merag Haja was admitted second time in his Hospital, at that time too, he had no information that it was a medico-



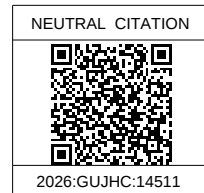
legal case. The Doctor does not remember the days Merag Haja remained admitted in his hospital for the second time and also stated that during that period, while staying as indoor patient, Merag Haja had not given him the history and also affirmed that since he had not received history as of medico-legal case, so he had not informed Keshod Police Station. He denied the suggestion that he has not mentioned of history in the treatment papers. The witness volunteered that he had noted in medico case papers, but does not remember the date and time. The papers, which he stated was not produced during the inquiry before Keshod Court. Exh.118 is stated was the certificate prepared on 16.03.1977, which was prepared on the basis of case papers, wherein too, he affirmed that there is no mention in the certificate of any history given by Merag Haja.

19.8 This witness was recalled under the order below Exh.122 by the Public Prosecutor and was asked about the papers with regard to the treatment dated 25.10.1976. The witness stated that after receiving the summons, he has



searched for the documents, but he could not locate since those were old records and also stated that there was no possibility of finding them. In the cross-examination, the witness affirmed that he had kept a separate file for the case papers of Merag Haja. He also affirmed that while he visited Keshod Court for his testimony, he had carried those case papers with him and stated that on 17.10.2002 i.e. during the trial of the present Sessions Case, when he was giving his testimony, he had not brought case papers of Merag Haja and denied the suggestion that in fact, he had no such note of the history in the case papers.

19.9 This witness – Dr. Sarvaiya could not prove the alleged history, as stated to be informed by Merag Haja. If he had taken the case papers during the inquiry in Keshod Court, then certainly, they would have been produced and referred to. Twice, Merag Haja was admitted in Bhagwat Hospital, Keshod. This Doctor could not give evidence of Merag Haja informing him of the injury with the history of alleged assault to be considered as medico-



legal case.

19.10 In the cross-examination of the complainant - Merag Haja, it has come on record that on that day i.e. 07.01.1976, there have been combing in the area of Sutrej, Khirsara, Sarsali Villages for weapons. The police had taken Merag Haja, Bhikha Deva and Jusab Habib in SRP van. All of them were made to sit in the vehicle at Antroli crossing and according to the complainant, in the police station room, all the three were made to stay together.

20. Sections 46 and 49 of Cr.P.C., as stood prior to 31.12.2009, provided as under:-

46. Arrest how made.-

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.



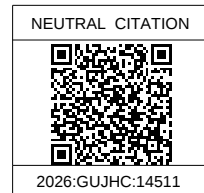
(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

49. No unnecessary restraint.-

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

So Section 46 Cr.P.C. permits the police to use force if such person forcibly resists the endeavour to arrest him, sub-section (2) of Section 46 authorises the police officer or other person to use all means necessary to effect the arrest.

21. The reference of these sections becomes necessary to be made since here in the present case, it was not only that Merag Haja was put under restrain, but even Bhikha Deva and Jusab Habib, all the three were taken to Porbandar Police Station. There appears to be no complaint by Bhikha Deva and Jusab Habib of any police torture. Merag Haja was even provided medical assistance in the custody, as stated by him. Civil



Surgeon–Shri Vora (PW1) and one local Vaidhya had also visited him in the police custody. Merag Haja was also taken to the Hospital as per his own request in the police vehicle. He also sought legal assistance of PW5 – Samatbhai Devabhai Ranavaya. When the case was lodged under the Arms Act, he also moved a bail application and on 14.10.1976, he was released on bail. Till that period, he remained in the Hospital. He had not informed Dr. V.M. Shah on 13.10.1976 when he had come for the treatment and remained as an indoor patient of any police torture. If statement of Merag Haja is to be believed, then, PW1–Dr. Bhupen Kanakshankar Vora had visited him in the police custody on 08.10.1976, inspite of that, Dr. Vora as PW1 is not stating such facts and Dr. Vora had also not found his case to be of medico-legal, nor Dr. V.M. Shah could affirm of any medico-legal case and even Dr. Sarvaiya – PW3 could not say that it was a medico-legal case. From 11.10.1976 till 24.11.1976, Merag Haja visited these three Doctors, but none of the Doctors could conclude his case as a medico-legal case.



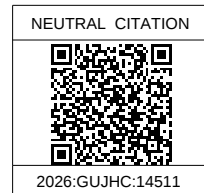
21.1 In the cross-examination, Merag Haja was put to question that on 08.10.1976, Porbandar PSI – Shri Shinde (DW3) had investigated him with regard to his revolver and that he had informed PSI – Shri Shinde that it was on the roof top of his house and that Bhikha Deva had also stated of having Tamancha (country-made pistol) at his house and volunteered to produce and that the deceased – Shri Raol took them from Porbandar to Sutrej and Bhikha Deva was taken to Khirsara. Bhikha Deva, from his residential house, had given the Tamancha to Shri Raol and on 09.10.1976, at about 09:00 a.m., a Panchnama was drawn with regard to Tamancha. The complainant – Merag Haja denied to all these suggestions.

21.2 The defence advocate informed Merag Haja that on 09.10.1976 at 12:00 noon, he used staircase to climb to the loft of the house to remove the revolver and at that time, he slipped from the stairs and fell down and the revolver, which he had removed fell on the ground. A Panchnama to that effect was drawn at 12:00 noon at his



house by Shri Raol and thereafter, he and Bhikha Deva reached with Shri Raol at about 4 O'Clock in the afternoon at Police Station and since he made complaint of pain, he was admitted in Bhavsing Hospital, Porbandar. To this suggestion, the witness did not affirm.

21.3 The prosecution specifically asked the complainant that on 07.10.1976, he was never present at Porbandar Police Station or Porbandar Village, to which, he denied. The investigation was by PSI – Shri Shinde. The complainant witness stated that during the period from 09.10.1976 to 14.10.1976, Shri Khandwawala (A-1) had never visited the Hospital and the complainant had no knowledge whether A-1 had gone to the Police Station. From Jamnagar Hospital, he had made five applications and those applications he got it written by a person of Jamnagar, but Merag Haja does not know the name of that person. Such communications were made by RPAD. The acknowledgment slip is stated that he had kept it safe till 1983, but got lost in the flood of that year. He affirmed that in the Inquiry Case of 1976, he had not



produced the acknowledgment slip of the five applications.

21.4 In the cross-examination, Merag Haja affirmed that he had filed a complaint on 02.11.1976 and the verification of the complaint was on the same day. He denied the suggestion that since he was physically disabled and as he was in the Hospital of Dr. Sarvaiya, he had got the complaint written through Advocate Mesvaniya in the Hospital.

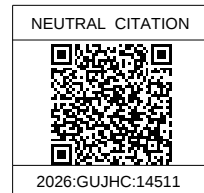
21.5 According to the complainant, as recorded in his testimony, he felt that he, Bhikha Deva and Jusab Habib were wrongly confined in the room and when he felt so, he had attempted to file a complaint, but no one heard him. As per his deposition, during the time of the incident at Porbandar, the members of his community as well as relatives were residing there. He even tried to contact the relatives as well as his acquaintance at Porbandar Police Station and since it was 11.30 night and as no one heard him in the Police Station, he could not contact them. The defence was raised that no such incident had



occurred when Merag Haja and Bhikha Deva were brought at Porbandar Police Station from their house. That on 08.10.1976, none had gone from Porbandar Police Station at Sutrej.

21.6 According to the witness, when he was at Porbandar Hospital, his wife had visited to him, while no other family members or his community persons from Sutrej had visited him. After being admitted in Bhavsing Hospital, Porbandar, he had made attempts to call his relatives and therefore, Punja Karsan, resident of Kotdawala had visited him. Apart from him, none other had come. The witness stated that in his complaint, he had not referred Punja Karsan as his witness. He had given all the facts to his Vakil – Shri Ranavaya and accordingly, the complaint was filed in the Court and he had also given his deposition in the Court.

21.7 The evidence, as was recorded, shows that he felt that on 08.10.1976, his confinement in the Police Station was illegal. He said that he had tried to give the complaint. As per his evidence, on 08.10.1976, Civil Surgeon – Dr.



Vora and Deputy Bhargav had visited him in the custody. Even one local Vaidhya was permitted to see him. Even CID Inspector – Shri Sharma had inquired from him in the police custody on 08.10.1976. The Deputy Bhargav and CID Inspector – Shri Sharma as well as the local Vaidhya had not been examined, while Civil Surgeon – Dr. Vora as PW1 has not stated in his deposition that he had visited the complainant in Porbandar Police Station on 08.10.1976 and had examined his injuries. His Advocate – Samatbhai Devabhai Ranavaya (PW5) has not produced copy of the bail application, nor the order of bail. The application was made from the Hospital. Nothing is on record to prove that he was taken from the police custody to Bhavsing Hospital through police Ambulance or police vehicle. PW1–Dr. Bhupen Kanakshankar Vora has not stated in his evidence that the patient had come in a police vehicle or police Ambulance. The witness – PW1–Dr. Bhupen Kanakshankar Vora had not brought any record and thus, stated that since record was not available, he could not say whether the patient had come with police yadi or



without. PW1 had issued the certificate on 11.10.1976.
The inward no. 1E/Refer/5/4993/76 - Exh.104 dated
11.10.1976, is scanned to reproduce hereunder:-

Ex 104

No 1E/Refer/ 5/ 4993 /76.
Office of the Superintendent,
Bhavsinhji & M.R. Hospital &
Civil Surgeon, Porbandar.
Dated:- 11.10.76.

To,
The Orthopedic Surgeon,
Irwin Hospital,
Jamnagar.

Dear Sir,

Referring you Shri Merag Haja aged about 46 years, who is
having fracture of ~~neck~~ neck of left femure.

Kindly examine him and do the needful under your care.

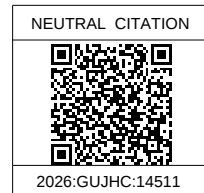
Thanking you,

Yours Sincerely,

(Dr. B. K. Vora) M.S.
Superintendent,
Bhavsinhji & M.R. Hospital
& Civil Surgeon, Porbandar.

Session's Case No. 76/82
Exh No. 104
Proved by Ex. No. ✓
Dt. 2nd Fast Track Judge
Junagadh
17-10-02

21.8 This document becomes relevant for comparing the
injury as well as to note the date of the alleged custodial
torture. The complainant stated about the beatings in his
testimony, as referred to hereinabove. The custodial



torture, as per the complainant, was on 08.10.1976. Here, in this document at Exh.104, the only injury referred is of fracture of neck of left femur. The injury was described as the upper part of left thigh. Nothing has been produced in the form of X-ray by PW1 to substantiate the exact place of injury on the femur bone.

21.9 The prosecution is required to prove that the torture was on 08.10.1976. The complainant was operated on 13.10.1976 at V.M. Shah Hospital. He was released on bail on 14.10.1976 and he remained in Jamnagar Hospital for 9-10 days. The private complaint, which he filed on 28.10.1976, was produced on record at Exh.135. In the inquiry before the Magistrate, the verification of the complaint of Bhikha Deva Rabari was recorded on 02.11.1976.

21.10 In the further cross-examination, it comes on record that when Shri Upadhyay and Shri Jani (PW7) were making search in his compound, at that time, accused no.1 – Shri Khandwawala had come there and prior to accused no.1 reaching the place, the Panchnama was drawn. So,



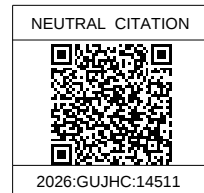
as per the complainant, in presence of Shri Upadhyay and Shri Jani, accused no.1 had come at the house of the complainant, while no such evidence has been given by Shri Jani as PW7. Shri Jani refers to the NIL Panchnama and also refers of making the search along with the Police Sub-Inspector – Kanakbhai Upadhyay, but in his deposition, Shri Jani does not make any mention of accused no.1 appearing there at the house of the complainant in their presence. Shri Jani had stayed at the house of the accused till 08:00 at night. The complainant witness also stated that SRP man, who had come with the liquor bottle, had come prior to Shri Khandwawala (A-1). He was in uniform who waited for about two minutes. The witness complainant also stated that Shri Khandwawala (A-1) and Shri Upadhyay had not taken any action against the SRP man who had come with the liquor bottle. The complainant himself has not made any efforts to know the name and residence of the SRP man.

21.11 The witness also stated that his neighbours were his



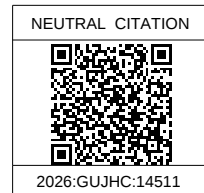
uncle – Meraman Bhaya and his son Bhima and he had not informed any of his uncle or his cousin of he being taken away to Porbandar. The witness volunteered to state that he was not provided any opportunity to inform those people, nor his wife.

21.12 With regard to Bhikha Deva, the witness stated that Bhikha Deva had come half an hour or an hour ago for taking his labour charges and when he was having tea with Bhikha Deva, the police had come there. The complainant does not know whether at Sutrej Village, over and above his house whether Deputy Superintendent of Police – Shri Jani (PW7) or Shri Upadhyay had made any search. He did not know why Bhikha Deva was taken in the police vehicle. He had not insisted for keeping Bhikha Deva along with him in the police van. The witness specifies that at 7 hours and 10 minutes, they had started from his house at Sutrej Village in the van. This fact does not get corroborated by the evidence of the Deputy Superintendent of Police – Shri Jani examined as PW7, who was at the house of the



complainant till 08:00 at night on 07.10.1976. The complainant had given the specific time of 07.10 hours in the evening, when he was taken by the accused.

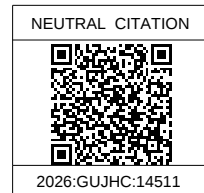
21.13 With regard to weapon, the complainant affirmed that he had gone to file the complaint at Keshod Court. He had not tried to produce the licence of the weapon, which he said had produced before the police. He denied the suggestion that Junagadh Collector had canceled his licence of his weapon Joto (revolver) and the revolver was expropriated. The witness was confronted to the facts in the complaint before the learned Magistrate. He had not stated that Shri Khandwawala (A-1) had asked his weapon and threatened to beat him if he failed to do so. In the same way, he denied that in the testimony before the learned Magistrate, he had got it recorded of his reply, telling Shri Khandwawala (A-1) that he was not having the weapon and if he wanted to beat him, he could do so. In the cross-examination, he stated that when he was taken from Sutrej to Porbandar, at that time, he had worn Jabbho and Chorni and a cap on his



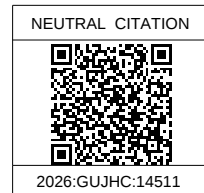
head and when he was released on bail, at that time, he had changed his clothes twice. Those clothes were brought by his cousin – Chana Haja and Samaj Bhoj at the Hospital.

21.14 The witness stated that the details of the injuries, which he had stated in his chief-examination from those injuries, there was no oozing of blood, nor there was any bruises or lacerations. The witness stated that his body has turned black. It had not so happened that the clothes, which he had worn got torned or holed.

21.15 The complainant denied the suggestion that in the case against him under the Arms Act, the co-accused was Salemohammad Abdul Rahman of Porbandar and denied the suggestion that prior to the incident, he was knowing Salemohammad. He was knowing Rabari Pitha Bhaya who was the driver of MLA of Porbandar – Vasantji Thakarar, but denied the suggestion that the driver of MLA is also an accused in the said case under the Arms Act. The witness does not remember whether Rabari Bhikha Deva was an accused in that matter. He knows



Jagjivan Pitambar Lohar, but denied the suggestion that Jagjivan Pitambar was also an accused in that Arms Act case filed by the Porbandar Police. He denied the suggestion that the investigation of the case was by Porbandar PSI – Shri Shinde. He denied the suggestion that prior to the incident, he had purchased the revolver from Salemohammad and another weapon was sold by Bhikha Deva to Salemohammad and also denied that Bhikha Deva had purchased the weapon from Jagjivan Pitambar of Jariyawada and denied the suggestion that all were made the accused in the charge-sheet filed before the Porbandar Court. The witness denied the suggestion that on 08.10.1976, he and Bhikha Deva were called at Porbandar Police Station and PSI – Shri Shinde on 08.10.1976 had inquired from him about the revolver and at that time, he had informed that it was at the ceiling of his house and he denied the suggestion that Bhikha Deva had also produced the country-made pistol from his house and from there, deceased – Shri Raol had taken them from Porbandar to Sutrej. He denied the suggestion that the weapon from the house was given by



Bhikha Deva to Shri Raol and denied the suggestion that on 09.10.1976, in the morning at 09:00, the Panchnama for the country-made pistol was drawn and also denied the suggestion that on 09.10.1976 in the afternoon at about 12 O'Clock, he climbed to the loft of his house through a ladder and had removed the revolver. At that time, his legs suddenly tripped from the ladder and he fell down and the revolver too fell on the ground. The Panchnama was drawn by Shri Raol at about 12:00 in the afternoon at his house and he denied the suggestion that he and Bhikha Deva along with Shri Raol had reached at about 04:00 in the afternoon and at that time, he had made complaint about the pain and therefore, was admitted in Bhavsing Hospital. The evidence of the complainant in the examination-in-chief refers to Shri Raol. In his evidence, he had referred to the presence of Shri Raol in the police custody.

22. In D.K. Basu's case (supra), Paragraph 33 gives reference of right to interrogation of arrestees to be given precedence over an individual's right to personal



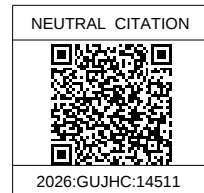
liberty.

"33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of *torture* for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated — indeed subjected to sustained and scientific interrogation — determined in accordance with the provisions of law. He cannot, however, be *tortured or subjected to third-degree methods* or *eliminated* with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared



to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge."

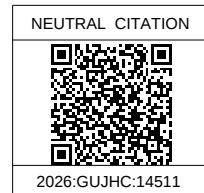
23. The complainant has to prove custodial torture and has to prove that he was subjected to third degree methods with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons, etc. The complainant had failed to prove that he had already deposited the licence weapon to the concerned Police Station or the Collector. Under the Arms Act, the police has the authority to arrest any person found carrying or conveying any arms whether covered by licence or not under such circumstances affording suspicion. The



complainant was required to even prove before the JMFC during the inquiry under Section 202 of Cr.P.C. that he had deposited his licence weapon before the police or the Collector. Further, no such evidence has been produced by the complainant during the trial of the weapon being earlier surrendered by him.

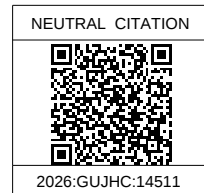
24. The accused, in their defence, had examined six witnesses. Vinayak Shivaram Shinde as DW3 was examined who deposed that he had conducted the raid on 07.10.1976 and had filed CR no. II-43/76 under Section 25A of the Arms Act at Porbandar City Police Station.

25. DW1 – Kasambhai Kanabhai Rajwani deposed that he was Crime Writer Head at Keshod Police Station. He had brought the original papers of CR no. 6/70 of Keshod Police Station, wherein a complaint under Sections 325 and 344 of the IPC and under the Arms Act was filed by Pravinchandra Mohanlal, and Merag Haja resident of Sutrej, was the accused. In the original complaint, which the witness produced in evidence, the witness had also



brought the conviction register of Keshod Police Station for the years 1965 to 1970 and referring to Page-24, the witness stated in CR no. 7/70 for the offence under Sections 325 and 34 of IPC, the fine was of Rs.20/-. The certified copy was produced at Exh.166. In the cross-examination, the witness clarified by referring to Exh.166 that the entry was of CR no. 7/70 and not CR no. 6/70. It appears that it is an inadvertent error typed in the examination-in-chief. The witness had brought the conviction register and complaint both. This witness – DW1 was examined with reference to CR no. 07/70, which was filed against the complainant by Pravinchandra Mohanlal.

26. DW2 – Madhubha Gambhirsinh was a Constable at Kirtimanzil Police Station, Porbandar “A” Division Police Station. He has served the summons in connection with CR no. II-43/76 to PSI – Shri B.B. Parmar. The witness stated that he had received a report from the Police Inspector – Shri Kher regarding non-availability of records of CR no. II-43/76 and the Case Diary to that



offence was also not found. He produced Exh.168, the report with the signature of Shri Kher with regard to the non-availability of the record. He affirmed that he had no other information, except the report, which was given by the Police Inspector.

27. DW4 – Jesing Savdasbhai Kher is the officer who has been referred by DW2. According to Shri Kher, on 02.11.2002, he was at Kirtimandir Police Station, Porbandar City as Police Inspector. He received a summons to produce Case Diary and case papers of CR no.II-43/76. After receiving the summons, he had tried to find the Case Diary and case papers, but were not found. He stated that as per the Rules, if the accused is acquitted, then, those case records are destroyed. In the referred matter, he stated that the case papers and the Case Diary were possibly destroyed because of earthquake, as the Police Station got damaged and had fallen down and such a report was produced under his writing at Exh.168 by DW2, wherein he identified his signature. The witness also stated that they maintained



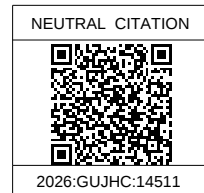
the notes of the records, which were destroyed. In the referred case, he stated that no such note was found of the destruction of the record and also stated that there are no possibilities of such notes to be found. Such report he produced at Exh.174. In the cross-examination, the witness stated that during his tenure, no such record was destroyed. He stated that since it was old record, he assumed that those would have been destroyed. He has no record in his hand to substantiate that the records could have been possibly destroyed in the earthquake and he does not recollect of filing any report to the then Police Inspector, A.D.S.P. of record destruction due to earthquake. He had not tried to search the record from DSP office. The witness stated that it was an acquittal case. The Case Diaries would only be for the investigation with the officer and he would maintain it till the conclusion of the investigation. According to the witness, in the Case Diary, there would be note regarding the investigation done by the officer. A copy of the Case Diary is sent to the superior officer A.D.S.P. or Dy.S.P. and after the charge-sheet, during the trial, the Case



Diary would be sent to the Court in a sealed condition. The witness also stated that the Case Diary would not bear the seal of the Police Station and generally, the original Case Diary would be sent to the Court and the another to DSP or Dy.S.P. Apart from that, there would not be any other copy. He denied the suggestion that, the fact of non-availability of the record and those being destroyed in the earthquake, such facts he had deposed to help the accused.

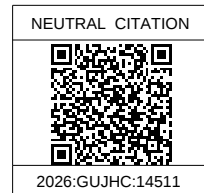
28. DW5 – Kanaiyalal Narandas Devchandani, as witness, was examined with regard to the Court record and he stated that on 27.09.2002, the record of Criminal Case no.2395/78 was available and he had produced it, wherein the accused was Merag Haja and others. The records, which were available in the District Court, were produced by him. Rest of the record as per the Rules were destroyed.

28.1 The witness appears to be working in the Court. He stated that there would not be any Case Diary in the Criminal Case. The Case Diary, which would be produced



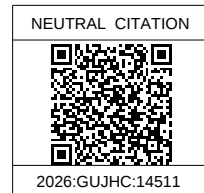
along with the remand, would be in carbon copy and those would be in "D" File. He stated that the original record, which he has produced does not contain the original Case Diary. The witness further stated that in sessions, no such Case Diaries are being entrusted and in any Criminal Case, if any Case Diary comes in a sealed condition, initially, it would go to the dispatch Clerk and thereafter, to the Clerk of the criminal table. Generally, whenever the Court calls for sealed diary, then, the concerned Clerk would produce it before the Court, otherwise, it would remain with the Clerk in the said condition.

28.2 The witness stated that he cannot say that in the Criminal Case no.2395/78 at Porbandar, whether any sealed diary was called from the concerned Clerk. The witness further stated that as per the ferist, the records get destroyed and in that, reference would be about the destruction of the file, but no detail is maintained as to which of the records were destroyed. He could not say whether in the related case, Case Diary was destroyed.

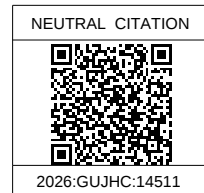


The witness clarified that generally, the copy of the Case Diary would be produced during the time of remand and such papers would be in "D" File, which would be destroyed. The record, which he had produced was "B" File, while "C" and "D" Files were destroyed. In criminal cases, he stated that there would not be "A" File and in the "B" File, which he had produced, it contained Exh.10– discharge application and Exh.17 – judgment. Both the documents were placed in evidence at Exhs.177 and 178.

29. DW6 – Bhojabhai Bhimabhai Parmar was examined in context with the police diary record. He stated that the record of any police diary of the offences at Porbandar would be sent to the office of the Deputy Superintendent of Police. He stated that case diary of II-CR no. 43/76 of City Police Station, Porbandar was sent to the office of the Deputy Superintendent of Police and that diary was destroyed in their office. The original register maintained for the destruction of the record was brought by him in the Court, and referring Page-34 at Sr. no.22, the witness stated that the record of CR no.II-43/76 was



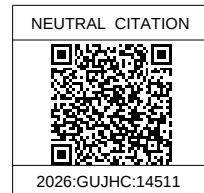
destroyed in the year 1978. According to the witness, the Case Diary of all the offences of the year 1976 were destroyed. The time period for destruction, as recorded in the register for the papers of 1976 was one year and on Page-49, on 22.06.1983, the endorsement was that the records were destroyed because of heavy rain. Copies of Pages no.44 and 49 were placed in evidence at Exh.182. The witness stated that the Case Diary of Porbandar Police Station CR no. II-43/76 was not available in their office and therefore, he could not produce. The witness was cross-examined by the Public Prosecutor, wherein he stated that his post was of PSI. He denied the suggestion that generally, the time period for destroying the Case Diary was of five years. The witness stated that it was of one year. The Police Sub-Inspector affirmed that in every Police Station, there were three parts of the offences; serious offences were of first part, and the minor is classified as second part and thereafter, there would be a third part. The Case Diary of the first part would be sent, while he denied that since second part would not be a serious offence, a copy of the



Case Diary would not be sent to DSP office. However, he also stated that he had no supporting evidence for that proposition. The signatures on Pages-34 and 49 he referred to be of Shri A.B. Vij. The witness was shown Page-27 of DSP Office, Porbandar with regard to second offence, where an endorsement was of the record being destroyed in presence of Deputy Superintendent of Police. The true copy was produced in evidence at Exh.183. The original register was produced at Exh.184.

29.1 The witness, in the cross-examination, was referred to various pages of the register from Pages-28 to 49, the reason were records being destroyed because of excessive rain and on Page-49, there was no endorsement that it was in presence of the officer. He denied the suggestion that the entry no.22 and the signature thereon was concocted later on.

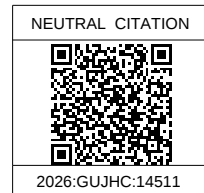
29.2 According to the witness, at the time of the incident, there was only one division and below the DSP office, there were five Police Stations. He affirmed the suggestion that on Page-34, the name of the Police



Station has not been recorded, whose records were destroyed. On Page-34 at Sr. no.21, the number denoted was five and on Sr. no.22, it was shown as 12. The witness could not state that the numbers, which have been noted at Sr. nos.21 and 22 whether that would include CR no. II-43/76. The witness stated that the records were not destroyed in his presence. He has not met the officers before whom the records were destroyed. He further stated that except that register, for the destruction of the Case Diary of CR no. II-43/76, he has not verified any other register.

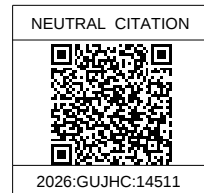
29.3 The witness stated that he has not brought any other material in support of the say, except Page-34 of the register Exh.184 to show the destruction of the record of CR no.II-43/76. The witness also stated that he had not verified whether the copy of the Case Diary of CR no. II-43/76 was received by the DSP Office. He denied the suggestion that to help the accused, he was falsely giving evidence of the destruction of the Case Diary.

30. So the Defence Witnesses so far examined were to prove



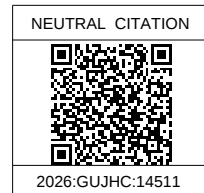
the case filed against complainant CR no. 7/70 and also about CR no. II-43/76. The witnesses were also examined to prove the destruction of case diary of CR no. II-43/76, and its record.

31. The star witness, which the defence examined was Vinayak Shivraoram Shinde as DW3. The witness was Deputy Superintendent of Police of Gujarat State. He retired on 30.11.2012. According to his testimony, on 07.10.1976, he was Police Sub-Inspector, Porbandar and on the night of 06/07.10.1976, he was on his night patrolling with Police Sub-Inspector, B.U. Raval, B.J. Parmar and other police personnel. At about 11 hrs. in the night, they received an information that Abdul Rehman Saleemohammad, who in Porbandar Chhaya Plot from his house was selling Desi Daru (country-made liquor/Indian Made Indian Liquor (IMIL). No sooner did they receive the information, they called for two independent Panchas at Hanuman Gufa Police Station and appraised the Panchas of the information and with the Panchas, between 01.30 to 08.00 on 07.10.1976, the



raid was conducted. During that raid, they had not found any prohibitory articles, but found 12 Bore Tamancha from a cloth bag from the house of Abdul Rehman Salemohammad and two country-made Tamancha and cartridges of the weapon and other things, which in total were 42 items. Therefore, in his house, in presence of Panchas, Panchnama was drawn and a complaint was filed at Porbandar City Police Station as CR no. II-43/76 under the Arms Act Section 25 and a complaint was filed with PSO and the witness started the investigation. He, in detail, interrogated Salemohammad. On 08.10.1976, prayer for remand was made before the Court for the accused, which was granted till 18.10.1976.

31.1 The witness – DW3 stated that during the detailed interrogation of the accused, it was informed to them that Bhikha Deva had purchased a weapon from Luhar Jagjivan Pitambar and one revolver was given to the accused Abdul Rehman Salemohammed by Bhikha Deva. The witness gave the information referring the Case Diary of Suleman Sutrej that the sale was to Merag Haja



of Sutrej for Rs.600/-. The witness further stated that Bhikha Deva was from Khirsara Village.

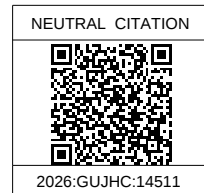
31.2 DW3 further stated that he felt on inquiry of Salemmohammad that both the persons were required to be called for interrogation and therefore, he phoned Police Sub-Inspector, Keshod at about 11 O'Clock to send both the persons to Porbandar City and therefore, Police Sub-Inspector, Keshod at about 17.00 hrs. had sent both the persons to Porbandar City and both the persons, in the inquiry, affirmed of they having weapons and volunteered to produce the same and therefore, while recording the statement of Merag Haja (present complainant), he informed that the revolver, which was in his possession was hidden in the loft of his house at Village Sutrej, which he wanted to produce and therefore, this witness – DW3 recorded a detailed statement of production of weapon.

31.3 During the course of recording of the testimony, the Public Prosecutor took objection in production of the statement recorded by the witness on the ground that it



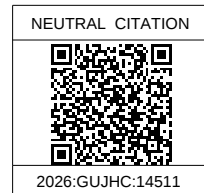
amounts to confession, while the defence lawyer submitted that the accused wanted to show the place, where he had hidden the revolver and therefore, urged to set aside the objection. The learned Trial Court Judge, on hearing both the sides, deferred the order and had decided to hear both the parties on that issue at the time of the judgment.

31.4 The fact, which becomes relevant to be noted, is that on 06/07.10.1976 during night hours, the information was received at 11 hrs. of the sale of prohibited liquors in the house of Abdul Rehman Salemohammed. A Panchnama was drawn on 07.10.1976 between 01:30 to 08:00, which means till the morning of 08.10.1976 and on that day i.e. 08.10.1976, prayer was made before the concerned Court for the remand of Abdul Rehman Salemohammed. The witness as DW3 further stated that during this time, there was murder of Porbandar Nagarpalika President – Dhanjibhai Kotiyawala and therefore, the atmosphere in the city was tense and even the position of order was tight. Porbandar as well as the



surrounding areas were not good and therefore, District Superintendent of Police of Junagadh had his camp at Porbandar. The witness informed the police officer about the fact that Merag Haja and Bhikha Deva were ready to produce the weapons and therefore, the officer had asked to investigate along with Police Sub-Inspector – Raval (Raol) and his staff and therefore, he had informed Shri Raval at 21:45 hrs.

31.5 The witness further stated that on 09.10.1976 at about 17:30 hrs., Shri Raval had come to the Porbandar Police Station and had produced Panchnama of both the persons. Along with Shri Raval was Merag Haja and Bhikha Deva. The Panchnamas were for production of the weapons. The witness – DW3 stated that when he had seen the Panchnama, he saw that the arrest of Merag Haja was at 12 O’Clock. Shri Raval informed him that in presence of the Panchas, through the Panchnama, Merag Haja has produced his revolver and cartridges. The witness stated that as the registers are maintained, in the same way Case Diary was maintained of CR no. II-



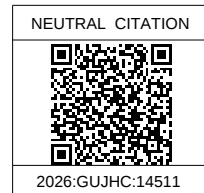
43/76. The witness produced a copy of the Case Diary from the documentary list, which he stated that it was the photocopy of the original. The handwriting in the diary from 07.10.1976 to 21.10.1976 was his own. Thereafter, the handwriting in the Case Diary was of Police Sub-Inspector – Shri D.J. Parmar till 12.04.1977, the witness could not recognize the handwriting thereafter. The Public Prosecutor took objection to exhibit the document. A copy of the Case Diary, at that time of deposition, was not exhibited on the ground that according to the report Exh.168, the Case Diary and the case papers could not be found even after verification and those documents may be destroyed or lost and there were no possibilities of finding it in near future. The matter stood adjourned on that day and in further examination-in-chief from the side of the defence lawyer, on the next adjournment, again, the copy of the Case Diary of Porbandar City Police Station bearing CR no. II-43/76 at Mark 170/1 was referred to be produced, but still it was not admitted observing that in the Case Diary at Mark 170/1, certain pages were blank and certain



pages could not be photocopied and most of the pages were not legible. The learned Trial Court Judge did not find it satisfactory to believe it to be exact or compact copy of the original.

31.6 Thus, in the evidence of DW3, the statement recorded of Merag Haja and the Case Diary of Porbandar City Police Station bearing CR no. II-43/76 at Mark 170/1 were not exhibited to be read as evidence.

31.7 The witness – DW3 further in the testimony, stated that when Merag Haja was produced before him on 09.10.1976, at that time, he had read the arrest panchnama of Merag Haja drawn by the police officer, wherein he had read about the physical condition of Merag Haja. In the Panchnama, it was recorded that he had fallen down while removing the revolver and cartridges from the roof tiles of his house and he tumble down as his leg got slipped on the staircase, while descending. The witness stated that there was reference of complaint of pain in the thigh. Muddamal Pavti slip was issued for the seizure of revolver and cartridges.



Thereafter, he recorded the statement of Merag Haja on 09.10.1976 at about 17:30 hrs. and in presence of this witness, Merag Haja, in his statement, had got it recorded that when he was removing the revolver and the cartridges, which he had kept below the loft of his house, he had fallen down from the staircase and therefore, there was pain in his left thigh and had asked for the treatment. Again, the Public Prosecutor took objection stating that such statement cannot be read in evidence as it is in the form of confession. The learned Trial Court Judge held to decide about the same while hearing both the sides at the time of the judgment.

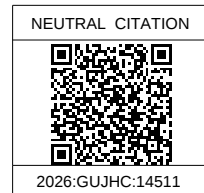
31.8 The witness – DW3 stated that since complaint was made of pain, therefore, with the Yadi under Police Japta he had sent Merag Haja for treatment at Porbandar Bhavsing Hospital, where he was admitted about 07.00 p.m. and on 10.10.1976, a report was produced in the Court regarding arrest of Merag Haja and a prayer was also made for the remand of Merag Haja on the ground that there would be more weapons with him and that he



was in the treatment at Porbandar Bhavsing Hospital. They had resisted for his bail. The witness stated that after few days, he came to know that Merag Haja was released on bail.

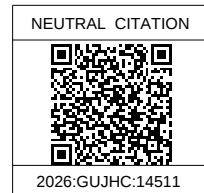
31.9 In the cross-examination, the Public Prosecutor elicited the fact that on 07.10.1976, when the house of the accused and accused's uncle – Meramanbhai and his son were searched by Deputy Superintendent of Police – Shri Jani and Keshod Police Sub-Inspector – Shri Upadhyay, NIL Panchnama was drawn. The witness, as DW3, stated that he came to know about the details and cause for the search, but was not aware as to which of the officer had conducted the search. The witness volunteered that at Keshod Police Station, entry was drawn of NIL Panchnama. The witness was not having information that Merag Haja had one weapon with licence and that was deposited by him.

31.10 DW3 denied the suggestion that he came to know about the incident dated 07.10.1976 and after the incident, Merag Haja and Bhikha Deva were sent in the custody of



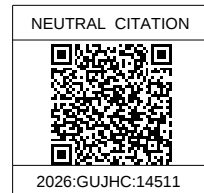
the accused at Police Station, Porbandar. DW3 also denied that he was stating false facts inspite of having the knowledge that on 07.10.1976 from 11:30 night, Merag Haja and Bhikha Deva were in the lock-up of the Police Station. The witness affirmed that in 1976, Police Sub-Inspector – Shri P.A. Raol was the P.S. of the accused no.1. DW3 denied that on 08.10.1976, from morning 08:30, Merag Haja and Bhikha Deva was in the custody of Shri Khandwawala (A-1) and his reader – Shri Raol and at that time, Merag Haja was beaten and therefore, he got injured.

31.11 According to DW3, he had not gone in the raid at Sutrej or Khirsara Village. He has no personal knowledge of what had occurred during the raid at Sutrej or Khirsara Village. He has not produced any Muddamal receipt. In II-CR no.43/76, the Panchnama for the arrest of Merag Haja was by Police Sub-Inspector – Shri Raol. He denied the suggestion that he has no knowledge as to what was written in the Panchnama. According to his memory, till 21.10.1976, he had investigated II-CR no.43/76. By



producing the report along with the copy of the Panchnama, he had sought for the permission from the Collector, but since he was transferred, he has no knowledge as to what had happened thereafter. The witness did not have the record of the report as well as other papers in his personal record. The witness, as DW3, also stated that no note was made in Station Diary of Merag Haja falling from the ladder at Porbandar Police Station. He denied the suggestion that he was stating false facts that Merag Haja was sent with police yadi to Porbandar Bhavsing Hospital under Police Japta for treatment and also denied the suggestion that in the same way, he is stating false facts that on 10.10.1976, Merag Haja was produced in the Court and his arrest report was produced and a remand application was moved for recovery of more weapons. He also denied the suggestion of telling false facts of writing coming from the JMFC, Porbandar Court in connection with Merag Haja's injury.

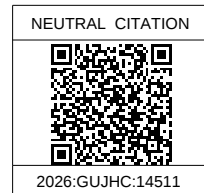
31.12 The witness stated that he had not recorded the



statement of the Doctor of Bhavsing Hospital as he did not feel the necessity. He had sent Yadi for the medical certificate of Merag Haja, which he had not received and Merag Haja was admitted in the Hospital under Police Japta. Thereafter, his investigation concluded; so, has no knowledge as to how long Merag Haja stayed in the Hospital.

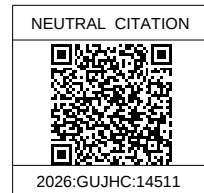
31.13 The witness DW3 came to know that Merag Haja for his treatment, was taken to Jamnagar from Bhavsing Hospital.

31.14 The witness was also asked by the Public Prosecutor that he was stating false facts of reference in the Panchnama regarding Merag Haja falling down from the ladder, while he was descending and as his left leg slipped, he suffered injury in the left thigh, to which, the witness denied. The witness has no knowledge of the result in case of II-CR no.43/76 and further stated that on 09.10.1976, after Merag Haja was admitted in Bhavsing Hospital thereafter, Bhikha Deva was in his custody in remand in connection with II-CR no.43/76. He had not made a separate report



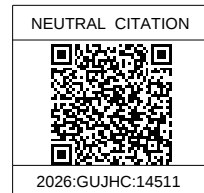
to the JMFC about Merag Haja falling down from the ladder and suffering injury on the left leg thigh. The witness volunteered that he had moved a report to the JMFC that Merag Haja was under treatment. He had not given the testimony in II-CR no.43/76 as complainant. He denied the suggestion that since they had not given evidence in II-CR no.43/76, therefore, the Court had acquitted Merag Haja and that fact was known to the witness. The witness stated that in II-CR no.43/76, he had recorded the statement of Luhar Jagjivan Pitambar who was accused in the matter.

31.15 He affirmed that he had not made any entry about the phone call to Police Sub-Inspector, Keshod in the station diary. The witness volunteered that such information was not to be recorded in the station diary. From Keshod, both of them had come at 5 in the evening. He had only inquired from them and since arrest was not made, no arrest Panchnama was drawn. The witness volunteered that at 11:45 hours. they were sent back. Police Sub-Inspector – Shri Raol had drawn the arrest Panchnama at



17:00 hrs. as well as of the Panchnama of seizure of weapons, which he had received. He denied the suggestion that both of them were sent away at 21:45 hrs. by Deputy Superintendent of Police, Pal and the fact of Shri Raol, PSI arresting them and drawing the Panchnama is a false facts, which the witness stated to support the accused who are his superior officers. This suggestion was denied by the witness. The facts, which was stated by the witness were again raised in the cross-examination of the Public Prosecutor, on the basis that he was stating false facts, which the witness denied. It was also the case of the prosecution, that to protect the accused, a false case was registered under CR no.II-43/76 under the Arms Act.

31.16 The witness was recalled for further examination in connection with the Case Diary Exh.204. Page-11 was brought to the notice of the witness, which he stated was in his handwriting, wherein it has been recorded that the accused – Bhikha Deva and Merag Haja who were produced and in that connection, the witness as well as

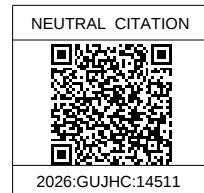


Divisional Police Inspector, Mangrol had drawn the Panchnama on 08.10.1976 between 22:10 and 09:10 to 12:00, wherein in presence of the Panchas, both the persons were taken and kept at Mangrol. At 7 O'Clock at Khirsara, when they came at the house of Rabari Bhikha Deva, he, from the pit besides his house after removing the stones, produced one Tamancha, which was a country-made weapon, which was having wooden handle with two nosals, having cartridges fitted in it with two triggers and bore, which was of six fingers length, valued at Rs.200/-, which was seized and at 15:15 hrs., Mer Merag Haja produced a revolver, which was hidden in the roof top of his residential house by climbing at the loft and while descending from the ladder with the revolver and cartridges, he slipped one step of the ladder and fell down on the ground. It was recorded on Page-11 that there was no visible injury, but was complaining about pain in the left thigh.

31.17 The witness was also referred to Page-12 to read that it was fit in the wooden handle and on the wooden handle,

there was monogram in wood of the figure "W", which could be opened from the upper part of the cartridge, hammer was on the upper part. There was trigger guard tilting towards the barrel. The cartridge was found lying down and on the rear side, it was written 0.38 in English. The revolver and the cartridges were seized. The Panchnama and the accused – Merag Haja arrested at 12 O'Clock and Bhikha Deva at 09:50 were produced along with the report, which was included in the matter. Thereafter, the receipt of the Muddamal was drawn of the seized Muddamal, which was included in the matter. While inquiring from both the accused, they were not disclosing further facts. On inquiring from Merag Haja, he volunteered to produce the weapon, at that time while coming down from the ladder with the weapon, the leg got tripped and he fell down and as he made complaint of the injury of the left thigh and therefore, he was taken for the treatment in police vehicle at Bhavsingji Hospital, where he was admitted.

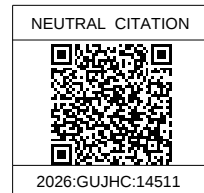
31.18 From the side of the State, Public Prosecutor took



objection to the evidence on the ground that the statement of the complainant before the police could not be read in evidence, which was ordered to be decided at the end of the evidence during the judgment.

31.19 The witness DW3 thereafter, in his testimony, stated that the fact, which he had read in evidence, of Page no.11 and 12 of his Case Diary, Exh.20, was in accordance to the evidence, which was produced before him and from the statement of Merag Haja. The writing in the Case Diary was true.

31.20 In the chief examination in connection with Exh.204 – Case Diary, while recalled for deposition, the witness had made a reference of the event that has been recorded of 09.10.1976. Page-11 was in his handwriting and he stated that it was in relation to the production made by accused – Bhikha Deva and Merag Haja and also the fact of the Divisional Police Officer, Mangrol drawing the Panchnama on 08.10.1976 from 22:10 hrs. to 09:30, 12:00 hrs., where both the persons were taken to Mangrol for the night and at 7 O’Clock, the event of



Rabari Bhikha Deva at Khirsara Village producing the Tamancha from the pit near his house and thereafter, about the incident at 15:15 hrs. at the residence of Merag Haja removing the revolver and cartridges and thereafter, while descending falling down from the stair case and sustained injuries in the left leg thigh has been recorded. Page-12 is the fact recorded of the description of the weapon and the Panchnama of arrest of Merag Haja at 12:00 hrs. and Bhikha Deva at 09:50 hrs.

31.21 The evidence, thus, would show that in the morning at 7 O'Clock, Bhikha Deva had produced Tamancha and Merag Haja at 15:15 hrs. i.e. 03:15 p.m. has produced the revolver and cartridge and the arrest of Bhikha Deva at 09:50 and thereafter, Merag Haja was arrested at 12:00 hrs. So, the evidence shows that prior to the arrest of Merag Haja, Bhikha Deva was arrested.

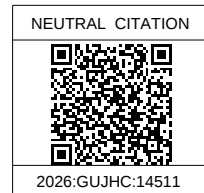
31.22 The learned Public Prosecutor for the State cross-examined the witness in connection to Case Diary no.204, the witness was asked about Page-1, wherein it was recorded that accused no.3 – Rabari Bhikha Deva,



resident of Khirsara, arrested at 09:50 dated 9/10. He denied the suggestion that the said writing was belatedly written after the writing in the Case Diary and that there was difference in the handwriting. The witness affirmed to the suggestion that on Page-1, after writing accused no.3 – Bhikha Deva, prior to that or thereafter, date of arrest, time and village of Merag Haja, resident of Sutrejvala has not been recorded.

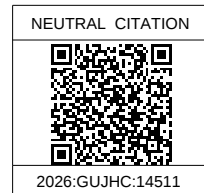
31.23 So, according to the evidence, Rabari Bhikha Deva was arrested on 9/10 at 09:50 hrs. and the examination-in-chief of DW3 would record that thereafter, at 12:00 hrs. Merag Haja was arrested; while in the cross-examination by the Public Prosecutor, on Page-1, no reference of time and date of arrest of Merag Haja has been made. The Public Prosecutor could find some change in the writing in the Case Diary and according to the evidence, on Page-1, no mention is made regarding the time and date of the arrest of Merag Haja.

31.24 DW3, in further cross-examination, stated that the facts which he has recorded at Page-11 in the examination-in-



chief, was about the Divisional Police Officer, Mangrol, Panchnama dated 08.10.1976 of 22.10 hrs. to 9/10 till 12:00 hrs. The witness affirmed that on Page-11 of Case Diary, the name of the Divisional Police Officer as well as the names of Panchas were not recorded. The witness affirmed that he has no personal knowledge of the Panchnama. He affirmed that the Panchnama in connection with the offence of CR no. II-43/76 of Porbandar, was in regard with the offence registered against Salemmohammad. The witness affirmed that the Case Diary for the offence would be one and continuous and he denied that Case Diaries would be recorded by different officers as per the investigation they have made to the offence.

31.25 DW3 affirmed in the cross-examination that on Pages-11 and 12 of the Case Diary, which he had read, it becomes clear that the investigation of Porbandar II CR no.43/76 was done by another officer and on Pages-11 and 12 of Exh.204, he has not recorded the name of the officer who had conducted the investigation. The witness does



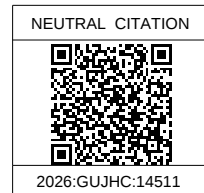
not have the copy of the Panchnama which was recorded on Page-11. He denied the suggestion that the facts as recorded on Pages-11 and 12 of Exh.204 was falsely made to assist his superior officer – accused no.1. The reference of the complainant falling down from the ladder and sending him with the police party to Bhavsing Hospital, was falsely raised, such suggestion was denied by DW3 who does not remember of any entry made in the Station Diary to that effect. He affirmed that in II-CR no.43/76, the arrest time of Merag Haja and Bhikha Deva was shown differently in the Case Diary and denied the suggestion that it cannot be seen that both the persons were with the same officer at the same time, because of the fact that they were arrested separately.

31.26 The witness – DW3 denied that certain details on Pages-11 and 12 and certain details of 07.10.1976 and 08.10.1976 were not legible. He affirmed the fact that on the last Page of the Case Diary – Exh.204, another police officer has written about the result of CR no. II-43/76 and accordingly, the accused were acquitted.



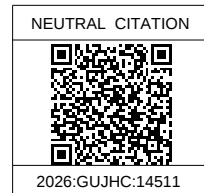
31.27 The witness – DW3 has also affirmed that on Page-2, no mention has been made about his informing Police Sub-Inspector, Keshod at 11 O’Clock by phone for bringing both the persons to Porbandar City, as was found necessary from the inquiry of Salemohammad and thereafter, both the persons at 17:00 hrs. were brought to Porbandar City, which the witness affirmed that he has not recorded such facts in his Case Diary dated 07.10.1976 and 08.10.1976.

31.28 The Public Prosecutor had also asked about not recording the fact of the murder of Porbandar Municipal President – Dhanjibhai Kotiyawala and its effect on Porbandar City and surrounding area being tensed and about the camp of District Superintendent of Police, Junagadh, which the witness partially denied stating that the fact of the camp at Porbandar of District Superintendent of Police has been recorded. He does not remember the DSP of Junagadh during the time of 07.10.1976, nor does he remember the Police Sub-Inspectors working at Keshod on 07.10.1976 and 08.10.1976. He does not remember



whether Police Sub-Inspector – Upadhyay was at Keshod. He has not recorded the statement of any police officer from Keshod Police Station of sending both the persons to Porbandar. The witness affirmed that when both the persons had come at 5 O’Clock at Porbandar, at that time, no Panchnama was drawn in presence of Panchas and both the Panchas with the arrest Panchnama, were produced before him, whose reference has been made on Pages-11 and 12. For that purpose, he has not drawn any Panchnama. The witness stated that when both the persons were produced before him, he had not inquired from them in presence of Panchas. He denied the suggestion that on Page-12, there is no mention in Case Diary of Merag Haja sent to Bhavsing Hospital with police yadi. He denied that no statement was recorded of Shri Raol in the case being CR no.II-43/76.

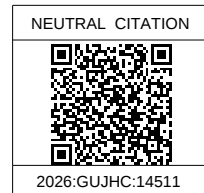
31.29 The prosecution, thus, had cross-examined DW3 with the defence that the testimony with regard to Exh.204 – Case Diary was to assist the accused. The case does not get falsified by the cross-examination of Public



Prosecutor that complainant - Merag Haja was not the accused in II-CR no. 43/76.

32. Here in this matter, the complainant himself stated that when he was brought in SRP vehicle at Antroli railway crossing. He was with Bhikha Deva and thereafter, even search was made at the field of Jusab Habib and Panchnama was drawn there. Jusab Habib was also taken along with them. Thus, the evidence of the complainant shows that he was along with the Bhikha Deva and Jusab Habib. He very categorically stated in his evidence that Bhikha Deva and Jusab Habib were with him in the same room at the Police Station. Even a field of Sarpanch Premdas was searched. What was the reason for searching the houses of all these people has not been clarified by the prosecution.

33. The argument was raised before the learned Trial Court Judge by the defence that the prosecution was required to examine Jusab Habib and Premdas Narandas who were the best available witnesses, on the premise that Merag Haja is an interested eye-witness. The learned



Trial Court Judge has rejected this argument observing that there is no material discrepancy in the evidence of Merag Haja. His evidence has ample corroboration with medical evidence and other evidence and further the learned Trial Court Judge observed that there was no pre-existing enmity between the accused and the complainant. Before the incident occurred, Merag Haja was not knowing accused no.1 and found the evidence of Merag Haja reliable trustworthy and thus, observed that non-examination of independent witness would not be fatal to the prosecution case. Further clarifying that the prosecution has discretion not to examine certain witnesses so that proliferation of evidence is avoided. The learned Trial Court Judge observed that adverse inference cannot be drawn from non-examination of material witnesses. The learned Judge thus was of the opinion that if the accused thought that his evidence would help the defence, it was open to the accused to examine him as the Defence Witness.

34. The learned Trial Court Judge conceding the fact that



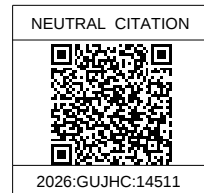
Jusab Habib has not been examined by the prosecution and as per defence, he was important witness as he was in custody with Merag Haja, the learned Trial Court Judge observed that the evidence adduced and produced on record nowhere mentions that at the time of beating Merag Haja, Jusab Habib was present and that it was not necessary that though Merag Haja and Jusab Habib were locked in one room, Merag Haja was beaten in presence of Jusab Habib. On the same line of observation for Premdas Narandas, the learned Trial Court Judge observed that if the defence feels that Jusab Habib's evidence would help the defence, it was open to the accused to examine as Defence Witness, but has failed to do so.

35. The learned Trial Court Judge had not found any case of wrongful confinement with an intention that the person confined should not be discovered. No such intention has been attributed to all the accused and it has been observed that the prosecution failed to prove any such intention of the accused. Referring to the provision of



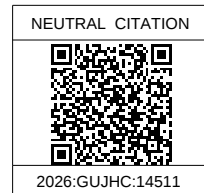
Section 355 of IPC for assault or use of criminal force with an intention to dishonour the person, otherwise, than on grave and sudden provocation given by that person, the learned Trial Court Judge concluded that the intention of the accused was to extort confession from the complainant and observed that the intention of the accused was not to dishonour the complainant.

35.1 It was noted by the learned Trial Court Judge that the complainant was abducted by accused no.1 and was kept in the lock-up with an intention to extort confession from him. The learned Trial Court Judge failed to clarify from the evidence recorded as to what kind of confession was intended to be extorted from the complainant. The learned Trial Court Judge further had noted that temporary detention of the person at the Police Station by the police for the purpose of search or investigation or for inquiry, does not amount to offence of wrongful confinement, but came to the conclusion that when the detention is serious and protracted enough to be a real and unauthorized prevention from proceeding beyond



certain circumscribing limits finding the case of the complainant of wrongful confinement for the purpose of obtaining confession from him and that he was beaten and seriously injured and he received permanent disability in his legs; thus concluded that all the accused had equally taken part in wrongfully confining the complainant to extort confession from him. The learned Trial Court Judge observed that the prosecution has proved that the accused used criminal force on the complainant and that act of the accused was intentional to extort confession from him and accused used such force without the consent of the complainant and by such act, the accused were knowing that by doing so, they will cause injury to the complainant, hence, found all the accused equally liable for voluntarily causing grievous hurt to the complainant and abetting each other in the commission of the crime.

36. It is not that the witnesses – Jusab Habib and Premdas Narandas could not be examined by the prosecution. They would have been the most independent persons to



have corroborated the complainant's case of custodial torture. Generally, it is observed that the police persons bound by brotherhood ties may often prefer to remain silent. But the witnesses – Jusab Habib and Premdas Narandas could have cleared out the circumstances. Non-examination of available independent witnesses would be fatal for prosecution when case of false complaint cannot be overlooked. Police person may try to gloss upon facts, but the mandatory document as Case Diary maintained under law cannot be overlooked. The trial against the accused who were all police persons, were under Sections 331, 336, 337, 344, 346, 348, 352, 355, 365 read with Sections 34 and 114 of the Indian Penal Code, 1860. Section 331 IPC would be charged for voluntarily causing grievous hurt to extort confession or to compel restoration of the property. Section 336 makes any act endangering life of personal safety of others punishable. Section 344 is about wrongful confinement for 10 or more days, while 346 provides for wrongful confinement in secret.



37. Section 348 makes wrongful confinement to extort confession or compel restoration of property punishable. Section 352 is for punishment for assault or criminal force otherwise than on grave provocation. Section 355 is the provision for assault of criminal force with intent to dishonour person, otherwise, than on grave provocation; while Section 365 is for kidnapping or abducting with intent secretly and wrongfully to confine person. The learned Trial Court Judge has made reference of the evidence of the Defence Witnesses in the judgment and in Paragraphs 31 and 32, has observed as under:-

"31. Now, as per prosecution, the complainant sustained injury because of beating by accused at Porbandar Police Station. While, as per say of the accused, Merag Haja slipped from the ladder while, he was taking arm from the slab of his house and he sustained injuries. The standard for proof of their cases for both the parties are different. Prosecution is bound to prove their case beyond shadow of doubt, while defence side is required to satisfy their case on probabilities only. Whether accused are able to create doubt about the case of prosecution for coming to a correct conclusion, we have to follow the grain and chaff policy to find out the truth.

32. The prosecution has cited certain



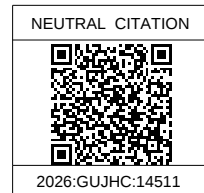
rulings such as 1997 Cr.L.J. page 743, D.K. Basu v. State of West Bengal; 1995 (4) SCC Page-262; 2002 Cr.L.J. Page 914; 1995 CCR 36 (S.C.); AIR 1992 SC Page 1689, all these rulings are referred in connection with the custodial crime. I have gone through all the cited rulings and guidelines and ratio laid down for appreciation of evidence in a custodial crime and I have kept in my mind all these ratios and guidelines while appreciating the evidence on record in the present case. Further, the case being an old one, many oral evidence as well as documentary evidence, are not available, that factor is also kept in mind while appreciating the evidence in the case. Court is required to adopt a realistic approach rather than a narrow technical approach while appreciating evidence in custodial torture. Any form of torture or cruel, inhuman or degrading treatment, would fall within the ambit of Article 21 of the Constitution of India. If the functionaries of the Government become law-breakers, it is bound to breed contempt of law and would encourage lawlessness and every man would have the tendency to become law upto himself, thereby leading to anarchism. The rights guaranteed by Article 21 of the Constitution of India, cannot be denied to convict, under trials, detainers and other prisoners in custody, except according to the procedure established by law. With this concept of appreciation of evidence, I hereby discuss the evidence as under."

38. The learned Trial Court Judge appears to have analysed the evidence keeping in mind the concept with regard to



the rights guaranteed under Article 21 of the Constitution of India and has appreciated the evidence keeping in view that it was a case of custodial torture. The prosecution witnesses were required to prove that the custodial torture was with regard to extorting confession. What kind of confession was expected from the complainant was it related to murder of Porbandar Nagarpalika President – Dhanjibhai Kotiyawala. It is not that only Merag Haja house was searched, there were Bhikha Deva, Jusab Habib, Premdas Narandas. They have not complained of custodial torture. Apart from them, houses of many others were searched.

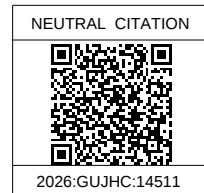
39. The case of NIL Panchnama drawn on 07.10.1976 between 5 to 6 p.m. and the house of the complainant raided was believed by the learned Trial Court Judge, as noted to have received the support from Deputy Superintendent of Police – Shri Jani and Panch – Shri Keshavdas Jamnadas. Appreciating their evidence to the FIR that nothing was found from the house of the complainant hence a NIL Panchnama was prepared.



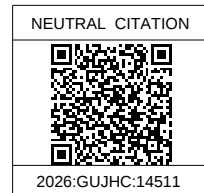
However, the Trial Court failed to give reason to contradict that the raid was actually for search of weapon by DSP Shri Jani who was entrusted the official duty to investigate the murder of Nagarpalika President – Shri Dhanjibhai Kotiyawala, why the raid for weapon was converted into NIL Panchnama under the Prohibition Act.

40. The learned Trial Court Judge noted that so far as the injuries to Merag Haja was concerned, they were supported by the Doctors with the history of injury as stated by Merag Haja and the say of Merag Haja that he was taken to Porbandar Police Station gets support from the admission of the accused no.1 in the further statement and also gets support from the version of Defence Witness – Shri B.S. Shinde.

41. The learned Trial Court Judge has failed to take into consideration the charge framed against the accused. As per the charge, on 07.10.1976, when the complainant and his man – Bhikhabhai were present, Police Inspector Shri Jani and Shri Upadhyay with his staff and other SRP members had surrounded the house of the complainant -



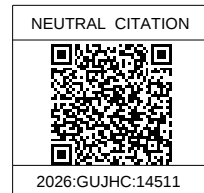
Merag Haja and had informed the complainant that he was having illegal weapon and for that purpose, his house was to be seized, those persons had no legal search warrant or authority letter. The learned Judge failed to take into consideration that the raid that was conducted on 07.10.1976 was by Shri Jani – PW7 and Shri Upadhyay; while Shri Jani as well as Shri Upadhyay had not been made accused in the matter. The raid was conducted along with the staff as well as SRP persons for searching illegal weapon. There is no clarification from PW7 – Shri Jani as to why the raid for the weapon was converted into raid under the prohibition recording the NIL Panchnama, though PW7 – Shri Jani had stated in his evidence that he was deputed in October, 1976 as Divisional Police Officer, Nadiad to investigate the murder of Porbandar Municipal President – Dhanjibhai Kotiyawala. So he was ordered to go from Nadiad to Porbandar and on 04.10.1976, he had come to Porbandar reporting DIG Range. The fact becomes clear that PW7 – Shri Jani was not the police officer serving at Porbandar. He was called from Nadiad. He has not clarified in his



evidence that though one SRP official had brought one bottle of liquor to be implanted in the house of the complainant - Merag Haja, why no action was taken against that SRP official who had come at 07.00 p.m. with the liquor bottle and Shri Jani as well as Shri Upadhyay refused to make any such mention of having found a liquor bottle from the house of the complainant on the ground that they were not willing to do any illegal act. In the charge, it was also mentioned that while Shri Jani and Shri Upadhyay were going out of the the house of the complainant, at that time, on the opposite side, in the police van, police persons including Shri Khandwawala (A-1) had come and they had asked the complainant to give the weapon. While the evidence of PW7 - Shri Jani would clarify that at about 08:00 p.m., after writing the Panchnama, they had left the house of Merag Haja, while the complainant stated that at 07:00 p.m., accused no.1 - Shri Khandwawala had reached his house, while PW7 - Divisional Police Officer - Shri Jani was present there till 08:00 p.m. at the house of the complainant - Merag Haja on 07.10.1976 and during the



time of Panchnama, he stated that no another incident had occurred, nor any one had come there nor any occurrence had taken place. According to PW7, Merag Haja had voluntarily allowed to take the search and he had not raised any objection. There is no explanation from PW7 that though the raid was for the search of weapon, and he had gone for the raid to Village Khirsara and Sutrej for the raid why the search of house of Merag Haja was shown under prohibition. PW7 had searched the house of Merag Haja from 16:45 to 20:00 hrs., which means that till 08:00 p.m., PW7 was in the house of Merag Haja. PW7 has not alleged that accused no.1, at that time, in the evening at about 07:00 p.m. accused no.1 had come with his staff and police vehicles there, rather PW7 clarifies that nothing had taken place till 08:00 p.m., nor anyone had come to the house of Merag Haja. Hence, presence of all the accused at the house of Merag Haja at 07:00 p.m. on 07.10.1976 does not get proved. As Police Sub-Inspector – Shri Kanak Upadhyay of Keshod, since deceased, could not be examined as the Prosecution Witness. Hence, nothing further could be



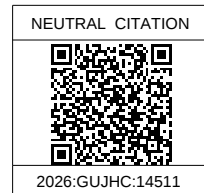
brought on record with regard to three hours raid at the house of the complainant - Merag Haja. From the evidence of PW7, it also becomes clear that the raid was for searching of weapons. It also becomes clear that PW7 had come from Nadiad to Porbandar under order for investigating the murder of Porbandar Municipal President – Dhanjibhai Kotiyawala. PW7 has not given any evidence as to what kind of investigation he had done in connection with the murder of the Municipal President and why he had to raid the house of the complainant.

42. As per the charge that was framed, during the time of NIL Panchnama, when the police persons were going out of the house of the complainant, at that time, on the opposite side of the road, accused no.1 - Shri Khandwawala who was with his police staff in police van had come near the complainant and asked him to give the weapon, at that time, the complainant informed him that he had 12-bore country-made pistol with licence, which he had deposited at Keshod Police Station in July,

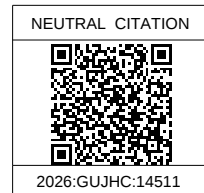


1976 and that now he had no illegal weapon and that he had no reason to keep such illegal weapon. Why such facts were not stated by the complainant to PW7 during his raid has not been explained by the complainant, nor by PW7.

43. The complainant has not proved any evidence to show that he has deposited that 12-bore country-made pistol at Keshod Police Station in July, 1976. Along with PW7 – Shri Jani, the police who had accompanied him was Police Sub-Inspector – Kanakbhai Upadhyay of Keshod Police Station. Had the complainant deposited his weapon at Keshod Police Station, PSI – Kanakbhai Upadhyay had no reason to raid the house of the complainant and he would certainly have known of the complainant surrendering his weapon in July, 1976 at Keshod Police Station.
44. The charge further was that, since the complainant stated that he has no such weapon, so Shri Khandwawala (A-1) without the consent and desire of the complainant with an intent to do criminal act, took the complainant in



his vehicle at Porbandar and on the route of the Porbandar, certain houses of Village Khirsara and Sarsali were searched. So, it is not the case that only the house of the complainant was searched. The evidence of the complainant corroborates this fact that when he was taken away by accused no.1, a field at the outskirts of Village Khirsara was searched and thereafter, a house in the Village Khirsara was searched and then the vehicle of accused no.1 - Shri Khandwawala had come at Antroli railway crossing from where one road was heading towards Mangrol and another was going towards Porbandar, there Shri Khandwawala (A-1) had made him and Bhikha Deva sit together in an SRP vehicle. The fact which also requires to be noticed that in the deposition of complainant while informing accused no.1 that he had no weapon, at that time, the complainant had also made an utterance "Tamare Marvo Hoy to Maro", which means that he even told accused no.1 at that time that if he wanted to beat him, they could do so. It is not the case of the complainant that he was beaten there. Further, the evidence of the complainant very much clarifies that

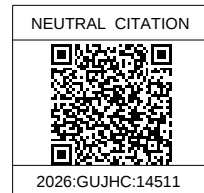


he and Bhikha Deva were both together in the SRP vehicle, while PW7 – Shri Jani does not state of any SRP personnel along with him in the raid, while according to the complainant, PW7 – Shri Jani and Shri Upadhyay had come with SRP Persons. A reference is also made about one of the SRP Persons wanted to implant a liquor bottle in the house of the complainant, why no inquiry has been made by PW7 – Divisional Police Officer to that action of SRP, does not become clear.

45. When the search and raid was for weapons in the background of the murder of Nagarpalika President, reference of the power of arrest of police becomes relevant to be made.

46. Section 20 of the Arms Act, 1959 reads as under:-

"20. Arrest of persons conveying arms, etc., under suspicious circumstances.-
Where any person is found carrying or conveying any arms or ammunition whether covered by a licence or not, in such manner or under such circumstances as to afford just grounds of suspicion that the same are or is being carried by him with intent to use then employee, or that the same may be used, for any unlawful purpose, any magistrate, any police officer or any other public servant or any persons

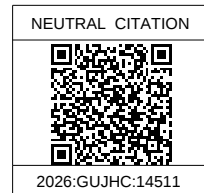


employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance, may arrest him without warrant and seize from him such arms or ammunition."

47. From the evidence that has been brought on record by the examination of the Prosecution Witnesses as well as Defence Witnesses, the fact becomes very much clear that the atmosphere at that time at Porbandar was tensed because of the murder of the Porbandar Municipal President – Dhanjibhai Kotiyawala.

48. In the case of **Munshi Singh Gautam (Dead) & Ors. v. State of M.P., (2005) 9 SCC 631**, it has been observed as under:-

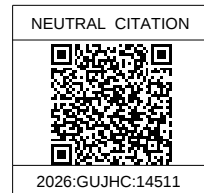
"9. But at the same time there seems to be a disturbing trend of increase in cases where false accusations of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully 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 a unique case in the sense that the complainant filed a complaint alleging



custodial torture while the accused alleged false implication because of oblique motives."

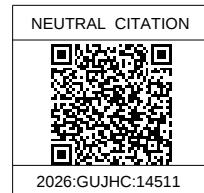
49. The complainant stated that accused no.1 - Shri Khandwawala had taken him in his vehicle. He does not state that at that time, Bhikha Deva was with him and Shri Khandwawala (A-1) had asked him to sit along with the complainant in Shri Khandwawala's vehicle. It was at Anthroli railway crossing that the complainant and Bhikha Deva were made to sit in the SRP vehicle, which would prove the fact that both were arrested separately. Thereafter, Shri Khandwawala (A-1) had gone to Mangrol and the complainant and Bhikha Deva were taken to Porbandar police custody, where according to the complainant, at about 11:30, they were sent in the police custody.

50. This evidence of the complainant if at all is to be believed, then, that itself proves that on 07.10.1976 at night, Shri Khandwawala (A-1) had not joined the complainant and Bhikha Deva at Porbandar police custody. The complainant himself has stated that Shri



Khandwawala (A-1) was heading towards Mangrol.

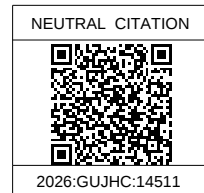
51. So, from the evidence of the complainant, it gets proved that on 07.10.1976, Shri Khandwawala (A-1) had not come to Porbandar police station, while evidence of PW7-Divisional police officer – Shri Jani makes it clear that there were no other incidents, which occurred on that day of 07.10.1976 during his presence till 08:00 p.m. at the complainant's house. According to PW7, after the Panchnama at 08:00 p.m., he had started towards Porbandar and at that time, Merag Haja was present at his house. So, from the evidence of PW7, it does not get proved that Merag Haja was in Porbandar Police Station, as according to PW7, he had headed towards Porbandar.
52. The complainant has referred to the police custodial torture by the accused on the next day. He does not specify that it was 08.10.1976, however, from the evidence of the complainant, it was on the next day at 8 O'Clock, Shri Khandwawala (A-1) had come there and asked him to give the weapon, at that time, he informed Shri Khandwawala (A-1) that he had no weapon. Again



the inquiry was of weapons, the charge against the accused specifically drawn was of such incident was dated 08.10.1976 at 08.00 in the morning. The charge states that accused no.1 – Shri Khandwawala and accused no.2–P.A. Raol, accused no.3 – B.D. Vaghela and accused no.4 – Pamolsinh Hardansinh had come there and had asked the complainant to give the weapon threatening that otherwise he would be required to be beaten, the complainant in the testimony gives evidence of police torture in following terms:-

"Thereafter, his both hands were held at a distance and was beaten severely. He was beaten on the hand, waist and back. Thereafter, he was made to lay down and both his legs were broadened and with the heels of the shoes, his legs were crushed and both the legs were heavily rolled with the stick. Thereafter, he was made to stand outside in the Osri, where below both his hands, keeping a stick and with the rope, both his upper arms were tied and the rope was pulled up on the ceiling from a hole and he was dropped down. Thereafter, he got unconscious."

53. In **Balu Sudam Khalde & Anr. v. State of Maharashtra**, reported in **AIR 2023 SC 1736**, wherein the Hon'ble Apex



Court has observed in Paragraphs 26 and 27 as under:-

"26. When the evidence of an injured eyewitness is to be appreciated, the undernoted legal principles enunciated by the courts are required to be kept in mind:

(a) The presence of an injured eyewitness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

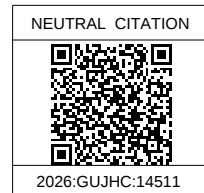
(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which



normally creep due to loss of memory with passage of time should be discarded.

27. In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or put forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence."

54. So as the proposition of law, the appreciation of injured witness evidence has to be examined with the definite plea or positive case put forward by the accused. The inconsistency has to be measured by taking into account the value of the prosecution evidence.



55. In the case of **D.K. Basu** (supra), the report of National Police Commission in India was even referred. The relevant part of Paragraph 19 is reproduced hereinunder:-

19. The Third Report of the National Police Commission in India expressed its deep concern with custodial violence and lock-up deaths. It appreciated the demoralising effect which custodial torture was creating on the society as a whole. It made some very useful suggestions. It suggested:

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

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

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

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

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental

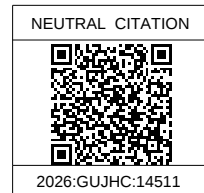


instructions that a police officer making an arrest should also record in the Case Diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines. ...”

The recommendations of the Police Commission (*supra*) reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. These recommendations, however, have not acquired any statutory status so far.

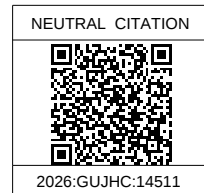
55.1 **D.K. Basu v. State of West Bengal** was decided on December 18, 1996, and in the case of **State represented by CBI v. Anil Sharma**, reported in (1997) 7 SCC 187, which was decided on 03.09.1997, the Hon'ble Supreme Court has recorded about custodial interrogation. In the case of **Anil Sharma** (*supra*), it has been observed as under:-

“6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconded with a favorable order under Section 438 if the code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Succession in such interrogation would elude if the suspected person knows



that he is well protected and insulated by a pre-arrest bail during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The court has to presume that responsible Police Officers would conduct themselves in a responsible manner and that these entrusted with the task of disinterring offences would not conduct themselves as offenders.”

56. From the prosecution side as well as from the defence, evidence was common that the complainant was sent to Bhavsing Hospital, Porbandar from the police custody in police vehicle. As per the Defence Witness - Shri Shinde, the complainant was sent along with police yadi to Bhavsing Hospital, Porbandar. Unfortunately, PW1–Dr. Bhupen Kanakshankar Vora from Bhavsing Hospital had not received any papers from the Hospital after receiving the summons. He was the Doctor who had attended the complainant at Bhavsing Hospital. The complainant himself has stated that when he was in police custody, at that time too, Civil Surgeon of Porbandar had visited



him. Dr. Vora had not stated about any injury as complained by the complainant in his deposition-in-chief.

57. If the complainant was beaten severely on hand, waist and back and he was made to lay down and by distancing his both legs, his legs were crushed and both legs were heavily rolled with a stick and after tying the complainant's upper arms, if he was thrown down from the ceiling, then, certainly those injuries would have been on all those parts of the body. None of these injuries have been seen by Dr. Vora who had visited the complainant, while he was in police custody. After two hours, the complainant regained consciousness. Dr. Vora had nothing to state about the alleged custody of the accused on 08.10.1976, 09.10.1976 and 10.10.1976. His certificate-Exh.104 dated 11.10.1976 only refers to fracture of neck of left femure. While Dr. V.M. Shah – PW2 certificates at Exhs.106 and 107 refer as under:-



Dr. V. M. Shah
M. S. (ORTH)
ORTHOPÆDIC SURGEON

ORTHOPÆDIC HOSPITAL
RANJIT TOWERS 'B'
OPP. LAL BUNGALOW CIRCLE
JAMNAGAR

81

Inq. No. 2/76
M. 1/1

Date: 23-10-76

It is to certify that SC. 76/82
Shri/Smt. meragbhai nayabhai
was admitted here on 13-10-76 and
was discharged on 23-10-76

He is having fracture neck femur
2 linear contusions - both
upper arms

He is advised rest for 3 months

Ex 106
17-10-02

Dr. V. M. SHAH
M. S., M. S. (ORTH)

Fast Track Judge,
Junagadh

Dr. V. M. Shah
M. S. (ORTH)
ORTHOPÆDIC SURGEON

ORTHOPÆDIC HOSPITAL
RANJIT TOWERS 'B'
OPP. LAL BUNGALOW CIRCLE
JAMNAGAR

99

SC 76/82

Date: 24-11-76

925

24-11-76
24-11-76
24-11-76

It is to certify that
Shri/Smt. Me ragbhai nayabhai
was admitted here on 8-11-76 and
was discharged on 24-11-76

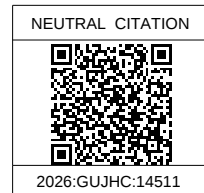
He is having fracture neck femur
Re-operated for osteotomy + Plating

He is advised rest for 3 months

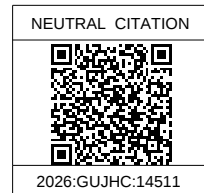
Ex 107
17-10-02

Dr. V. M. SHAH
M. S., M. S. (ORTH)

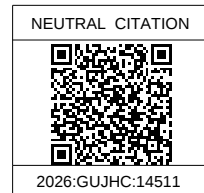
Fast Track Judge,
Junagadh



58. Dr. Shah's observation was also about fracture neck femur L 2 Linear contusions both upper arms and the date of admission was 13.10.1976 to 23.10.1976. The fact, as was brought by Defence Witness – Shri Shinde on record is about institution of Criminal Case at Porbandar City Police Station as CR no. II-43/76 against the accused, which was under the Arms Act, where apart from the complainant, others were also accused in the matter. The names of the complainant - Merag Haja and Bhikha Deva came up during the interrogation of Salemmohammad. The fact of this case under the Arms Act has not been denied, rather the complainant as well as his advocate – Samatbhai Ranavaya examined as PW5 affirms the case as Merag Haja had filed bail application from Bhavsing Hospital. The evidence does not get correlated that on 08.10.1976, the complainant – Merag Haja was in Porbandar police custody. His evidence shows that the CID Inspector – Shri Sharma, who had visited the complainant in the police custody, had inquired from him who assured him that he would make



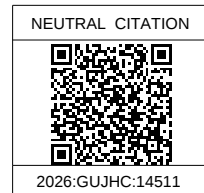
efforts to send him to the Hospital. The CID Inspector – Shri Sharma has not been examined. Why Shri Sharma visited him in Porbandar police custody does not become clear. Was it that the complainant as accused preferred to be in hospital rather than in judicial custody till the bail. This has to be considered in the background of the fact that Bhikha Deva and Jusab Habib had not made any complaint of police torture. Nor the evidence has been brought on record that CID Inspector – Shri Sharma had also visited Bhikha Deva and Jusab Habib. No Doctor from Civil Hospital had been examined to prove the injuries complained. The evidence of PW7 – Pratapray Laljibhai Jani does not inspire confidence. PW7 has not clarified as to why the raid was converted under the prohibition and further nothing is coming on record the reason for CID Inspector – Shri Sharma to visit the complainant in the custody. It appears that CID Inspector – Shri Sharma has aided the complainant and the evidence further records that after the assurance from CID Inspector – Shri Sharma, in the evening, Deputy Bhargav and Civil Surgeon, Porbandar had visited



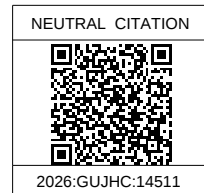
him. Thereafter, one local Vaidhya was called and the complainant was sent to Bhavsing Hospital, Porbandar at 09:00 to 09:30 night in the Ambulance or police vehicle.

59. It appears from the evidence that the complainant himself had made all the efforts to come out from the police custody. He had not allowed accused no.1 as the police to interrogate him in the custody and he shifted himself to Bhavsing Hospital, from where, he filed the bail application.

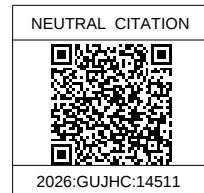
60. The relevant fact, which becomes noticeable, is that the advocate who had moved the bail application under the Arms Act, has not produced a copy of the bail application. It also becomes relevant to note that though the complainant was under arrest, he had not made any complaint before the learned Judicial Magistrate First Class of any custodial torture by the accused. Nothing has been brought on record by way of documentary evidence to prove that at that relevant time, the complainant had suffered the custodial torture as mentioned by him in his deposition. Reference in bail



application could have been a corroborative piece of evidence. Further, any complaint of ill-treatment by the police made to the learned Judicial Magistrate First Class in connection with the case CR no. II-43/76 could also have been a relevant fact. The evidence of Shri Shinde as DW3 who had investigated the complaint of Porbandar City Police Station bearing CR no. II-43/76 under the Arms Act had stated that when they had raided the house of Abdul Rehman Salemmohammad on the basis of the secret information on 07.10.1976 with regard to the sale of liquor, no article under the Prohibition Act was received; however, from his house, a cotton bag was found, wherein a 12-bore Tamancha and 2 country-made Tamancha with cartridges and other 42 items were found from his house and after the referred FIR was recorded, the remand application was moved on 08.10.1976 for Salemmohammad, which was allowed and remand was granted till 18.10.1976 and during the course of this interrogation, DW3 stated that it had come in the interrogation that Bhikha Deva had purchased weapon from Luhar Jagjivan Pitambar and Salemmohammad had



stated that Bhikha Deva had also sold him one revolver and Salemohammad had sold one weapon to Merag Haja for Rs.600/-. This fact was noticed on 08.10.1976. DW3– Shri Shinde, therefore, informed the District Superintendent of Police officer Junagadh whose camp was there at Porbandar, as statements of Merag Haja and Bhikha Deva were recorded who both stated that they wanted to produce the weapon. Therefore, DW3 had informed the same to District Police Officer about both wanting to produce the weapon and therefore, the District Police Officer had asked Police Sub-Inspector – Shri Raol to investigate the same with his staff and Shri Raol was informed at 21.45 hrs. and Shri Raol had taken both these persons for investigation. The fact, thus, becomes clear by further evidence recorded that on 09.10.1976 at 17.30 hrs., Shri Raol had come to Porbandar Police Station and had produced both the persons through Panchnama and accordingly, Merag Haja’s arrest was made at 12 O’Clock by way of Panchnama.

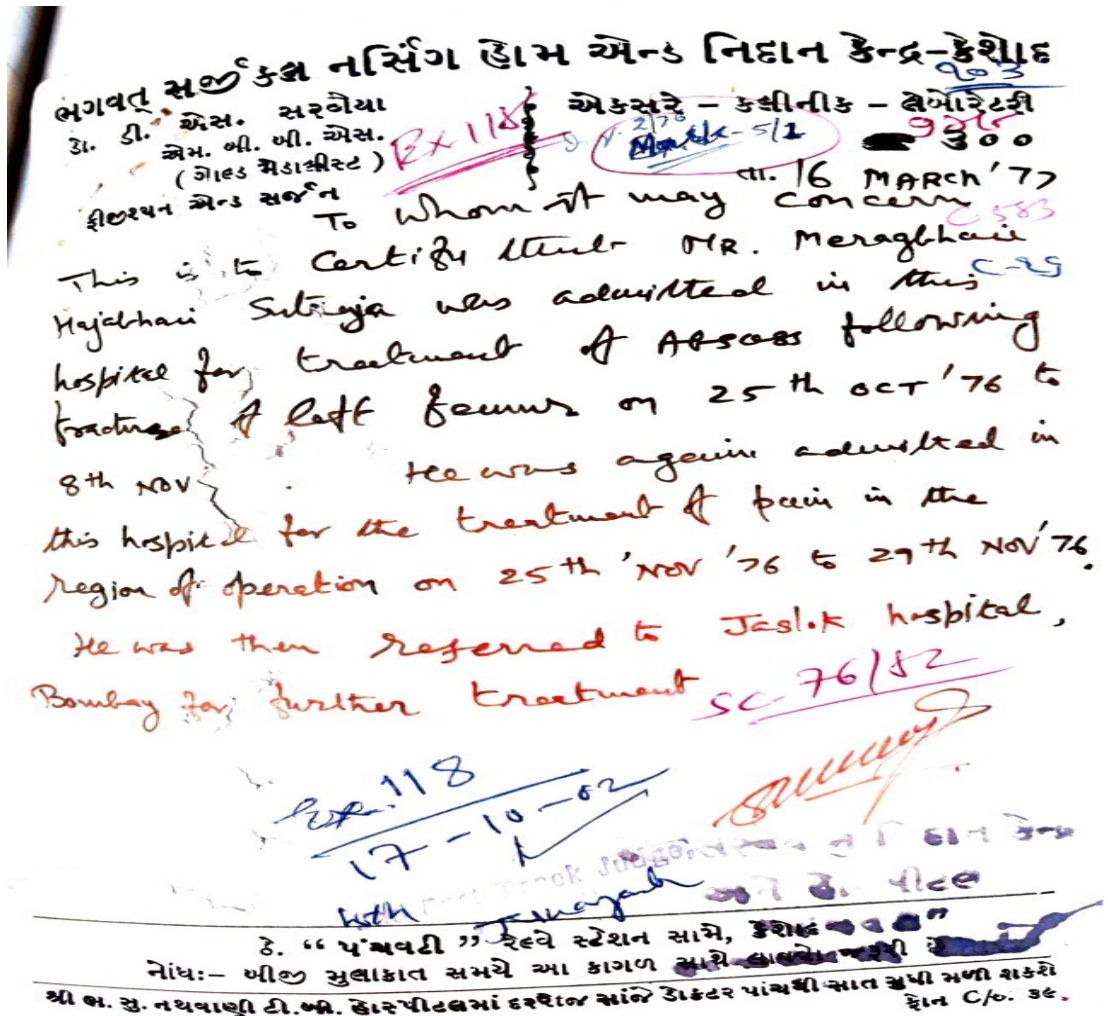


61. The prosecution, through the witnesses, had to prove that on 07.10.1976 night, Merag Haja - the complainant was in Porbandar police custody and thereafter too, on 08.10.1976 morning, he was in police custody. The prosecution witnesses as well as the complainant himself had failed to prove so. The evidence of Jusab Habib could have proved this fact of they being in police custody on 07.10.1976 and 08.10.1976. CID – Shri Sharma, Deputy Bhargav could have proved that fact. As observed, Civil Surgeon – Shri Vora (PW1) had not uttered about his visiting complainant on 08.10.1976 in the police custody. By the evidence of DW3, it had been proved that the arrest of complainant was in connection to II-CR no.43/76.

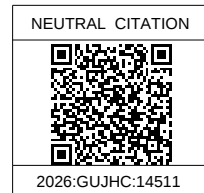
62. The referred documents of Dr. V.M. Shah – PW2 show the date of admission in the hospital as 13.10.1976 to 23.10.1976 and from 08.11.1976 to 24.11.1976, while the evidence of Dr. Sarvaiya – PW3 at Exh.118 shows that the complainant was admitted at his Hospital between 25.10.1976 to 8th November and was again



admitted with a complain of pain in the operation from 25.11.1976 to 29.11.1976. Document at Exh.118 is as under:-



63. Thus, from 13.10.1976 to 24.11.1976, the complainant remained in the Hospital and the document of PW1-Dr. Bhupen Kanakshankar Vora is dated 11.10.1976. The complainant has failed to explain about his alleged police custody on 07.10.1976, 08.10.1976 and 09.10.1976 as



well as 10.10.1976. While as per DW3 – Shri Shinde, the complainant – Merag Haja was arrested on 09.10.1976 at 12:00 hrs.

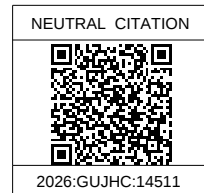
64. The private complaint was filed before the Magistrate on 02.11.1976. The delay of filing the complaint was appreciated by the learned Trial Court Judge observing that the delay has been sufficiently explained. The learned Judge had, perusing the proceedings of the matter, observed as under:-

"When we peruse the proceedings of this case, house of Merag Haja was raided on 07.10.1976. Thereafter, he was taken at Porbandar, where he was beaten and from there, he was shifted to Bhavsing Hospital as indoor patient and thereafter, he was shifted to Jamnagar and then to Keshod. Upto 14.10.1976, he was under police protection and during that period, he was at Jamnagar Hospital, where he was operated. He sustained fracture of left foot femur. He was operated twice. He had filed the complaint when he was indoor patient at Keshod. He was brought on a stretcher in the Court to file the complaint. When a person was having serious injury and was operated, in such circumstances, if the complaint is delayed, it will not defeat the ends of justice. Further, upto 14.10.1976, he was under police protection. He was not having opportunity to file the complaint. On perusing the complaint, it appears that the



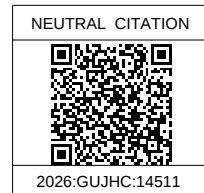
complaint was prepared on 28.10.1976, but verification below the complaint was taken on 02.11.1976 and Merag Haja was brought to the Court on a stretcher for filing a complaint. We cannot expect from a person who is suffering from such grievous injury to rush to the court to lodge the complaint before the Court. Naturally, first of all, his attempt would be towards his treatment and his nearby person will also make attempts towards his treatment. In such circumstances, if there is any delay in lodging the complaint, it cannot be termed as cooked one.”

65. It appears that the learned Trial Court Judge was completely in oblivion that the search of almost all the suspected houses of Village Sutrej, Khirsara, Sarsali were made in background of the murder of Porbandar Municipal President – Dhanji Kotiyawala. A team was constituted, even PW7 was called from Nadiad who had come down to Porbandar and there was combing all the houses. The learned Trial Court Judge also forgot the fact that CR no. II-43/76 was filed against the complainant and others under the Arms Act. As referred hereinabove, under Section 20 of the Arms Act, 1959, the arrest of any person conveying arms whether covered by a licence or not, under such circumstances as to afford just ground



of suspicion, then, any police officer may arrest that person without warrant and seize from him such arms or ammunition. The evidence of DW3 – Shri Shinde clarifies under what circumstances and in what manner, Salemmohammed, Bhikha Deva and Merag Haja came to be arrested in connection with the arms and were the accused at Porbandar City Police Station CR no. II-43/76. This fact could not be denied even by the complainant - Merag Haja that he was an accused in the matter. His lawyer has been examined as PW5 – Shri Ranavaya has proved by his evidence that while Merag Haja was in Hospital, he had moved a bail application under the Arms Act and while he was in the Hospital, he was bailed out.

66. The learned Trial Court Judge has even not taken into consideration the fact that Merag Haja, though had the opportunity at that relevant time to inform the JMFC about any such custodial torture, he had failed to do so though law provided him that right. The advocate – Ranavaya has also not stated of any such complaint made to the Magistrate even at the time of filing the bail

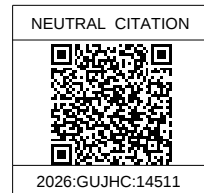


application. A copy of the bail application has not been produced. The medical documents do not reflect the injury as he had complained in the form of custodial torture. Merag Haja, during this period, had twice legal opportunity to make complaint of custodial torture; one at the time of his production in connection with CR no. II-43/76 before the Magistrate and another when he filed bail application, when during production, the Magistrate invariably would inquire from the accused of any ill-treatment from the police. As per the evidence of DW3, application for police custody remand for accused–Merag Haja was also moved by the police. As of practice, all the Judicial Magistrates before whom the accused are brought and produced would inquire about any custodial torture. In these circumstances, where the complainant as injured has not made any complaint against the police before the Judicial Magistrate during his production in connection with CR no. II-43/76, nor has made any allegation in the bail application, the delay in filing the private complaint becomes a relevant aspect and it becomes incumbent on the complainant to explain the



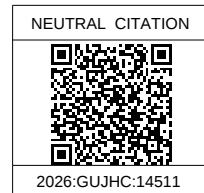
fact and in that circumstances, all the burden would fall upon the complainant and such circumstances could be considered detrimental to the complaint filed by Merag Haja. In the case of D.K. Basu (supra), in Paragraph 27, it has been held as under:-

"27. It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt for law develops. It was considering these aspects that the Law Commission in its 113th Report recommended the insertion of Section 114-B in the Indian Evidence Act. The Law Commission recommended in its 113th Report that in prosecution of a police officer for an alleged offence of having caused bodily injury to a person, if there was evidence that the injury was caused during the period when the person was in the custody of the police, the Court *may presume* that the injury was caused by the police officer having the custody of that person during that period. The Commission further recommended that the court, while considering the question of presumption, should have regard to all relevant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded. Change of burden of proof was, thus, advocated. In *Shyamsunder Trivedi case* [(1995) 4 SCC 262 : 1995 SCC (Cri) 715 : (1995) 3 Scale 343] this Court also expressed the hope



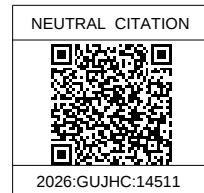
that the Government and the legislature would give serious thought to the recommendation of the Law Commission. Unfortunately, the suggested amendment, has not been incorporated in the statute so far. The need of amendment requires no emphasis — sharp rise in custodial violence, torture and death in custody, justifies the urgency for the amendment and we invite Parliament's attention to it."

67. In the referred Paragraph of D.K. Basu case as observed, the recommendation was made in 113th report of the Law Commission that in a prosecution of a police officer for an alleged offence of having caused bodily injury to a person and if there was evidence that the injury was caused during the period when the person was in the custody of the police, the Court may presume that the injury was caused by the police officer having the custody of that person during that period. The commission had also recommended that while considering the question of presumption, regard should be given to the relevant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded.

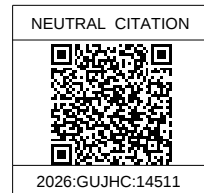


68. Here, as noted by way of the documentary evidence, the custodial torture as alleged by the complainant has not been proved by way of medical evidence. At the cost of repetition, it is to be mentioned that Merag Haja had not even given any complaint of custodial torture when he was produced after the arrest in CR no. II-43/76. Even there is no evidence of complaint recorded of custodial torture in the bail application. None of the witness, as complainant himself and the witness as his advocate, has stated of any such reference in the bail application. The co-accused – Jusab Habib has not made complaint of custodial torture, nor was he examined. Bhikha Deva could not be examined since deceased.

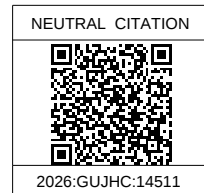
69. The Defence Witnesses and more specifically, DW3 had clearly specified that arrest of Merag Haja was on 09.10.1976 and he was brought at Porbandar Police Station at 17.30 hrs. by Police – Shri Raol. The Panchnama of their producing the weapons were also produced at Porbandar Police Station and as per the Panchnama, DW3 stated that Merag Haja was arrested at



12:00 hrs. The police, therefore, by way of examination of DW3 has categorically proved that Merag Haja was never in custody of DW1 on 07.10.1976 as well as 08.10.1976. The complainant had all the reason to cook up the story since he was suspected in the background of the murder of Porbandar Municipal President – Dhanji Kotiyawala. No clarification is coming from the evidence of PW7 – Pratapray Laljibhai Jani who was specially brought to Porbandar from Nadiad for investigating the murder of Dhanji Kotiyawala and a NIL Panchnama was drawn by PW7 on 07.10.1976 under the Prohibition Act for the search that was made at the house of Merag Haja. The prosecution has not brought any document to show as to what had happened about the investigation in connection with the murder of Dhanjibhai Kotiyawala. Was it that the complainant – Merag Haja was trying to hide something or was creating evidence to bring pressure on the police, does not get ruled out, in the circumstances of the murder of Dhanji Kotiyawala and the combing of the police team in the houses of the suspect in the surrounding villages.



70. The Case Diary – Exh.204 was also relied upon by DW3. The learned Trial Court Judge was not ready to believe the Case Diary referring to provision of Section 145 of the Indian Evidence Act, 1872 observing that the police diary cannot be used as evidence in case, but can be used only for the purpose of assisting the Court in appreciation of evidence and to clear up any doubt. The learned Trial Court Judge did not find the evidence of DW3 – Shri Shinde as supporting the probability of defence story, while not believing the Case Diary, it was observed that Section 145 of the Indian Evidence Act, 1872 suggest that the case diary can be used as evidence in another case to disprove the evidence of other side. That case diary has very limited purpose as disclosed in Section 172 Cr.P.C. It can only be used for contradicting the witness or if there is doubt or confusion Court can use for such clarification in the said case. The learned Trial Court Judge found the writing in the Case Diary – Exh.204 in respect of arrest of Rabari Bhikha Deva as subsequently interpolated. The learned Judge

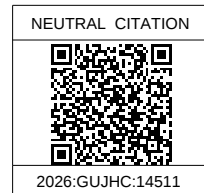


has also observed of CR no. 7/70, which was before the Keshod Police Station, wherein Merag Haja was previously convicted under Sections 325 and 34 of the IPC but was not convicted under the Arms Act. Thus, the learned Trial Court was of an opinion that it cannot be said that Merag Haja is a hard criminal.

71. As referred earlier hereinabove, third report of National Police Commission in India as referred in **D.K. Basu's** case (supra) in Paragraph 19 circumstance, it has been observed as under:-

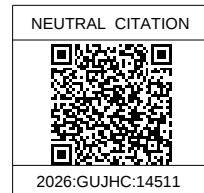
(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the Case Diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines. ..."

72. The police in his defence need not disclose all the facts and procedure in connection with the murder, but the relevant facts, which is undisputed from both the sides had been given bypass by the learned Trial Court Judge



about the arrest of the complainant in CR no.II-43/76. When the complainant has come with a case that he was tortured in the custody, then, such torture as mentioned by him has to be specifically proved by the injured complainant. The burden on the defence would shift only when the custody of the injured is proved to be with the accused police and that bodily injury was proved as per the allegation.

73. As circumstance (iv) as per the report by the Commission referred hereinabove mandates the police to maintain the Case Diary to record reasons for making the arrest to adhere to the guidelines, the Case Diary becomes a relevant document. Here the defence had examined witnesses to prove that original Case Diary was not available, it was destroyed or got lost, there is absence of original and in the circumstances proved by the defence, when the original could not be brought on record, the copy of Case Diary Exh.204 would be relevant as the police has to clarify their stance through Case Diary. There was no reason for the Trial Court Judge not



to believe the Case Diary, which was maintained by the police under the guidelines and that could be the only evidence for the police to defend his action.

74. The prosecution had failed to prove the case of police custodial torture of the complainant. The injuries are not proved as of police custody beating. Even the date of custody is not proved. The complainant had failed to invoke his right to make complaint of injuries by police as an accused when was arrested and produced before the Magistrate in case under the Arms Act. The learned Trial Court Judge has failed to analyse the evidence as per the sections of the Arms Act, Criminal Manual and Cr.P.C. in the matter. The judgment, thus, becomes erroneous and fails in merits and is required to be set aside. Since there is no case for conviction, there would be no ground for the plea of enhancement of the sentence.

75. Consequently, Criminal Appeal no.1509 of 2003 filed by the State is dismissed. Criminal Appeal no.1195 of 2003 is allowed. The judgment and order of conviction and sentence dated 30.09.2003 passed by the learned



Additional Sessions Judge, 5th Fast Track Court, Junagadh in Sessions Case no.76 of 1982 is set aside. The appellant herein is acquitted of all the charges leveled against him. The appellant is entitled to recover the amount of Rs.10,000/-, as ordered to be paid as compensatory and exemplary costs in Criminal Revision Application no.568/2001 from the complainant. Bail bond stands discharged. Registry is directed to send the record and proceedings back to the concerned Trial Court forthwith.

Maulik

(GITA GOPI,J)