IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)
WRIT PETITION NO. 3806 of 1998

In the matter of:

An applicant under Article 102 of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of:

Bangladesh Legal Aid and Services Trust (BLAST) and others

..... Petitioner

-Vs-

Bangladesh and others

..... Respondents.

Dr. Kamal Hossain with

Mr. M. Amirul Islam.

Mr. Md. Idrisur Rahman

Mr. M. A. Mannan Khan

Mr. Tanzibul Alam

Mr. Abu Obaidur Rahman and

Mr. Kowsar Ahmed ..... For the Petitioner

Mr. A. F. Hassan Ariff, Attorney General with

Mr. Abdur Razaque Khan, Additional Attorney General

Mr. Zaman Akhter, A.A.G and

Ms. Kumrunnesa…….For the Respondents

Heard on 24th, 30th March & 2nd April, 2003

Judgement on 7th April 2003.

Present:

Mr. Justice Md. Hamidul Haque

And

Ms. Justice Salma Masud Chowdhury

Md. Hamidul Haque, J:

This Rule was issued calling upon the respondents to show cause as to why they shall not be directed to refrain from an abusive exercise of powers under section 54 of the Code of Criminal Procedure or to seek unreasonable remand under section 167 of the Code of Criminal Procedure and to strictly exercise powers of arrest and investigation within the limits established by the law and in view of the safeguards contained in Articles 27, 31, 32, 33 and 35 of the constitution.

This writ petition has been filed by the petitioners including Bangladesh Legal Aid and Services Trust (BLAST), Ain-O-Salish Kendra, Sammilita Samajik Andolon and some other individuals. The subject matter involves a burning question of the day which is now hotly debated by the intellectual quarters, lawyers and even the general public. It has been alleged in this writ petition that the police, by abusing the power given under section 54 of the Code of Criminal Procedure, has been curtailing the liberty of the citizens and that by misuse and abuse of the power of taking an accused into police custody as given in section 167, has been violating the fundamental rights guaranteed under different Articles of the constitution. In this writ petition, several instances of such abusive exercise of power and violation of fundamental rights have been narrated.

We are conscious that the question raised in this Rule is a very important question touching liberty and fundamental rights of the citizens of the country. The above two provisions of the Code of Criminal Procedure

are in force from the time of coming into force of the Code itself in the year 1898. The question of abusive exercise of power under these two sections were also debated in the past. This Code of Criminal Procedure is being followed in Pakistan, India and Bangladesh. In India section 54 was amended and substituted and the present section 41 of the Code of Criminal Procedure of India corresponds to section 54 of the Code of Criminal Procedure now in force in this country. Even after amendment of the section in India, the debate on the question was not stopped. This question also came up for consideration before the Law Commission of India and the Law Commission of Bangladesh and some serious deliberations were made by the Law Commission of both the countries. So, we think that it is a great responsibility to examine such an important question. We also think that full proof remedies may not be found but we shall try to find out some solutions.

The writ petitioners in prayer A(ii) prayed for issuing a direction upon the respondents to comply with the guidelines as set out in paragraph 21 of the petition. The guidelines as set out in that paragraph, are based on the guidelines as given by the Supreme Court of India in the Cases of D.K. Basu vs. State of West Bengal reported in (1997) 1 Supreme Court cases, page 416 and the guidelines which were suggested by an one man Inquiry Commission constituted with Mr. Justice Habibur Rahman Khan to inquire into the death of a student named Rubel who was arrested by police under section 54 and who died in the police custody due to the alleged torture by the police.

Dr. Kamal Hossain along with Mr. Md. Idrisur Rahman and Mr. Tanzibul Alam addressed the Court on behalf of the petitioners and Mr. M. Amirul Islam was also allowed to address the Court on the question raised in this writ petition because of the special importance of the question. However, at the time of hearing, Dr. Kamal Hossain has conceded that the suggestions and recommendations as mentioned in paragraph 21 are not exhaustive and

he has submitted that there is scope of making some other clear and specific recommendations to safeguard the life and liberty of the citizen and to put some restrictions over the power given to the police and Magistrate under the above two sections. Dr. Kamal Hossain thereafter has taken us through the writ petition and has submitted that the police officers, in abusive exercise of the power are acting against the specific provisions of the Constitution under which the liberty and fundamental rights of the citizens are guaranteed. He also pointed out that due to the abuse of the power given to the Magistrate under section 167 of the Code for allowing a person to be taken into police custody, hundreds of incidents of custodial death and cases of torture and inhuman treatment took place during last several years. He has further submitted that there must be some safeguards in the law itself so that neither the police can abuse the power given to it by the law nor the Magistrate can exercise such power without applying judicial mind. So, he has made a prayer to this court to suggest proper measures and safeguards so that the powers as given under sections 54 and 167 of the Code cannot be exercised in an abusive manner.

Dr. Kamal Hossain, next has also argued with reference to two cases of Indian Jurisdiction specially the case reported in AIR 1977 SC that while fundamental rights to life and liberty is curtailed or infringed, this Court in exercise of its power given under Article 102 of the Constitution may also give compensation to the victim if it is found that the confinement or detention of the victim is not lawful and that the victim was subjected to torture, cruel, inhuman and degrading treatment. He has further submitted that the victim should not be asked to seek relief in any other civil court for damages and compensation. Mr. Amir-Ul Islam also referred to some decisions of Indian Jurisdiction. (1991) 2 Supreme Court Cases 373 and a case reported in AIR 1990 SC 513 and some other cases to show that compensation may be given to the victim in cases where detention and

confinement is found to be unlawful and the victim is subjected to torture, cruel and degrading treatment. Mr. Amirul Islam has also invited our attention to the fact that the police in colourable exercise of power given under section 54 of the Code arrests a person without warrant with a view to give detention under section 3 of the Special Powers Act, 1974. Such arrest without warrant under section 54 of the Code according to him, is totally unwarranted. He submitted that arrest of a person under section 54 of the Code without warrant for the purpose of giving him detention for a specific period under the Special Powers Act, 1974 is totally unlawful.

The learned Attorney General Mr. A.F. Hasan Ariff and Additional Attorney General Mr. Abdur Razaque Khan appeared on behalf of the respondents. With reference to the recommendations in paragraph 21 of the writ petition, they have submitted that it will not be possible to implement some of the suggestions because of some practical difficulties. In this connection they referred to the difficulties mentioned in the affidavit-in-opposition. However, both of them are of the opinion that some restrictions may be there to check the abuse of the power given under the two sections.

We have considered the submissions of the learned Advocates, perused the writ petition including the Annexures. Let us first consider whether the power given to the police to arrest a person without warrant is exercised abusively and whether there is scope of exercising the power is such manner under the provisions of the section itself. For proper appreciation, section 54 of the Code is reproduced below.

> 54- (1) Any Police-Officer may, without an order from a Magistrate and without a warrant arrest-
>
> first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;

secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking;

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Government;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

fifthly, any person who obstructs a Police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

sixthly, any person reasonably suspected or being a deserter from the armed forces of Bangladesh;

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881 or otherwise liable to be apprehended or detained in custody in Bangladesh:

eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3);

ninthly, any person for whose arrest a requisition has been received from another police officer provided that the requisition specified the person to be arrested and the offence or

other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

From the above section, we find that under eight conditions a person may be arrested by a police-officer without warrant but from the first condition we find that this condition actually includes four conditions under which a police officer may arrest without warrant and these four conditions are couched in such wards that there is scope of abusive and colorable exercise of power. Following are the four conditions which are included in the first condition. The police officer may arrest –

(a) any person who has been concerned in any cognizable offence;

(b) against whom a reasonable complaint has been made;

(c) a credible information has been received; and

(d) against whom a reasonable suspicion exists of his having been so concerned in any cognizable offence.

We may say that the word 'concerned' used in first condition is a vague word which gives unhindered power to a police officer to arrest any person stating that the person arrested by him is concerned in a cognizable offence. So, to safeguard the life and liberty of the citizen and to limit the power of the police, in our view, the word concerned is to be substituted by any other appropriate word or words. It is true that the other words sued in the first condition such as reasonable credible have been interpreted in many cases both by the Indian Courts and our Courts. But in spite of specific interpretation give to these words, the abusive exercise of power by the police officers could not be cheeked. So, we are of the view that only interpretation of words is not sufficient. The provision itself shall be amended in such a manner that the safeguard will be found in the provision itself. Similar words like reasonable, credible etc. have been used in other

seven conditions. So, we are of the view that there should be some restrictions so that the police officers will be bound to exercise the power within some limits and the police officers will not be able to justify the arrest without warrant by saying “I thought that the person was concerned in any cognizable offence”. Thinking is different from guess work. A thinking must have some reasons behind it but guess work is not backed by any reasons. A police officer can exercise the power if he has definite knowledge of the existence of some facts and such knowledge shall be the basis of arrest without warrant. There can be knowledge of a thing only if the thing exists.

If a person is arrested on the basis of credible information nature of the information source of information must be disclosed by the police officer and also the reason why he believed the information. ‘Credible’ means believable. Belief does not mean make belief. An ordinary layman may believe any information without any scrutiny but a police officer who is supposed to possess knowledge about criminal activities in the society, nature and character of the criminals etc. cannot believe any vague information received from any person. If the police officer receives any information from a person who works as source of the police, even in that case also the police officer before arresting the person named by the source should try to verify the information by perusal of the diary kept in the police station about the criminals to ascertain whether there is any record of any past criminal activities against the person named by the source.

If a person is arrested on reasonable suspicion the police officer must record the reasons on which his suspicion is based. If the police officer justify the arrest only by saying that the person is suspected to be involved in a cognizable offence, such general statement can not justify the arrest. Use of the expression reasonable suspicion implies that the suspicion must be based on reasons are based on existence of some facts which is within the knowledge of the person. So, when the police officer arrests a person

without warrant, he must have some knowledge of some definite facts on the basis of which he can have reasonable suspicion.

It has been alleged, as we have mentioned earlier, that in police custody many deaths took place during last several years. In the writ petition in Annexure-D series and Annexure-K to the supplementary affidavit we find that a good number of people died in the police custody after their arrest under section 54. In 2002, number of custodial death is 38. This is absolutely shocking. Even the President of the country in a speech delivered in 8th National Conference on Human Rights, had to say that torture and inhuman treatment meted out to a person in custody and custodial death are against humanity and civilization. This speech was reported in the Daily Ittefaq on 27.12.02 and also in other national dailies. Obviously, such tragic deaths are resulted due to sweeping and unhindered power given to a police officer under section 54 of the Code. The power given to the police officer under this section in our view, to a large extent is inconsistent with the provisions of part III of the Constitution. In view of this position, according to us, such inconsistency is liable to be removed and this Court in exercise of the power given under Article 102, is empowered to given proper and necessary direction upon the Government to make proper amendments in the provisions of section 54 of the Code to ensure the fundamental rights as guaranteed under Article 27, 31, 32, 33 and 35 of the Constitution. So, we would like to suggest or recommended the amendment of section 54. The suggestion will be given after we finish our discussion on the other question raised i.e. after discussing the question of remand now granted under section 167 of the Code.

Let us now consider the question of granting remand to the police custody. It has been alleged in this Writ Petition is also now common that once remand is granted the police tries to extort information or confession from the person arrested by physical or mental torture and in the process

sometimes also cause death. So, the system of granting remand itself has been challenged. Such, remand is allowed under subsection (2) of section 167 of the Code of Criminal Procedure. Though the word remand is not there in that sub-section however, the word remand is being used in the order passed by a Magistrate in the sense of authorizing detention of a person in police custody. By authorizing such custody, the person brought before the Magistrate under section 167 of the Code is sent back to police and perhaps for this reason the word remand has been used.

When a person is arrested under section 54 without a warrant, the provisions of section 61 of the Code applies in his case. Section 61 provides that no police officer shall detain in custody a person arrested without warrant for a period exceeding 24 hours unless there is a special order of a Magistrate under section 167 of the Code. So, we find that there is reference of section 167 in section 61 of the Code. Section 61 implies that if there is a special order of a Magistrate under section 167, the police may keep a person in its custody for more then 24 hours.

Now, let us see what is provided in section 167. Relevant provisions of the section 167 are reproduced below up to sub-section (4):

> "Procedure when investigation cannot be completed in twenty four hours-
>
> 167-(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by section 61 and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation if he is not below the rank of sub inspector shall forthwith transmit to

the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

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

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Government shall authorize detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the chief Metropolitan Magistrate, District Magistrate, or Sub-divisional Magistrate he shall forward a copy of his order with his reasons, for making it, to the Magistrate to whom his immediately sub-ordinate".

From the above, we find that heading of the section is “Procedure when investigation cannot be completed in twenty four hours”. So, the heading that investigation starts before producing the accused to the nearest Magistrate. The heading further indicates that there is scope of completing the investigation within 24 hours. Unfortunately, we have not come across any case where the police officer gave any importance to the above provision of the section.

Sub-section (1) of this section provides that under the following two circumstances a person arrested without warrant is to be produced before the Magistrate-

(a) If the investigation cannot be completed within 24 hours; and

(b) If there are grounds for believing that the accusation or information received against the person is well founded.

These are the mandatory provisions of the law. So, while producing a person arrested without warrant before the Magistrate the police officer must state that reasons as to why the investigation could not be completed within 24 hours and what are the grounds for believing that the accusation or the information received against the person is well-founded.

Besides the above two requirements there is another requirement which the police officer must fulfill at the time of producing the accused before the Magistrate. This sub-section provides that the police officer shall transmit to the nearest Magistrate copy of the entries in the diary hereinafter prescribed relating to the case. There is reference of diary in subsequent section 172 of the Code. However, it appears to us that by using the expression hereinafter prescribed in sub-section (1) of section 167, the case diary as mentioned in section 172 is meant because in section 167 (1) it is also mentioned as follows “the diary hereinafter prescribed relating to the case.” So, it appears to us that the case diary is the diary which is meant in

section 167(1). Thus, the police officer shall be bound to transmit copy of the entries of the case diary to the Magistrate at the time when the accused is produced before him under that provision. This case diary is B.P. Form No. 38. In Police Regulation No. 264, details are given as to how this diary shall be maintained. Regulation No. 263 provides that in the diary, the police officer is to show that time at which the relevant information reached him, the time at which he began and closed his investigation the place or visited by him, and statement of the circumstances ascertained through his investigation. So, if copy of the entries of this diary is produced before the Magistrate and if there are materials before the Magistrate to decide whether the accusation against the person or the information against the person is well funded, he can decide the question whether the person shall be released at once or shall be detained further. If these three legal requirements are not fulfilled it will not be possible on the part of the Magistrate to apply his judicial mind. But unfortunately though these three legal requirement are not fulfilled the Magistrate as a routine matter passes his order on the forwarding letter of the police officer either for detaining the person for further period in jail or in police custody. The order for detaining in police custody is passed by a Magistrate in exercise of the power given to him under sub-section (2) of this section. If the requirement of sub-section (I) are not fulfilled, the Magistrate cannot pass an order under sub-section (2) for detaining a person even not to speak of detention in police custody.

However, we find that in view of the provisions of sub-section (1) in view of the provisions of sub-section (3) of section 167, a Magistrate exercises the power to pass on order authorizing detention in the custody of the police. Though the above provisions empower the Magistrate to authorize the detention in police custody it is surprising to note that no guideline has been given in sub-section (2) and (3) as to the circumstances under which detention in police custody may be authorized. The Magistrate

in the absence of any guideline, passes a parrot like order authorizing detention in police custody which ultimately results in so many custodial death and incidents of torture in police custody. Had the Magistrate exercised his power by applying judicial mind on fulfillment of the requirements as provided in sub-section (1) there would have been no such innumerable cases of custodian death or torture. In our view, the provisions of sub-section (1)(2) and (3) of section 167 of the Code shall be read together and considered together and if the Magistrate before whom an accused is produced under sub-section 1 is satisfied that there are grounds for believing that the accusation is well founded and that there are materials for further detention on consideration of the entries of the dairy relating to the case, the Magistrate may pass and order for further detention. Otherwise, the Magistrate shall be bound to release the person forthwith. We also like to mention here that if the police officer fails to explain that, there are grounds for believing that the accusation or information is well founded and also to produce copy of the entries relating to the case the Magistrate shall release the accused forthwith.

Now let us see how the prayer for remand is made by the police officer and how such an order is passed by the Magistrate. A police officer makes a prayer for remand stating that the accused is involved in a cognizable offence and for the purpose of interrogation remand is necessary. In sub-section (2) of section 167 though it is not mentioned that remand can be allowed for the purpose of interrogation at present the practice is that an accused is taken on remand only for the purpose of interrogation or for extorting information from the accused through interrogation.

We shall now consider whether such detention in police custody is at all necessary and is permissible. One view is that it is an evil necessity if some force is not applied, no clue can be find out from hard nut criminals. Obviously, this is view of the police but we can not shut our eyes to the fact

that this view is contrary to the constitutional provisions as we find in part III of the Constitution specially Articles 27, 30, 31, 32, 33 and 35. If the purpose of interrogation of an accused is to extort information from him, in view of the provisions of Article 35 (4), information which is extorted from him cannot be used against him. Clause (4) of the Article 35 clearly provides that no person accused of an offence shall be compelled to be witness against himself. So, any information which may be obtained or extorted by taking an accused on remand and by applying physical torture or torture through any other means, the same information cannot be considered as evidence and cannot be used against him. Clause (4) of Article 35 is so clear that the information obtained from the accused carries no evidentiary value against the accused person and cannot be used against him at the time of trial. Under section 163 of the Code, a police officer is barred from offering any inducement or from making any threat or promise to any accused while recording his statement under section 161 of the Code. So, we do not understand how a police officer or a Magistrate allowing remand can act in violation of the Constitution and provisions of other laws including this Code and can legalise the practice of remand. Through judicial pronouncements, it is also establishment that any statement made by any accused before a police officer in course of his interrogation cannot be used against any other accused. In view of the provisions of section 27 of the Evidence Act, if any information is received from the accused while he is in custody of a police officer so much of such information, whether it amounts to confession or not as it relates distinctly to the fact discovered by such confession or information may be proved by the police against that person. So, any statement of an accused made to a police officer relating to discovery of any fact or alamat may be used against him at the time of trial. If the purpose of interrogation is so limited as we have found in the above, we do not understand why there will be any necessity of taking the accused

in the custody of the police. Such interrogation may be made while the accused is in jail custody if interrogation is necessary.

Next, the use of force to extort information can never be justified. Use of force is totally prohibited by the constitution. In this connection, we may refer to clause (5) of Article 35 of the constitution which provides that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This clause is preceded by clause (4) where it is provided that no person accused of any offence shall be compelled to be a witness against himself. Due to the use of the word “compelled” in clause (4), we may presume that the framers of the constitution were apprehensive of use of force upon an accused and as such in clause (5) of Article 35 it has been clearly provided that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. So, we find that even if the accused is taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the constitution gives an any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment. Thus, it is clear to us that the very system of taking an accused on remand for the purpose of interrogation and extortion of information by application of force on such person is totally against the sprit [sic] and explicit provisions of the constitution. So, the practice is also inconsistent with the provisions of the constitution.

Now, we like to discuss what safeguards may be suggested for ensuring the liberty of the citizen and enforcement of the fundamental rights as guaranteed under the constitution. In section 54 of the Code we have found from the language used, the police an exercise the power abusively. There is nothing in this section which provides that the accused be furnished with the grounds for his arrest. It is the basic human right that whenever a person is arrested he must know the reasons for his arrest. As the section 54

now stands, a police officer is not required to disclose the reasons for the arrest to the person whom he has arrested. Clause (1) of the Article 33 provides that the person who is arrested shall be informed of the grounds for such arrest. It is true that no time that limit has been mentioned in this Article but the expression as soon as may be is used. This expression as soon as may be does not mean that furnishing of grounds may be delayed for an indefinite period. According to us, as soon as may be implies that the grounds shall be furnished after the person is brought to the police station after his arrest and entries are made in the diary about his arrest. Unfortunately, this provision of the constitution is not followed by the police officers. It is strange that they are very much over jealous in exercising the powers given under section 54 but their reluctant to act in accordance with the provisions of the constitution itself. Constitution is the Supreme law of the country and shall prevail over any other law. It is the duty of every one in the country to adhere to the provisions of the constitution. It is unfortunate that instead of adhering to the provisions of the constitution, the police officers are interested in exercising the powers given to them under the Code without any hindrance.

The constitution not only provides that the person arrested shall be informed of the grounds for his arrest, the constitution also provides that the person arrested shall not be denied the right to consult and to defend himself by a legal practitioner of his choice. We are of the view that immediately after furnishing the grounds for arrest to the person, the police shall be bound to provide the facility to the person to consult his lawyer if he desires. So, here, again we like to mention that the persons arrested by the police under section 54 are not allowed to enjoy this constitutional right. Not only this right is denied, even the police refuses to inform the nearest or close relation of the person arrested. We are of the view that the person arrested shall be allowed to enjoy these rights immediately after he is brought to the

police station from the place of arrest and before he is produced to the nearest Magistrate. We like to give emphasis on this point that the accused should be allowed to enjoy these rights before he is produced to the Magistrate because this will help him to defend himself before the Magistrate properly, he will be aware of the grounds for his arrest and he will also get the help of his lawyer by consulting him. If these two rights are denied, this will amount to confining him in custody beyond the authority of the constitution. So, we like to suggest some amendments in section 54 so that the provisions of this section are made consistent with the provisions of part III the constitution. Similarly, we have also noticed that some provisions of section 167 are inconsistent to some extent with the provisions of the Constitution such as clause (4) and (5) of Article 35 and in general provides of Article 27, 31 and 32. So, we shall also suggest some amendments in section 167 of the Code. To give full affect to the proposed amendments, we are also of the view that some other related sections are also to be amended for example, section 167 of the Code, Section 44 of the Police Act, Section 220, 330 and 348 of the Penal Code. Before we like to set out our recommendations for the amendment of those sections, we like to give our consideration about the other points raised by the learned Advocates.

Mr. Amir-Ul Islam has pointed that now a days in most of the cases different persons are arrested under section 54 of the Code on political grounds in order to detain him under the provisions of section 3 of the Special Powers Act, 1974. According to him, this is a concrete example of colorable and abusive exercise of power by the police. We accept the argument of Mr. Amir-ul Islam. Mr. Abdur Razzaque Khan, the learned Additional Attorney General conceded that arrest of a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act is not proper. As we have quoted the section 54 earlier, we have found that a police officer may arrest a person under that section,

under certain conditions. Main condition is that the person arrested is to be concerned in a cognizable offence. So, first requirement to arrest a person under section 54 is that the same person is concerned in any cognizable offence. The purpose of detention is totally different. A person is detained under the preventive detention law not for his involvement in any offence but for the purpose of preventing him from doing any prejudicial act. So, there is not doubt in our mind that a police officer cannot arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974. Such arrest is neither lawful nor permissible under section 54. If the authority has any reason to detain a person under section 3 the Special Powers Act, the detention can be made by making an order under the provisions of that section and when such order is made and handed over to the police for detaining the person, the order shall be treated as warrant of arrest and on the basis of that order, the police may arrest a person for the purpose of detention. But a person cannot be arrested under section 54 of the Code for detaining him under section 3 of the Special Power Act.

Now, as regards the custodial death and torture we have already mentioned about the provisions of the constitution that is clause (4) and (5) of Article 35 of the constitution. Torture or cruel, inhuman or degrading treatment in police custody or jail custody are not permissible under the constitution. So, any such act is unconstitutional and unlawful. Now, a question is raised whether this court is competent to award compensation to a victim of torture or to the relation of a person whose death is caused in police custody or jail custody. We have considered the principle laid down in the case reported in AIR 1977 (SC) 610. According to us, this Court, in exercise of its power of judicial review wen [sic] finds that fundamental rights of an individual has been infringed by colourable exercise of power by the police under section 54 of the Code or under section 167 of the Code the

Court is competent to award compensation for the wrong done to the person concerned. Indian Supreme Court held the view in the above case that compensatory relief under the public law jurisdiction may be given for the wrong done due to breach of public duty by the state of not protecting the fundamental right to the life of citizen. So, we accept the argument of the learned Advocate for the petitioner that compensation may be given by this Court when it is found that confinement is not legal and death resulted due to failure of the state to protect the life but at the same time we like to emphasis that it will depend upon the facts and circumstances of each case. If the question of custodial death becomes a disputed question of fact, in that case under the writ jurisdiction it will not be possible to give compensation but where it is found that the arrest was unlawful and that the person was subjected to torture while he was in police custody or in jail, in that case, there is scope of awarding compensation to the victim and in case of death of a person to his nearest relation. As regards the occurrence of death which are mentioned in this writ petition it appears that specific cases were filed and trial of those cases were completed in accordance with law and appeals are now pending. In those cases, the Writ Petition has not given any decision as to whether the arrest or detention were unlawful. In view of this position we do not think it proper to award any compensation in this writ petition.

In the above we have scrutinised two sections of the Code and have found that the provisions of these sections are to extent inconsistent with the provisions of the constitution and requires some amendments. To remove the inconsistencies now we would like to make some recommendations which are as follows:

Existing Section	Recommendation-A
54(1) Any Police officer may, without an order from a Magistrate and without any Warrant, arrest-	(1) The first condition may be amended as follows:
first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.	first, any person <u>against whom there is a definite knowledge about his involvement</u> in any cognizable offence or against whom a reasonable complain has been made or credible information has been received or a reasonable suspicion exists of his having been so <u>involved</u>;
	(2) The seventh condition may be also amended like the first condition.
	(3) A sub-section (2) shall be added which shall contain the following provisions:
	(a) Whenever a person is arrested by a police officer under sub-section (1) he shall disclose his identity to that person and if the person arrested from any place of residence or place of business. He shall disclose his identity to the inmates or the persons present and shall how his official identity card if so demanded.
	(b) Immediately after bringing the person arrested to the police station, the police officer shall record the

reasons for the arrest including the knowledge which he has about the involvement of the person in a cognizable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information description of the place note the date and time of arrest, name and address of the persons, if any, present at the time of arrest in a diary kept in the police station for that purpose.

(c) The particulars as referred to in clause (b) shall be recorded in a special diary kept in the police station for recording such particulars in respect of persons arrested under this section.

(d) If at the time of arrest, the police officer finds any marks of injury on the body of the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or to a Government doctor for treatment and shall obtain a certificate from the attending doctor about the injuries.

(e) When the person arrested is

brought to the police station, after recording the reasons for the arrest and other particulars as mentioned in clause (b), the police officer shall furnish a copy of the entries made by him relating to the grounds of the arrest to the person arrested by him. Such grounds shall be furnished not later than three hours from the time of bringing him in the police station.

(f) If the person is not arrested from his residence and not from his place of business or not in presence of any person known to the accused, the police officer shall inform the nearest relation of the person over phone if any, or through a messenger within one hour of bringing him in the police station.

(g) The police officer shall allow the person arrested to consult a lawyer, if the person so desires. Such consultation shall be allowed before the person is produced to the nearest Magistrate under section 61 of the Code.

Existing Section	Recommendation-B
167-(1) Whenever and person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by section 61, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.	(1) Existing sub-section (2) be re-numbered as sub-section (3) and a new sub-section (2) may be added with the following provisions;
(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the cases from time to time authorize the detention of the accused in such custody as such Magistrate thinks fir, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or send it	Sub-section (2)-(a) If the Magistrate after considering the forwarding of the Investigating officer and the entries in the diary relating to the case is satisfied that there are grounds for believing that the accusation or information about the accused is well founded, he shall pass an order for detaining the accused in the jail. If the Magistrate is not so satisfied, he shall forthwith release the accused. If in the forwarding of the Investigating Officer the grounds for believing that the accusation or information is well founded are not mentioned and if the copy of the entries in the diary is not produced the Magistrate shall also release the accused forthwith. (b) If the Investigating Officer prays for time to complete the investigation

for trial, and considers further detention unnecessary, he may order the accused to forwarded to a Magistrate, having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Government shall authorize detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the chief Metropolitan Magistrate, District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom his immediately subordinate.

the Magistrate may allow time out exceeding seven days and if no specific case about the involvement of the accused in a cognizable offence can be filed within that period the accused shall be released by the Magistrate after expiry of that period.

(c) If the accused is released under clause (a) and (b) above, the Magistrate may period for committing offence under section 220 of the Penal Code suo motu against the police officer who arrested the person without warrant even if no petition of complaint is filed before him.

(2) Sub-section (2) be substituted by a new sub-section (3) with the following provisions:

(a) If a specific case has been filed against the accused by the Investigating officer within the time as specified in sub-section (2)(b) the Magistrate may authorized further detention of the accused in jail

custody.

(b) If no order for police custody is made under clause (c), the Investigating Officer shall interrogate the accused, if necessary for the purpose of investigation in a room specially made for the purpose with glass wall and grill in one side, within the view but not within hearing of a close relation or lawyer of the accused.

(c) If the Investigating officer files any application for taking any accused to custody for interrogation, he shall state in detail the grounds for taking the accused in custody and shall produce the case diary for consideration of the Magistrate. If the Magistrate is satisfied that the accused be sent back to police custody for a period not exceeded there days, after recording reasons, he may authorized detention in police custody for that period.

(d) Before passing an order under clause (c) the Magistrate shall ascertain whether the grounds for the arrest was furnished to the accused and the accused was given opportunity to consult lawyer of his choice. The Magistrate shall also hear the accused or his lawyer.

(3) Sub-section (4) be substituted as follows:

(a) If the order under clause (c) is made by a Metropolitan Magistrate or any other Magistrate he shall forward a copy of the order to the Metropolitan Sessions Judge or the Sessions Judge as the case may be for approval. The Metropolitan Sessions Judge or the Sessions Judge shall pass order within fifteen days from the date of the receipt of the copy.

(b) If the order of the Magistrate is approved under clause (a), the accused, before he is taken custody of the Investigating Officer, shall be examined by a doctor designated or

by a Medical Board constituted for the purpose and the report shall be submitted to the Magistrate concerned.

(c) After taking the accused into custody, only the Investigating officer shall be entitled to interrogate the accused and after expiry of the period, the investigating officer shall produce him before the Magistrate. If the accused makes any allegation of any torture, the Magistrate shall at once send the accused to the same doctor or Medical Board for examination.

(d) If the Magistrate finds from the report of the doctor or Medical Board that the accused sustained injury during the period under police custody, he shall proceed under section 190(1)(c) of the Code against the Investigating Officer for committing offence under section 330 of the Penal Code without filing of any petition of any petition of complaint by the accused.

(e) When any person dies in police custody or in jail, the Investigating officer or the Jailor shall at once inform the nearest Magistrate of such death.

If a person dies in custody either in Jail or in police custody the relations are reluctant to lodge any FIR or formal complaint due to apprehension of further harassment. The existing provisions of section 176 of the Code appears to us not sufficient enough to take appropriate and effective action about such custodial death. Under the existing provisions of this section, the Magistrate is not bound to hold inquiry. So, we like to emphasis that the duty of the Magistrate shall be made mandatory. For this following amendment in section 176 is recommended:-

Existing Section	Recommendation – C
176-(1) When any person dies while in the custody of the police, the nearest Magistrate, empowered to hold inquests shall, and in any other case mentioned in section 174, clauses (a), (b) and (c) of sub-section (1) any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer, and if he does so, he	(1) Existing sub-section (2) be renumbered as sub-section (3) and the following be added as sub-section (2). (2) When any information of death of a person in the custody of the police or in jail is received by the Magistrate under section 167(4)(e) of the Code (as recommended by us), he shall proceed to the place, make an

shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death the Magistrate may, cause the body to be disinterred and examined.

investigation, draw up a report of the cause of the death describing marks of injuries found on the body stating in what manner or by what weapon the injuries appear to have been inflicted. The Magistrate shall then send the body for post mortem examination. The report of such examination shall be forwarded to the same examination shall be forwarded to the same Magistrate immediately after such examination.

Under the existing provisions of section 202 of the Code, there is no scope on the part of the Magistrate to proceed suo moto he can act only when there is a petition of complaint. If it is evident from the post mortem report that the death is culpable homicide amounting to murder, the Magistrate shall be empowered by the law itself by adding an enabling provision to section 202 to proceed with the case by holding inquiry himself or by any other competent Magistrate. So, we also like to recommend amendment in section 202 of the code.

Existing Section	Recommendation – D
202(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint: Provided that save where the complaint has been made by a Court no such direction shall be made unless the provisions of section 200 have been complied with: Provided further that where it appears to the Magistrate that the offence complained of is tribal exclusively by a Court of Session,	(1) A new sub-section (3) be added with the following provisions: (3) (i) The Magistrate on receipt of the post mortem report under section 176(2) of the Code (as recommended by us) shall hold inquiry into the case and if necessary may take evidence of witnesses on oath. (b) After completion of the inquiry the Magistrate shall transmit the record of the case along with the report drawn up under section 176(2) (as recommended by us) the post mortem report his inquiry report and a list of the witnesses to the Sessions Judge or Metropolitan Sessions Judge, as the case may be and shall also send the accused to such judge. (c) In case of death in police custody, after a person taken in such custody on the prayer of the Investigating Officer, the Magistrate may proceed against the Investigating Officer, without holding any inquiry as provided in clause (a) above and may send the Investigating Officer to the Sessions Judge of the Metropolitan

the Magistrate may postpone the issue of process for compelling the attendance of the person complained against and may make or cause to be made an inquiry of investigation as mentioned in this sub-section for the purpose of ascertaining the truth or falsehood of the complaint.

(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station except that he shall not have power to arrest without warrant.

(2A) Any Magistrate inquiring into a case under this section may if he thinks fit, take evidence of witness on oath. Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(2B) Where the police submits the final report the Magistrate shall be

Sessions as provided in clause (b) along with his own report under sub-section (2) of section 176 and post mortem report.

competent to accept such report and discharge the accused.

In the Penal Code the relevant section for causing hurt for the purpose of extorting confession or information from any person is provided in section 330 and for confinement to extort such confession or information is provided in section 348. But in neither of these sections, there is mention of causing such hurt to a person while he is in police custody or in jail. Punishment appears to be not adequate. So, we like to recommend that suitable provisions be added to those two sections by adding provision to those sections or by adding new sections by giving section Nos. 330 A and 348 A. Moreover, we are also of the view that causing death in police custody or in jail is more heinous than death caused by a private person. So, a separate penal section may be added after section 302 of the Penal Code.

Existing sections	Recommendation – E
Section 330 of the Penal Code and section 302, 348.	(a) One provision be added in section 330 Providing enhanced punishment upto ten years imprisonment with minimum punishment of sentence of seven years if hurt is caused while in police custody or in jail including payment of compensation to the victim. (b) 2nd proviso for causing grievous hurt while in such custody providing minimum punishment of sentence of

ten years imprisonment including payment of compensation to the victim.

(c) A new section be added as section 302A providing punishment for causing death in police custody or in jail including payment of compensation to the nearest relation of the victim.

(d) A new section be added after section 348 providing for punishment for unlawful confinement by police officer for extorting information etc. as provided in section 348 with minimum punishment imprisonment for three years and with imprisonment which may extend to seven years.

If death takes place in police custody or in jail it is difficult to prove by the relations of the victim as to who caused the death. In many cases, this court has decided that when a wife dies while in custody of the husband, the husband shall explain how the wife met her death. Similar principle may be applied when a person dies in police custody or in jail. To give a legal backing to the above principle, we like to recommend that a section in the Evidence Act (after section 106) or a clause may be added in section 114 of that Act incorporating the above principle.

Recommendation-F

The new section in the Evidence Act shall provide that when a person dies in police custody or in jail, the police officer who arrested the person or the police officer who has taken him in custody for the purpose of interrogation or the jail authority in which jail the death took place, shall explain the reasons for death and shall prove the relevant facts to substantiate the explanation.

In the Police Act of 1861, there is no provision for maintaining any diary for recording the reasons for arrest without warrant and other necessary particulars as have been mentioned in the recommended sub-section (2) of section 54 of the Code. So, we like to recommend that a new section be added after section 44 of the Police Act.

Recommendation-G

The new section in the Police Act shall provide that the officer in charge of a police station shall keep a special diary for recording the reasons and other particulars as required under recommended new sub-section (2) of section 54 of the Code.

We have already mentioned that the provisions of the existing sections 54 and 167 of the Code are to some extent inconsistent with the provisions of Article 27, 30, 31, 32, 33 and 35 of the Constitution and we have recommended that the above two sections may be amended for the purpose of safeguarding the liberty and fundamental rights of the citizens. We also like to emphasise that the respondents are to be directed to remove the inconsistency within the time fixed by us.

A question may be raised as to whether this Court has any power to make recommendation for amendment of any law. Our answer is that this Court has such power under Article 102. As we have found that some of the existing provisions of section 54 and 167 of the Code are inconsistent with the fundamental rights of the citizens, this Court can not only recommend amendment, it can even issue direction. In Mazdar Hossain's case the Appellate Division issued directions upon the Government to ensure separation of the Judiciary from the Executive and the Appellate Division modified the drafts and made those drafts as part of its order. It is expected that with the separation of judiciary from Executive, the Magistrate and the Courts may exercise powers free from any Executive pressure.

We are conscious that some of our recommendations can not be implemented without making necessary amendments in the relevant law at the same time we like to insist that some of the recommendations may be implemented immediately as these are in conformity with some of the existing provisions of the Constitution and the Code itself. So, we would like to issue some directions to follows those immediately. The directions are as follows:

1) No police officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Power Act, 1974.

2) A police officer shall disclose his identity and if demanded shall show his identity card to the person arrested and to the persons present at the time of arrest.

3) He shall record the reasons for the arrest and other particulars as mentioned in recommendation A (3)(b) in separate for the arrest and other particulars as mentioned in recommendation A (3)(b) in a separate register till a special diary is prescribed.

4) If he finds any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or Government doctor for treatment and shall obtain a certificate from the attending doctor.

5) He shall furnish the reason for arrest to the person arrested within three hours of bringing him in the police station.

6) If the person is not arrested from his residence or place of business he shall inform the arrested relation of the person over phone, if any, or through a messenger within one hour of bringing him in the police station.

7) He shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relation.

8) When such person is produced before the nearest Magistrate under section 61, the police officer shall state in his forwarding letter under section 167 (1) of the Code as to why the investigation could not be completed within twenty four hours why he considers that the accusation or the information against that person is well-founded. He shall also transmit copy of the relevant entries in the case diary B.P. Form 38 to the same Magistrate.

9) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or the information is well-funded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith.

10) If the Magistrate releases a person on the ground that the accusation or the information against the person produced before him is not well-founded and there are no materials in the case diary against that person, he shall proceed under section 190(1)(c) of the Code against that police officer who arrested the person without warrant for committing offence under section 220 of the Penal Code.

11) If the Magistrate passes an order for further detention in jail, the Investigating officer shall interrogate the accused if necessary for the purpose of investigation in a room in the jail till the room as mentioned in recommendation B(2)(b) is constructed.

12) In the application for taking the accused in police custody for interrogation, the investigating officer shall state reasons as mentioned in recommendation B(2)(c).

13) If the Magistrate authorizes detention in police custody he shall follow the recommendation contained in recommendation B(2)(c)(d) and B(3)(b)(c)(d).

14) The police officer of the police station who arrests a person under section 54 or the Investigating officer who takes a person in police custody or the jailor of the jail as the case may be shall at once inform the nearest Magistrate as recommended in recommendation B(3)(e) of the death of any person who dies in custody.

15) A Magistrate shall inquire into the death of a person in police custody or in jail as recommended and recommendation C(1) immediately after receiving information of such death.

In view of our discussion above, the Rule is disposed of with a direction upon the respondent Nos. 1 and 2 to implement the recommendations made above within six month. All the respondents are also directed to implement the directions made above immediately.

H. Haque.

Salma Masud Chowdhury, J:

I agree.

S. Masud.