HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1377 OF 2008

Mr. Saeed Sohail Sheikh s/o Mr. Sohail)
Mehmood Sheikh, aged 21 years,)
Occupation: Student, R/o. Yakub Driver)
Chawl, Gaonevi, Dongri, Andheri (West))
Mumbai - 400 058.).. .. .. Petitioner.

Versus

1) The State of Maharashtra)
(Through Department of Home,)
Prison Section, Mantralaya,)
Mumbai).)

2) The Inspector General of Prisons)
(Maharashtra))
(Having his office at :)
Inspectorate of Prisons, 2nd Floor,)
Old Central Building, State of)
Maharashtra, Pune - 1))

3) The Superintendent,)
(Bombay Central Prison,)
Sane Guruji Marg, Agripada,)
Mumbai - 400 011.))

4) The Superintendent,)
(Nagpur Central Prison, Nagpur,)
Maharashtra))

5) I/C Anti Terrorism Squad,)
(Traffic Institute Building,)
Byculla, Mumbai.)).. .. ..Respondents.

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-: ALONG WITH :-

CIVIL APPLICATION NO. 50 OF 2009
IN
CRIMINAL WRIT PETITION NO. 1377 OF 2008

Gautam Yashvant Desai,)
Age : 35 years, Occ:)
Residing at Flat No.11/A Wing,)
Model House Society, 3rd Floor,)
Near Robert Money School, Procter)
Road, Grant Road, Mumbai - 7.).. .. .. Applicant.

Versus

1) Mr. Saeed Sohail Sheikh s/o)
Mr. Sohail Mehmood Sheikh,)
aged 21 years, Occupation: Student,)
R/o. Yakub Driver Chawl, Gaonevi,)
Dongri, Andheri (West), Mumbai -)
400 058.).. ..(Orig.Petitioner)

2) The State of Maharashtra)
(Through Department of Home,)
Prison Section, Mantralaya,)
Mumbai).)

3) The Inspector General of Prisons)
(Maharashtra))
(Having his office at :)
Inspectorate of Prisons, 2nd Floor,)
Old Central Building, State of)
Maharashtra, Pune - 1))

4) The Superintendent,)
(Bombay Central Prison,)
Sane Guruji Marg, Agripada,)
Mumbai - 400 011.))

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5) The Superintendent,)
(Nagpur Central Prison, Nagpur,)
Maharashtra))

6) I/C Anti Terrorism Squad,)
(Traffic Institute Building,)
Byculla, Mumbai.)).. .. ..Respondents.

-: ALONG WITH :-

CRIMINAL WRIT PETITION NO. 1496 OF 2008

1) Sayed Aslam Sayed Jafar)
Age 32 years, Indian Inhabitant,)
Occ: Salesman, Permanent Resident)
of Kamrunnissa Husain Daruwala)
Chawl No.90, Room No.1, Qureshi)
Nagar, Kurla (E), Mumbai No.)
400 070.)

2) Sayed Akhtar Sayed Jafar,)
Age 34 years, Indian Inhabitant,)
Occ: Salesman, Permanent Resident)
of Kamrunnissa Husain Daruwala)
Chawl No.90, Room No.1, Qureshi)
Nagar, Kurla (E), Mumbai No.)
400 070.)

3) Sunil @ Karan Mahipal Walmiki)
Age 24 years, Indian Inhabitant,)
Occ: Service, Permanent resident)
of New B. M. Chawl No.5, 3rd)
Floor, R. No.77, Naigaon, Dadar,)
Mumbai - 14.)

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(Presently all of them lodged at Arthur Road Central Prison as an under trial prisoner in the C.R. No. 101 of 2003 of Respondent No.2.) .. .. ..Petitioners.

VERSUS

1) The State of Maharashtra)

2) The Senior Inspector of Police, R.A.K. Marg Police Station vide their C.R. No.232 of 2003.)

3) The Senior Inspector of Police, DCB, CID, Mumbai vide their C.R. No. 101 of 2003.)

4) The Superintendent, Arthur Road Central Prison, Mahalaxmi, Mumbai.)

5) Mrs. Mira Borwankar, the then Joint Commissioner of Police (Crime), Crawford Market, Mumbai.) .. .. ..Respondents.

-: ALONG WITH :-

CRIMINAL WRIT PETITION NO. 1773 OF 2008

1) Ehtesham Qutbuddin Siddiqui)

2) Abdul Wahid Deen Mohd. Shaikh) .. .. ..Petitioners.

Versus

1) Smt. Swati Sathe (Supdt. of Arthur Road Jail, Mumbai.))

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2) The State of Maharashtra)
(At the instance of ATS, Mumbai.)).. .. ..Respondents.

-: ALONG WITH :-

CRIMINAL WRIT PETITION NO. 2746 OF 2008

Sayed Aslam Sayed Jaffer. ... . Petitioner.

Versus

The State of Maharashtra. ... . Respondent.

Mr. Shahid Azmi i/by Mr. Ashish Sharma for the Petitioner
in Cri. WP 1377/08.
Mr. Wahab Khan for petitioner in Cri.WP 1496/08.
Mr. Vinod Jadhav, Advocate appointed for the petitioner
in Cri. WP 1773/08.
Mr. V. T. Tulpule, Sr. Counsel with Mr. Harshad J. Kandalkar
and Ms. Nisha Parab for Supdt. of Arthur Road Jail.
Mr. S.R.Borulkar, Public Prosecutor for the State.

CORAM : BILAL NAZKI and
A. R. JOSHI, JJ.

RESERVED ON : 24TH MARCH, 2009.

DELIVERED ON: 21ST JULY, 2009.

JUDGMENT (Per Bilal Nazki, J.) :

All these writ petitions raise same questions and relate to the

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same incident. For the purpose of facts, we are taking Criminal Writ Petition No. 1377 of 2008 as it is more comprehensive than the other petitions. The writ petitions have been filed either by the prisoner or the person interested in their welfare. The prisoners are involved in some serious offences.

2. In this writ petition, which is filed on behalf of Mohd. Sohail Mehmood Sheikh, the son of the prisoner has stated that while in Bombay Central Prison, on several occasions prisoner was pressurized to become an approver by the Anti Terrorism Squad with the help of Jail Authorities. The prisoner complained to various authorities, he suffered mental agony, physical harm and abuse from Mrs. Swati Sathe, the Superintendent and Jailor Mr. Govind Patil.

3. On 28th June, 2008, Sohail and other 27 prisoners were brutally, inhumanly and savagely beaten up by the Jail authorities along with other convicts and gangsters by lathis, batons, belts and stone. Sohail was left unconscious, profusely bleeding, scarred with abrasions and cut wounds. The other prisoners also got seriously injured. Some of them got head injuries and fractures. Later on, Sohail was transferred to Nagpur Central Prison. According to this writ petition, on 28th June, 2008, 40 prisoners were mercilessly beaten in the Arthur Road Prison. One of the prayers in the writ petition was that the judicial probe be ordered into the

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incident of alleged assault on the prisoners dated 28th June, 2008.

4. Affidavit was filed in reply by Mrs. Swati Madhav Sathe, Superintendent of Mumbai Central Prison. In her reply, she stated that on 17th March, 2008 she submitted a letter to the Special Judge under MCOC Act requesting transfer of accused persons in MCOC Case Nos. 16/2006, 21/2006 and 23/2006 to other jails. The request was made on the basis that the Jail had the capacity to have 804 prisoners, whereas at that point of time it had 2500 prisoners. The Supreme Court had stayed the proceedings of the three cases i.e. MCOC Case Nos. 16/2006, 21/2006 and 23/2006 and the prisoners in these cases were not needed to be produced in the court. The learned Judge granted liberty to transfer the accused as per rules and regulations. The Inspector General of Prisons, thereafter, ordered transfer of 37 under trial prisoners to different prisons as per the Prison Manual by order dated 27th June, 2008. On 27th June, 2008, the Jail Authorities requisitioned a squad from Police Head Quarters and on 28th June, 2008 the Police escorts reached the jail. She stated that on 28th June, 2008, announcements were made requesting 32 under trial prisoners to gather near Lal Gate in the prison premises. At 11.40 hrs. 7 prisoners were transferred to Ratnagiri Special Jail. Other 19 under trial prisoners were sitting outside. Two under trial prisoners, who were lodged in high Security

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Cell were also sitting there. Two under trial prisoners, namely, Kamal Ahmed Vakil Ansari and Dr. Tanveer Mohd. Ibrahim Ansari refused to leave their Cell. The Jail Authorities tried to explain to the under trial prisoners that they should leave the Cell. These under trial prisoners refused to listen to the Jail Authorities and started using abusive language and misbehaved with the Jail Authorities. Mr. Kamal Ahmed Vakil Ansari snatched the baton from Jail Guard and started assaulting the Jail Officer. She tried to intervene but was abused. These two under trial prisoners started giving anti national and provocative slogans like, "*Pakistan Jindabad, Hindustan Murdabad. Hamne Judge Bhatkar Ko Hataya, Giraya To Tum Kya Ho*?" After listening to these slogans, 21 under trial prisoners, who had gathered near Lal Gate also started giving similar slogans. Those 21 under trial prisoners charged towards the Jail Officials, Warden and Watchmen and assaulted them with bricks and stones. The said 21 under trial prisoners also tried to approach the High Security Cell and tried to open the gate of High Security Cell. They continued to give slogans. Considering the situation and to avoid further untoward incident at 11.50 hrs. alarm was sounded in the Jail and after using reasonable and required force, the situation was brought under control. Because of the assault by the under trial prisoners, the Jail Guards and Prison Authorities sustained injuries. On 28th June, 2008, seven under

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trial prisoners were transferred to Ratnagiri Special Jail, fifteen under trial prisoners were transferred to Kolhapur Central Prison and ten under trial prisoners were transferred to Nagpur Central Prison. Thereafter, on 30th June, 2008 she submitted report of the incident of transfer of prisoners to Deputy Inspector General of Prisons. Copies were given to Court as well. Under trial prisoners, who sustained injuries were forwarded to jail Medical Officer. In view of this reply by the Jail Superintendent, incident of using force against under trial prisoners was admitted.

5. In the light of the pleadings of parties, which have been referred to above, this Court thought it appropriate to direct the Principal Judge, City Civil and Sessions Court at Mumbai to hold an inquiry into the matter. This Court passed a detailed order on 23rd July, 2008. Five questions were framed by this Court to be looked into by the Principal Judge. These questions are:

(1) Whether use of force by the Jail Authorities on 28th June, 2008 was necessary ?

(2) If it was necessary, whether minimum force was used ?

(3) Whether the force was used for some extraneous reasons and not for reasons of maintaining discipline ?

(4) Whether the force was used for reasons given in Discipline Rule

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163 of the Manual or was used for any extraneous purpose ?

(5) How was it that the prisoners had access to bricks and stones, as claimed by the respondents in the counter affidavit ?

Thereafter, the learned Sessions Judge took up the inquiry and submitted a report.

6. On 12th January, 2009, the court noted that the copies of the report submitted by the learned Sessions Judge were given to the parties and they were given liberty to file objections to the said report. Thereafter, the objections were also filed and the matter was finally posted for hearing.

7. When the matter came up for hearing on 29th January, 2009, the Court found that Mr. Tulpule, learned Advocate was only appearing for the Jail Superintendent and not the State. Counter had been filed on behalf of the Jail Superintendent. She had also filed objections to the report. The Government had not filed any counter to the writ petition. It had not even filed any objection to the report of the learned Sessions Judge. The Court, therefore, asked the Public Prosecutor to spell out the stand with respect to the incident and also the report filed by the learned Sessions Judge. Thereafter the State also filed the affidavit.

8. Besides factual questions relating to the incident certain legal submissions have also been made by the learned Counsel appearing for the

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petitioners. We will examine the factual position first. The learned Sessions Judge noted in his report that he received report in respect of the incident from the Jail Authority through Shri Awasarmol, Presiding Officer of the Court where Sessions Case No. 569/2004 was pending and also through Shri Y. D. Shinde, Presiding Officer of MCOCA Court where the two other cases were pending. Reports were sent as the prisoners made allegations to the Presiding Officers also. The statements recorded by the Presiding Officers were sent by them and those statements were also considered by the Inquiry Judge. The Inquiry Judge also collected record like MLC prepared by the various Government hospitals in respect of these prisoners. He conducted inquiry in an open court. The jail staff appointed an advocate and their advocate and some of the jail staff of the jail remained present in the court hall throughout the inquiry. Some under trial prisoners also appointed advocates and they were also allowed to witness the proceedings and on some occasions they were allowed to make submissions. He recorded statements of 15 such prisoners. He preferred to record the statement of those prisoners who appeared to be a leader and who had sustained grievous injuries in the incident. The statements of the Officers of the jail, who wanted to make statement, were also recorded. The Jail staff also examined one API, who was working as Liaison Officer for State

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Government in the MCOCA cases. The Jail authority had requested to record statement of some other prisoners. The prisoners also wanted the statement of some other prisoners to be recorded. But the Inquiry Judge avoided to record the statement of such persons. The Inquiry Judge also visited the jail and made discreet inquiry in the circles and barracks with many prisoners who included Foreigners, Hindus and Muslims. That was done by the Inquiry Judge to see as to anybody was tutored and as to whether there was truth in the different stories given by both sides. He further noted that the 7 prisoners were sent to Ratnagiri Jail prior to 11.40 am. on 28th June, 2008. The main incident took place after sending of these prisoners to Ratnagiri jail. The incident took place in respect of the prisoners who were sent to Nagpur jail and Kolhapur jail and also in respect of some prisoners of SC No. 569-04. After considering the material, the Inquiry Judge gave the following conclusion and answer to the questions referred to him :

Points	For prisoners sent to Kolhapur & Nagpur Jails	For Prisoners sent to Ratnagiri Jail	Against prisoners from SC No. 569-04.
1) Whether use of force by the Jail Authorities on 28th June, 2008 was necessary ?	Yes	Yes	No
2) If it was necessary, whether minimum force was used ?	No	Yes	No
3) Whether the force was used for some extraneous reasons for maintaining discipline ?	Yes, against some prisoners.	No	Yes

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4) Whether the force was used for reasons given in Discipline Rules, 1963 or the Manual or was used for any extraneous purpose ?	Against some prisoners force used for extraneous purpose.	No	Force used for extraneous purpose.
5) How was it that the prisoners had access to bricks and stones, as claimed by the Respondents in the counter-affidavit.	Bricks & stones were not available. Story of Jail authority not true.	Not relevant.	Not relevant

In view of the report, the learned Judge found that the force was used against some persons for extraneous reasons. He also found that the bricks and stones were not available as contended by the jail authority and story of jail authority was not true. So factually, the learned Judge came to the conclusion that the force was not used for maintaining discipline but it was used for extraneous purpose, at least against some prisoners.

9. About one of the prisoner Tanvir, the Inquiry Judge found that he had sustained injury on forearms, shoulder and elbow and he was examined first time after 15 days of the incident and fracture of left elbow and 5th metacarpal right were detected. In addition to these injuries, there were some blunt injuries. The record reveled that in Nagpur Jail, plastering could not be done as plastering material was not supplied by the jail. The record also reveled that there is restriction in movement of elbow of Tanvir and some deformity was caused to Tanvir. The learned Judge also said that circumstances showed that Tanvir had resisted and he was not obeying the order of the jail authority but the force was used against him could not be justified. Similar is the case of the another prisoner, Kamal, who was

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examined in Nagpur Jail on 16th July, 2008, that is also the 20 days after the incident and he had swelling at right thumb and fracture of distal phalynx of right thumb. Most of the contusions were on left arm and chest. Kamal was given beating in the open space. He had only complained to the other prisoners that Tanvir was being assaulted. Ehatesham was also examined in the Government Hospital at Kolhapur after 20 days of the incident. He was found with 11 injuries and the grievance against him was that he had raised slogans. He had fracture of fifth metacarpal right. The finding of the Judge is that the nature of injury was such that he did not appear to be aggressor but he appeared to be defender and he was perhaps running away from the assault. Similar is the case of Sayed Asif, who was examined on 19th July, 2008. He had three wheal marks, contusions on shoulder and scapular region. Length of injury was between 7 cm. to 9 cm. There was injury over fifth metacarpal. All these injuries were caused by hard and blunt object like stick. Another prisoner Mohd. Akil was examined on 19th July, 2008 at Kolhapur Government Hospital. He was also having serious injuries and the finding was that excessive force was used against him. Abdul Wahid had also been examined on 19th July, 2008 and he had also serious injuries. Similar was the case with Mohd. Zuber who was also examined on 19th July, 2008. Mushtaq Ahmed was examined on 21st July,

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2008. He had contusion over left scapular region, contusion over right scapular region, contusion over supra scapular region, contusion over supra scapular region left, contusion over left forearm; contusion over right shoulder, abrasion over left elbow. These injuries were caused by hard and blunt object. These injuries were such that they could be noted even after 20 days of the incident. Mohd. Zahix, Zameer Ahmed and Riyaz Ahmed also had injuries, which was noticed even after 20 days by the Doctor, who examined them. Similar was the case with Mohd. Amin, Mohd. Zuber and Bilal. So far as the prisoners sent to Ratnagiri Jail are concerned, there was no dispute that they had not sustained any injury. The injuries recorded in the medical certificate of the jail authority were manipulated in order to help the jail authority because the injuries were found by the Government Doctors even after 20 to 23 days after the prisoners were shifted to other jail.

10. The Jail Superintendent filed her objections to this report. She has not in fact disputed the findings of the learned Judge. But has quoted some Lesson Eighteen from "*Prisons and Detention Centers if an indictment is issued and the trial begins, the brother has to pay attention to the following.*" This extract she has taken from Internet, but she has not even stated that this material allegedly issued by Al-Queda was even known to the prisoners.

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However, there is one incident mentioned by the Jail Superintendent was that the learned Sessions Judge had indicted Mr. Karkar. Mr. Karkar was the Jailor attached to Arthur Road Central Prison. A specific allegation was made that Mr. Karkar assaulted some of the prisoners, when in fact Mr. Karkar was not attached to Arthur Road Jail at that time as he was transferred to Chandigarh for training and certain certificates have been annexed to show that he was on an official trip. However, we have not found any indictment of Mr. Karkar by the Inquiry Judge. The prisoners might have leveled charges against Mr. Karkar although Mr. Karkar was not at the place of occurrence. But there is no finding about his presence at the time of incident in the report of the learned Judge.

11. Another objection taken is that the learned Judge did not allow examination of the eye witnesses. The learned Judge has already explained in his report that he did not allow some of the witnesses, whom the Jail Authorities wanted to produce as witnesses and similarly he did not also allow the examination of the witnesses whom the prisoners wanted to examine. Certain findings of the Inquiry Judge go unrebutted, which are as under:

> "34. From the hand-sketch-map, it can be seen that it was virtually impossible for prisoners from Circle No.8/barrack No.2 to come out from that barrack and then from the circle. They were required to pass first the grill gate which is on the first floor

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and which is kept ordinarily in locked condition when there is barrack-bandi. A constable is posted at this gate. After this gate, there is another gate of circle itself and it always remains in closed condition. It is required to be opened by the constable posted at this gate of the circle. It does not look probable that after ordering barrack-bandi, these two gates were kept open or that prisoners from barrack No.2 of Circle No.8 could come out to overpower the constable. Further, when one comes out of Circle No.8, there is another gate between the portion of the jail where Circle No.8 is situated and the portion of the jail where Circle No.2, which is High Security Zone, is situated. It does not look probable that during barrack-bandi, this gate was kept open or that no constable was kept at this gate. The aforesaid statements show that prisoners from other circles were already brought to the open space and only prisoners from the High Security Zone (Circle No.2) who were four in number, were to be taken out. Thus, there was no question of keeping the aforesaid gates open by the jail authority This circumstance also falsifies the story given by the jail staff that prisoners from Circle No.8/barrack No.2 had come out to the open space by breaking barrack-bandi and by over powering the jail staff. In discreet inquiry also, most of the prisoners from both the barracks 1 and 2 of this circle categorically stated that during the main incident, nobody from these barracks could leave the barrack. Only one prisoner who appeared to be tutored by jail authority came forward and that circumstance I am discussing at other place.

35. There is report sent by the Presiding Officer of Sewree Court. There is copy of the order passed by the P.O. on 4-8-08 in SC No.569-04. This record shows that both Walmiki and Sayed Jafar made complaints to the P.O. when they came to be produced before the court first time after the incident. They have made allegations against the jail staff that they were beaten in jail on 28-6-08. The P.O. had examined their person and P.O. found some injuries and so the prisoners were referred to Government hospital. Even after six days of the incident, the P.O. could notice swellings and other injuries on the person of these two under-trials. The report and MLC dated 3-7-08 show that Sayed Jafar had sustained injury on right thigh, foot, chest, elbow and there was excessive swelling on the chest. Sunil

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> Walmiki had sustained injury on his back of the size 8 cm x 3 cm caused by stick. There was also injury on his left leg & left toe. When enquiry was made by the P.O. in the said sessions case, the Superintendent gave explanation and the Superintendent also produced copies of MLC prepared by jail doctor. This MLC shows that Sayed Jafar and Sunil Walmiki were examined at 5.10 pm and 5.20 pm respectively. These MLCs show that injuries like swelling on thigh, on right arm, left elbow were found on the person of Sayed Jafar and on left foot toe only of Sunil swelling was present as per the doctor of the jail. The doctor from jail gave history as sustained in scuffle and assault for controlling them as there was indiscipline."

The findings of the learned Judge that some injuries were noticed even after 4 days in the Government Hospital but they were not noticed by the Jail doctor, as according to him the Jail doctor had helped the jail authority to create MLCs favorable to jail authority.

12. The learned Judge also went into the allegation that Smt. Sathe was forcing Sayed Jafar and Walmiki to become approver. The record shows that actually these two witnesses were produced before the Magistrate for recording statement and for application to become approver, but when they were heard by the Presiding Officer and the Magistrate they had said that they had no desire to become approver or make a statement. Complaint was made by Sunil Walmiki to the then Principal Judge against the jail authority that they were pressurizing him to become approver. Mr. Thipsay, who was the Judge of the Court was requested to make an inquiry and Mr. Thipsay had submitted a report. This report had been received by the Sessions

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Registrar on 15th April, 2008 and was seen by the learned Inquiry Judge on 30th July, 2008. The report also said that the jail authority had pressurized at least Sunil Walmiki to become approver in Case No. 569/04. There was a finding by the learned Sessions Judge that on 28th June, 2008 there was no breach of discipline at least from Sunil Walmiki, but he was brought out of his room and beaten. He also observed that there were no bricks available in the jail which could have been used by prisoners for pelting at the jail staff.

13. Therefore, we have no doubt in our mind that the force was used disproportionately and also for the reasons extraneous. Before coming to the legal submissions made, we may hold that the Jail Superintendent and the supporting staff used the force excessively and for the reasons extraneous and not for the reasons to maintain discipline in the jail. It has to be remembered that the convicts or the under trials are human being and they have to be treated like human beings. The jail authorities who have custody over them have special responsibility to protect their rights and in fact they are their custodian, reformer and councilor. They cannot assume the role by which they turn into villian. They in fact should command respect from the prisoners and that respect should come as a result of their conduct with the prisoners. This is no longer in debate in this country that

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whether the prisoners have fundamental rights available to them or not as this has been decided in number of cases by the Supreme Court of India. Suffice it to refer to the following judgments.

In **Sunil Batra v/s Delhi Administration** *reported in AIR 1980 SC 1579,* in paragraph 5, the Supreme Court observed as under:

> "'Prisons are built with stones of law' and so it behoves the court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant `guardians' of the prison system where they go berserk and define the dignity of the human inmate Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials `dressed in a little, brief authority', when Part III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock. And when the Court takes cognizance of such violence and violation, it does, like the hound of Heaven, `But with unhurrying chase. And unperturbed pace. Deliberate speed and Majestic instancy' follow the official offender and frown down the outlaw adventure."

In **T. V. Vatheeswaran v/s State of Tamil *Nadu*** *reported in AIR 1983 SC 361,* the Bench of the Supreme Court was primarily dealing with the matters of four prisoners, who were facing death sentence and had been waiting to receive the sentence for more than two years, in paragraph 2 observed as under :

> "First, let us get rid of the cobwebs of prejudice. Sure, the murders were wicked and diabolic. The appellant and his friends showed no mercy to their victims. Why should any mercy be shown to them? But, gently, we must remind ourselves it is not Shylock' pound of flesh that we week, nor a chilling of the human spirit. It is justice to the killer too and not justice untempered by mercy that we dispense. Of course, we cannot refuse to pass the sentence of death where the

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> circumstances cry for it. But, the question is whether in a case where after the sentence of death is given, the accused person is made to undergo inhuman and degrading punishment or where the execution of the sentence is endlessly delayed and the accused is made to suffer the most excruciating agony and anguish, is it not open to a court of appeal or a court exercising writ jurisdiction, in an appropriate proceeding to take note of the circumstance when it is brought to its notice and give relief where necessary."

In Sunil Batra (*Supra*) in paragraph 48 the Supreme Court while deprecating transfer of prisoner held that transfer to a distant prison where visits or society of friends or relations may be snapped was violation of Article 21 of the Constitution of India. Para 48 is reproduced below:

> "48. Inflictions may take many protean forms, apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends of relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied. There must be a corrective legal procedure, fair and reasonable and effective. Such infraction will be arbitrary, under Article 14 if it is dependent on unguided discretion, unreasonable, under Article 19 if it is irremediable and unappealable, and unfair, under Article 21 if it violates natural justice. The string of guide-lines in *Batra-1* set out in the first judgment, which we adopt, provides for a hearing at some stages, a review by a superior and early judicial consideration so that the proceedings may not hop from Caesar to Caesar. We direct strict compliance with those norms and institutional provisions for that purpose."

Now, if these principles apply to the persons who have already been convicted and sentenced to the extreme penalty these have to be applied in

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case of persons who are still under trial more rigorously.

14. Going by the principles laid down by the Supreme Court and the evidence collected by the learned Inquiry Judge, one cannot condone the conduct of the jail authorities particularly the Superintendent of the Jail because all other Officers must have done what they did under her command. Least said about this conduct, is the conduct was shameful. All Jail Superintendents in a free democratic republic behaving inside the jail like a dictator is not acceptable. Such Officials if left to manage the jail would negate all the principles on which our democratic set up is built. Therefore, this Court has to take cognizance of it and pass appropriate directions, which we will do after discussing the legal aspect.

15. We have discussed the injuries as reported by the learned Inquiry Judge in paragraph 9 of this order and most of the prisoners have received very serious injuries. They were not treated for 20 days and there is a finding by the Inquiry Judge that the injuries shown in the medical certificate issued by the Jail Doctors were manipulated in order to help the Jail Authority. The Jail Doctors did not find injuries on the person of the prisoners, which were found by the Government Hospitals even after 20 to 23 days. The role of these doctors is reprehensible and shameful.

16. Now coming to the legal question, the whole thing appears to

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be shrouded in mystery. In her affidavit in reply to the writ petition, she stated that she submitted a letter to the MCOC Court requesting him to permit transfer of prisoners in Case Nos. 16/2006; 21/2006 and 23/2006. We have seen the letter. The letter is addressed to the Registrar of the Sessions Court requesting transfer of prisoners in Case Nos. 16/2008, 21/2008 and 23/2008. The reason given is that the Supreme Court has stayed the trial. The second reason given is that the jail has capacity to lodge 804 prisoners and at that time it had 2500 prisoners. Surprisingly, the Judge responded to this letter. Because there is no precedent or law shown to us by the Advocate appearing for the Jail authority or by the Public Prosecutor which empowers the Jail authority to write letters in a pending matter to the learned Judge. The learned Judge replied, referring to the order of the Supreme Court and the stay, "As the presence of accused is not required immediately, you are at liberty to take action of transfer of above referred accused to other jails as per Rules and Regulations. In case of transfer of accused to other jails, such intimation be forwarded to this Court, which would make me enable to issue production warrant, as and when required." Needless to say, this all was happening behind the back of the accused persons. It is well settled that in a matter pending before the Court, if any party wants any order from the Court, it is by way of an application, a copy

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of which is made available to the other side. The Judge was still cautious and he did not grant any permission for transfer of the prisoners. He only gave liberty to the jail authority to take action in accordance with the Rules and Regulations, but at the same time forgetting that he was abdicating his lawful authority.

17. Learned Counsel appearing for the petitioner submits that the rules did not allow transfer of prisoner at all. He submits that the lodging of prisoner has to be done under the Prisoners Act and the Rules made thereunder. In terms of Section 29 of the Prisoners Act, Rules have been framed in Chapter XXXV of the Maharashtra Prison Manual. These rules are by way of an order and this order is called `*the Removal of Prisoners Order, 1965*' and has come into force on 31st May, 1965. This order entitles the respondents to pass order for "Removal of Prisoners". The order itself shows that it has been passed in exercise of the power conferred by sub-Section (1) of Section 29 of the Prisoners Act, 1900. Under Section 2(c) the "prisoner" is defined as, "means a prisoner referred to in sub-section (1) of Section 29 of the Act. So Chapter XXXV of the Jail Manual would apply to prisoner as defined in sub-Section (1) of Section 29 of the Act. Section 29 is under Part VI of the Prisoners Act, titled "Removal of Prisoners". Section 29(1) of the Prisoners Act, 1900 lays down :

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"**29. Removal of prisoners. -** (1) The State Government may, by general or special order, provide for the removal of any prisoner confined in a person -

(a) under sentence of death, or
(b) under, or in lieu of, a sentence of imprisonment or transportation, or
(c) in default of payment of a fine, or
(d) in default of giving security for keeping the peace or for maintaining good behaviour,

to any other prison in the State."

By bare perusal of this section, it becomes clear that prisoner is a person confined (1) under sentence of death, (2) under, or in lieu of, a sentence of imprisonment or transportation, (3) in default of payment of a fine, or (4) in default of giving security for keeping the peace or for maintaining good behaviour, to any prison in the State. Learned Counsel for the petitioners submits that under trial prisoner is not at all a prisoner within the meaning of Section 29 of the Act. Therefore, neither Section 29 of the Act applies to the prisoner in question nor Chapter XXXV of the Jail Manual applies to him.

18. The police has no power to detain a person beyond 24 hours in terms of Section 57 of the Code of Criminal Procedure. Under Section 167 of the Code the power of remand has been commonly understood vests with the Magistrate. Section 167 is reproduced below :

"**167. Procedure when investigation cannot be completed in twenty-four hours.-**
(1) Whenever any person is arrested and detained in custody, and

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it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, 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 Judicial Magistrate a copy of the entires 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, authorise the detention of the accused n such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that -

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, -

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section hall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention n any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially

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empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I - For the avoidance of doubts, it is hereby declared that notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II - If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be provided by his signature on the order authorising detention.

(2-A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entires in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in

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the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

The words in Section 167(2) are "the accused in such custody as such Magistrate thinks fit". So, right from the beginning of custody of an accused, it is the Magistrate in whose control the accused remains and the accused can be detained in such custody as Magistrate thinks fit. If the person is not bailed out then a charge sheet shall be filed against him in terms of Section 173 of the Code. Section 173 requires the police report to disclose whether the accused has been arrested and whether he has been released on his bond and, if so, whether with or without sureties. It does not cast a duty on the police to produce the accused before the court when the police files the

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report because it pre-supposes that if the person is in custody then it is already under the custody of the Magistrate and in case of bail also only particulars of police report are to be given as a person who is on bail is also in the custody of the court. Once a charge sheet is filed, nobody has authority over the custody of an under trial except the court. We have been able to find a very short judgment of the Madras High Court in the case of **M. R. Venkataraman & Ors. v/s *State*,** *reported in (1947) 2 MLJ 202.* We are reproducing the observations of the Court along with the facts as mentioned in the Judgment so that the principle laid down by this judgment is fully appreciated. Paragraphs 1, 2 and 3 are reproduced below :

> "1. Seven persons have filed a joint application that this Court should issue directions in the nature of *habeas corpus* under section 491 of the Code of Criminal Procedure to produce the petitioners before this Court and to set them at liberty.
>
> 2. Although the evidence adduced by the petitioners is very unsatisfactory, in that they have filed only one affidavit, and that by a person who had no acquaintance with the facts to which he has sworn, yet two allegations relied on by the petitioners seem to be true and are not denied by the learned Public Prosecutor. The first is that they were remanded to the Central Jail, Trichinoply, instead of to the Central Jail, Madura, which is the Jail to which prisoners are normally remanded when under trail in the Courts of the Madura district, including that of the Stationary Sub-Magistrate of Madura, in whose Court the petitioners were being tried. The other complaint of the petitioners is that the provisions of sections 167 and 344 of the Code of Criminal Procedure were not complied with, in that they were not brought to Court when the Magistrate issued fresh orders for the remand of the petitioners to custody.

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> 3. On the first point, it seems to us that an illegality or irregularity was committed. Section 167 empowers a Magistrate having jurisdiction to remand a prisoner to such custody as he thinks fit. Section 344 does not use the words "as he think fit" with regard to the order of remand; but there is nothing in the section which suggests that after a charge sheet has been filed, the Magistrate has not the same freedom with regard to the custody to which he commits the accused as he had before a charge sheet was filed. The learned advocate for the petitioners has referred to the wording of section 29 of the Prisoners' Act, as indicating that the only person who can transfer a prisoner from one Jail to another within the same Province is the Inspector General of Prisons; but by its very wording section 29 of the Prisoners' Act does not apply to an under trial prisoner; nor are we dealing with a transfer of a prisoner. Whenever an accused is brought before the Court and the Court issues an order of remand, the Magistrate has complete freedom, as far as we can see, to remand the accused to whatever custody he thinks fit."

19. It is well settled that a person who is facing a trial in a court is in the custody of the Court. Therefore, he is to be lodged at a place where the Court wants him to be lodged.

20. In this view of the matter, the learned Judge, who had been approached with the letter by the Jail Superintendent should either have allowed the application or dismissed the application and that too after hearing the prisoner. Therefore, the transfer itself was illegal, improper and bad as the Jail authority had no power at all to transfer the prisoner, who had been confined to a particular jail by the trial court. They could only be transferred if the transfer was allowed by the Court conducting their trial. Therefore, it is immaterial whether the Inspector General (Prison) had

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permitted the transfer or not permitted the transfer. As contended by the learned Counsel for the Jail Superintendent, the Jail Superintendent maintained that after receiving letter from the learned Judge, she had obtained permission from the Inspector General of Prison, Maharashtra. In fact, the Inspector General (Prison) also did not have any authority or jurisdiction to order the transfer of those prisoners. There is also a dispute as to whether this order was obtained from the Inspector General (Prison) *post facto*. But we are not going into that controversy because our finding is that the transfer itself was bad even if it was allowed by Inspector General (Prison).

21. Learned Counsel for the petitioners has drawn our attention to another aspect of the matter contending that even these rules which are in Chapter XXXV of the Manual were not followed. He submits that all transfer of all prisoners from jail are being made on Saturdays and Sundays. Even if the rules were applicable, even then the transfer could have not been made on Saturday and Sunday as 28th June, 2008 was the Saturday. He has drawn our attention to Rule 9 of the Chapter XXXV, which lays down, "Prisoners shall not, as far as possible, be removed so as to reach their destination on a Sunday or other prison holiday, or before the lock up of the prison." This has not been at all explained as to why the transfer was made

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on Saturday or Sunday, if it is barred by the Rule. Learned Counsel for the petitioners submits that the transfers are made on Saturdays and Sundays only to avoid court intervention as it is not possible for the prisoner to contact anybody so that the Court would not be in a position to intervene in such transfer. We have also seen Rule 12(1), which says,"No prisoner shall be removed without first ascertaining whether accommodation is available at the receiving prison to which he is to be removed". There is nothing on record to show that the prisons where these prisoners were being removed had the accommodation available.

22. Therefore, we hold that the transfer of these prisoners was illegal and they should be transferred back to the jail at first. If the Government wants to transfer all these prisoners to other jail for any reason, they may make a proper application before the trial court and trial court may decide the matter in accordance with law after hearing the other side.

23. In the light of the above discussions we have found the force was used against the under trial prisoners for no fault of theirs. Force was used excessively for extraneous reasons and law was also flouted. Even as a formality the Jail Manual was not followed. We, therefore, direct the Chief Secretary, State of Maharashtra to initiate disciplinary inquiry against all the Officers involved in the incident for using excessive force and for using force

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for extraneous reason. If need be, in addition to departmental inquiry, criminal action be also initiated against the concerned Officers. The inquiry be also initiated against the Jail Doctors for dereliction of duty and for fudging the record. The departmental inquiry should be started within a period of one month from today and after inquiry is concluded the matter be decided in accordance with law. In any case, the departmental proceedings should be decided within a period of six months.

24. With these observations, the above writ petitions are disposed of.

25. Registry of this Court to send a copy of this order to the Chief Secretary and the Principal Secretary to the Home Department of the State of Maharashtra.

Sd/-
(BILAL NAZKI, J.)
Sd/-
(A. R. JOSHI, J.)

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