

“Fake Encounters within the Ambit of Custodial Death”

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ABSTRACT

Police authority of any country is given the power to protect the rights of every person whether it is an offender or normal citizen. Police has the power to protect every person from the wrong which is being done to them and during performance of this power, police is given the power to investigate on any matter with the proper leave of the court, but police is, nowhere, given the power to act as judge or to give judgment or punishment in any matter without the approval of judiciary. Thus it can be clearly said that police have to comply with the order of the judiciary. Post-Independence of India, it is the belief of every citizen that if police is there to protect them, then nobody can cause any harm to them, they also believe that police is the “Rakshak ” (paraclete) of Indian society. But what will be the situation in case, where these “*RAKSHAKS BECOME BHAKSHAK* ” (police becomes the eater). That situation will be worse than a country which has no place for their denizens (no rights for citizens), as police doing harm to people will be reported nowhere because police is itself the wrongdoer thus, neither FIR nor any complaint will be lodged. Thus, the powers given to police authority necessarily need to be balanced and checked in order to make society a safer place for every citizen. In this paper, we will be dealing with the most debated issue in recent time, that is, Custodial Death and Fake Encounter, and this paper will focus on the inclusion of Fake Encounters within the ambit of Custodial Deaths.

INTRODUCTION

Firstly, we will start with the quote of **Alexander the Great** that “*If I can love myself despite my infinite faults, how can I hate anyone at the glimpse of a few faults*”. This quote was often referred to by Swami Vivekananda for the strength and compassion in humans but in contemporary society particularly in India can very much relate to the meaning of Custodial death, where offenders die within the custody of police authority or within the prison”. And that could include death caused due to two reasons, either it is a natural death or it is by excessive torture, and we will be dealing with the issue of death caused by excessive torture. Now the question arises ‘*what amounts to custody*’. This was thoroughly debated in the case of *California v. Beheler*¹, in which the court roughly held that custody includes ‘*formal arrest or restraint in freedom of movement*’. Black’s law Dictionary defines custody² as, “*The care and keeping of anything; as when an article is said to be "in the custody of the court."* And also mean that the detainer of a man's person by virtue of lawful process or authority;

¹ 463 U.S. 1121 (1983)

² Black’s Law Dictionary, 4th ed.

actual imprisonment”. In a sentence that the defendant “be in custody until,” etc., this term imports actual imprisonment.” According to Black’s law Dictionary, *custody actually means actual imprisonment*, and dictionary meaning of imprisonment³ as, “to prevent the free exercise of his powers of locomotion.” Thus according to the dictionary, when there is restriction on free movement of a person, that person is said to be within the custody of police or any authority. Same was also decided by the Supreme Court of India in a number of cases. Supreme Court in the case of *Haroon v. Emperor*⁴, held that it does not necessarily mean detention or confinement as used in the code of criminal procedure but includes state of affairs from which it can be ascertained that the accused is under some sort of surveillance⁵ or restriction and cannot break the company of a police officer and get away. As soon as an accused or suspect comes into the hands of a police officer unless there is clear and unmistakable evidence to the contrary, he is no longer at liberty. Therefore, would deem to be in custody, though the formal order of arrest had not been made or made later on. Later, in the case of *Parahmhans Jadav v. State of Orissa*⁶, high court of Orissa stated that, it is now well settled that police custody for the purpose of section 26⁷ of Indian Evidence Act does not commence only when the accused is formally arrested but would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect police surveillance. From the above discussion, it can be construed that “within the custody of public authority” means restriction by that authority on the free movement and there is some sort of surveillance on the person.

CUSTODIAL DEATH

Starting from discussion on Custodial Death, many NGOs⁸ have worked on the protection of rights of custodial death victims⁹, and data produced by the National Human Right Commission¹⁰ (hereinafter NHRC) shows a large number of such incidents being happened in the recent time. Today, the society has nearly succumbed to the syndrome of lawless tensions, psychic penury and miseries of conflict, at individual, domestic, local, National and international levels. During the recent time, it has been observed that there is a massive increase in the toll of deaths in police custody, but so far not much attention has been paid. In India, the power to enforce law in society is solely managed by the police officials. Recently, there was public agitation against the custodial death of Jayaraj and Bennicks (father and son arrested by police due to failure to follow lockdown norms) at the Sathankulam Police Station in the Tuticorin District of Tamil Nadu. Due to the recent uprise in the number of custodial tortures by police, the NHRC has proposed that in cases of custodial death, the police officer

³ Supra note 2.

⁴ AIR 1932 Sind 87

⁵ 1963 AIR 1295

⁶ AIR 1964 Ori 144

⁷ Indian Evidence act, 1872

⁸ Non-government organisations.

⁹ National Campaign Against Torture, June 2020

¹⁰ “NHRC”

in-charge must be held responsible and the state should not be held vicariously liable for the act of police. It is the author's belief that if liability of such an act is poured on the state the amount of compensation and relief provided shall be exemplary which will be in the interest of the one oppressed. Article 21 enshrined in the constitution of India gives the right to life and liberty and empowers the state to guarantee these rights; it lies down that "No person shall be deprived of his life or personal liberty except according to procedure established by law". This not only refers to the enacted law but also to the principle of Natural Justice. This link must be direct and set at rest any question regarding the compensation to be paid for violation of rights in Article 21.¹¹ UN Convention against Torture¹² and Other Degrading treatment provides for maintaining human dignity of arrestees and thus we need to mould our domestic law, by following the guidelines of these international treaties and conventions. The High Court in the case of *Mariayappan v. State of Tamil Nadu*¹³ directed to initiate criminal proceedings against the police officials and ordered the state to pay compensation of 2Lakhs to the family. According to the NHRC's annual report¹⁴, There are reported complaints of 34 custodial deaths in 1993-1994, increasing to 1297 custodial deaths in 1998-99 and reaching its peak to a startling figure of 1493 custodial deaths in 2004-2005.

There were a total 1,636 intimations concerning death in judicial custody, and 148 intimations of death in police custody during the year 2017-18¹⁵. One intimation of death in para-military/defence forces custody was also reported during the review period. It disposed of 2,151 cases of custodial death. Out of these 2,151 cases, 1,945 cases relate to death in judicial custody, 205 cases of death in police custody and one case of death in the custody of paramilitary forces.

According to Latest report by NCRB¹⁶, 70 people died in custody in the year 2018, and in the year 2019, 117 deaths were reported by NHRC¹⁷. According to the recent report by National Campaign against Torture, death in police custody occurs primarily as a result of torture. Out of 125 deaths recorded in the police custody in the year 2019, 93 of them died due to alleged torture or foul play, whereas 24 died in suspicious circumstances, with the police claiming that they either committed suicide or died due to accident. Report emphasized on the fact that the practice of torturing suspects in police custody to punish them, gather information, extract confession or demand bribes was very much prevalent.

¹¹ Nilabati Behra v. State of Orissa (1993) 2 SCC 373; D.K Basu v. State of West Bengal (1997) 1 SCC 416; Rudal Shah v. State of Bihar (1983) 4 SCC 141.

¹² United Nations Treaty Collection: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Retrieved on 26 June 2018.

¹³ 2000 Cri LJ 4459

¹⁴ NHRC, Final Report, 2004-05

¹⁵ NHRC, Annual Report, 2017-18

¹⁶ <https://ncrb.gov.in/en/crime-in-india-table-addtional-table-and-chapter-contents?page=18>

¹⁷ NHRC, Annual Report, 2018-19

After the incident of George Floyd in USA¹⁸ and Jayaraj and Bennicks¹⁹ Custodial death in Tamil Nadu has raised a lot many concerns and once again debate has been started on the topic of Third Degree torture. After mass agitation against the death of George Floyd in the US, Congress decided to introduce a Police Reform Bill along with the introduction of a National Database for reporting Police Misconduct²⁰. Same Anti-Torture bill²¹ was also introduced in India in the year 2010, which haven't been passed since now by the Parliament. This bill talks about punishment for police officials, and it has also given a very wide definition to the word 'Torture' and said that, "when any police official inflict harm on any person in order to extract confession or put harm to the life or limb of person, then that will constitute Torture" within the Bill and it also prescribes punishment of 10 years for such police personnel.

FAKE ENCOUNTERS

Oxford Dictionary defines "encounter" as, an incident in which police shoot dead a suspected criminal under controversial circumstances, which may even include their personal gain.

Manual on Human Rights for Police Officers claimed that there have been more than 700 cases of police encounters recorded in the country between the years 2000-2007 and out of all states, UP topped the list with more than 300 cases and Gujrat came last with 17 cases.

NHRC came up with the date of 1,782 cases of fake encounters during 2000-2017²² 44.75% of cases came from the State of Uttar Pradesh and also a report of NHRC 2017-18 shows that 164 deaths have occurred from Police encounters in that year.

Now moving on to fake encounters, most debated after the case of Vikas Dubey encounter²³. Encounters are also known as Extra-judicial killings or extrajudicial execution. Indian Penal Code, 1860 does not mention anything about Encounter but section 96-106²⁴ (Private Defense) justifies these Police encounters on the ground of self-defense, when attacked. Section 96²⁵ provides that every human being has a right to private defense which is natural and inherent right. Similarly, section 100²⁶ & exception 3 of section 300²⁷ and section 46²⁸ which lays down similar provisions with regard to investigation in extra-judicial killings and

¹⁸ Taylor, Derrick Bryson (June 2, 2020). "George Floyd Protests: A Timeline". *The New York Times*. Archived from the original, June 2, 2020.

¹⁹ "Tamil Nadu Can't Turn Blind Eye to Police Torture: Amnesty India". *The Quint*, 28 June 2020.

²⁰ Fandos, Nicholas (June 6, 2020). "Democrats to Propose Broad Bill to Target Police Misconduct and Racial Bias". *The New York Times*. ISSN 0362-4331, June 8, 2020.

²¹ <https://sabrangindia.in/article/prevention-torture-bill-forgotten-law>

²² NHRC, Final Report, 2016-17

²³ The Hindu, Krishnadas Rajagopal, July 17, 2020

²⁴ THE INDIAN PENAL CODE, 1860. ACT NO. 45 OF 1860

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ THE CODE OF CRIMINAL PROCEDURE, 1973. ACT NO. 2 OF 1974.

cases of culpable homicide. In case of an encounter, if it is done for self-defense then that will be considered as killing for self-defense, but if not justified, it will be considered as a fake encounter. NHRC issued guidelines in 2010 and highlighted that if the use of force cannot be justified and death falls outside the jurisdiction, it is a crime and the police officer would be guilty of culpable homicide. Andhra High Court in the case of *Andhra Pradesh Civil Liberties Committee v. The Government of AP*²⁹, observed firstly, that registration of FIR³⁰ is mandatory after every encounter death and secondly, the judicial magistrate was given the power to decide the next step, as to continue the trial or end it after listening to police arguments.

One of the main issues which we are concerned here is regarding the attempts made by the accused for fleeing away by snatching the revolver while transferring the prisoner and police take this as a defence and in return they ultimately have to kill the accused in ‘retaliatory firing’. The Supreme Court has issued various guidelines time and again for ensuring that accused must be handcuffed. On this point, the Apex Court gave a landmark judgment in *Prem Shankar Shukla v. Delhi Administration*³¹, and noted down that handcuffs should be used if the prisoner has any past record of violence or attempts to flee from jail. And further observed that using chains or handcuffs violates basic principles regarding the dignity of human beings and this does not hold the test of Article 14, 19 and 21³².

Justice VR Krishna Iyer stated: “The guarantee of human dignity from an essential part of our constitutional culture and to manacle man is more than to humiliate him, deprive him of humanity and, therefore, to infringe his very personhood in the disguise of dangerousness and security. Even a prisoner has a living soul as a person and deserves not to be treated as an animal.³³” Court finally observed that the “Iron curtain” cannot be drawn between the prisoner and the constitution.

In another case of *Prakash Kadam v. Ramprasad Vishwanath Gupta and others*³⁴, court while discussing the issue of fake encounter in detail, held that the policeman against whom fake encounters are proved must be given death sentence and treating such cases as rarest of rare case because fake encounters are nothing but a cold blooded murder by the person who are supposed to uphold the law. Markandey Katju and Gyan Sudha Mishra, JJ, also told that in their opinion if crimes are committed by the ordinary people, ordinary punishment should be given but if the offence is committed by the policeman, then much harsher punishment should be given to them because they do and act totally contrary to their duties.

²⁹ 2008 CriLJ 402

³⁰ First Information Report.

³¹ 1980 AIR 1535

³² THE CONSTITUTION OF INDIA, 1950.

³³ Sunil Batra v. Delhi Administration, (1978) 4 SCC 409

³⁴ (2011) 6 SCC 189

Considering the recent issue of alleged fake encounter of Gangster Vikas Dubey³⁵, in which Eight UP policemen which included DSP were brutally killed and four were severely injured when a team of policemen raided the gangster Vikas Dubey at Bikhru village under Chaubepur Police station in Kanpur, UP. After that police said that sacrifice of martyrs should not go waste and culprits should be punished as per the law of the land. Later after 7 days of struggle, police arrested Vikas Dubey from Ujjain, MP and while he was being brought back to UP, he was given to UP police and as soon as he entered border of Kanpur, the car hit an accident and there he tried to run away from the custody of police he was shot dead in encounter and police stated that, he tried to run away by snatching the revolver of one of policemen, and there he was shot by other police personnel. Ground encounters are common, as it was in many many encounter cases that is “the deceased snatched a pistol/rifle from policemen and tried to escape and fired, the policemen who were guarding them fired in self-defense. Even a petition was filed in the Supreme Court in anticipation that had demanded protection for Vikas Dubey³⁶ saying that there is greater apprehension that UP Police would commit a fake encounter and this cannot be neglected by just stating this as mere coincidence. The truth of the matter is that he was killed in highly mysterious circumstances by the UP Police. There were visible signs of police complicity in his success and his political connections that ultimately helped him to play with the law. The same was the story when Hyderabad Police encountered the rapist of a young doctor who was raped and burned by the rapists.

The recent UP Chief Minister after becoming CM in 2017 publically glorified this practice. Since 2017, over 3000 encounters have taken place that have killed 60 and more that 400 were injured. A prohibition to the prosecution of policemen without the prior sanction of state as stated in sections 132 and 197 of CrPC, 1973 had encouraged Indian police to indulge in illegal, unconstitutional and inhuman activities. Fake encounters completely evade and circumvent the due process of law and hence violate article 14 and 21 of the Constitution which has ensured fair trial to criminals like Nathuram Godse³⁷ and Ajmal Kasab³⁸. Every accused has a constitutional right to defend him in a trial conducted by a competent court³⁹; *justice is the duty of the court without any favour or fear*⁴⁰ and not of police officials.

INCLUSION OF FAKE ENCOUNTER WITHIN THE AMBIT OF CUSTODIAL DEATH

Finally, authors are of the view that fake encounters and custodial death should be considered as one head, as fake encounter is the situation where a person surrender himself to the

³⁵ The Indian Express, 14 July 2020

³⁶ India Today, Aneesha Mathur, July 10 2020

³⁷ Khosla, G.D. (1965). *The Murder of the Mahatma (proceedings by the Chief Justice of Punjab)* (PDF). Jaico Publishers. Archived from the original (PDF) on 21 September 2015.

³⁸ Mumbai Attacks: A Chronology of the Trial Archived 18 July 2011 at the Wayback Machine Outlook India. 20 July 2009. Retrieved 25 November 2012.

³⁹ Article 22(1), The Constitution of India, 1950.

⁴⁰ http://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.html

custody of police, and police officials in order to save some third person, kills the accused without any fair trial or order of the court, this should be construed as a case of custodial death because, person has submitted himself to the custody of police and after being within the custody of police, he was killed by the police, which fulfills all the requirements of custodial death. Both fake encounter and Custodial death have two major similarities, first is that both were committed within the custody of police and second, both were the wrongs committed by the police official. Here the issue arises that, how can fake encounters be included within the ambit of custodial death, as custodial death requires that the purpose of death should be getting statements or extracting confessions from the accused which is not the purpose in case of fake encounters. This can be answered in the way that the purpose of fake encounters is to protect someone from penal punishment or there can be any other reason, thus it can be clearly construed that fake encounters come within the ambit of custodial death.

CONCLUSION

We are quite shocked on noticing the fact that till now no one has raised the issue of the inclusion of fake encounters within the ambit of Custodial death, to the best of authors knowledge. Still, authors are of the view that fake encounters should be considered the same as that of custodial death. From the above discussion, authors want to conclude that there is no doubt for the inclusion of fake encounters as both are committed within the custody of police officials and are done by police personnel only. From the above discussion on the point of deciding the custody of police, it was held that custody starts as soon as there is restriction on the free movement of arrested persons, thus issue nowhere arises that custody under fake encounter and custodial death are different. And also custody under both the wrongs includes both judicial as well as extrajudicial custody. Thus, authors finally insist on the inclusion of fake encounters within the ambit of Custodial death.

Further authors are of the view that installation of cameras at police stations and also with the team which is going to arrest the accused will work to control the powers of the police as well as will reduce the number of cases of custodial death and fake encounters⁴¹ and same was recently iterated by the Supreme Court. As everything will be under the CCTV surveillance, and it will neither affect any basic feature nor will act as any restriction on power of police and it can also serve other purposes, like restrict police from harassing the common people and also help police in matters of fake complaints against themselves as everything will be recorded in the CCTV cameras.

⁴¹ Paramvir Singh Saini v. Baljeet Singh and Others