IN THE HON'BLE HIGH COURT OF DELHI AT NEW DELHI

CRL. M.A. NO. 8003/2015 & CRL. M.A. No.18056/2015
IN
CRIMINAL APPEAL NO. 574/2015

In the matter of:
Zulfikar Nasir and Ors ...Appellants

Versus

State of Uttar Pradesh and Ors ...Respondents

AND
In the matter of:
National Human Rights Commission
Through its authorised representative
Secretary General ...Intervenor/Applicant

WRITTEN SUBMISSIONS ON BEHALF OF INTERVENOR/ NATIONAL HUMAN RIGHTS COMMISSION (NHRC)

Most respectfully submitted:

Preliminary submissions:

(a) That the aforesaid Criminal Appeal No.574/2015 has been filed against the Judgment dated 21.03.2015, passed by Sh. Sanjay Jindal, Ld. Additional Sessions' Judge, West District, Tis Hazari Court, Delhi, in a case titled 'State v. Surender Pal Singh & Ors.' wherein all the accused sixteen officers and jawans of the Provincial Armed Constabulary (a reserved police force of the State of Uttar Pradesh, hereinafter PAC) charged with the killing 40-45 men, in May 1987, were acquitted. This impugned judgment delivered 28 years later, in what constitutes the worst case of custodial communal killings in independent India, is a travesty of justice.

(b) The abovementioned killings pertain to an incident dating back to 22nd May 1987, when during the course of communal riots in Meerut District, a search and arrest operation was launched by the police, PAC, and Army. About 644 Muslim men were arrested under S.107/151/116 of the Code of Criminal Procedure. A large majority of the arrested men were sent to different police stations and jails, in PAC and Army trucks. Around 40-45 innocent Muslim men also arrested in this operation, were put into truck no. URU-1493 and abducted by the PAC Platoon. Instead of being taken to a police station, they were taken to Gang Nehar,

Muradnagar and then to Hindon Canal. At both places the PAC personnel stopped the truck and shot at the abducted persons, both, after making them get down from the truck and inside the truck. After shooting them, the PAC personnel threw the bodies of the abducted persons into the water.

(c) From the injured persons thrown into the Hindon Canal, one Babudeen survived, and on his information FIR No. 110/87, P.S.Link Road came to be registered; From the injured persons thrown in Gang Nehar, six persons survived and FIR No. 141/87 P.S Murad Nagar, Ghaziabad, was registered on the statement of one of the six survivors, Mujibur Rehman. One of the injured survivors, Qamruddin, died on the way to the hospital from the Murad Nagar Police station.

(d) Five survivors of this gruesome and unlawful killings laid bare the truth about the incident in their testimonies before the Trial Court as Prosecution witnesses. For 28 years, these survivors and the families of the remaining 40-45 persons have tirelessly pursued the case with the hope of securing justice.

(e) This is one of the worst incidents of targeted custodial killings by the police. Acquittals in cases of this nature are bound to have a chilling impact on citizens by eroding the confidence that citizens place in the legal system and the rule of law.

(f) It is important to note that even while acquitting the accused due to lack of evidence to connect them to the crime, Ld. Trial Court has conclusively found that,

"*Conclusions on Facts no.1, 2 & 3*

As a result of combined reading of the above mentioned prosecution witnesses, it can be said that a search operation was conducted by the police, PAC and army in Mohalla Hashimpura and adjoining areas on 22.5.1987 and several persons were detained/arrested and taken to different places like police station or police line etc." (@ pg 137 of Impugned Judgment)

...

"Conclusions on facts in issues no. 4, 5 & 6:

It has been established that about 42 persons abducted from Mohalla Hashimpura were put in a yellow colour PAC truck by PAC officials, the said truck, instead of police station or police line, was take first to Gang Nahar Murad Nagar where several abducted persons were shot at and thrown into waters of Gang Nahar, Murad Nagar and thereafter the remaining persons were shot at Hindon River near Makanpur village, Ghaziabad and thrown into waters of Hindon River by presuming all of them to be dead." (@ pg 160 of Impugned Judgment)

In the very first sentence of the Impugned Judgment the Trial Court notes,

"That the present case relates to a horrific incident of targetted abduction and killing of around 42 persons by the officers of Provincial Armed Constabulary (in short PAC), a reserve police force of the State of Uttar Pradesh on the night of 22.05.1987." (@ pg 7 of Impugned Judgment)

(g) The acquittal of the perpetrators despite a finding that 40-45 Muslim men were abducted and killed by law enforcement officials, is indicative of the difficulties in determining culpability and securing accountability in cases of custodial crimes and crimes committed by law enforcement officials.

(h) If perpetrators, particularly when they are law enforcement officials, go unpunished, the fundamental right to life and personal liberty of all citizens is at grave risk. There is also a grave apprehension that such acquittals will embolden and encourage impunity which runs the danger of undermining our constitutional democracy.

(i) The present case also highlights that while unlawful killings of innocent persons are an arbitrary abuse of power by members of State forces who are duty bound to protect the lives and property of these persons and uphold the law, the gravity of the situation is further aggravated by the continuing impact the incident has had on the survivors and the families of the deceased victims. The victim-survivors and families of the deceased victims are a socially and economically marginalised community; the families also belong to a religious minority.

(j) The present submissions on behalf of the National Human Rights Commission are limited to underlining the grave injustice that has been caused due to deliberate *malafide* investigation and the harm and injury caused to the victim families and survivors, as well as drawing this Hon'ble Court's attention to the need to lay down Guidelines that should be applicable to such cases.

(k) In the present submissions the term "custodial crime" is used to refer to crimes perpetrated by police and law enforcement officials such as PAC.

1. Proposition 1- Detention and captivity of Muslim men by the PAC in the truck amounts to deemed custody

(A) Provincial Armed Constabulary or PAC: Is an armed unit of the Uttar Pradesh police force which is deployed usually to maintain law and order. It

consists of battalions posted at different parts of the State, each battalion consists of companies. A battalion is commanded by an IPS officer of Superintendent rank, a company is commanded by a State Police officer of Inspector rank who is referred to as the Company Commander. The PAC is headed by the Director General of PAC.

(B) It is the Prosecution's case and accepted in the Impugned Judgment that around 644 Muslim men were rounded up and arrested under Sections 107, 151, 116 Cr.P.C.

(C) When the victims were rounded up and directed to board the PAC Truck, they came under the control and authority of the PAC, and the liberty of about 45-50 men of mohalla Hashimpura was curtailed and hence they were effectively in the deemed custody of the PAC.

(D) There is a growing legal recognition that "custody" extends beyond the mere spatial construct of prisons or lock-ups. A more realistic and expansive legal understanding of custody is required given the circumstances in which persons whose liberty is restrained by/under the control of law enforcement officials/state agencies are subjected to torture/harm/killings. For instance, in ***Niranjan Singh v. Prabhakar Rajaram Kharote AIR 1980 SC 785*** (@ Para 7) (ANNEXURE 1) the Hon'ble Supreme Court held that,

"*When is a person in custody, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the courts jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide and seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law…"*

This view was reiterated by the Hon'ble Supreme Court in ***Sunita Devi v. State of Bihar AIR 2005 SC 498*** **(**@ Para 13 to 18) (ANNEXURE 2) which also refers to the Black's Law Dictionary definition of custody as a *"restraint of liberty".*

(E) The Law Commission of India in multiple reports has recommended that an expansive and realistic definition of custody is necessary, and has defined custody around the principles of deprivation and restraint of liberty.

Refer:

(a) **113th Law Commission of India Report on Injuries in Police Custody, 1985** (@ Para 5.3) (ANNEXURE 3)

(b) **152nd Law Commission in its Report on Custodial Crimes, 1995** (@ Para 2.1) (ANNEXURE 4)

(c) **185th Law Commission in its Report on Review of Indian Evidence Act, 2003** (ANNEXURE 5)

(d) **273rd Law Commission of India in its Report on Implementation of United Nations Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment or Punishment, 2017** (@ Chapter V, pg 44) (ANNEXURE 6)

(e) **Black's Law Dictionary, Henry Campbell black, M.A. 6th Edn**

2. Proposition 2: Accountability in cases of crimes by law enforcement officials is necessary to inspire confidence in the rule of law:

Refer:

(a) In **Raghbir Singh v State of Haryana (1980) 3 SCC 80 (**@Para 2, 3) (ANNEXURE 7) the Hon'ble Supreme Court emphasised the urgent need to prevent and punish custodial torture and other forms of brutality committed by the security force whose duty is to protect the lives and liberty of common citizens by holding that in cases of custodial violence by the police "the vulnerability of human rights assumes a traumatic, torturesome poignancy" (Para 2). Further, that any failure to punish the perpetrators of custodial violence and killings the Court held, would result in "the credibility of the rule of law in our Republic vis-a-vis the people deteriorating" (Para 3).

(b) **Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Mr. Philip Alston submitted to the United Nations Human Rights Commission, dated 20th May 2010 (A/HRC/14/24)-** @ Para 53 (ANNEXURE 8)

"53. Impunity is often a central cause of continued killings. In many of the countries visited, impunity is maintained through problems at every level of the criminal justice system. Thus, police may be unwilling or unable to carry out an independent investigation of the killing. The State may lack forensic capacity to conduct investigations. Crimes scenes may not be secured. The police may fail to refer cases to the prosecution service. Prosecutors may be corrupt or poorly trained. Witnesses may justifiably be unwilling to testify because of inadequate witness protection programmes. Judges' dockets may be so overcrowded that cases are delayed for years, or judges may also take bribes to delay cases or absolve perpetrators. If perpetrators are convicted, prison systems may be insecure or susceptible to corruption, resulting in prisoners escaping or bribing their way out of detention."

(c) **Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns, Mission to India dated 26th April 2013 A/HRC/23/47/Add. 1 (**@ Para 108) (ANNEXURE 9) recommended that,

"108. India should put in place a mechanism of regular review and monitoring of the status of implementation of the directives of the Supreme Court and the NHRC guidelines on arrest, encounter killings, and custodial violence and death."

3. Proposition 3: Investigation into crimes by law enforcement officials by a fraternal force betrays complicity and bias, and is designed to shield the perpetrators:

A. The record of the present case and the grounds of acquittal by the Trial Court show that the glaring lacunae in the evidence was due to the lack of a fair and competent investigation. In cases of crimes perpetrated by law enforcement officials, it is noticeable that from the inception the scene of crime is not secured, crucial pieces of evidence and records are not secured or taken into safe custody, official records are destroyed, statements of relevant witnesses are not recorded or inaccurate statements are recorded, and often the prosecution is conducted ineffectively. Both, the investigation and the trial are protracted and the delay irreparably damages the case in favour of the accused.

B. In the present case, while the crime was perpetrated by members of the PAC, and two F.I.Rs were registered by the U.P police, two days after the incident on 24.5.1987, the investigation was assigned to the CB-CID.

The following list is illustrative of the failures and lapses in the investigation:

01. Failure to secure scenes of crime despite the multiple scenes of crime being within the knowledge of the investigating agency from the statements of the 2 FIR informants. If the same had been done in time, it would also have led to the seizure of the cartridges/shells and/or other relevant and crucial evidence that would have conclusively linked the present accused with the gruesome crime.

02. Failure to promptly seize the PAC Truck URU 1493 on 22.05.1987, particularly when senior police officials were informed of the incident and had gone to the MT Section, PAC Battalion, Ghaziabad, that night itself. Failure to seize the truck, provided an opportunity for evidence to be erased from the truck over a period of time, including evidence of chemical residue, blood, grazing caused by bullet marks of the accused persons and other valuable material and forensic evidence of the highest quality was allowed to be compromised.

03. Failure to seize the "bloody" colour water found at the MT Section, PAC Battalion, Ghaziabad, despite senior police officials stating in their evidence of having seen the same.
04. Failure to examine eye-witnesses from the MT Section, PAC Battalion, Ghaziabad, who witnessed the washing of the truck and who named and identified Platoon Commander Surinder Pal Singh.
05. Failure to seize the relevant register/arms issuance register, containing details of arms and ammunition issued to the accused, and details of arms and ammunition deposited back.
06. Failure to seize the weapons of offence immediately after the incident, which led to destruction of forensic evidence.
07. Failure to seize the uniforms of the accused which would have yielded evidence such as blood stains, since they physically lifted the victims and throwing them into the river, after having shot at them from close range.
08. Failure to rigorously and professionally inspect the two scenes of crime - Makanpur village or near Hindon canal, both of which would have borne testament to and corroborated the statements of the victims/eye-witnesses.
09. Failure to conduct Test Identification Parade of the accused, and identification of the truck, the weapons, the helmets, etc.
10. Failure to conduct a prompt and robust investigation which would have resulted in the filing of a charge sheet within a reasonable period of time.

This case discloses that there is an urgent need for Guidelines to govern the investigation in cases of this nature, where men in uniform are under scrutiny.

4. Proposition 4: Police investigation into custodial crimes marked by tampering, destruction and exclusion of crucial and relevant evidence to shield accused men in uniform

A. In in cases of crimes committed by law enforcement officials, there is a recurring pattern of exclusion, destruction and tampering of crucial evidence. This is both because the perpetrators have access to, and control and custody of the documents and material evidence surrounding the crimes; and also because the investigation is carried out by the police, which "*bound as they are by the ties of brotherhood"* work to shield each other from criminal accountability. This fraternal affiliation between the accused and the investigator has been judicially recognised by the

Supreme Court in **State of M.P v. Shyam Sundar Trivedi (1995) 4 SCC 262 @ Para 16. (**ANNEXURE 10)

B. Charges were framed *inter-alia* under Section 201 of the IPC against all the accused persons on 24th May 2006 (@ page 13 of the Impugned Judgment)

C. It is pertinent to note that the Ld. Trial Court acquitted the 16 accused men on grounds that there was lack of evidence to connect these persons to the crime, which was established to have been committed.

D. The police as well as the CB-CID have deliberately suppressed and concealed certain material evidences in order to screen the accused PAC personnel and to shield them from punishment. It is reiterated that the Ld. Trial Court based its acquittal of the 16 accused on the lack of evidence to connect the accused specifically to the crime, while maintaining that the crime was committed by PAC personnel.

E. The record of this case will show that several crucial pieces of documentary and other evidence which would beyond a shadow of doubt establish the identity of the perpetrators, the identity of the weapons used to shoot the victims, and the truck used to abduct the victims, were not secured by the investigating agency and were not proved through trial by the Prosecution.

F. In view of the above circumstances, an application bearing Crl. M.A No.18056/2015 dated 7th December 2015 was filed under S.391 CrPC on behalf of the NHRC seeking specific additional documents which are in the custody and control of the State of Uttar Pradesh to be placed on record. (see pg 436 to 445, @ pg 444 for list of documents)

Prayer A(i) of Crl. MA 18056 under S.391 CrPC @ pg 444

> *"registers, duty register, attendance registers, log-books and other documents relating to the names, duty rosters, posting and connected relevant details of PAC personnel comprising the Platoon operating under the command of Subedar Surender Pal Singh on 22.5.1987, on riot control duty at Mohalla Hashimpura, Meerut District, Uttar Pradesh of the 41st Battalion, 'C' Company, Provincial Armed Constabulary, Uttar Pradesh."*

G. This was followed up by a letter dated 2nd February 2016 from the Registrar (Law) NHRC to Mr. Zafaryab Jilani, then AAG of State of U.P containing a list of documents being sought. (see pg 460-461)

> *(i) Duty Registers; Attendance registers; Duty roster; Posting register; Log-books, that list and show the names and details of personnel comprising the C-Company of 41st Battalion, of Provincial Armed Constabulary with its Headquarters in Ghaziabad, operating under the command of Subedar Surender Pal Singh on 22.5.1987, and posted for riot control duty at Mohalla Hashimpura, Meerut District, Uttar Pradesh.*

(ii) Register and/or Diary noting the arms and ammunitions assigned to/ taken by and returned by, the C-Company of 41st Battalion, of Provincial Armed Constabulary, on 22.5.1987, operating under the command of Subedar Surender Pal Singh.

(iii) the Report of the CB-CID inquiry into the killing of Muslim men of Hashimpura by the PAC on 22nd May 1987.

(iv) the Report of the Commission of Inquiry headed by Retd. Justice Gyan Prakash to inquire into the massacre, which was submitted to the State of U.P in 1994.

(v) personal knowledge pertaining to any information contained in the aforesaid records with persons in supervisory positions in the PAC on 22nd May 1987.

(vi) If the records have been weeded out, please give us a copy of the relevant entries in the weeding register maintained for each of the abovementioned documents and records indicating the date of destruction and details of the officer who authorised the destruction, and the manner in which the documents were destroyed.

(vi) personal knowledge with any officer of the State of Uttar Pradesh pertaining to the date of destruction, details of the officer who authorised the destruction, and the manner in which the documents were destroyed.

H. Pursuant to this certain documents were placed on record by the State of Uttar Pradesh:

a) On 25th October 2016 the State of U.P filed an undated "Note" authored by S.K.Rizvi, S.P of Police, CID, Crime Branch. Vide Order dated 24th November 2016 (@ Para 12), this Hon'ble Court had directed the State of U.P to place the original note on record; and place an affidavit on record giving the approximation of the most probable date of the note as the note itself is undated.

b) On 6th December 2016 the State of U.P filed an Affidavit of the present S.P of Police, CBCID, Meerut, stating in Para 7 that the estimated/probable date of the "NOTE" by S.K.Rizvi is 22.6.1989 and annexing as Annexure No.A-1 a copy of the original Note by S.K.Rizvi.

c) On 9th January 2017 an Affidavit was filed by the State of U.P with the following documents:

- Annexure R-1/1: List of 89 names of officers and constables of 'C' Company 41 Battalion, PAC, Ghaziabad who were on duty on 22.5.1987 (which was already a part of trial Court record)
- **Annexure R-1/2: PAC's General Diary Register for 22.5.1987**

- Affidavit states that the Running Register of vehicle bearing registration No. URU-1493 is part of trial Court record at pg 1356. (Part of trial court record)

  Subsequently vide Order dated 20.2.2018 this Hon'ble Court allowed the application under S.391 and remanded the matter back to the Trial Court so that the General Diary Register of the PAC for 22.5.1987 could be proved. In the Trial Court PW-72 proved the General Diary Register which is exhibited as Ex. PW-72/A. Entry No.6 and Entry No.15 prove that it was the accused persons who used Truck No. URU-1493 on the day of the incident.

I. **Weeding out of relevant and necessary material evidence and documents during the pendency of the trial a brazen instance of *malafides* and prosecutorial apathy**

On 27 February 2017, the NHRC was provided the following documents:

- Affidavit dated 18.1.2017 "in compliance with order dated 4.8.2016" stating at Para 3 that the General Diary of "local police, Meerut" for the period from 1.1.1987 to 31.12.1987 containing information about deployment of police troops was weeded out on 20.4.1993 "as per established procedure as the same was not required for any investigation or enquiry"
- Weeding out Register of the year 1993 as Annexure R-1/1

However, at this stage, the State of U.P had provided weeding out register of "local police, meerut", whereas the weeding out register of all documents pertaining to *Platoon Operating under Command of Subedar Surender Pal Singh* on 22.5.1987 had been sought (See @ Para A.(i) of Prayer @ pg 444, Crl. M.A No.18056). This has been noted in Order dated 4.8.2016.

Further, the additional evidence required to determine identity of perpetrators, relevant documents not placed on record by investigating agency (@ Para 10 of Crl. M.A. 18056 @ pg 443)

It is pertinent to point out that the justification given by the State of U.P that certain documents of P.S. Link Road and P.S. Muradnagar were weeded out as they were not required for any investigation or inquiry is baseless as FIR No.110/1987 P.S. Link Road and FIR No.141/1987 P.S. Muradnagar (Ghaziabad) was registered on 22.5.1987, the investigation was pending and chargesheet was only filed in 1996. It is also significant that the documents seem to have been weeded out despite the S.K.Rizvi Report dated 22.06.1989 stating that further investigation is required into the incident.

Further, the Order dated 06.10.2017 (@ Para 22) required that the Affidavit must contain "*reasons for destruction and dates on which record was called for by trial court or counsel*", however, the Affidavit dated 18.1.2017 did not disclose the same.

The Affidavit dated 18.1.2017 failed to provide the "details of officer who authorised the destruction" as sought in the letter sent by NHRC to AAG dated 2.2.2016 (@ pg 460 and @ pg 461 Para (vi))

In view of the above, this Hon'ble Court vide Order dated 6.10.2016 recorded that the State of Uttar Pradesh could be held liable for destruction of evidence under S.201 IPC and contempt of court for concealing true facts.

Refer:

(a) Zahira Habibullah Sheikh v. State of Gujarat (2004) 4 SCC 158 (@ Para 35, 54, 56, 64, 68) (ANNEXURE 11)

(b) Gajoo v. State of Uttarakhand (2012) 9 SCC 532 (@ Para's 18, 19, 20, 21) (ANNEXURE 12)

(c) Paras Yadav v. State of Bihar (1999) 2 SCC 126 (@ Para 8) (ANNEXURE 13)

(d) Ram Bihari Yadav v. State of Bihar (1998) 4 SCC 517 (@Para 13) (ANNEXURE 14)

(e) Amar Singh v. Balwinder Singh (2003) 2 SCC 518 (@Para 15) (ANNEXURE 15)

(f) ***Fair trial includes right to fair investigation:***

(g) Babubhai v. State of Gujarat (2010) 12 SCC 254 (@Para 32, 45) (ANNEXURE 16)

(h) Dayal Singh v. State of Uttarakhand (2012) 8 SCC 263 (@Para 30, 34, 41) (ANNEXURE 17)

5. Proposition 5: Court to draw an adverse inference that defective investigation in cases of crimes by men in uniform denotes malafide and is intended to shield the perpetrators:

A. In order to stem impunity enjoyed by perpetrators of such crimes, accountability in cases of crimes by law enforcement officials is necessary to inspire confidence in the rule of law

Refer:

(a) In **Tehseen S. Poonawalla v. Union of India (2018) SCC Online SC 696** (@ Para 40) (ANNEXURE 18) the Hon'ble Supreme Court has directed that,

40.

"C. Punitive Measures:

(i) Wherever it is found that a police officer or any officer of the district administration has failed to comply with the aforesaid directions in order to prevent and/or investigate and/or facilitate expeditious trial of any crime of mob violence and lynching, the same shall be considered as an act of deliberate negligence and/or misconduct for which appropriate action must be taken against him/her and not limited to departmental action under the service rules. The departmental action shall be taken to its logical conclusion preferably within six months by the authority of the first instance.

(b) **The 152nd Law Commission of India in its Report on 'Custodial Crimes', 1994 (**ANNEXURE 4) saw it necessary to make certain recommendations with regard to appropriate provisions in criminal law to foreclose torture in custody by public servants and to protect the interests of the victims of custodial crimes. It recommended that a new section, S.166A be added to the IPC for punishing the violation of S.160 of the CrPC:

" Whoever, being a public servant-

(a) knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purposes of investigation into an offence or other matter, or

(b) knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person shall be punished with imprisonment for a term which may extend to one year or with fine or with both."

The proposed offence should be cognizable bailable and triable by any magistrate." (@ Para 14.2, discussed in Para 6.5)

Vide Criminal Law Amendment of 2013, Section 166A has been introduced in the IPC with specific application to sexual offences.This provision should be extended to custodial crimes.

(c) In **Raghbir Singh v State of Haryana (1980) 3 SCC 80 (2 judge bench) (Para's 2, 3)** (ANNEXURE 7) the Hon'ble Supreme Court emphasised the urgent need to prevent and punish custodial torture and other forms of brutality committed by the security force whose duty is to protect the lives and liberty of common citizens by holding that in cases of custodial violence by the police "The vulnerability of human rights assumes a traumatic, torturesome poignancy" (Para 2) Any failure to punish the perpetrators of custodial violence and killings the Court held, would result in "the credibility of the rule of law in our Republic vis-a-vis the people deteriorating" (Para 3).

(d) **Report dated 2010 of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Mr. Philip Alston submitted to the United Nations Human Rights Commission (A/HRC/14/24)-** @ Para 53) (ANNEXURE 8)

(e) **Report dated 2013 of the Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns** @ Para 108 (ANNEXURE 9)

6. Proposition 6: Separation of Investigation from enforcement of law and order in order to ensure a fair, competent and independent investigation:

Refer:

(a) **Prakash Singh v. Union of India (2006) 8 SCC** (@ Para 31.4, 6) (ANNEXURE 19)

(b) The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. (@ Part II D @ pg 7, Part IV,) (ANNEXURE 20)

7. Proposition 7: Stringent guidelines required to prevent malafide, partisan and defective investigation in cases of custodial crimes/crimes by law enforcement officials:

A. Strict enforcement of rules that all relevant records, or records which have a bearing on and may be relevant at any stage of the trial, including defence evidence and appellate stage to be secured and kept in safe custody

B. Evidence/documents/articles that are to be secured on being informed by any injury or death in police action/in custody

Refer:

(a) **The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.** (@ Part II D @ pg 7, Part IV,) (ANNEXURE 20)

C. Clear written orders by the concerned authority specifically indexing the documents being weeded out if at all with reasons for why the same are not relevant or connected to the pending criminal proceedings.

D. Create a chain of safe custody for documents/articles/ weapons/vehicles/electronic devices etc. relevant to the pending criminal proceedings

E. Ensure that statements of witnesses including public and police witnesses are recorded before a Judicial Magistrate under S.164 CrPC.

F. Ensure that the records bearing names and attendance of all law enforcement officials with respect to the custodial crime are secured and not tampered with.

G. Ensure robust and effective Victim /witness protections measures are instituted including police protection and concealment of identity of witnesses, survivors or families of witnesses and any public witnesses.

H. Ensure that a report detailing the manner in which the post-mortem has been conducted be submitted to the NHRC along with a copy of the post mortem report and videography of the same as prescribed by in the NHRC guidelines on cases of death in police action.

I. Ensure that forensic examination be conducted at the earliest by a forensic institute of repute outside the State in which the crime has been perpetrated.

J. Inquiry by Judicial Magistrate or Metropolitan Magistrate under S.176(1-A) CrPC must be mandatorily carried out and the same should be time bound. The rationale underpinning the 2005 amendment to S.176 Cr.P.C. would apply to cases like the present one where the victims were in deemed custody of law enforcement officials before they were murdered.

K. Persons accused of custodial crimes to be placed under suspension from official positions during investigation and pending trial.

It is pertinent to note that in the present case the accused men were not suspended from service immediately after the F.I.R was registered. In May 2007, replies to RTI applications filed by family members of about 43 victims revealed that while the accused were suspended briefly (from 1995 to 1996/7), they were reinstated and remained in active service throughout the trial, even as they faced prosecution for mass murder. It is important to note that the investigation commenced in 1987, the the accused were on active duty in an armed police force during the initial stages of the investigation, and were only suspended towards the end. Pertinently, their Annual Confidential Report bore no trace of the fact that they were facing criminal prosecution for mass murder.

Refer:

(a) **NHRC letter to all Chief Secretaries on the reporting of custodial deaths within 24 hours, dated 14th December 1993**

(b) NHRC letter to all Chief Secretaries clarifying that not only deaths in police custody but also deaths in judicial custody be reported, dated 21 June 1995

(c) NHRC Letter to Chief Ministers of States on the video filming of post mortem examination in cases of custodial deaths, dated 10 August 1995

(d) **NHRC letter to Chief Ministers/Administrators of all States/Union Territories with a request to adopt the Model Autopsy form and the additional procedure for inquest, dated 27 March 1997**

(e) **NHRC "Guidelines/Procedures to be followed in cases of deaths caused in police action" issued in 2003 and revised in 2010.**

(Serial No. (a) to (e) are available on the website of the NHRC)

(f) PUCL v. State of Maharashtra (2014) 10 SCC 635

(g) **The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.**

(ANNEXURE 20)

(Complete report available at https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf)

(h) **Niranjan Singh v. Prabhakar Rajaram Kharote and Ors (1980) 2 SCC 559 (**@ para 12, 13) (ANNEXURE 1)

"12. We conclude this order on a note of anguish. The complainant has been protesting against the States bias and police threats. We must remember that a democratic State is the custodian of people's interests and not only police interests. Then how come that the team of ten policemen against whom a magistrate after due enquiry, found a case to be proceeded with and grave charges, including for murder, were framed continue on duty without as much as being suspended from service until the disposal of the pending sessions trial? On whose side is the State? The rule of law is not a one-way traffic and the authority of the State is not for the police and against the people. A responsible government, responsive to appearances of justice, would have placed police officers against whom serious charges had been framed by a criminal court, under suspension unless exceptional circumstances suggesting a contrary course exist. After all, a gesture of justice to courts of justice is the least that a government owes to the governed. We are confident that this inadvertance will be made good and the State of Maharashtra will disprove by deeds Henry Clay's famous censure:

The arts of power and its minions are the same in all countries and in all ages. It marks its victim, denounces it, and excites the public odium and the public hatred, to conceal its own abuses and encroachments.

13. The observations that we have made in the concluding portion of the order are of such moment, not merely to the State of Maharashtra but also to the other States in the country and to the Union of India, that we deem it necessary to direct that a copy of this Order be sent to the Home Ministry in the Government of India for suitable sensitized measures to pre-empt recurrence of the error we have highlighted."

8. Proposition 8: To break the unholy nexus between the investigating agency and the perpetrators, the distinct contours of such crimes and the authority of the perpetrators to be taken into consideration in the judicial appreciation of evidence:

A. While appreciating evidence, the Court will be mindful that in cases of crimes by men in uniform/custodial killings/extrajudicial killings, direct, unequivocal evidence like ocular evidence is rarely available. The Hon'ble Supreme Court has held that in cases of this nature that the exaggerated adherence to and insistence on establishment of proof beyond reasonable doubt, especially in cases of crimes by men in uniform may result in a miscarriage of justice.

B. In the present case, while the incident of killing by PAC men has been established beyond doubt, the identity of the perpetrators has been held by the Trial Court to be unproven. However there is adequate and sufficient documentary and circumstantial evidence to link the accused men to the heinous killings.

C. **Refer:**

(a) Munshi Singh Gautam and Ors v. State of M.P (2005) 9 SCC 631 (@ Para 6, 7, 8) (ANNEXURE)

(b) State of M.P. v. Shyam Sundar Trivedi (1995) 4 SCC 262 (@ Para 16, 17) (ANNEXURE 10)

9. Proposition 9: Nature of custodial crimes such that victim/survivors/witnesses cannot identify the perpetrators:

A. In the present case, as in most custodial crimes or extra judicial killings the perpetrators were not known to the victims beforehand. Further, at the time they were rounded up in Hashimpura Mohalla, the victims were unaware that an abduction and shooting would follow. Once they were placed in the PAC truck in their deemed custody and thereafter abducted, the survivor PWs testimonies show that the PAC jawans forced them to keep their heads down and even hit them with the butt of their rifles when they raised their heads. In addition, the incident is of 1987 and the evidence of the survivors/eye-witnesses was recorded after 2006, a gap of almost 20 years.

B. Pertinently, the official records, including the Duty Registers, Attendance Records etc. which establish and prove the identity of the perpetrators beyond a shadow of doubt and which were in the custody of the State, were knowingly and intentionally suppressed and not placed in eveidence before the Trial Court.

Refer:

(a) Malkhan Singh and Ors v. State of M.P (2003) 5 SCC 746 (@ Para 7, 8, 10, 12, 13) (ANNEXURE 22)

"It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court."

10. Proposition 10: Section 106 of the Indian Evidence Act to be attracted to cases of custodial crimes :

A. Once it has been established that victims of a crime were in the deemed custody of men in uniform, whether by abduction or by being lawfully or unlawfully taken into custody, the evidentiary rule under S.106 Indian Evidence Act must be applied and there must be a presumption that the personnel are responsible for the harm/death.

B. Courts may depart from the general rule that the Prosecution must discharge the burden of proving all facts, facts within the special knowledge of the accused must be explained by the accused.

Refer:

(a) **State of U.P v. Ram Sagar Yadav (1985) 1 SCC 552 (**@ Para 20) (ANNEXURE 23)

(b) **Bhagwan Singh v. State of Punjab (1992) 3 SCC 249** (@ Para 7-9) (ANNEXURE 24)

(c) **Nilabati Behara v. State of Orissa (1994) 2 SCC 746** (@ Para 9) (ANNEXURE 25)

(d) **State of W.B v. Mir Mohammad Omar and Ors (2000) 8 SCC 382 (**@ Para 31, 32) (ANNEXURE 26)

(e) **State of Rajasthan v. Kashi Ram (2006) 12 SCC 254** (@ Para 23) (ANNEXURE 27)

(f) **Dalip Singh v State of Haryana (1995) 3 Supp SCC 336** (Para's 6, 7) (ANNEXURE 28)

11. Proposition 11: Rebuttable legal presumption to be raised against the accused men in uniform:

Refer:

(a) The **113th Law Commission of India in its Report on Injuries in Police Custody, 1985** (ANNEXURE 3) took note of the judgment of the Hon'ble Supreme Court in State of U.P. v. Ram Sagar Yadav (1985) 1 SCC 552 where the Court convicted a police officer for causing the death of a person in his custody and suggested an amendment in the law of evidence, in regard to burden of proof. The 113th LCI on examining the need for reform of the law with regard to burden of proof and evidence in cases of custodial crimes suggested, that where bodily injuries (fatal or otherwise) are caused to a person while he is in custody of the police, the courts be given the power to draw a presumption that the injuries were caused by the police officer having custody of the person during the relevant period. This suggestion was supported by senior police officers amongst other persons who were consulted during the process, and the 113th LCI recommended the incorporation of Section 114-B in the Indian Evidence Act:

"114B. (1) In a prosecution (of a police officer) for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the police officer having custody of that person during that period.
(2) The court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard to all the relevant circumstances, including, in particular, (a) the period of custody, (b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence, © the evidence of any medical practitioner who might have examined the victim, and (d) evidence of any magistrate who might have recorded the victim's statement or attempted to record it". (@ Para 5.2)

This aforesaid recommendation to introduced Section 114 B in the Indian Evidence Act was reiterated by

(b) **152nd Law Commission in its Report on Custodial Crimes in 1995 (**ANNEXURE 4)

(c) **185th Law Commission in its Report on Review of Indian Evidence Act in 2003** (ANNEXURE 5)

(d) **273rd Law Commission of India in its Report on Implementation of United Nations Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment or Punishment in 2017.** (ANNEXURE 6)

12. Proposition 12: Strict enforcement of legal safeguards against arbitrary arrest, excessive use of force, necessary to hold law enforcement officials accountable for harm/death that takes place in their custody:

Refer:

(a) **United Nations Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979 (**@ Articles 2, 3, 5, 6) (ANNEXURE 29)

(b) That in **1985 the Ministry of Home Affairs issued and communicated to Chief Secretaries of all States/ Union Territories and Heads of Central Police Organisations a 'Code of Conduct for the Police in India'.** (@ Serial No. 1, 5, 7, 13) (ANNEXURE 30)

"13. As members of a secular, democratic state, the police should strive continually to rise above personal prejudices and promote harmony and the spirit of common brotherhood amongst all the people of India, transcending religious, linguistic or sectional diversities and to renounce practices derogatory to the dignity of women and disadvantaged sections of society."

(c) That the Hon'ble Supreme Court in **D.K.Basu v State of West Bengal (1997) 1 SCC 416** (ANNEXURE 31) taking note of the increasing incidence of illegal detention and custodial torture, to curtail arbitrary abuse of power by the police and in the absence of legal provisions governing the same, set down certain requirements to be followed in all cases of arrest or detention (@ Para 35)

(d) **In 2003 the Law Commission of India in its 185th Report on 'Law of Evidence'** (ANNEXURE 5) once again reiterated that S.114 B should be inserted in the Indian Evidence Act. Incorporation the guidelines laid down in D.K. Basu v. State of West Bengal (1997) 1 SCC 3 the Law Commission modified the recommendation

13. Proposition 13: Transparency in the investigation process from inception is essential to aid justice:

A. In cases of crimes committed by law enforcement officials, considering the real likelihood of complicity and partisanship in investigation, transparency in investigation is necessary to check defective, corrupt and shoddy investigation. Without compromising the investigation, periodic status reports of investigation to be provided to the victims. The The victim's right to know the truth is a facet of the victims right to justice, which in turn in a facet of the right to justice/administration of justice.

B. In ***Tehseen Poonawalla vs UOI & Ors (2018) SCC OnLine 696*** (@ Para 42(B) (ANNEXURE 18) the Hon'ble Supreme Court recognises the victims right to be informed of the proceedings and to be heard in the proceedings in exceptional cases like mob-lynchings

"*B. <u>Remedial Measures:</u>*

…

(viii) The victim(s) or the next of kin of the deceased in cases of mob violence and lynching shall be given timely notice of any court proceedings and he/she shall be entitled to be heard in the trial in respect of applications such as bail, discharge, release and parole filed by the accused persons. They shall also have the right to file written submissions on conviction, acquittal or sentencing.
(ix) The victim(s) or the next of kin of the deceased in cases of mob violence and lynching shall receive free legal aid if he or she chooses and engage any advocate of his/her choice from amongst those enrolled in the legal aid panel under the Legal Services Authorities Act, 1987."

14. Proposition 14: Right to know the truth and the right for the truth to be known is an integral facet of right to justice:

A. The existence of the right to truth and the right to know the truth as an autonomous right, independent of the right to justice or punishment has been recognised in International law, specifically in the context of enforced disappearances.

Refer:

(a) **United Nations, Working Group on Enforced or Involuntary Disappearances General Comment on the Right to the Truth in Relation to Enforced Disappearances, Preamble A/HRC/16/48 dated 20th July 2010** (ANNEXURE 32)

(b) United Nations Set of Principles for The Protection And Promotion Of Human Rights Through Action To Combat Impunity (E/CN.4/2005/102/Add.1) (ANNEXURE 33)

Principle 3- lays down that the right to truth is essential to the State's duty to preserve memory and that people's knowledge of oppression is an integral part of their heritage in order to guard against revisionist and negationist arguments.

Principle 4- establishes victims right to know irrespective of legal proceedings.

15. Proposition 15: Recognition of Victims right to justice:

Refer:

(a) Zahira Habibullah Sheikh v. State of Gujarat (2004) 4 SCC 158 (@ Para 30, 32 35, 36, 38, 42, 43, 49, 55) (ANNEXURE 11)

"This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community and are harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona

non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice- often referred to as the duty to vindicate and uphold the "majesty of law"..."

16. Proposition 16: Institutional bias within law enforcement force provides the context for the targeted killing:

A. That at the outset, the facts of this case shows that there was a deliberate targeting of young, able-bodied Muslim men. The investigation, prosecution as well as appreciation of evidence must take this context of targeted killings into account.

B. That experiences from across India indicate that the prejudice against religious minorities, manifest in the conduct and functioning of the police, is of a structural and systemic nature. This was evident in the 1984 anti Sikh pogrom; Bhagalpur massacre of Muslims in 1989; Mumbai anti Muslim riots in 1992-1993; Gujarat genocidal attack on Muslims in 2002; Kandhamal anti-Christian riots of 2008; Assam targeting of Muslim community in 2013 and 2014. In each of these instances the police as a force have displayed an institutional bias against persons identified as religious minorities. A communalised police force enjoying *de facto* and *de jure* immunity and subject to weak mechanisms of accountability reinforces already etched patterns of impunity for communal crimes.

C. In the present case during the course of communal riots in and around Meerut in May 1987, 45-50 able bodies Muslim men were detained and then directed to board the PAC Truck, which was to transport them to the jail or Police Station as a measure of preventive arrest. However the accused PAC platoon of 19 men, led by Commandant Surendra Pal Singh, (deceased accused) in pursuance of a criminal conspiracy and common intention committed cold blooded killings of about 45 Muslim men in their deemed custody and threw them in their watery graves in 2 canals, in targeted killings motivated by an institutional bias against the religious minority community.

Refer:

(a) **Article titled "Police, Minorities and Perception Management" by Smita Nair published in the Indian Express on 17th July 2014:** (ANNEXURE 34)

In 2013 a Committee comprising of the DGP's of Maharashtra, Tamil Nadu and Uttar Pradesh and a senior Intelligence Bureau official submitted its report dealing with minority bias and the Police to the Central Government. While the report is not available in the public domain, it has been reported by the media, and is stated to have said, *"Minorities view police as being communal and allege that they deal*

with situations involving two communities in a partisan manner favouring the majority community. All states are affected by communal virus in small or large measure and every riot appears to strengthen the feeling that police are communal.Barring Tamil Nadu, police forces of all states suffer from this adverse perception about them,"

"Dispersal of crowds and use of force, arrests of accused, registration of criminal offences, applications of sections of law, preventive arrests, enforcement of curfew and providing security to minority members are some of the issues which are viewed with suspicion and allegations of unprofessional and prejudiced conduct made."

It adds that *"unfortunately for police, demeanour of some police officers and men in several serious communal riots in recent and not so recent past has served to strengthen such beliefs about the police".*

(b) **A report titled 'Status of Policing in India Report, 2018: A study of Performance and Perceptions' published by the Non-governmental organisations, Centre for Study of Developing Societies and Common Cause** (ANNEXURE 35) based on a survey of 22 states, finds that about 64 % of Indian Muslims that were interviewed are either "highly" or "somewhat" fearful of the police. The main reasons for this fear are apprehension of false implication and perception that the police discriminates on the basis of religion.

"In addition to the physical police brutality, institutional discrimination is another component of policing that cannot be denied. Discrimination manifests itself in a variety of ways and may be motivated by intolerance towards traditionally marginalised groups, religious communities, caste and class background, and gender. For instance, around the time of communal riots, it has been widely perceived that the police does not act as a neutral law enforcement agency and perceptible discrimination is alleged in the use of force, preventive arrests, treatment of detained persons at police stations, reporting of facts and investigation, detection and prosecution of registered cases. This kind of social marginalisation is likely to have negative consequences and affect social harmony in society…" (@ page 71)

Significantly, this study also finds that persons from the Muslim community are disproportionately under-represented in the IPS, presently Muslims comprise about 2.5 % of the police force compared to 14% of the population comprising of Muslims.

(The complete report is available at http://commoncause.in/pdf/SPIR2018.pdf)

(c) That in England, a parliamentary Committee was appointed following protests at the acquittal of all for the killing of a young black man, Stephen Lawrence, which led to an in depth review of the police force and corrective measures were introduced. **Lord William MacPherson in his Report dated 15 February 1999 titled "The Inquiry into the matters arising from the death of Stephen Lawrence"** submitted to the Home Secretary defined institutional racism as, *"The*

collective failure of an organisation to provide an appropriate and professional service to people because of their color, culture, or ethnic origin. It can be seen or detected in processes, attitudes, and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and stereotyping which disadvantage minority ethnic people."

(The complete report is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf)

17. Proposition 17: Victim Compensation, a right owed to the victims by the State:

After the incident, the dependants of the deceased victims were only given Rs. 20,000 in 1987. It was only 20 years later, when the dependants and survivors raised this issue through a public protest in Lucknow, did the State award compensation. Even at this time the 5 injured survivors were not granted compensation. It is important that the right to compensation must be recognised as an inherent right under Article 21 of the Constitution.

The victims of a custodial killing or death caused by brutality inflicted by State forces are entitled to compensation by the State. For the purposes of the Cr.P.C., a 'victim' is defined in Sec. 2(wa) as, *""victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir*." Thus, the families of those persons who have been murdered by State forces, would be 'victims' within the definition provided in the Cr.P.C.

The public law remedy for compensation due to violation of Fundamental Rights has for long been recognized in Indian criminal law jurisprudence. In its judgment in the *locus classicus* on the subject, *Nilabati Behera v State of Orissa* (1993) 2 SCC 746, the Supreme Court categorically stated, "*a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.*"

The right of victims of custodial killing to compensation was explained in detail in the 152nd Law Commission of India (hereinafter 152nd LCI) Report on 'Custodial Crimes', which was released in 1994 after the judgment of the hon'ble Supreme Court in *Nilabati Behera* (Supra).. Explaining the rationale underlying the right to compensation in custodial crime, the 153nd LCI Report stated *inter-alia, "Our intention is to provide specifically for the joint and several liability of the guilty*

officers and the Government and to set out the important factors to be taken into account in assessing the compensation." (Para 12.7, 152nd LCI Report, 1994)

For the purposes of fixing the amount of compensation, the Law Commission enumerated certain relevant circumstances, which are illustrative but not exhaustive. These criteria are broad ranging and include the following:

(a) the type and severity of the injury suffered by the victim;

(b) the mental anguish suffered by the victim;

(c) the expenditure incurred or likely to be incurred on the treatment and rehabilitation of the victim;

(d) the actual and projected earning capacity of the victim and impact of its loss on the persons entitled to compensation and other members of the family;

(e) the extent, if any, to which the victim himself contributed to the injury

(f) the expenses incurred in the prosecution of the case

The 152nd LCI Report also stated that, *"In case of death or permanent disablement of the victim, the court may take into account the estimated annual income of the victim as multiplied by the number of years of his estimated span of life…"* (Para 12.7, 152nd LCI Report, 1994)

The legislature, vide an amendment in 2008 to the Code of Criminal Procedure, 1973, has incorporated Sec 357A into the Code, which recognizes and codifies the principles enunciated in *Nilabati Behera* (Supra) and the 152nd LCI Report.

That pursuant to the inclusion of Sec 357A, various states were required to draft a victim compensation scheme, and in 2015 the Central Victim Compensation Fund (CVCF) Guidelines were issued by the Ministry of Home Affairs, which required all States to revise the minimum amount of compensation for each category of crime to not be less than the amount prescribed in the guidelines incorporated in the CVCF.

There are various categories of crime for which compensation is prescribed in the CVCF. As it stands today, a victim of custodial killing would be covered under the category, 'Death', and would be entitled to compensation for the same. However, to equate death resulting from the brutality of State agencies and functionaries, with death due to other crimes would cause grave injustice. Jurisprudence established by the Supreme Court in a catena of judgments including Nilabati Behara, Rudul Shah recognizes death caused by State agents or/and in their custody as deserving of exemplary compensation under public law. Following this line of jurisprudence, custodial crimes must be recognised as separate category of crime within the state schedule of offences and exemplary compensation awarded. Constitutional Courts have the power to identify such crimes which constitute grave social harm and direct that special provisions be made for compensating the victims of such crimes. This was recently done by the Hon'ble Supreme Court in *Tehseen Poonawalla vs UOI & Ors* (2018) SCC OnLine 696, wherein the Hon'ble Supreme Court recognized the grave social harm resulting from mob lynching, and directed as follows:

"The State Governments shall prepare a lynching/mob violence victim compensation scheme in the light of the provisions of Section 357A of CrPC within one month from the date of this judgment. In the said scheme for computation of compensation, the State Governments shall give due regard to the nature of bodily injury, psychological injury and loss of earnings including loss of opportunities of employment and education and expenses incurred on account of legal and medical expenses. The said compensation scheme must also have a provision for interim relief to be paid to the victim(s) or to the next of kin of the deceased within a period of thirty days of the incident of mob violence/lynching."

However, it is important to note that this direction does not provide for any mechanism to hold accountable the officers who do not assign and release the compensation.

That the experiences of the victim families of Mohalla Hashimpura have exposed various shortcomings between the statutory incorporation of compensation to victims and its enforcement and implementation on the ground. Very often the

victims of custodial killing are poor people lacking resources, awareness, and all these become barriers to them accessing the compensation due to them. In the present case, and the families of such persons were usually neither aware nor capable of accessing the compensation to which they are entitled under Sec 357A of the Cr.P.C. Most of the dependents are women, who are illiterate and ignorant of state procedures. Particularly poignant is the case of Zarina, Appellant No. 18, whose husband and son were both killed in this custodial massacre, leaving her traumatised, scarred and helpless. It is also extremely cruel to make the family members of those killed by State agents to run from pillar to post seeking compensation. In the aftermath of custodial killings or murder by State agents, it is natural that the victim families are wary and unable to reach out to other institutions for help, Learning from the hardships experienced by the victim families of Mohalla Hashimpura, it is recommended that a Nodal Officer may be designated by the State Legal Services Authority for cases of custodial killings or State excesses, in order to identify and reach out to victim families that are entitled to compensation. Measures should be taken to make the SLSA compensation procedure victim friendly, accessible, prompt and sensitive.

18. Proposition 18: Incorporate and invoke the criminal law doctrine of command and/or superior responsibility:

A. To curb impunity and enable accountability for custodial crimes the criminal law doctrine of command/superior responsibility as prescribed in the Rome Statute of the International Criminal Court must be incorporated and invoked.

Articles 28 of the Rome Statute lays down that:

Responsibility of commanders and other superiors
In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

National Human Rights Commission

Through

VRINDA GROVER,
BHAVOOK CHAUHAAN AND
SOUTIK BANERJEE,
ADVOCATES

28.9.2018
New Delhi