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High Court Of Kerala

Case No: Criminal M.C. No"s. 4520, 4530 and 4535 of 2008

Fr. Jose Poothrikkayil	APPELLANT
Vs	
Central Bureau of Investigation	RESPONDENT

Date of Decision: Nov. 11, 2008

Acts Referred:

- Constitution of India, 1950 - Article 21, 22
- Criminal Procedure Code, 1973 (CrPC) - Section 157, 160, 167, 167(1), 167(3)
- Kerala Criminal Rules of Practice, 1982 - Rule 20, 20(1)
- Penal Code, 1860 (IPC) - Section 302

Hon'ble Judges: R. Basant, J

Bench: Single Bench

Advocate: M.K. Damodaran and C.P. Udayabhanu, Alan Papali, B. Raman Pillai and R. Anil, for the Appellant; M.V.S. Namboothiri, S.C., for the Respondent

Judgement

@JUDGMENTTAG-ORDER

R. Basant, J.
The cursade for justice to deceased Sr. Abhaya still remains only a cry in the wilderness. No organised prayers, fasting or agitation have been devoted to the cause of identifying her detractors. But it is a tribute to the civil society of Kerala that even after 16 long years, despite all the odds, the fight for justice to her is not given up yet. Whether written in Deva Nagari script at the appropriate spot or not, the Indian Constitutional Republic believes and has faith in the eternal principle or axiom (or is it only a fiction to motivate the righteous) that truth shall ultimately triumph-Satyameva Jayathe. Invoking that sublime axiom, let me address myself to the issues.

2. A synoptic resume of the events may be relevant. The dead body of Sr. Abhaya, a young lass in her late teens, a nun was found in a well in the compound of the Convent

where she was an inmate. This was on 27-3-1992. Hurriedly initial investigation appears to have been done by the local police. Investigation was handed over to the CBCID. Later it was handed over to the C.B.I. All three initially came to the conclusion that it was a case of suicide. The Chief Judicial Magistrates before whom such reports were filed, with fortitude refused to accept such reports. Further investigation was directed. The C.B.I continued the investigation. They appear to have come to the conclusion that it was undoubtedly a case of homicide. Report to that effect was filed. It was received by the Magistrate. Still, surprisingly, the caption of the crime registered continued to be one of "unnatural death". The section of offence was not altered to Section 302 I.P.C. Investigation by the C.B.I, continued. Repeatedly reports were filed that though a case of homicide, the offenders in this case were not traceable. The Magistrates refused to relent. The matter came up before this Court.

3. To cut a long story short, ultimately as per directions of this Court on 1-11-2008 the Kochi Unit of C.B.I, started investigation. The present Investigators, one who the C.B.I. claimed has impeccable history as a professionally competent investigator took over the investigation on 1-11-2008. Immediate results appear to have been struck. On 19-11-2008 the three accused persons (accused 1 to 3), the Petitioners herein, were produced before the learned C.J.M. Accused 1 and 2 were arrested on 18-11-2008 and accused 3 was arrested on 19-11-2008. They were produced before the learned C.J.M. Along with four important documents. They are:

(1) The inclusion report to include the offence u/s 302 I.P.C., which as I indicated earlier, surprisingly was not filed at any earlier point of time. The said inclusion report further shows that the Investigator has identified accused 1 to 3 to be involved in the offence of murder of Sr. Abhaya.

(2) A remand report, which is expected to be filed u/s 167(1) Code of Criminal Procedure.

(3) A petition seeking police custody and

(4) An affidavit seeking police custody for a period of 14 days to facilitate continuance of interrogation. This was filed to comply with the mandate of Rule 20 of the Kerala Criminal Rules of Practice.

4. The learned C.J.M. appears to have perused those documents. The learned Magistrate by the impugned common order directed that all the three accused be handed over to the custody of the C.B.I. for the purpose of further investigation for a period of 14 days. It is that order which is assailed before me primarily.

5. I have heard the counsel for all the three accused and the learned Standing Counsel for the C.B.I. The father of the deceased Sr. Abhaya wanted to be heard and I have allowed his counsel to assist the court by making his submissions.

6. Four grounds have been taken by the Petitioners/accused to assail the impugned order. They are:

(1) The Investigating Officer had no reasonable or justifiable ground to arrest the accused.

(2) There has been gross inadequacy in the report u/s 167(1) Code of Criminal Procedure in that the mandate of the section that the extracts of the case diary must be produced has not been complied with.

(3) There is gross violation of Rule 20 of the Rules of Practice in as much as the affidavit filed is wide, sweeping, general and non-specific.

(4) The order passed by the learned C.J.M. does not satisfy the requirements of Section 167(3) Code of Criminal Procedure in that it does not speak adequately.

7. It will be apposite in this context to straight away refer to the relevant provisions of the Constitution of India, Code of Criminal Procedure and the Kerala Criminal Rules of Practice.

8. Article 21 of the Constitution, which recites the Mantra of right to life and personal liberty, reads as follows:

21. Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by law.

(emphasis supplied)

9. We then have Article 22, which I extract below:

22. Protection against arrest and detention in certain cases.- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(emphasis supplied)

10. Then comes Section 167 Code of Criminal Procedure of which I feel that Section 167(1), (3) and (4), which I extract below are of crucial relevance.

167. Procedure when investigation cannot be completed in twenty four hours.-

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 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 entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) * * * *

(3) A IvIagistrate authorising under this section detention in 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.

(emphasis supplied)

11. It is contended that the mandatory requirements in these provisions have not been complied with. I now take note of the relevant statements appearing in the four documents referred above. We find identical statements to the following effect:

that the investigation revealed scientifically that Fr. Thomas Kottoor, Fr. Jose Poothrikka and Sr.Sefy are involved in the murder of Sr. Abhaya. The oral evidence also corroborate the same.

That these three accused are highly influential and can exert undue influence on the witnesses, that there are more incriminating evidence against these three accused, the involvement of the other accused in the reconstruction of the scene of the crime and for recovery of the weapon, the custodial interrogation of the accused is required.

12. I must consider whether in the light of the above statements, it can be said that there is compliance with the mandate of law, which I have already extracted above.

13. Power of arrest is a very important and serious power which is given to an Investigating Officer. I have adverted to these aspects earlier in the decision in Jyothish v. State of Kerala 2007 (3) KLT 176. It may not be necessary for me to deal with the matter afresh. Suffice it to say that it has been observed thus in paragraphs 39 to 42 of the said decision:

39. A police officer is competent to investigate into a cognizable offence under Chapter XXII of the Code of Criminal Procedure and Section 157 of the Code of Criminal Procedure clearly shows that the police officer shall proceed to the spot to investigate the facts and circumstances "and if necessary, to take measures for the discovery and arrest of the offender".

40. The jurisdiction to arrest the offender is an important right/power in the hands of the police officer u/s 157 Code of Criminal Procedure. It is important to note that the law does

not mandate that such arrest must take place in every case. All that Section 157 of the Code of Criminal Procedure stipulates is that the police official investigating into the offence may arrest the offender, "if necessary". A vital discretion is vested in the police official. He can arrest, but he may or may not arrest. Only if necessary the arrest has to be effected. To examine an accused person and to ascertain details from him, it is not always necessary to arrest the accused. The powers u/s 160 of the Code of Criminal Procedure extends to the power to require attendance of the accused also. Merely because the police officer has the power to arrest an accused, he need not be arrested. This is evident again from Section 173(2) of the Code of Criminal Procedure which states that the final report must show whether the accused has been arrested Section 173(2)(i)(e). If he has not been arrested, that fact can be reported to the learned Magistrate in the final report.

41. It is true that it is normally assumed that in every cognizable offence if the accused is available, arrest must be effected and in every non-bailable offence unless the accused is released u/s 437 of the Code of Criminal Procedure by the police officer, he must be produced before the Magistrate concerned. This prevalent impression is not strictly justified by the language of Sections 157, 160 and 173 of the Code of Criminal Procedure Arrest need be made only if necessary. The accused can be examined even without arrest by invoking the powers u/s 160 of the Code of Criminal Procedure available to a police officer. If the arrest has not been effected, that fact is to be reported to the Magistrate u/s 173(2) of the Code of Criminal Procedure. A ritualistic arrest is not contemplated in Section 157 of the Code of Criminal Procedure.

42. It follows therefore that a police officer has to alertly consider in every case whether it is necessary to effect arrest. An arrest entails traumatic consequences. The polity dreads arrest by a police officer. The prospect is frightening. There must therefore be a proportionately onerous and sublime responsibility on the police officer to consider whether such arrest is necessary. Only if necessary, such arrest ought to be effected. If not necessary, an accused person should not be subjected to such trauma. While exercising such discretion, mind has to be applied to the question. All relevant inputs must go into the discerning mind before exercising that discretion. The reason for exercising that discretion in favour of arrest must certainly be adverted to. Nay, I would even insist that the reasons for exercise of such discretion must be recorded in the case diary by the police official concerned. A police officer who is a functionary invested with discretionary powers on such a vital aspect under the Code cannot lightly exercise the power of arrest. He must satisfy himself by adverting to all necessary inputs that it is necessaiy to effect arrest. I would also observe that a proper exercise of such discretion in favour ofarrest must be preceded by recording of the reasons for such arrest in the Case Diary also. The Case Diary in every case must show that this sublime discretion was exercised by the police official after adverting to the circumstances and only thereafter on the basis of valid reasons the power of arrest was invoked and exercised against an accused person. A system which values and cherishes the right to freedom

and liberty zealously must insist on such informed exercise of discretion by the Police Officer before he effects the arrest.

(emphasis supplied)

14. Has the Investigating Officer in this case complied with the above directions? I do not find any noting in detail in the case diary as to whether the question whether arrest should be effected or not has been considered in such detail. No such recording of reasons had preceded the arrest. Of course, general reasons are seen recorded. The Investigating Officer before his arrest does not appear to have zealously considered whether the option to arrest must be exercised or not by a reasoned order as insisted in Jyothish"s case (supra). But he has definitely recorded his conclusion that arrest has to be effected and he had proceeded to arrest the three accused.

15. The next question is whether the mandate of Section 167 of the Code of Criminal Procedure has been complied with. u/s 167(1) Code of Criminal Procedure it is not necessary to produce the entire case diary, including the statements of witnesses. The obligation u/s 167(1) is not to produce the entire case diary file, not even the diary entries u/s 172 Code of Criminal Procedure but only the extracts of the diary entries. I have gone through all the four documents filed by the Investigating Officer when the accused were produced before the court. There is nothing to indicate that the extract of the diaries was produced. At least there is no specific statement in any of these four documents that such extracts have been produced. The remand report does not give the details of what materials have been collected against each of the accused persons to justify an inference or conclusion that they are involved in the commission of the offence of murder against the deceased. It appears to be very clear to me that the mandate of Section 167(1) has not been specifically complied with. Every Investigating Officer in the remand report must furnish sufficient information to the court of the grounds on which the arrest is effected and the grounds on which further detention-whether in the police custody or judicial custody-is sought. The two passages which are extracted above do not in detail convey to the Magistrate the reasons on which the arrest is effected and remand is sought. I have no hesitation to agree with the learned Counsel for the Petitioners that the mandate of Section 167(1) Code of Criminal Procedure in its soul and spirit has not been complied with.

16. We then come to Section 167(3) Code of Criminal Procedure. The learned Magistrate in the impugned common order has come to the conclusion that the accused deserve to be remanded to custody and that police custody for 14 days deserve to be granted. The crucial and relevant findings appear in paragraph 9, which I extract below:

9. On considering the arguments from both sides and the special circumstances of the case, I am of opinion that a sustained interrogation of the accused in isolation is warranted to collect the more facts from the accused. So, the request for presence of the lawyer of the accused during the time of interrogation of the accused in police custody

could not be allowed. Further I find that there is sufficient justification for granting police custody of the accused for 14 days. It is a case in which different Investigating Agencies had conducted investigation for 16 years and destroyed or spoiled many materials to find out murderer of Sister Abhaya. So, police custody of 14 days is just and reasonable. If the Special Investigation Team is directed to file report once in every three days, that will be an interference into the free hand of investigation. So, the objection and demands made from the side of defence are rejected.

17. Does this comply with the mandate of Section 167(3) Code of Criminal Procedure, which obliges the Magistrate to pass an order which speaks and gives reasons? This is the next question to be considered. I note that the learned Magistrate has also not specifically adverted in the order as to how and in what manner each one of the accused person can be said to be involved in the commission of the offence of murder of Sr. Abhaya. Broad and general statements are there, but specifically the grounds of arrest of accused 1 to 3 vis-a-vis the materials against them have not been adverted to in the impugned common order passed u/s 167(3) Code of Criminal Procedure.

18. I have adverted to Section 167(4). It only says that when Subordinate Magistrates pass an order u/s 167(3), the order must be forwarded to the Chief Judicial Magistrate. Considering the higher pedestal which the Chief Judicial Magistrate occupies in the hierarchy it is not stipulated that the learned Chief Judicial Magistrate must forward the order to any superior court. The system appears to place trust and faith in the high office of the Chief Judicial Magistrate to pass a proper order u/s 167(3) Code of Criminal Procedure.

19. I shall now come to the alleged non-compliance of the mandate of Rule 20, which I extract below:

20. Remand to police custody.- (1) Magistrates shall not grant remands to police custody unless they are satisfied that there is good ground for doing so and shall not accept a general statement made by the investigating or other police officer to the effect that the accused may be able to give further information. A request for remand to police custody shall be accompanied by an affidavit setting out briefly the prior history of the investigation and the likelihood of further clues which the police expect to derive by having the accused in custody, sworn to by the investigating or other police officer, not below the rank of a Sub Inspector of Police. Magistrates shall personally see and satisfy themselves about the accused being sound in mind and body before entrusting him to police custody and also at the end of the period of custody by questioning him whether he had in any way been interfered with during the period of custody. Where the object of a remand is verification of the statement of an accused, he shall, whenever possible, be remanded to the charge of a Magistrate and the period of remand shall be as short as possible.

(emphasis supplied)

20. The petition and the affidavit perhaps suffer from the same inadequacy which has been eloquently prescribed in Rule 20(1) when it stated that the court "shall not accept a general statement made by the Investigating Officer or other police officer". Specific statements have not been given.

21. So reckoned, I find no difficulty in coming to the conclusion that the directions in Jyothish"s case and the mandates of Section 167(1), 167(3) and Rule 20 have not been specifically complied with.

22. But the controversy cannot end with that finding. The effect of non-compliance with such mandates has to be considered. The relevant statutory provisions employ the expression "shall". But it is by now trite that the mere use of the mandatory expression "shall" cannot by itself lead the court to the conclusion that everything done in derogation of such mandate is nonest and void. The purpose of the statutory provisions, its broad scheme and destination which are to be reached and achieved, etc. will have to be considered by a court when it adverts to the question whether a particular rule is mandatory or not. Every rule is mandatory in the sense that it is expected to be complied with. But that is far from saying that every violation of such a rule would entail invalidation of the action taken. Counsel were requested to research and enlighten this Court on the consequences of violation of such provisions. Precedents have been placed before me. Reliance has been placed by the counsel for the Petitioners on the decisions in Bir Bhadra Pratap Singh Vs. D.M. Azamgarh and Others, and R.K. Nabachandra Singh v. Manipur Administration AIR 1964 Mani 39. The Standing Counsel for the C.B.I. and the counsel for the father of the deceased have also placed reliance on certain precedents.

23. There appears to be controversy about the purpose of such mandate in Section 167(1) that the copies of the entries shall be made available to the Magistrate. The counsel for the accused contend that the purpose of that provision is to enable the accused to formulate and modulate their defence. I am afraid, I cannot agree.

24. The obligation u/s 167(1) Code of Criminal Procedure to furnish copies of entries is certainly, according to me, not to give the accused an opportunity to modulate and formulate his defence. The purpose is very clear and certain. A person is to be deprived of his liberty only in accordance with the procedure established by law as per Article 21. Even before he is found guilty, notwithstanding the presumption of innocence, the court is given the power to deprive a person of his liberty. Strong reasons must be shown. Such powers cannot be resorted to as a matter of course. It is incumbent on the Investigating Officer to satisfy himself first as stated in Jyothish"s case (supra) that an arrest has to be made. It is incumbent on him to satisfy the judicial authority-the judicial Magistrate-that he has valid and just reason for arresting a person and depriving him of his personal liberty. He has the duty to apprise the court of the circumstances which must prompt the court to resort to the unpleasant assignment of denying a person liberty even when the allegation against him is not proved to the hilt. I reckon that the clear and unambiguous mandate of Section 167(1) Code of Criminal Procedure is that a person shall not be deprived of his

personal liberty unless there be satisfactory reasons. A compromise between the high ideals of personal liberty and the compelling needs of a proper investigation to collect materials in the interests of the State and the polity at large is reflected in Section 167(1) Code of Criminal Procedure. Therefore, according to me, it is idle to contend that the accused have been deprived of an opportunity to modulate their defence.

25. I must also note that every error committed by an Investigating Officer or Magistrate cannot persuade this Court to invalidate the action taken. Rule of law is not a mere fetish. Rule of law must cater to justice in the ultimate sense. It would puerile and myopic for a court merely on seeing some inadequacy on the part of the Investigating Officer or the Magistrate u/s 167(1) Code of Criminal Procedure to invalidate the entire proceedings and action taken. The duty is on every functionary under the Constitution to translate into reality the preambular commitment to do justice. Justice is the primary concern. Section 167(1) deals with procedural law. All rules of procedure are nothing but handmaids of justice. Where the provisions of the Statute and Rules are violated the court has to see whether notwithstanding the violation, such infraction affects the root of the matter and is sufficient to invalidate the action taken.

26. I am of the opinion that the decision of the Kamataka High Court in Sudha Shivarame Gowda v. State of Karnataka 1992 STPL (LE-Crime) 9651 KAR is perhaps the most apposite one on this aspect and rhymes with my thoughts on the subject. I am in complete agreement that the requirement of forwarding the entries in the Case Diary cannot be reckoned as a rule of the thumb as to invalidate the action as soon as that requirement is not satisfied. Such a view would lead to the bizarre conclusion that the Investigating Officer willing to oblige the accused or an innocuous omission on the part of the Magistrate to give reasons u/s 167(3) would deliver to the accused an undeserved advantage. That cannot be the law at all.

27. According to me, therefore, it is incumbent on this Court to ascertain from the records whether remand was justified and handing over of the accused to police custody was just and reasonable in the facts and circumstances of this case.

28. Hence I had directed the Investigating Officer to furnish to me in a sealed cover all the relevant documents, including the extract of the case diary and a list of the circumstances revealed against the accused. I have perused the same.

29. At this early stage of the proceedings, this Court has to be very cautious. No comment made must convey an unintended impression that any particular contention on merits has been accepted or rejected. This is not the stage for this Court to consider the contentions on merits about the culpability or acceptability of the materials placed before court. Therefore I shall very carefully avoid any detailed discussion of the materials collected. I shall look into the same only to decide whether this Court can justifiably entertain the satisfaction that the action of the Magistrate of having remanded the accused to police custody is justified or not.

30. It will be apposite to refer to the contention of the C.B.I. The C.B.I. contends that the relevant extracts had been produced before the Magistrate. The four reports referred above do not refer to such production. The impugned order of the Magistrate or any other noting by the Magistrate does not reveal that such case diaries or extracts have been produced. I must in these circumstances take the view, which appears to be more probable, that along with the four reports referred above, the case diary or extract thereof has not been produced. Of course, I could have called for a report from the Magistrate whether it had been produced or not. But considering the urgency in the matter, I have not resorted to that course.

31. Secondly the learned Standing Counsel for the C.B.I. contends that ritualistic repetition of matters which the learned Magistrate is already aware of and was cognizant of was not necessary and at any rate the absence of such repetition cannot be held to be crucial or significant. The learned Standing Counsel for the C.B.I. places reliance on the decision in SakiriVasu v. State of U.P. 2008 (1) KLT 724 (S.C.) followed by this Court in Vasanthi Devi Vs. S.I. of Police and Others, as also the specific directions earlier issued by this Court that the learned Chief Judicial Magistrate must monitor the investigation in this case. The C.B.I. was submitting reports not to a person, who did not know anything about the case, but to a Magistrate who was monitoring the investigation in an on-going manner. If this case has not met with premature death earlier it is only because of the alert interventions of the learned Chief Judicial Magistrates from time to time, I must unambiguously acknowledge. These four reports referred above were not submitted to any stranger, but to a person who was monitoring the investigation. The significance of omission to furnish the case diary must be considered in the light of these facts, even if it be assumed that there was an omission, contends the Standing Counsel for C.B.I. I find merit in this contention. I must note that the Chief Judicial Magistrate must be attributed and assume to have knowledge about the mandate if Section 167(1) Code of Criminal Procedure. If the learned Magistrate felt that remand to police custody was not necessary on the materials available I would have certainly expected the Chief Judicial Magistrate to call for records as required u/s 167(1) and make them available to him. The mere fact that reference is not specifically made to the production of the case diary extract as required u/s 167(1), I agree with the learned Standing Counsel, cannot lead me to the preposterous inference that the learned Magistrate was not apprised of the developments in the case.

32. I shall now advert broadly to the circumstances relied on by the Investigators. Here again I must remind myself that the Investigating Officer or the court at the stage of Section 167 are not to weigh the materials in golden scales. They are only deciding whether for the purpose of investigation, remand of the accused is necessary or not. Even when the needle of suspicion is pointed convincingly at a person, his arrest may be justified to facilitate collection of further materials. The question at the stage of Section 167, I make it very clear, is not whether there is proof beyond doubt. The question is only whether there is reasonable suspicion or ground to show the involvement of the persons

whose custody is sought for and whether their interrogation in custody is likely to be productive. That is the signature tune of Section 167 and not whether the accused are guilty or not. It is with that in mind that I have carefully scanned through the materials which are placed before me. I find that the Investigating Officer relies on the following circumstances to justify his prayer for remand to police custody. I repeat that I am not accepting these conclusions, but I am refering to these only to decide whether giving over to the custody is justified or not. The relevant circumstances to put it in a nut shell are:

(1) It was a case of homicide and not suicide.

(2) There was an attempt at all earlier stages to make it appear that it v/as a suicide and not a homicide.

(3) The incident which led to the death of the deceased must in all probability have taken place inside the convent-basement of Pius tenth Convent.

(4) There are indications and materials to suggest that the first accused was present in the convent on that night.

(5) The third accused was an important person in that convent and was in the control and grip of matters there. She was residing on the basement floor of that building, which it is suggested is an inconvenient place to reside in.

(6) The investigators believe that nothing could have taken place there on that floor on that fateful night without the knowledge of the third accused.

(7) The Investigators rely on the unsatisfactory and incongruent explanations offered from time to time by the accused persons.

(8) They rely on the evidence collected in scientific examination-Polygraph test, brain mapping and narco analysis-which indicate clearly that in a state of trance all these three accused persons have made vital admissions.

(9) The Investigators believe that the persons who are best suited to give valid, authentic and tangible information are stone walling and are not revealing the facts which are crucial to the investigators.

(10) There is deliberate organised, skillful and trained efforts to avoid the obligation to reveal truth in the course of ordinary interrogation-and even in the course of interrogation using scientific techniques.

(11) The Investigators believe that sustained and continued efforts in investigation using intelligent techniques may help them to interrogate the accused effectively and lead to the break up of the defence mechanism employed by them and ascertain the truth from them.

(12) Even the possibility of an accomplice who is willing to turn approver on such continued interrogation cannot be ruled out at this stage.

33. Are these sufficient to justify an order of remand in police custody, is the crucial question. I have no hesitation that the order passed by the learned Magistrate remanding the accused to custody notwithstanding the fact that Section 167(1) report do not reveal sufficient details or the order of the Magistrate does not speak sufficiently, is justified on the above materials/circumstances.

34. The counsel for the Petitioners impassionately query as to what are the materials collected by the present Investigating Officer between 1-11-2008 to 19-11-2008 to justify an arrest, which his predecessors had not chosen to make. They press for that information to be revealed. According to me, it would be puerile to assume that the arrest has been effected on the basis of the investigation from 1-11-2008 to 19-11-2008. A re-evaluation of the entire materials collected, the case diary shows, was undertaken. It is not as though on one fine morning they collected information and effected the arrest. The cumulative effect of the investigation by the previous investigators topped by the efforts made from 1-11-2008 to 19-11-2008 appear to have persuaded the Investigating Officer to feel that the rubicon has been crossed and that attempt can now be made to collect further information by interrogation of the Petitioners in custody. The query as to what has been revealed from 1-11-2008 to 19-11-2008, which is seen raised, cannot be a legitimate question at all.

35. It is said that at any rate 14 days custody was unnecessaiy. What must be the length of custody granted must depend upon the totality of facts and circumstances of each case. There can be no rigid or straight jacket formula as to how many days custody can be given. The facts and circumstances of each case must be taken note of. There is great amount of attempt to stone wall and not reveal information. The Investigating Officer, according to me, is perfectlyjustified in asking for, and the court is absolutely justified in granting, custody for a period of 14 days. It will not be inapposite for me to refer to the case diary extracts which have been placed before me. The Investigating Officers have specifically recorded that the accused even after arrest are not co-operating and are not willing to reveal any vital information. The Investigating Officers have recorded that with the help of criminologists and experts the accused persons appear to have been trained in the techniques of resisting interrogation and adamantly refusing to reveal truth. It is such persons, who have been given over to 14 days custody. I find absolutely no irregularity.

36. Custodial torture is apprehended. Impassionate appeals are made on the ground that the Petitioners may be tortured in custody. The learned Standing Counsel for the C.B.I. relies on the decision in State Rep. by the C.B.I. Vs. Anil Sharma, to contend that the court must assume that responsible police officers conduct the investigation in a responsible manner. There is absolutely nothing for me to assume that the C.B.I. has resorted to high handed methods. The task must have been very easy for them if they

had resorted to such tactics. This Court is happy to note that they have not done the same so far. Even one witness has committed suicide, it is urged. The blame is attempted to be left at the doors of the C.B.I. for such commission of suicide. Investigators must be made of sterner stuff. Such allegations should not prompt the Investigators to deviate from the path of professional excellence and of continuing the investigation to its logical conclusion. From what has been submitted at the Bar and after going through the case diary and considering the timing of the alleged suicide of such witness the C.B.I. must carefully consider the cause of such death also. Is there any attempt to interfere with the investigation? This must carefully and cautiously be considered by the C.B.I. if they are to conduct an investigation worth the name in this case.

37. There is a contention that the mandate of the decision in D.K. Basu Vs. State of West Bengal, has been violated. Even though there is a contention that no arrest memo has been prepared and copies have not been given to the relatives, I find no factual basis for this allegation. The case diary reveals that those formalities have been complied with. But Sri C.P. Udayabhanu raises a contention that proposition No. 10 of the decision in D.K. Basu''s case, which is extracted below has not been complied with. It reads:

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

The counsel also relies on the mandate of Article 22 of the Constitution. An arrestee is entitled for legal consultation. This cannot be denied to him at all. But such legal consultation cannot extend to the accused turning back to the counsel when each question is put by the Investigating Officer to ascertain what he should say and what he should not say. But there is no doubt that an arrestee while in custody is entitled for reasonable legal assistance and consultation. I do note that during this long period of 14 days while they are in custody opportunity for legal consultation has not been provided. Appropriate direction to that effect can be issued.

38. I am satisfied in these circumstances that these petitions must meet with their inevitable fate of dismissal, but subject to a direction that all the accused persons shall be granted permission to have legal consultation with one lawyer of their choice while in custody between 3.30 and 4 p.m. on 29-11-2008 at the office of the C.B.I., Kochi, in the presence of the Investigating Officer. I direct so.

39. I am conscious of the need for circumspection. I know the virtues of judicial restraint. I am aware of the sensitivity and sensibility of religious communities in India. But as a constitutional functionary in this sovereign socialistic democratic republic I cannot restrain myself to express certain vital concerns which worry me. The doctrine of Satyameva Jayathe shall remain an empty dream if all citizens-theists and atheists, sanyasees and the ordinary citizens, the laity and the clergy, the professional spiritualists and the mundane materialists do not co-operate with the truth discovery process. Every citizens has the duty to co-operate with the investigation that has been going on for the last 16

years.

40. The convent authorities appear to have been satisfied at least initially that it was not a case of suicide as I find from the case diaiy that the deceased was given a decent burial service, which is not extended to one who commits suicide. What efforts did the authorities in the convent make thereafter to ascertain truth? What enquiry did they conduct? What materials did they collect? What was the result? After all Sister Abhaya was a nun and they must have been eager to ascertain the cause of her death. Even after revelation of results of Narco Analysis I find no efforts forthcoming to inspire all concerned-witnesses and accused-to co-operate with the truth discovery process. One cannot run with the hare and hunt with the hounds. One cannot side with the cow and the clover. A righteous, honest, sublime and truthful stand has to be taken by all in the fight between vice and virtue, truth and falsehood, good and bad. If C.B.I. and the convent authorities join hands and the witnesses and the suspected guilty are righteously and spiritually motivated to reveal the truth of what happened, within 16 minutes we can achieve what has not been achieved within 16 long years of the past. The efforts in this direction appear to be not forthcoming. The C.B.I. must be able to earn their confidence to persuade them to co-operate and they must co-operate in the truth discovery process. At least in the interests of those against whom the needle of suspicion is pointed, if they are not really guilty, such co-operation appears to be absolutely necessary. The ordinary citizen is worried that there is no such co-operation between the temporal and spiritual authorities to discover the truth.

41. Let me end on a sombre note. May every one remind himself that that even if man''s justice fails Lord''s justice will catch up. May it be remembered by every one that the darkest and hottest place in hell is reserved for he who remains silent when it is his righteous duty to speak and reveal. I would certainly like to avoid that spot and hence these last three paragraphs.