

## Mushtaq Ahmed Chacha Vs The State and Others

**Court:** Jammu & Kashmir High Court

**Date of Decision:** May 14, 2002

**Acts Referred:** Arms Act, 1959 â€” Section 25, 3  
Constitution of India, 1950 â€” Article 21, 22, 22(1), 226, 32  
Criminal Procedure Code, 1973 (CrPC) â€” Section 491  
Jammu and Kashmir Public Safety Act, 1978 â€” Section 8  
Penal Code, 1860 (IPC) â€” Section 330  
Ranbir Penal Code, 1989 â€” Section 120B, 153, 153A, 216, 276

**Citation:** (2002) CriLJ 3904

**Hon'ble Judges:** Syed Bashir-Ud-Din, J

**Bench:** Single Bench

**Advocate:** N.A. Ronga, for the Appellant; Mustaffa, Government Advocate and Anil Bhan, for the Respondent

### Judgement

@JUDGMENTTAG-ORDER

Syed Bashir-Ud-Din, J.

A petition u/s 491, Cr.P.C. was filed way-back in 1995 with the prayer requiring the respondents to disclose the

authority under which Mushtaq Ahmed Chacha is detained and to show cause why he should not be set at liberty. This was so after the subject

Mushtaq Ahmed Chacha was alleged to have been arrested on 9-7-1995 by 41st Bn. B.S.F. during Crackdown of Maharaja Gunj area of city of

Srinagar. The respondents failed to supply whereabouts of the detenu to family members of the subject and the cause was not shown except that it

was pleaded and submitted that the Mushtaq Ahmed Chacha detainee was arrested in FIR 4/95 registered at P/S CIK, Srinagar Under Sections

302, 307, 276, 278, 120B RPC and 121(a) and 25, Arms Act. Further respondents 4 and 5 representing 41st BN. of BSF, however, disclosed

that during interrogatory detention Mushtaq Ahmed Chacha pointed to some location of Hizbul Mujahideen out-fit hide-out in different parts of the

Srinagar city and, therefore, on 15-7-95, the said subject was taken up by the B.S.F. authority in custody for operational purposes for recovery

and when the party accompanied by the detenu reached Kani-Muzar area the BSF party was attacked and cross firing ensued and the subject

gave slip to the BSF authorities and escaped. The BSF lodged FIR 92/95 Under Sections 216/307, RPC 3/25 Arms Act with Police Station

Baghiyas but the subject has not been traced hereto.

2. In this backdrop a co-ordinate bench of this Court after inviting objections and hearing the parties ordered enquiry in the matter by Additional

District and Sessions Judge, Srinagar vide order dated 25-2-1997. The Additional District and Sessions Judge held the enquiry. Evidence was

received. Statements of witnesses produced by the parties were recorded. Upon hearing, on consideration the Additional District and Sessions

Judge, concluded the proceedings and filed his report along with record. On detail enquiry after admitting/recording appreciating evidence, he

came to the conclusion that for custodial disappearance of the subject, after his arrest by BSF 41st Bn. and lodgement with CID, CIK, Srinagar

(in FIR 4/95 registered at CIK, Srinagar) under the charge of SP CID, CIK Srinagar, the SP CID, CIK is squarely to be blamed for

disappearance of Mustaq Ahmed Chacha from custody. Though it is also mentioned that the BSF people represented by respondents 4 and 5

cannot escape their share of blame for the custodial disappearance of the subject, in as much as, they have failed to lodge FIR immediately after

the alleged escape of Mushtaq Ahmed Chacha and that too in absence of any plausible explanation for delay in lodgement of FIR. On these

conclusions the enquiry officer Additional District and Sessions Judge, Srinagar concluded :-

In this view of the matter and in view of the discussion made hereinabove the respondents have to share the blame for the custodial disappearance

of Mushtaq Ahmed Chacha although with the main responsibility is of respondent No. 3. The enquiry report be sent to Registrar Judicial High

Court of J. & K. Srinagar with the request that the same be placed before the Hon'ble Court for their kind perusal.

3. To this report dated 20-7-2000, the BSF represented by respondents 4 and 5, as also Home Department and DG of Police and SP, CID, CIK

Srinagar representing State Government, have filed their objections.

4. Counsel for the parties have been heard.

5. From record including the report of the enquiry officer, it is seen that during the enquiry the parties have participated. They have filed their

statements in writing and even affidavits have been filed. Petitioner has examined eight witnesses. Besides the case diary of FIR 92/95 diarized at

P/Baghiyas has been also produced by the S.H.O. Non-applicants 4 and 5 from BSF have also examined 9 witnesses besides statement of B. B.

Viyas District Magistrate, Srinagar has been recorded in the wake of record pointing to complicity of State officials including respondent No. 3

SP, CID, CIK, Srinagar. Even respondent No. 3 has also filed his affidavit. The parties submitted written and addressed oral arguments. On

conclusion of enquiry the Additional District and Sessions Judge, enquiry officer, has come to the conclusion that disappearance of Mushtaq

Ahmed Chacha is a case of custodial disappearance while the said Mushtaq Ahmed Chacha was with the State Police and the BSF. Parties have

taken objections to this report. In terms of objections of the Commandant of 41st Bn. BSF, though occurrence is not denied and it is not also

denied that Mushtaq Ahmed Chacha was picked up and detained by the BSF but it is alleged that Mushtaq Ahmed Chacha escaped on 15-7-95,

the material date when the BSF party was taking said Mushtaq Ahmed Chacha to Kani-Mazar area of the city for recovery from one of the

hideouts of H.M. Out-fit and came under fire from militants. The BSF lodged report FIR 92/95 with P/S Baghiyas, Srinagar. However, Mushtaq

Ahmed Chacha was apprehended after the alleged escape from BSF custody and was lodged P/S CIK, Srinagar as warrant/detention order was

passed to detain subject Mushtaq Ahmed Chacha by District Magistrate, Srinagar on September 27, 1995. Thus being custody of CIK, Srinagar

on 27-9-95, as even admitted by Dy. Commissioner, Srinagar, the charge of custodial disappearance of the subject is not brought home to

respondents 4 and 5, the officers from BSF.

6. Shri I.A.S. Bali SSP, IGP Kashmir has filed objections on behalf of respondents 1 and 2. It is stated by him that the members of the Force from

41st Bn. arrested Mushtaq Ahmed Chacha on 12-7-95 in FIR No. 4/95 u/s 3/25, IAA 2/3 IMCO, EAO, 3 OSA. 4/5 Exp. Act 13U.A(P) Act,

302, 307, 436, 376, 153-A and 153-BRPC of Police Station CIK, Srinagar and was lodged in G.I.C. Fair view. During interrogation the subject

disclosed particulars of 2 to 3 hide-outs of Hizbul Mujahideen out-fit in different parts of Srinagar City. On 15-7-95 while he was being taken to

Kani-Mazar he disappeared, about which a report was lodged by BSF on 24-7-95, which report came to be registered as FIR No. 92/95 u/s

216/307 RPC and 3/25 Arms Act. On the basis of investigations and dossier prepared by SSP, the District Magistrate passed detention order

bearing No. PSA/DMS/379/95 dated 27-9-95. The parents of the subject have in the statement disclosed that the subject was detained in

September and October, 1995, in BSF Camp Karan Nagar and the detenu was all along with the BSF people. In the premise they have denied

their culpability in the disappearance of the subject.

7. Counsel for the parties have made submissions in line with and in support of the above contentions of the parties. The record is perused.

8. It is not only made out from the enquiry but also unequivocally admitted by the respondents whether from BSF or State Police that Mushtaq

Ahmed Chacha has disappeared after he was detained initially in FIR No. 4/95 registered at P/S CKK, Srinagar. The stand of respondents 4 and

5 is that after Mushtaq Ahmed Chacha was apprehended on 10-7-95 while he was being taken on 15-7-95 for recovery to hideout in Jamalatap

area he gave slip to the BSF when the BSF Personnel came under fire from militants. He could not be traced thereafter in respect of which incident

BSF filed FIR 92/95 with P/S Division Bagyas. However, this version is not believed by the enquiry officer on analysis and evaluation of evidence

and on appreciation of facts and circumstances of the case. Similarly the stand of respondents 1 to 3, that the subject Mushtaq Ahmed Chacha

never came in custody of the State Police or any JIC run by the State Government after his disappearance (in the encounter as alleged by

respondents 4 and 5) too has not been believed, again on screening the evidence and on appreciation of facts and circumstances of the case.

Contextually the enquiry officer has referred to the detention order passed by District Magistrate, Srinagar on 27-9-95 detaining the subject u/s 8

of J. & K. Public Safety Act and the mention in the grounds thereof that subject Mushtaq Ahmed Chacha has been taken into custody and

continued in custody of the respondents. The conduct of respondent No. 3 is stated to be "irresponsible and unbecoming of a police officer,

because after the registration of the case i.e. FIR/4/95 CIK, the custody of the suspect should have ordinarily been with the CIK but that does not

seem to be a fact in view of the evidence produced by the petitioner that till October, 1998 he continued to be in the custody of 41st Bn. Karan

Nagar Camp. The District Magistrate, Srinagar as his witness has fully owned and deposed to the veracity of the statement that the subject was

apprehended by Security Forces in FIR No. 4/95 and that he was lodged on the day and date of the passing of the order dated 27-9-95 in

additional lockup Fair View. This order as per Dy. Commissioner is passed by him on the dossier of the Police agencies.

9. Obviously the stand of the BSF and State Police is self destructive to reveal custodial disappearance of Mushtaq Ahmed Chacha in

circumstances not admittedly explained or brought to light. Their conduct and actions have violated law as per evidence recorded, fact-situation

and circumstances of the case. The conclusions of the enquiry officer cannot be said to be unreasonable or not based on material/evidence. The

attempt on the part of State Police and the BSF to cover up or hush the matter is writ large on record. The only conclusion to be drawn is that

Mushtaq Ahmed Chacha has disappeared while in physical custody of the respondent No. 3, the main and chief culprit in the matter. Conduct of

the respondents is blame worthy and they cannot escape the responsibility for custodial disappearance of the subject.

10. Petitioner's counsel contends that it being a case of arrest followed by custodial disappearance, the respondents Union of India. J. & K. State

Govt. and BSF Personnel are under an obligation to compensate the family for the pain and suffering occasioned by loss of liberty and

disappearance of Mushtaq Ahmed Chacha the bread earner of his aged parents. Government and its instrumentality are under a legal duty to

safeguard the life and liberty of the individual and citizens from wrong doings which do occasionally result in the death or disappearance of a

citizen. Besides for the tortious liability for damages in general law, the State is under legal duty to compensate the father and mother and other

family members of the deceased bread earner of the family under public law.

11. Mr. Anil Bhan Sr. CGSC and Gh. Mustaffa. GA for the State respondents submit that the Govt. and the named respondents are not liable to

pay any compensation for violation of fundamental rights guaranteed under Articles 21 and 22 of the Constitution. The remedy for the dependants

of the subject Mushtaq Ahmed Chacha is under General Law in tort for damages in criminal law. The writ jurisdiction of the Court cannot be a

substitute forum to pursue the remedy available under General law before a Civil Court.

12. In D.K. Basu Vs. State of West Bengal, it has been observed :-

Custodial death is perhaps one of the worst crimes in a civilized society governed by the Rule of Law. The rights inherent in Article 21 and 22(1)

of the constitution require to be callously and scrupulously protected. We cannot whisk away the problem. Any form of torture or cruel, inhuman

or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or

otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness

and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen.

Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his

arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed has to be an emphatic 'No'.....Section 330,

therefore directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions are

however inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the

victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore,

cannot stop by giving a mere declaration. It must proceed further and give compensatory relief not by way of damages as in a civil action but by

way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the

fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.

13. In the context of protection of fundamental rights qua duties of police while combating terrorism it is further observed :-

The state must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law

into themselves. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the

violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the

investigators properly to interrogate to meet the challenge.

14. In Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, , the Apex Court held :-

34. This Court and the High Courts, being the protectors of the Civil liberties of the citizen, have not only the power and jurisdiction but also an

obligation to grant relief in exercise of its jurisdiction under Article 32 and 226 of the constitution to the victim or the heir of the victim whose

fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair

the damage done by its officers to the fundamental rights of the citizen notwithstanding the right of the citizen to the remedy by way of a civil suit or

criminal proceedings....

15. The compensatory relief in the nature of compensation under the Public law jurisdiction for the wrong done in breach of public duty by the

State of not protecting the fundamental right of the citizen, earns the citizen compensation of judicial redress for the wrong done and legal injury

caused. The case at hand is one of such cases where compensation as above has to be given under the public law jurisdiction for the wrong of

custodial disappearance in breach of public duty by the Central or State Government and its police agencies of having failed to protect the

fundamental right of subject Mushtaq Ahmed Chacha a State subject of the State and citizen of India.

16. The next question to be considered is to arrive at just quantum of compensation in the facts and circumstances of the case. In Lalitha v.

Director General of Police, Madras 1989 Cri LJ 1732 the Madras High Court awarded compensation of Rupees 50,000/- on 7-12-1988 to the

wife of a person who was arrested by police on charge of murder, but during custody was killed on the ground that his wife has been deprived of

her life partner and bread earner of the family. Besides the children were minor and the person was earning 1500/- per month.

17. In *Bhuvneshwar Singh Vs. Union of India (UOI) and Others*, compensation of Rs. 30,000/- was granted for violating fundamental right of

personal liberty of the person as far as he was being held illegally at pre-trial stage.

18. In *Sebastian M. Hongray Vs. Union of India (UOI)*, where the Govt. submission of detenu having left the camp and thereafter remained

untraceable was found incorrect, compensation in the sum of Rs. one lakh was awarded.

19. In *Peoples' Union For Democratic Rights Through Its Secretary and Another Vs. Police Commissioner, Delhi Police Headquarters and*

Another, where a labourer succumbed to injuries on receiving severe beating at the hands of the police, deceased labourers's family was awarded

compensation of Rs. 75,000/-.

20. In *D.K. Basu Vs. State of West Bengal*, , the following observations of the Lordship in the matter of assessment of compensation need to be

taken note of:-

...In the assessment of compensation the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to

the wounds and not to punish the transgressor or to offender, as awarding appropriate punishment for the offence (irrespective of compensation)

must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in

the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs

of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of

compensation will of course, depend upon the peculiar facts of each case and no straight jacket formula can be evolved in that behalf. The relief to

address the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the

traditional remedies and not in derogation of them.

21. In *Mohammad Sultan Mir Vs. State of Jammu and Kashmir and Others*, this Court (while I was sitting singly) observed :-

The award of appropriate compensation has to reckon with the pain in body and mind, distress, impoverishment, indigence, loss of life and death.

Contextually adequate monetary compensation has to be an effective remedy for redressal of the serious infringement of fundamental right to life of

the citizen in question by the B.S.F. Personnel for which state is vicariously responsible. Award of the appropriate amount of compensation is to

off set the wrong done while giving fillip to indemnification by the wrong doer. Defence of 'sovernity' is quite alien to such a situation.

22. In the facts and circumstances of this case and in the view of the matter I have taken, an amount of Rs. one and a half lac is awarded (1.5 lac)

as just and proper compensation 'o be paid by the respondents to the father and mother among other defendants of the deceased. The

compensation shall be payable within a period of three months unless the time is extended on sufficient cause shown. It is left to the Union of India

and State Government whether to recover this amount of compensation or part thereof from the officers or personnel actually responsible for

wrong done and in particular respondent No. 3. However, it is placed on record that the award of compensation hereto would be taken into

account for adjustment in the eventuality of awarded of compensation in any other proceedings being taken for recovery of compensation on the

very grounds of subject of instant writ proceedings with a view that this amount of award of compensation is not recovered by the petitioner over

again.

23. A criminal case shall be registered about custodial disappearance of Mushtaq Ahmed Chacha at the concerned P/S, in case the above

disappearance of Mushtaq Ahmed Chacha is not covered by the FIRs lodged with the Police Station(s). The investigation shall be taken to its

logical conclusion. The investigation shall be completed as far as possible within a period of four months.

24. Any observation made to justify and sustain this order shall not affect or have any bearing in any proceedings or on criminal prosecution

pending or initiated against the concerned State Police or BSF Personnel in connection with disappearance of Mushtaq Ahmed Chacha. Disposed

of.