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## MURDER OR JUSTICE- A PARADOXICAL VIEW ON ENCOUNTER KILLINGS

Vanshika Mittal

Advocate

Delhi High Court.

### ABSTRACT

India being one of the largest democracies in the world has been witnessing an unprecedented failure when it comes to the justice delivery system. The unnecessary delay, harassment of witnesses, lack of protection given to both victim and the witness, politically and socially influenced public officials, custodial violence, unlawful detention, excessive remedies available, more protection and leniency towards the accused and false encounters by police are few factors which prove to be prejudicial to the criminal justice delivery system.

The present article will deal mainly about the excessive powers given to the policemen on arrest and extra-judicial killings against which appropriate actions are not taken and which is now becoming a latest trend giving it a label of *immediate justice*. I will also bring into consideration the loopholes in the judicial system and the media trials which are having the major influential force in jeopardizing actual justice.

In a leading case, *Justice Markandey Katju* described such encounter killings as cold-blooded murders, rather than just calling it as an extra-judicial killing. It is however, very important to consider the opinion as to why such acts are being given attempts to and why is there no procedure to curb such extra-judicial killings, yet. Why is there a blind trust on the functioning of police officer? Why such violations of fundamental rights are not brought under the purview constitution and rather given it a name of the judicial act? Even though there are a number of judicial pronouncements regarding the extra-judicial killings, these questions are still unanswered. Therefore, the object of writing this paper is to give importance to this issue which is being largely ignored. The object is to bring into light the injustice caused by even one false encounter leading to death of an accused whose guilt has not even been proved yet. Every person on this earth has a right to be tried and executed lawfully and this is why the trust on judiciary subsists.

**Key Words:** Encounters, Murder, Justice, Proportionality, Sovereign Immunity, Necessity, Media Trials.

## 1. INTRODUCTION

Justice and equality are indisputably the two inevitable factors for the protection of human rights which are the most basic and essential for a dignified life of any person. India being one of the largest democracies in the whole world has given a prominent status to the human rights. The state is the primary authority for safeguarding the human rights of an individual through various mechanisms, most significantly, through the police officials. The role of police is an indispensable part in maintaining law and order in the society.

When the concept of justice is discussed, the police play a substantial part in protecting the life and security of persons concerned. Justice however, is a process where right is done to the victim as well as to the accused. The rule of proportionality always applies when it comes to punishing the persons accused of any offence. Justice does not only mean rights of the victim but balances the rights of both accused and the victim. However, police sometimes try to exceed their limit of powers and apply their own methods of punishing the wrongdoers. Though, the Indian Criminal System follows the inquisitorial system of law where the man is presumed to be innocent until proved guilty, nowadays a person is presumed to be guilty as soon as he is brought to the custody of police. The media trials play a pivotal role in determining the hatred in the minds of people which leads to the police in using such aggressive methods.

Extra judicial killings in India are not new but have been prevailing in the society since a long time ago. Many times police encounters have been proved to be false. Such authority is given to the police in very rarest of rare cases when the police can cause death of the accused. But this has now been presumed as a liberty to punish their own way and taking the law in their own hands. The most regretful part of this is that the people are appreciating such an act of the police because what they see is only that the accused is dead and they no more have to wait for the prolonged judicial trials. The recent case of the police encounter in Hyderabad where a veterinarian was raped and burnt, is an example of the aggressive methods used. The accused were shot on the spot by the policemen. According to the research, many scholars believe that such an act did not justify the case at all as there seemed no signs of the self defence by the police or any kind of escaping from the custody because of which they shot the accused. Such inhumane acts in no case give justice to the victim. Justice Markandey Katju stated in one of the judgments that “such acts are nothing but cold blooded murders.”

In this paper, I would deal with such misconception of brutal murders with causing justice to the victims. It is, in the recent scenario, most important to revive back the confidence of people in the role of judiciary so that such unlawful methods are not supported and judiciary is relied upon for the rights of an individual. I would also like to explain the concept of sovereign immunity and the role of judiciary with regard to police encounters.

## **2. JUDICIAL RESPONSE TO ENCOUNTER KILLINGS**

The democratization process in the world focuses on aspects of human rights through the medium of good governance and rule of law. Good governance however, is a prerequisite for democratic features of the country. It is pertinent to mention that police is entrusted with the duty of protecting the lives of people and maintaining law and order in the society. The police is considered to be the custodian of law empowered largely to prevent commission of crime and therefore, for good governance.

Encounter killings or extra-judicial killings act as an antithesis to the concept of justice and rule of law. In the case of **Raghubir Singh V. State of Haryana**<sup>1</sup>, the Supreme Court expressed that *"We are deeply disturbed by the diabolical recurrence of police torture resulting in terrible scare in the minds of common citizens that their lives and liberty are under a new peril when the guardians of law gore human rights to death."*

Another case **Prakash Kadam v. Ramprasad Vishwanath Gupta**<sup>2</sup>, is a landmark case in which bench comprising Justice Markandey Katju, former judge of Supreme Court of India was of the opinion that *"This is a very serious case and cannot be treated like an ordinary case. The accused who are policemen are supposed to uphold the law, but the allegation against them is that they functioned as contract killers. It was indicated that victim was abducted during the daytime and was taken to police station and from there he was taken to some unknown place where he was shot dead. This is a very serious case wherein prima facie some police officers and staff were engaged by some private persons to kill their opponent and the police officers and the staff acted as contract killers for them. If police officers and staff can be engaged as contract killers to finish some person, there may be very strong apprehension in the mind of the witnesses about their own safety."* It was further held in this case that *"In cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake "encounters" are nothing but cold-blooded, brutal murders by persons who are supposed to uphold the law. If crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties. The "encounter" philosophy is a criminal philosophy, and all policemen must know this. Trigger-happy policemen who think they can kill people in the name of "encounter" and get away with it should know that the gallows await them."*

Further in the case of **Om Prakash and Others V. State of Jharkhand**<sup>3</sup>, Supreme Court held that *"It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. The Supreme Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognised as legal by our criminal justice administration system. They amount to State-sponsored terrorism"*.

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<sup>1</sup> (1980) 3 SCC 70.

<sup>2</sup> (2011) 6 SCC 189

<sup>3</sup> Criminal appeal no. 1491 of 2012

Such killings by the policemen clearly amount to State lawlessness. Where people believe the most in the police officials who have been given wider powers to investigate cases and for prevention of crimes, such injustice done by these police officials will gradually result in losing faith in them and thus, putting the security of the state in jeopardy. Such crimes are more severe than those done by a lay man, due to the reason that these police officers are those entrusted with the most crucial aspect of governance of the state and also preserving the law and order of the country and if crimes are committed by them, it must not be excusable in any way, rather be punished.

In a very important case which is *People's Union for Civil Liberties and Another V. State of Maharashtra and Others*<sup>4</sup>, Supreme Court bench comprising the then CJI R.M. Lodha and Justice Rohinton Fali Nariman while emphasizing on the importance of article 21 of the Constitution of India, have issued certain guidelines which shall be followed while investigating matter of police encounters in the cases of death and grievous hurt as a standard procedure for thorough, effective and independent investigation. It was further stated that *"These requirements/norms must be strictly observed in all cases of death and grievous injury in police encounters by treating them as law declared under Article 141 of the Constitution of India"*.

Therefore, it is imperative in regards to the current scenario of the country that such gross injustice carried out by the police officers must not be taken leniently, rather, such policemen accused of fake encounters must be strictly punished so that confidence of the public in such officers are not affected and security of the country is preserved.

### **3. SOVEREIGN IMMUNITY AND JUDICIAL SAFEGUARDS**

Given the judicial remedy by means of right of action against the police officials for violating the fundamental and constitutional rights of the individual with a view to diversify the public accountability, the question of doubt will be discussed whether the violations caused by the police officers come under the purview of the concept of **Sovereign Immunity**. Whether the National Human Rights commission or State Human Rights Commission hold any importance in dealing with such excessive misuse of the police powers, will also be discussed in this chapter.

The term 'Police' falls under the State List of the 7th Schedule of the Constitution of India<sup>5</sup>, therefore, it is clear that Constitution gives the power to State Governments to make laws regulating the police of their respective States. However, the quasi- federal nature of India makes it open to Central Government and Legislature to make laws regarding the police of the whole country and not for a specific State, for example, Indian Police Act, 1861 is a central statute and governs the police officials of whole of India.

<sup>4</sup> (2014) 10 Supreme Court Cases 635

<sup>5</sup> Article 246 of Constitution of India

Public law liability of the police finds its source from the Constitution of India and the Administrative law for violations of Fundamental rights explained in Part III of the Constitution where the courts hold the police directly responsible and liable for violating right to life and personal liberty, protection from arbitrary arrest and detention etc., and have awarded compensation against the State for abuse and misuse of power by the police while not holding the police officer individually liable to compensate.

Several references can be seen from back in 1983 where Supreme Court in the case of **Rudal Shah v. State of Bihar**<sup>6</sup> awarded compensation for the abuse of power by the police officer under the Writ Jurisdiction, for violations of Article 21 and Article 22. In this case, the police unlawfully detained the prisoner even after acquittal for 14 long years. The Court ordered the State on behalf of the police officers to pay Rs. 30,000 by way of compensation to the victim. Furthermore, in the cases of **Sebastian Hongray V. Union of India**<sup>7</sup> and **Bhim Singh V State of Jammu and Kashmir**<sup>8</sup>, Supreme Court awarded compensation for causing torture, agony and harassment to two women whose husband had gone missing from an army camp by army officials in Manipur, and illegal arrest of petitioner by the police, respectively. In another case of **State of Maharashtra V. Ravi Kant Patil**<sup>9</sup>, an under-trial prisoner was handcuffed and beaten up, subject to humiliation and undignified treatment. The Court while awarding Rs. 10,000 as compensation, discussed the question whether the liability to compensate lies within the State or the individual Police officer who committed such an act. While examining the question of vicarious liability, the Court iterated that “*He has acted only as an official and even assuming that he has exceeded his limits and thus erred in taking the under-trial prisoners handcuffed, still we do not think that he can be made personally liable.*” Another landmark case in which the Supreme Court reiterated the principles laid down in the cases of **Rudal Shah and Bhim Singh**, was **Nilabati Behera V. State of Odisha**<sup>10</sup> where the custodial death caused to the victim was held to be the result of police brutality and a gross violation of fundamental right of life and personal liberty under Article 21, therefore, awarded compensation under Article 32. The combined reading of these cases indicate that such cases of police atrocities falls under the strict liability principle of public law for infringement of fundamental rights. Where the Police officers are held liable for false encounters, are also examples of strict liability coming under the purview of public law. It is to be stated further that it is an exception to the concept of Sovereign immunity.

The Principle of Sovereign Immunity is generally misconstrued as giving liberty to the statutory authorities to make unlimited use of the powers given to them and sometimes even misuse it to the extent that the human rights are infringed to a greater possibility. A common law doctrine, where the strict compliance of the legal doctrine “A King can do no Wrong” was followed, it normally gave immunity to the state authorities to perform whatever act for the public welfare for which no liability will occur for any breach resulting wherefrom. The concept of sovereign immunity thus forms the basis of public policy and welfare of the society, as it is a

<sup>6</sup> AIR 1983 SC 1086

<sup>7</sup> AIR 1984 SC 1026

<sup>8</sup> AIR 1986 SC 494

<sup>9</sup> AIR 1991 SC 871 (Single Bench)

<sup>10</sup> 1993 AIR 1960, 1993 SCR (2) 581



justification for the wrongs committed by the State or the public servants falling under the control of state. Therefore, it can be clearly indicated that the functions of police falls under the concept of Sovereign immunity, however, emphasis should be placed on the fact that even this immunity has some restrictions which can definitely not mean taking away the fundamental right to life of any person, whosoever. In 2004 judgment, the court observed while placing importance on the protection of fundamental rights that “it has been well established that for violation of fundamental rights guaranteed under Article 21 of the Constitution of India, public authorities, officials and the State are liable to pay compensation. Public law courts in India exercising powers under Articles 32, 136 and 226 of the Constitution of India can award compensation in public law. Such remedy is in addition to the remedy in tort in private law.”<sup>11</sup>

## **4. JUSTIFICATION FOR USE OF LETHAL FORCE BY THE POLICE OFFICIALS**

### **4.1 Proportionality**

Principle of proportionality is one of the main principles of the criminal justice system, which means that the person must be punished to the extent of the crime committed. It is considered as a *sine qua non* for justice and fairness. This principle is internationally used where justification to use of firearms should be based on rule of proportionality and demands a balance between the degree of danger and degree of force applied.

Death of any person can only be caused by the police under rarest of rare circumstances, and if such is misused, then the police even though falling under the statutory control, must be held liable, severely. Many provisions can be traced through the Criminal Procedure Code, 1973, Indian Penal Code, 1860 Indian Evidence Act, 1872, etc. **Section 46** of the Code of Criminal Procedure Code makes it clear that no death can be caused to any person except of those punishable with death or imprisonment for life. The negative words of this section show that the emphasis is placed on affecting the arrest of the person and not causing any unnecessary harm or death of anyone. Therefore, if death caused is unexplained and unnecessary, then severe liability must be given to such policemen, individually also. **Section 79** of the Indian Penal Code provides for general exception where a person is immune from liability when act done by a person is justified, or by mistake of fact he believes himself to be justified by law. Such a provision is generally misused and taken as a defense even though such mistake of fact is really not what it appears to be. **Section 99** of IPC clearly states that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. It is in other words called the Principle of Proportionality. This means that police officers are justified upto the extent of causing harm proportionate to the offence done by them however, the false defenses taken by the police officers that killing occurred while in the process of self defense must be thoroughly investigated into and when found false and disproportionate, must be criminalized.

<sup>11</sup> A.V. Janaki Amma And Ors. V. Union Of India, 2004 (1) ALD 19

## 4.2 Necessity

Another important factor in justifying the commission of any offence by the police is the rule of necessity. The appropriately used latin maxim "*Id Quod Alias Non Est Licitum Facit*" means that which is otherwise not lawful becomes lawful if necessity demands, implies that in situations where necessity is bigger than the harm that is likely to be caused, then such becomes lawful and completely justified on grounds of necessity. **Section 81** of IPC explains this exemption from criminal liability which states that nothing is an offence which is likely to cause harm if done for the purpose of prevention of other harm to any person or property. However, this rule of necessity is sometimes misused by the persons in power who try to escape from their offence by giving it a name of necessity. It is therefore important to propound the literal meaning of necessity so that such general exceptions and internationally used principles are not misused. The basis of this principle lies within the purpose of preservation of life. Life- threatening force can be used by the police only if their life is actually in danger and cannot be saved if lesser force is used. It is very clear that police officials who have the best of training before coming to power, about what force is necessary in which circumstances. Therefore, wrongfully moulding the case to make it look like a matter of necessity to kill the accused is nothing but taking the law in hands and is the abuse of the process of the court, hence, must be punished more severely than the actual offence demands.

## 5. ROLE OF JUDICIARY

### 5.1 Lack of confidence on judiciary and delayed trials

In India, reformatory theory of punishment is followed where the criminal justice system is based on the basic principle of "**Abhor the crime, not the criminal**". The purpose of this theory is to eliminate the criminalism prevailing in the society and increasing at a rapid growth rate. The forms of punishment explained in the Indian Penal Code are the means of coercing the anti- social factors of the society.

The situation in the country however, is getting miserable where the judicial system is getting lenient with more of political influence prevailing across the society. Several cases like *Priyadarshini Mattoo*<sup>12</sup> is one example where Santosh Kumar death sentence was awarded by the Delhi High Court, thereafter Supreme court had converted the Death Sentence into Life imprisonment. Hardly 4 years were spent by the convict in prison and was granted parole and after which he again he was granted parole on short terms in jail. Another case of *Manu Sharma*<sup>13</sup>, where victim Jessica Lal was killed by the son of an influential person, politician due to which the whole judicial process came to the jeopardy and the convict was going through a 'privileged trial'. Moreover, there are a number of cases where the accused makes use of the remedies available to him in such a way that the whole judicial process becomes a hardship for the victim and the convict thereafter is left free from the whole setoff offence that he committed. The sole purpose of the remedies given to the convict is protection of the rights and also for correction of any mistake or error that might have been committed by the lower courts. However,

<sup>12</sup> Santosh Kumar Singh v. State, (2010) 9 SCC 747

<sup>13</sup> Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1

now the current situation of the judicial process has been so lenient and slow that the criminal is more relaxed after doing the offence as compared to the victim who has suffered the most out of it. Earlier, first appeal was a right and second appeal was allowed in rare cases, however, now even the second has been made an easy remedy available to the convict. Also, there have been remedies like that of revision, appeal to Supreme Court, Curative petition, mercy petition etc., available to the convict which drags the whole prosecution into the delayed trials and which results in nothing but reduces the confidence of the public from judiciary. Article 72 of the Constitution of India empowers the President of India with wide powers of pardon, remission, commutation of punishment where the emphasis is placed on the interests of the convict more than giving justice to the victim and their families. Similarly, in the Nirbhaya case, the judicial system had floundered to such a level that hanging the criminals and giving justice to the victim became such a delayed matter that people exhaustingly started depreciating their trust on the courts and judiciary. Such prolonged trials generally are unaffordable for most of the Indian population and to avoid such, people now mostly try to ignore filing most of the cases and on the other hand the criminals feel ignorant towards to punitive aspect of their crime. This is one important factor that results in lack of confidence on judiciary and make people believe that more access to remedies and delay leads to more injustice to the victim.

Now the question arises that whether balancing the rights of the accused and the victim would reach to an injustice to the victim? Whether accused must be given so many judicial remedies as are available within the judicial system? Does this mean that reformatory theory is a factor of failure in the Indian Criminal Justice System? The answer will be found with the use of deterrent and retributive theories of punishment. This implies that the perpetrator deserves the punishment as severe to the crime committed by him and must not be let free at any cost. The purpose of this theory is two-fold, i.e., firstly, to prevent offender to further commit the offence, secondly, to create fear in the minds of other persons who might commit the offences.

The sole object of this study is to bring an emphasis on the psychology of people in general that these factors provoke the whole society to have more faith in out-of-court justice or extra-judicial modes of giving justice to the victim. Therefore, when police officials commit such false encounters, then most of the society is in support of it because of the belief in principle of “*Justice delayed is Justice denied*”.

This is how the judiciary plays now an important part in people having disbelief in the justice system and also to come out in support of such gross injustice done by the policemen in charge.

## 5.2 Media trials more influential

The encounters are likely to take place due to various social, political influences where the policemen consider themselves to be more responsible to provide justice to the victims more than the courts of law. It may be due to the political pressure where efforts are made to suppress material facts of the case and also to tamper with the evidences and to do away with the witnesses being suspects or approver of the case sometimes. Another reason for such acts may be the media trials that diversify the situation more than it actually is, due to which the



policemen consider themselves to be serving justice more expediently than anyone waiting for the prolonged judicial trials. Most recent example is the 2012 Delhi gang-rape case also famous as Nirbhaya case, where it took more than 7 years to punish the 4 persons involved in the offence. What most debates in the news and otherwise took place were about the comparisons between the execution of delayed death warrants in Nirbhaya case and the immediate encounter killing in the Hyderabad Veterinarian case. Most of the people in the country supported and shouted slogans in favour of the police official who shot dead the accused in the Hyderabad case, only because of the reason that media created so much of hatred and disgust on the delayed trials in the courts of law which lead to lack of confidence in judiciary, and placed more reliance on the immediate retaliation.

Media trials are the most dangerous and unfair means for the justice delivery system and it influences the minds of people and they on the other hand become so opinionated that the actual cause gets overshadowed with the moulded opinion. When media trials play such a major factor then the purpose of the verdict gets eroded. Judges delivering judgment also gets influenced to some extent to pass the verdict as per the opinions already overflowing via the media trials. This is the main reason why the justice system sounds biased and unfairness becomes the key to the judgment. The present situation prevailing in the country revolves around the system of law where more faith lies within the public opinion as to how it is presented through the media rather than actually understanding what would have actually resulted into the occurrence of the crime. Such opinionated views shown through the mechanism of journalism plays a vital role when it comes to circulating the happenings within and beyond the country, however, the over expressed emotional and biased news has always proved to be dangerous and unjustified on the grounds of personal opinions of the journalist being shown as the universal truth about the facts in hand, which as a result becomes the opinions of public at large.

Media is considered to be the fourth pillar of democracy. It is responsible to build opinions and forms the whole outlook of the matters prevailing both nationally and internationally. The television and newspaper coverage leaves an impact of a person's reputation by forming a widespread approach or perception of the criminality regardless and much prior to the verdict of court. This is how minds of people including the policemen have become in favour of what has been said by decades old saying, **“eye for an eye and a tooth for a tooth justice”**. However, retribution is not a policy of the civilized society and preference must be given to the judicial process, rather than extra-judicial settlements. People become protagonists of the public lynching of the rapists and are not in favour of iron bars as justice is what they have perceived to mean as immediate retaliatory methods such as these encounters. This is a probable reason why the policemen having the authority to arrest believe that they have the right to do anything possible with the suspects and can even cause death on the spot to what they call as “serving justice”, or due to any psychological pressures created on their minds by the media.

## 6. CONCLUSION

No doubt police in India has to perform a difficult and delicate task, particularly, when many hard-core criminals, like, extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society but then such criminals must be dealt with by the police in an efficient and effective manner so as to bring them to justice by following the rule of law. It would be useful and effective to structure appropriate guidelines to restore faith of the people in police force. In a society governed by the rule of law, it is imperative that extra-judicial killings are properly and independently investigated so that justice may be done. In the case of *PUCL V. Union of India*, guidelines have been framed for looking into such matters of encounter killings and how to investigate such cases. It is important therefore, to be cautious in regards to the violations of the authority given to the policemen and stricter action needs to be taken for such infringement of fundamental rights of the people.

The question arises as to whether the encounter killings done by the policemen is actually giving *justice* to the victim or is the *murder* of the accused? It is very ironical to express any view of such encounter killings as justification of such an act is difficult not only because of the lack in procedure but also because there prevails an undoubted faith on the police. Though police officers are given wider powers to investigate the matter as they have an independent authority to prepare the case file and submit the police diary to the Magistrate/ Court, still there is a need to have some control over the functioning of the investigation process and further if any violations and misuse of powers are being taken place then punishments need to be given against such persons, to prevent further injustice.

Although we have seen in a number of cases that public liability arises when violation is done by the police officers while carrying out any investigation or arrest, and compensation is given by the state on behalf of such policemen, there is a need in my opinion to impose certain personal liability on the police persons, in terms of compensation or a temporary suspension if any intentional violation is done. It is necessary to eliminate fake encounters from the country as it results in a permanent damage to serving justice and impacts the independence of judiciary to a greater extent. People must revive back the faith in judiciary as it is important for the democratic country that serves the interests of people. Police officers must be trained in such a way that a scientific and logical investigation is carried on rather than holding an emotionally biased one. The defenses available to the police officials must be clearly and reasonably looked into to avoid any misuse of the defenses and powers. Also, very importantly, the police diary and whole of the process of investigation must be included within the domain of RTI so that some level of transparency is maintained and justice can be seen in terms of fairness rather than a targeted and planned procedure, as there is a need to give importance to the often quoted aphorism evolved by **Lord Hewart CJ** in the case of *R V. Sussex Justices ex parte Mc Carthy*<sup>14</sup>, that “*not only must justice be done, it must also be seen to be done.*”

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<sup>14</sup> [1924] 1 KB 256