Chapter 6

SAFETY MECHANISM AGAINST POLICE ARREST

Introductory

THE POLICE has the power to arrest both in cognizable and non-cognizable offences. The range of police power being quite expansive in nature is likely to collide with the personal libery of an individual. A *bona fide* exercise of power, in case of a mistaken judgment of the situation, may not raise any hullabaloo but unscrupulous exercise of the authority, even for a zealous fulfilment of duty, is not warranted, and, therefore, the same ought to be considered as violation of duty within the meaning of the Police Act. The Police Act envisages that a police officer, in discharge of his duty, would not commit a wilful breach or neglect of any rule, regulation or lawful order; nor would he offer any unwarranted personal violence to a person who has been in his custody.[1] All such breaches are to be visited with punitive consequences.[2] The various devices provided under the law can well be used as safety measures against the excesses of police authority in the administration of criminal justice.

The exercise of police power and authority has to be executed in an utmost legal manner. Accordingly, it is imperative that proper checks and balances are put into action. An illegal arrest by a police officer is an unwarranted attack on the liberty of a person which seeks sustenance from legal and constitutional provisions. Such act is primarily a contravention of duty of a police officer, who is required "to obey and execute all orders and warrants lawfully issued to him by any competent authority"[3] and can, therefore, be subjected to disciplinary treatment under the Police Act for breach of the same.

Departmental Disciplining of Police Officer

The need to regulate and control police power with a view to disciplining the policemen at the hands of police administration has itself been provided under the Police Act. The disciplining modes prescribed under the Act are in the nature of departmental action and judicial trial.[4]

Section 7 of the Act envisages that as and when a police officer of subordinate rank is found remiss or negligent in discharge of his duties he can be subjected to suitable departmental action, notwithstanding the

---

1. S. 9 of the Police Act, 1861.
2. *Ibid.*
3. *Id.*, s. 23.
4. *Id.*, ss. 7 & 36. The penalties are prescribed in ss. 7 and 29 of the Act.

fact that a *prima facie* case against the person concerned can be established in a court of law or not.[5] The superintendent of police is empowered to dismiss, suspend, reduce in rank, or impose a fine or any other prescribed disability on a policeman subordinate to him and on his finding that the person is unfit or is a delinquent to discharge duties as police officer, a major punishment can be inflicted upon him. This power is not fettered by any such rule that if any major punishment is to be awarded for a serious charge, the matter has to be decided only by a competent court.[6] Apparently an anomaly has been created by section 35 of the Police Act that a judicial inquiry be held in the matter of taking disciplinary action even when the administrative power to take such action under section 7 of the Police Act is exercised. The courts have resolved the difficulty by holding that the scope of the two provisions are different. The anomaly has remained on account of legislative inattention not to modify section 35 while deleting section 6 of the Police Act. Section 6 related to the magisterial power of the police officer and section 35 was to be read in that context.[7]

These powers are merely dependent upon the observance of rules and regulations framed under the Act at the departmental inquiry. Though section 35 of the Police Act states: "Any charge against a police officer above the rank of a constable... shall be enquired into and determined only by an officer exercising the powers of a magistrate", the courts have held that the scope and application of these two sections *viz.*, sections 7 and 35 are different and the later provision does not encroach upon the administrative powers of the superintendent of police to discipline a police officer or take suitable action against him.[8] The Police Act or regulations do not put restrictions for taking disciplinary action against a police officer for the abuse of authority or power in course of the discharge of his functions or for his being remiss or negligent in duty.

Besides, the departmental action, the Police Act provides for prosecution of a policeman for any offence made punishable by the Act or under any other law. Section 36 of the Act contemplates a proceeding against a police officer who has contravened the law in discharge of his functions and has abused his authority in such manner as makes it distinctly a penal offence. This course of action does not foreclose the opinion of initiating departmental inquiry under section 7 of the Police Act except that the complained act need not simultaneously be initiated before two tribunals. However, if a *prima facie* case against the officer

---

5. *Rajeshwar Prasad* v. *D.I.G.*, 1969 All. Cr. R. 135.
6. *Jatindra Mohan Goswami* v. *Supdt. of Police*, A.I.R. 1962 Assam 34.
7. *Ibid.*
8. *Mahendra Singh* v. *State of U.P.*, A.I.R. 1935 All. 400; *Shiva Nandan Sinha* v. *State of West Bengal*, A.I.R. 1954 Cal. 60; *Sisir Kumar* v. *State of West Bengal*, A.I.R. 1955 Cal. 183; *Jatindra Lal* v. *Narendra Chandra Dev Burman*, A.I.R. 1957 Tripura 19; *Tarapada Banerjee* v. *State of West Bengal*, A.I.R. 1951 Cal. 179.

had not been found, it would not bar prosecution under section 36 of the Police Act.[9] Likewise, a departmental action can be taken even if no case against the person concerned is established in a court of law.[10] The bar against double punishment[11] operates in such cases. This protection is afforded against proceedings in connection with prosecution and punishment of a person in criminal proceedings before a judicial tribunal or a court of law. A departmental or an administrative inquiry, even though conducted by the judiciary on the basis of legal evidence, does not constitute a bar for the prosecution in a judicial trial.[12] The above mode of disciplining a police officer is rather stringent. The consequence, may result in dismissal, suspension, reduction in rank or in any other departmental sanction,[13] conviction and punishment of the police officer under the penal law. However, in practice the prosecutions are rarely found.

The Practice

Apparently one may find that legal provisions are enough to discipline police officers in matters where they abuse the authority and power to effect an illegal arrest. But, in practice, it is not the case. The police administration has always been averse to the thought that an arrest made by a member of its force can be termed illegal; Hence it rarely thinks of departmental action against a person who in discharge of his duties as police officer, does not feel fettered by technicalities of the law of arrest. Until and unless there is an indelible and expressly *mala fide* action on his part, police administration generally wants that a zealous police officer should go ahead to put curbs on the freedom of citizens; because it facilitates the police in fulfilling its obligations and duties towards the upkeep of law and order. A stern action in this regard which has a fearsome impact in the minds of citizenry is thus considered to give sustenance to police efforts in accomplishing its assigned duties.

It is yet to come to the notice that superior police officers have initiated departmental actions against policemen for their having violated a law or rule respecting the rights of an individual. It is too sophisticated an idea for an agency, which has largely been dealing with coarse situations involving crimes and the criminals. The lower ranks of the police, generally recruited from among the lowly educated rough and tough men, cannot be expected to know and respect such newer legal values which apparently run counter to their main task of apprehending the

---

9. *Rajeshwar Prasad* v. *D.I.G., supra* note 5.

10. *Ibid.*

11. See proviso to s. 36 of the Police Act. See also art. 20(2) of the Constitution of India and s. 403 of the Code of Criminal Procedure, 1973, proviso.

12. *S.K. Venkatraman* v. *Union of India*, A.I.R. 1954 S.C. 375.

13. These actions are to be taken subject to art. 311 of the Constitution of India, 1950 which provides protection and security to members of the civil services.

offenders. Superior officers of the police administration would not like to pursue a policy of implementing a law to the advantage of an individual's right and his personal freedom if it proves a handicap in turning a subordinate police official into something like a robot who would start functioning as an enlightened law enforcement official. With this background of police personnel and police policies, a departmental action against an erring officer simply in the matter of disregard for personal freedom of a commoner would be deemed an illogical and ridiculous administrative behaviour by the entire corps of police profession.

The use of departmental action for impairing individual freedom is not regarded as a violation of duty. It is now over a century that such issues were cogitated and finally settled. As early as 1873 in *Queen* v. *Bolaki Lall*[14] a sub-inspector was prosecuted for violating his duty by ordering a search of a man's house for stolen property without having a reasonable and probable ground to do so. It was held that there was no rashness or negligence on the part of the police officer, hence it did not amount to violation of duty because *mala fide* was not imputed to his actions except that the act lacked a reasonable and probable ground. An order which seeks to intrude upon the privacy of a citizen and rummage his belongings without probable cause is an imprudent omission of duty. An exercise of such authority without caution is a rash and negligent act which can well be braced within the charge of violation of duty. However, the court viewed the issue with empathy and said that the legislature did not intend to treat it as wilful negligence. Thus, the mistake committed by a police officer in discharge of his duty cannot be treated as a penal violation.

Section 29 of the Police Act considers the breach or neglect of rule, regulation or order as violation of duty. A violation of duty can be committed in one of the following two ways. It can be in the nature of wilful non-performance of duty which under certain circumstances may include an illegal omission to act which he wilfully failed to do. The other situation arises where positive duty has been imposed by the law but which has been done in a manner not authorised by the law. The duty to apprehend a person falls in the latter category and an arrest of a person can be effected as part of police duty but the execution of this duty, in turn, becomes an exercise of power against a citizen. As law vests this power in the police officer, it cannot be a mere exercise for an accomplishment of the duty, but it has to be exercised in accordance with other requirements prescribed by the law for this purpose. Thus, an arrest which implies a restraint on the liberty of an individual has to be founded on a reasonable belief that an offence has been committed and that the person apprehended has done it. It requires necessary procedural

14. 19 Suther. W.R. 7 (1873) (Criminal), see also *Queen* v. *Radhoo Singh*, 17 Suther W.R. 34 (1871) (Criminal).

compliance of the law with an earnest keeness to observe the letter and spirit of the law. These requirements are not constraints on the exercise of power to defeat the object of a duty enjoined by the law on a police officer, but are necessary cautions which tend to curb excessess of coercive powers which the society deploys under compelling circumstances, and which expectedly demands from its officer that degree of diligence in the performance of duty as may not be in conflict with the freedom of an individual member of the society on whom such a right has been conferred upon by the law and the Constitution.

However, the above correlation of duty and power has not yet percolated through departmental thoughts and actions. As noted above, police attitude has not been to view the illegal arrest as violation of a duty. There is hardly any opportunity of departmental action being taken on this count. The above facts may also explain the futility of section 36 of the Police Act, which envisages a further stringent step to prosecute a defaulting police officer.

Criminal Prosecution

The police is busily engaged in making arrests day in and day out. However, no follow up action is taken in each and every case where an arrest is made. Some are not even recorded and the person taken into custody finds himself released by the custodians themselves, without having been informed as to why he was brought there at all. In such cases, the prescribed legal ritual of presenting the arrested person before a magistrate on or before the expiry of twenty-four hours does not arise. In many cases, the arrest power is invoked, and then the process is put to an end either by not investigating into the matter further or by not prosecuting it in a court by filing a final report. In the remaining cases which are presented in the courts for trial, one may come across the fact that all prosecutions do not end in convictions. It thus shows that the need for excercise of arrest power is actuated by a fewer number of situations than the ones for which it is in fact invoked. In some situations, the exercise of the power to arrest may be in good faith, although it may be a mistaken judgment on the part of the policeman. However, the fact remains that on numerous occasions the police exercise this power with the utmost lack of prudence and care. It is in this context that one feels prone to view an arrest of a citizen as violation of duty by the police which coupled with wilfulness or culpable negligence, in all likelihood, could characterise the performance of duty as a criminal act. Section 42 of the Police Act empowers the state to prosecute its own functionary under these circumstances within a period of three months. This time limit imposed under the Act is, however, no bar for putting a police officer on trial for his having effected an illegal arrest[15] or for his actions

15. *Shankar Lal* v. *Emperor*, A.I.R. 1922 All. 246, 265.

brought for scrutiny under the Code of Criminal Procedure.[16]

Despite the above statutory course of action provided under the Police Act against an erring policeman, the administration as a matter of policy seldom resort to criminal prosecution. This mode of disciplining the policemen is not considered feasible for it may inject a sense of demoralisation among other members of the force. The police attitude does not preceive or has hitherto admitted the fact that there can be a situation of exceeding the authority and power by a policeman in the performance of his duty. A police officer's view, that power has been conferred upon him by the law, enjoining upon him a duty, implicitly recognised in practice, to upkeep the security of the society as understood by officials of the police department. If a policy to prosecute were pursued, it is felt, it may have the potentiality of reducing the organised coercive state power to an inert unit of inactive policemen.

On the other hand if criminal prosecution is launched against a police officer for his violation of duty by interfering with the right and freedom of an individual, it may have a wholesome effect in curbing abuse of authority. It will also have an effect of creating awareness in the ranks of the police force that if there be an extravagent use of power of the nature that transgresses limits of authority it will provoke a situation which might lead to prosecution against them. In course of time this orientation may lead to develop a built-in mechanism, which would enable a policeman to draw a line between his lawful exercise of authority and an unauthorised zeal for acting in the performance of his duty. Recklessness and negligence will give way to prudence and caution in exercise of the coercive power. It would also be a step forward in giving life and meaning to the statutorily conferred rights of an individual, which hitherto are merely counted as being the cherished ideals of freedom and dignity with a bare notional existence. It can also be expressive of a genuine desire on the part of the state to help and promote helpless individuals to enjoy meaningful freedom under the law. However, striving to achieve the above goal is still considered a utopian idea. Thus, sandwiched between two diverse options indicated above, the police as well as other institutions of the state favour a tilt towards the police convenience in the matter. It is also considered to be in conformity with the immediate need of keeping stability in the social order, even though such an attitude may sometime lead to characterising our society as some kind of a semi-police state.

Consequently, a criminal prosecution by police officials against one of their own colleagues for committing defaults in effecting an illegal arrest is generally inconceivable, notwithstanding a statutory provision in this regard having been existing for over a century.

---

16. *Mohamed Sharif* v. *Nasir Ali*, A.I.R. 1930 All. 742, 744-5.

The prosecution of officials for their wrongful acts is also open to an individual. Private individuals can move the machinery of criminal justice by filing a complaint for an offence which a police officer might have committed. Section 220 of the Indian Penal Code also provides for punishing police officers if they confine persons on some accusation or commit them for trial. Section 220 reads :

> Whoever being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment...or with fine or with both.

The foregoing check on the exercise of arbitrary power and illegal authority has met with the difficulty of proving the ingredient of "corruptly or maliciously". As stated earlier, the exercise of authority by a police officer has been taken to be lawful unless the action has been too callous or too revolting in the sense that the extreme guilt is superadded to an obviously illegal act.

The filing of complaint against a public servant has to be preceded by securing the sanction for prosecution under section 197 of the Code of Criminal Procedure, 1973. Indeed, such step is aimed at affording reasonable protection to public servants acting or purporting to act in discharge of their duties. But this protection cannot be used as a cloak for doing what transgresses the authority of law. It would be objectionable both in terms of propriety and the rule of law. The judicial attitude in this regard has succinctly been put in *Mulsanker Ojha* v. *Bhagoban Misra*[17] where it was observed that : "The circumstance that while so acting, the public servants acted in excess of their duty will not be a sufficient ground for deprivaion of such protection, so long as there is a reasonable connection between the impugned act and the performance of the official duties".[18] However, a "reasonable connection" is a matter, which is essentially and substantially, to be determined on the facts and circumstances of each case.

The invoking of a criminal process against police officers is fraught with practical difficulties. The bonds with which the policemen are tied together and a feeling on part of the police witness that he could be in the same predicament one day tends him to give a diluted version of evidence. The inclination of the magistracy also goes in favour of a governmental official rather than a commoner. However, with the advent of the Constitution, a note of caution in favour of the people *vis-a-vis*

17. 77 Cr. L.J. 442 (1971).
18. *Id.* at 445.

the police was sounded. As far back as 1950 the then East Punjab High Court[19] directed the attention of the magistrates "to deal carefully and expeditiously with all complaints made to them against anybody and more so against the police officials, because the stability of the State depends on the confidence which citizens have in the machinery for adjudication of rights.... Citizens should not be given even a chance to labour under the apprehension that against persons in power they can get no redress and the policemen can get away with their high-handedness without the state, acting through its magistracy, taking any notice of it and even where a complaint is made with regard to that matter".[20]

With the passage of time, the people witnessed an increase in the police power as well as the police brutalities so much so that the trend set in the beginning seems to be going rather stationarily in the reverse gear. There is a confirmed belief that today any high handedness by men of the police force can go scotfree and unpunished.

Civil Action

A law enforcement officer is vulnerable to civil liability, if in discharge of duties his actions turn out to be a tresspass on the person or the property of an alleged victim. A tresspass thus committed may either be an assault, battery, false arrest or false imprisonment. As most cases of detention or arrest without warrant, approximate to situations of wrongful confinement, the remedy is usually sought in the common law action of recovering damages for false imprisonment.

Tort remedies for police violations of individual rights too have not proved effective counteractions. It is a fact that a large number of arrests without warrant take place in the course of law enforcement and many of such arrests, if challenged, would be adjuged unlawful. Nonetheless the remedy with its surrounding technicalities has had little attraction for purposes of collecting substantial money judgments against erring police officers.

Apparently, the explanation for infrequent litigation, in contrast to the large number of arrests, may lie in the low economic status of the potential plaintiff. Added to this is the restriction that in the absence of pecuniary loss, the courts award nominal damages for mental anguish and humiliation, which are the usual elements of damages in such cases. Furthermore, the recovery of a sum sufficient to justify action depends on the moral aspects of the case as well. This aspect of reparation of injuries in a civil action has a restrictive effect on litigation, because the rule does not contribute much incentive to potential plaintiffs who so often are persons with past conviction records or are suspects of questionable character. The element of respectability, on which the fiction of reparation can

19. *Hari Singh* v. *Balmokand*, A.I.R. 1950 (East) Punjab 367.
20. *Id.* at 368.

operate, is lacking in such tort cases. The view is that a person with a past criminal record could not have been humiliated by an arrest.

Immunity of officers from civil liability is another factor which reduces efficacy of the tort remedy. Even where an arrest is not lawful the presumption of legality invariably is in favour of the police action presumably with a view to promoting a policy of not hampering law enforcement officers in their day to day work of law enforcement. The judicial approach has been that the government cannot be held liable either when in pursuance of a statutory duty an officer takes action or when the act committed by him happens to be in excess of his authority unless however in the latter case, the act is either done by the government's order or is subsequently ratified by it.[21]

In view of the legal and practical difficulties, it may be concluded that recourse to civil action has lost significance to a considerable degree to compensate for injuries arising out of illegal police actions. One possible way to resolve this is to enact specific legislation making the government liable for action of false arrest, false imprisonment, assault and battery, and in case of the government liability for wrongful arrest the wages of the defaulting officer be subjected to garnishment.

Need for Civil Rights Action

It has been noted above that police attitude has not been to view an illegal arrest as violation of the duty. Consequently, the mode of departmental action for redressal of such grievances by an affected victim does not create much hope and confidence. The indictment of policemen by way of criminal prosecutions has also not been effective, inasmuch as, sanction for the prosecution has to be obtained from the state agency. Apparently, the police officer exceeds his limits of authority in favour of the state while kicking off the rights and privileges of a citizen victim. This fact tends to fetter the discretion of the state while considering a request for the grant of sanction to prosecute a police officer. Hence, it poses a real difficulty for a complainant to make use of the jurisdiction by way of criminal prosecution.[22] Furthermore, difficulties are felt in the matter of producing witnesses in a court without harbouring a sense of fear of reprisals. The proof of *mens rea* or wilfulness always remains difficult to establish in view of the presumption of legality attributed to a police action.

The position is still more dismal as regards the use of civil action in assuaging hurt feelings of a victim of wrongful police action. The victims of tortious acts committed by government officials find themselves in a quagmire, because the judicial dicta indicate that all assorted activities of government servants can assumably be fitted well within the *cliche* of

21. *Maharani Gurcharan Kaur* v. *Province of Madras*, (1942) 2 M.L J. 14.
22. S. 197, Cr.P.C., 1973.

"sovereign function" of the state.[23] With such a backdrop, the poor plaintiff is hardly enthused to mobilise resources for initiating an action against police excesses. The civil litigation is a costly affair both in terms of money spent and the time involved. The decrees, if and when awarded, are for low sums which rob the civil action of its utility to operate as an effective mode of action against an illegal arrest.[24]

In the United States, judicial activitism has developed "exclusionary rule". The rule forbids use of evidence in a criminal trial if it had been obtained in course of an illegal arrest or search. This mode has basically been used to police the police with a view that the organised governmental force could be disciplined to respect the sanctity of rights and privileges of the citizen in contrast to their enthusiasm to curb crimes. The rule of exclusion, however, has not been developed to that extent in India. Its purpose to discipline the police for adopting only legal methods in law enforcement has not been given much importance. Illegality of an arrest or search does not affect jurisdiction of the court to try an accused.[25] It has been held that a conviction is not bad merely because the accused was arrested illegally; or that the search which made available the tangible and material evidence was not altogether legal. On the other hand, a court has to take cognizance if a report results from police investigation.[26] The jurisdiction is also not nullified even if the cognizance is based on an invalid report until and unless irregularities committed by the officer are of such nature as may result in the miscarriage of justice.[27] The rule of exclusion operates in the area of confessional statements because of the statutory rule.

As regards admissibility of evidence obtained as a result of illegal arrest of a person or search of his person or premises, the general rule seems to be that what would otherwise be relevant does not become irrelevant because it was discovered by disregarding some provisions of the Criminal Procedure Code.[28] In *Emperor* v. *Allahadad*[29] the court set aside an order of acquittal stating that whether the search was legal or not there was evidence in the case that the accused had kept the contraband in his house; and that this should make him liable for conviction. The illegality of arrest has no bearing either on the jurisdiction of the court to try an accused,[30] or on the confession made by him before a magistrate in

23. D.C. Pandey, Law of Torts, XIV *A.S.I.L.* 474 esp. at 474, f.n. 7 (1978).

24. For a discussion of the factors leading to stunted growth of tort law, see D.C. Pandey, Law of Tort, XV *A.S.I.L.* 194-198 (1979).

25. See *Pandhikhan Nand Okhan* v. *Emperor*, 49 Cr.L.J. 178 (1948); *Juma* v. *Emperor*, 5 Cr. L.J. 89 (1906); *Barindra Kumar Ghosh* v. *Emperor*, 11 Cr.L.J. 453 (1909); In *re Solia Naick*, 11 Cr.L.J. 576 (1909); *Emperor* v. *Allahadad Khan*, 14 Cr.L.J. 236 (1913).

26. See s. 190, Cr.P.C. 1973.

27; See *id.* ch. XXXV.

28. See *Barindra Kumar Ghose's*, *Solia Naick's* and *Allahadad's* cases, *supra* note 25.

29. *Supra* note 25.

30. *Manbodh* v. *State*, A.I.R. 1955 Nag. 97.

compliance with the statutory provisions.[31] Thus, the evidence of guilt is not excluded merely because the police officer has committed illegality in securing evidence. This judicial policy has, therefore, not been of help to check misuse of authority and power by a zealous police officer, who is attuned by tradition and practice to disregard rights of an individual even though awareness of the same has now been crystallised into a constitutional mandate.

In view of such shortcomings in the existing civil, criminal and departmental actions to check an arbitrary exercise of authority by the police, and also because of growing need for public awareness of personal freedoms, it has become incumbent that necessary ways and means be devised to strike a balance between interests of the society and of individual rights. The need is then felt for a group action on behalf of citizens to counter the problems of exceeding authority by state officials, who continue to be powerfully organised as compared to individuals. The remedial action need not remain any more with the victim, but the right should devolve on organised groups championing the cause of civil liberty. This should be recognised by the law to bring necessary civil actions. The recognition of such right for compensatory money actions will go a long way to put a check on reckless behaviour of the authority. Likewise, criminal prosecutions be made easier for wrongful police actions resorted to under the colour of law, and also where a citizen has been wilfully deprived of rights protected by the laws and the Constitution.

---

31. *Prabhu* v. *King Emperor*, 46 Cr.L.J. 119 (1945).