

Uttarakhand High Court

Bharti vs State Of Uttarakhand And Others on 22 July, 2021

HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (Criminal) No.924 of 2021

BhartiPetitioner

Versus

State of Uttarakhand and othersRespondents

Present: -

Mr. Sanjay Kumar, Advocate for the petitioner.

Mr. S.N. Babulkar, Advocate General with Ms. Manisha Rana Singh and Mr. Lalit Miglani, A.G.As. for the State/respondent nos.1, 2 and 3.

Mr. Sandeep Tandon, Standing Counsel for the CBI/respondent no.4.

JUDGMENT

Hon'ble Ravindra Maithani, J. (Oral) Petitioner seeks transfer of investigation in the case arising out from FIR No. 261 of 2021, under Section 302 IPC, Police Station Haldwani, District Nainital from Police to Central Bureau of Investigation (for short, "CBI").

2. Facts necessary to appreciate the controversy, briefly stated, are as hereunder:-

The petitioner, on 03.03.2021, lodged a report under Sections 323, 504, 345 IPC and Section 9 read with 10 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act") against her husband Pravesh Kumar, which was lodged on 03.03.2021 at 11:55 PM at reporting Police Chowki Kundeshwari, Thana Kashipur. Pursuant to this FIR, on 04.03.2021, Pravesh Kumar was arrested and lodged at Police Station. An entry was made to this effect in GD Report No. 30, at reporting Police Chowki Kundeshwari, Thana Kashipur. The report reveals that Pravesh Kumar was hale and hearty and he had no injuries. Pravesh Kumar was remanded to judicial custody on 05.03.2021 by the court of Additional District Judge/FTC/Special Judge, POCSO, Udham Singh Nagar. The remand sheet does not note any injury on his person. On 05.03.2021 at 04:29 PM, Pravesh Kumar was lodged at Sub-Jail Haldwani. Entry was made in Jail register at SL. No. 24. When he entered into Sub-Jail, Haldwani, he was also examined for COVID-19 and the report was "Negative". On the same day, in the hospital of Sub-Jail, Haldwani, Pravesh Kumar was examined, but no injury was noted in his person. It was noted that he was "chronic alcoholic". On 06.03.2021, in the hospital of Sub-Jail, Haldwani, in its OPD register at SL No. 164 an entry was made that Pravesh Kumar suddenly fell down on the ground and he was referred to Base Hospital, Haldwani. In the Base Hospital, Haldwani, Pravesh Kumar was taken, where in OPD Register at SL No. 29, it was

recorded that he was brought dead. His post mortem was conducted. There were ten injuries on his person, which are as hereunder:-

"1 Bluish red contusion present over the back of left (LT) lower limb extending from the back of mid thigh to upper 1/3 RD of left leg measuring 40 cm X 30 cm; lower end 30 cm above the heels and upper end 20 cm from the gluteal cleft.

2. Reddish blue pattern contusion horizontally placed present over the left upper 1/3 RD of left leg, 6 cm below the popliteal fossa and 25 cm from the heels, measuring 12 cm X 9 cm and showing one of the parallel contusion measuring 0.4 cm in width of each of the linear haemorrhages measuring with a gap of 1.8 cm.

3. On dissection of injury no. 1, 2 200 ml of thick clotted blood is coming out and all muscles of back of thigh and upper end of muscles of leg are diffusely contused with blood clots throughout.

4. Bluish red contusion present over the back of right thigh extending from mid-thigh to lower thigh measuring 11cm x 15 cm. On dissection of underlying muscle are diffusely contused.

5. A reddish abrasion present over left gluteal area measuring 4cm x 1cm.

6. A bluish contusion is present over the mid 1/3 RD of back of trunk, present over midline 21 cm above the gluteal cleft, measuring 5cm x 1 cm. On dissection underlying muscle is contused.

7. A bluish contusion present over the front of right of lower abdomen, measuring 2.5 cm x 2 cm, 10 cm from midline and 87 cm from heel. On dissection subcutaneous tissue is contused.

8. A bluish contusion is present over the sole of right feet measuring 1.5 cm x 2 cm, 2 cm below the greater toe.

9. A bluish contusion is present over the sole of right feet measuring 1.2 cm x 1 cm, 3 cm below the middle toe. On dissection of injury no. 8, 9 blood is extravasated over the underlying muscle.

10. A reddish brown scab abrasion present over the front of upper one third of left leg measuring 3.8 cm x 2.3 m."

3. The petitioner was informed about the death of her husband. She noticed injuries on the person of her husband. The injuries were not explained to her. According to the petitioner, on 13.03.2021, a Rahul Shrivastav telephoned her and informed that on 06.03.2021 at about 02:00 PM Pravesh Kumar (hereinafter referred to as, "the

deceased") was quite upset in the Sub-Jail, Haldwani and was making a lot of noise. Therefore, he was beaten up by danda, patta, kicks and fists by Devendra Prasad Yadav, Head Constable, Kriti Nainwal, Devendra Rawat and Harish, all Guards of Sub-Jail, Haldwani. Due to this beating, the deceased fell down. Rahul Shrivastav had told that he was present in Sub-Jail, Haldwani on that date. Thereafter, the petitioner approached Police Station Haldwani to lodge the report, but it was not lodged. She approached Senior Superintendent of Police (for short, SSP), Nainital and other high ranking official, but FIR was not lodged.

4. Petitioner thereafter, moved an application to the Secretary, District Legal Services Authority (for short, "DLSA"), Nainital giving details as to how her husband died in judicial custody, who killed him and how the petitioner came to know about it. The Secretary, DLSA forwarded the application of the petitioner to SSP on 22.03.2021 for taking necessary action at the earliest. Instead of lodging an FIR, the SSP, Nainital got an inquiry conducted by Circle Officer Police, Haldwani and thereafter, informed the Secretary, DLSA that since Magisterial inquiry is underway, any further action may be taken only after the perusal of the Magisterial inquiry. This communication was made on 05.04.2021.

5. The petitioner again approached the Magistrate of competent jurisdiction under Section 156 (3) of the Code of Criminal Procedure, 1973 (for short, "the Code") and an order was passed. It is thereafter, FIR No. 261 of 2021, under Section 302 IPC at Police Station Haldwani has been lodged against four named Guards of Sub-Jail, Haldwani. The petitioner seeks transfer of the investigation to CBI. In para no. 11 of the writ petition, the petitioner discloses as to why she is not happy with the police investigation. It is as hereunder:-

"11. That even otherwise also such types of incidents are increasing, the police department several times violates upon the right of the prisoners. The husband of the petitioner was beaten brutally by the prison guard. There is no one to look after the prisoner except the prison guard but in the instant case, protectors became the eaters. The petitioner knocked the every possible door to expose the secret behind the bar but with no result because the police department wanted to bury the case. And resultantly the petitioner constrained to knock the door of the court and on the direction of the court the FIR against the accused person could have been lodged but if the investigation of the aforesaid case would not be handed over to an independent investigation agency, the very purpose of fair and unprejudicated justice would be frustrated and this will amount to curtail the rights of the petitioner and will strengthen the hand of the culprits."

(emphasis supplied)

6. The Court sought certain documents from the learned State counsel which have been filed. The Court further sought response from the SSP, Nainital, which have also been received. It will be referred to at an appropriate place in this order now.

7. Heard learned counsel for the parties through video conferencing and perused the record.

8. Learned counsel for the petitioner would submit that FIR in the instant case was not lodged despite repeated requests made by the petitioner. She approached the SSP, Nainital twice but FIR was not lodged. Even the Secretary, DLSA approached SSP, Nainital, but FIR was not lodged. There is only one eye witness, who may be won over by the Police. The deceased died in the judicial custody. The kind of injuries which the deceased sustained reveals the extent of brutality in custody and injuries could not have been caused by falling on the ground or hitting on any surface. It is argued that the petitioner is apprehensive that police may not investigate the matter fairly. Hence, the investigation may be transferred to CBI.

9. In this matter on 08.07.2021, the Court had sought the following documents from the learned State counsel:-

"(i) General Diary entry of Chowki Kundeshwari and Police Station Kashipur of 03.03.2021, when the deceased was first lodged in the police chowki/police station or if on any other date, the deceased was entered in the police station, the relevant copy of General Diary.

(ii) The copy of remand-sheet by which the deceased was remanded to judicial custody on the complaint of the petitioner. It may be obtained from the concerned court (for this purpose a copy of the order be sent to the court of A.C.J.M., Kashipur, which court, according to learned counsel for the petitioner, remanded the deceased .

(iii) The entry in the Sub-Jail Haldwani where on 05.03.2021 the deceased was taken ,particularly with regard to medical check-up, the copy of the medical examination which is done at the time of entry in the jail should also be filed.

(iv) Copy of the order dated 22.03.2021 of the District Legal Services Authority, passed on the application of the petitioner directing S.S.P., Nainital to lodge the FIR and also the documents to reveal as to what action has been taken by the police on that application or order.

(v) When did the Magistrate enquiry begin in this matter? When was the order passed? Copy of the order be attached."

10 Subsequent to it, on 15.07.2021, the Court sought response from the SSP, Nainital on the following points:-

"1. Under what provision of law the Magisterial inquiry was being conducted?

2. Which provision of law bars lodging of FIR in the case of allegations of custodial death during pendency of Magisterial inquiry?

3. Under what provision of law, the SSP, Nainital got inquiry conducted from CO, Haldwani?

4. Did CO, Haldwani record the statement of the Doctor who observed injuries on the person of the deceased?

5. Did CO, Haldwani recorded the statement of the Doctor with regard to the nature of injuries etc.?

6. How it was considered appropriate and lawful by the SSP, Nainital to get an inquiry conducted through CO, Police when Magisterial inquiry was already underway and when the SSP, Nainital declined to lodge the FIR on the ground that the Magisterial inquiry is underway?

7. What is the response of the Police Constables Stationed at Kotwali Haldwani on 15.03.2021, from whom, the CO Haldwani sought explanation with regard to receipt of the report from the petitioner?

11. The Court also sought information from the learned State counsel with regard to compliance of the directions as contained in para 38.5, in the case of D.K. Basu vs. State of West Bengal and others, (2015) 8 SCC 744, which is as hereunder:-

"38.5. The State Governments shall take steps to install CCTV cameras in all the prisons in their respective States, within a period of one year from today but not later than two years."

12. Learned Advocate General would submit that the SSP, Nainital ordered for inquiry by Circle Officer, Police only for her own satisfaction as the post mortem report of the deceased did not reveal the cause of death. The SSP, Nainital has also requested for judicial inquiries, which had already begun on 09.03.2021. The FIR has already been lodged pursuant to the direction given under Section 156 (3) of the Code. Investigation is underway, which is in accordance with the procedure established by law. There has not been negligence on the part of SSP, Nainital. It is argued that CBI inquiry cannot be ordered in a writ petition in a routine and mechanical manner. There should be exceptional circumstances to order for such investigation. Learned Advocate General referred to the judgment passed in the cases of Sakiri Vasu Vs. State of Uttar Pradesh and others, (2008) 2 SCC 409 and State of West Bengal and others Vs. Committee For Production of Democratic Rights, West Bengal and others, (2010) 3 SCC 571. References has been made to the paragraphs 10 and 11 in the judgment of Sakiri Basu (supra), which are as hereunder:-

"10. It has been held by this Court in CBI and Anr. v. Rajesh Gandhi and Anr. 1997 Cri LJ 63 that no one can insist that an offence be investigated by a particular agency. We fully agree with the view in the aforesaid decision. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.

11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 Cr.P.C., then he can approach the Superintendent of Police under Section 154(3) Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) Cr.P.C. before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation."

13. In the case of State of West Bengal (supra), reference has been made to para no. 70, which is reproduced as hereunder:

"70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

14. Learned Advocate General very fairly concedes that there is no provision of law which authorizes SSP to get an enquiry conducted by C.O. Haldwani. This has been so informed on a query raised by the Court because in the response affidavit filed by the SSP, Nainital, there is no response to the query no.3, as required by the Court on 15.07.2021. In response to the point no.2, as to which provision of law bars lodging of the FIR, in the case of allegation of custodial death during the pendency of Magisterial inquiry, SSP, Nainital has reported in para no. 11 of the response affidavit that there is no bar in lodging of FIR in the cases of allegation of custodial death during the pendency of Magisterial inquiry.

15. Learned Advocate General would argue that investigation in accordance with law is underway, therefore, the Court should be slow in interfering at this stage and after the outcome of the investigation, if occasion arises, the matter may be considered. It is also argued that the petitioner cannot choose between the agencies as to who should investigate the matter. The investigation is underway on FIR which has been lodged under the direction of the court of competent jurisdiction.

16. Learned State counsel would also submit that a CCTV camera is installed at Sub-Jail, Haldwani, but when the Court requested as to whether the incident, has been captured in the CCTV, he would submit that there is no report to that effect.

17. Before the Court proceeds further, it would be apt to refer to the response affidavit submitted by SSP Nainital. As stated in para no. 11 of it, it is admitted that there is no bar in lodging of FIR, even if, Magisterial enquiry is underway. Fact remains that in the instant case FIR was not lodged by the SSP Nainital. In Para no. 12 (h) of the response affidavit, the SSP Nainital states as hereunder:

"General administration of jail is at the hands of Superintendent Sub-Jail Haldwani the police has no role in the internal administration of affairs of jail and since the facts mentioned in the application were hazy about exact details of the commission of offence and necessary particulars of it and it was a complaint against Jail authorities the deponent, who had promptly instructed and deputed responsible officer i.e. Circle Officer, Haldwani to inquire and report the matter and who has also come to know about ongoing magisterial inquiry into the matter fell into an impression that it was proper to await report of the Magisterial inquiry. It is respectfully submitted that post mortem report was not conclusive regarding cause of death and viscera was preserved and the responsible prison authority were indicted in the application and since the incident has allegedly taken place inside a jail premises the deponent thought it proper to ascertain facts by conducting a preliminary inquiry into the matter and awaiting result of the ongoing magisterial inquiry for ascertaining facts."

At the cost of repetition, it may be noted that Ms Preeti Priyadarshini, the SSP Nainital has admitted that any enquiry is no bar to lodge an FIR in such cases. It may be noted that the allegations as levelled in the instant case cannot be internal affairs of the Jail. Police under law, could very well immediately act in such matter.

18. FIR in the instant case was lodged after directions under Section 156 (3) of the Code on 26.05.2021. More than 45 days after death of a person in judicial custody. How can a fair investigation be ensured? Fair investigation and fair trial are necessary ingredients of right to life. It is true that a party may not choose investigating agency at the drop of a hat. There are considerations, which decide whether investigation should be transferred or not. This Court will revert to it also in a little while. But, the ground realities in such cases of custodial violence and custodial death cannot be ignored. They have been discussed by the Hon'ble Supreme Court in various judgments. In the case of State of M.P. Vs. Shyamsunder Trivedi and others, (1995) 4 SCC, 262, the Hon'ble Supreme Court observed as hereunder:

"The High Court erroneously overlooked the ground realities that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that 'direct' evidence about the complicity of these respondents was not available. Generally speaking, it would be police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole matter."

(emphasis supplied)

19. In para no. 17 of the Shyamsunder Trivedi case (supra), the Hon'ble Supreme Court further observed as hereunder:

"Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The Courts, must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crime in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves to be above the law and sometimes even to become law unto themselves."

(emphasis supplied)

20. In the case of D.K. Basu (supra), the Hon'ble Supreme Court took note of the instances of custodial violence and custodial death and observed as hereunder:

"It is aggravated by the fact that it is committed by the persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society."

(emphasis supplied)

21. In the case of Mehboob Batcha and others Vs. State, (2011) 7 SCC, 45 the Hon'ble Supreme Court further referred to the directions given in the case of D.K. Basu

(supra) and observed as hereunder:

"we give a warning to all policemen in the country that this will not be tolerated. The graphic description of the barbaric conduct of the accused in this case shocks our conscience. Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people."

(emphasis supplied)

22. Needless to say, the incidences of custodian violence and deaths have come up again and again for adjudication before the higher Courts. To ensure that right to life is respected in prisons as well and with other related issues, in the case of Re-Inhuman Conditions in 1382 Prisons, (2017) 10 SCC, 658, the Hon'ble Supreme Court in para 2 observed as hereunder:

"Like most societies, we are not strangers to custodial violence and unnatural deaths but our vibrant democracy permits us to debate and discuss these issues with rational arguments. However, right sounding noises critical of custodial violence (in any form) cannot achieve any useful purpose unless persons in authority hear the voices of the victims or the silence of the dead and act on them by taking remedial steps. There must be a greater degree of sensitivity among those in authority with regard to persons in custody and it has been the endeavour of the constitutional courts in our country, over several decades, to consistently flag this issue."

The Hon'ble Supreme Court in this case also quoted various directions and circulars issued by National Human Rights Commission. In para no.58.4, the Hon'ble Supreme Court also roped in SLSA for conducting training and sensitization programmes for senior police officials of all prisons.

23. Prompt lodging of an FIR is a step which may ensure early collection of evidence and fair investigation. In the case of Sube Singh Vs. State of Haryana, (2006) 3 SCC 178, the Hon'ble Supreme Court further considered the matter relating to custodial violence and death and para no. 49 issues directions to tackle the instances of custodial violence. Para no. 49 (d) is as hereunder:-

" simple and foolproof procedure should be introduced for prompt registration of first information reports relating to all crimes."

24. Allegations in the instant case are against the Guards at Sub Jail, Haldwani of custodial death of the deceased. The allegations are of cognizable offences. In the case of Lalita Kumari and others Vs. Government of Uttar Pradesh and others, (2014) 2 SCC 1, the Hon'ble Supreme Court categorically held that registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary enquiry is permissible in such a situation. In the case of Lalita Kumari (supra) the Court authorized a preliminary enquiry in certain cases, but in para no. 120.5 of the judgment, Hon'ble Supreme Court categorically held that the

scope of preliminary enquiry is not to verify the veracity otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

25. FIR in the instant case has already been lodged under the order of the court of competent jurisdiction. Investigation is already underway. Undoubtedly, it is in accordance with the procedure established by law. There are provisions of conducting investigation. It is also true that a party may not choose the agency by which the investigation should be conducted. As held in the case of State of West Bengal (supra) by the Hon'ble Supreme Court that the extraordinary power to transfer investigation "must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights."

26. In the case of Dr. Naresh Kumar Mangla Vs. Smt. Anita Agarwal and others etc., 2020 SCC OnLine SC 1031, Hon'ble Supreme Court observed that the power which is vested in the superior court to transfer the investigation to another agency, such as the CBI, must be wielded with caution. Reference has been made to the case of Arnab Ranjan Goswami Vs. Union of India and others (2020) 14 SCC 12, in para no. 44 of which, the Hon'ble Court has held as hereunder:-

"44. In assessing the contention for the transfer of the investigation to the CBI, we have factored into the decision-making calculus the averments on the record and submissions urged on behalf of the Petitioner. We are unable to find any reason that warrants a transfer of the investigation to the CBI. In holding thus, we have applied the tests spelt out in the consistent line of precedent of this Court. They have not been fulfilled. An individual under investigation has a legitimate expectation of a fair process which accords with law. The displeasure of an Accused person about the manner in which the investigation proceeds or an unsubstantiated allegation (as in the present case) of a conflict of interest against the police conducting the investigation must not derail the legitimate course of law and warrant the invocation of the extraordinary power of this Court to transfer an investigation to the CBI. Courts assume the extraordinary jurisdiction to transfer an investigation in exceptional situations to ensure that the sanctity of the administration of criminal justice is preserved. While no inflexible guidelines are laid down, the notion that such a transfer is an "extraordinary power" to be used "sparingly" and "in exceptional circumstances" comports with the idea that routine transfers would belie not just public confidence in the normal course of law but also render meaningless the extraordinary situations that warrant the exercise of the power to transfer the investigation. Having balanced and considered the material on record as well as the averments of and submissions urged by the Petitioner, we find that no case of the nature which falls within the ambit of the tests enunciated in the precedents of this Court has been established for the transfer of the investigation."

(emphasis supplied)

27. The instant case is not an ordinary case. Allegations are of custodial death. It is against Guards of Sub-Jail, Haldwani. Deceased entered in Sub-Jail, Haldwani hale and hearty with no wounds on his body. But, when he was taken out from Sub-Jail, Haldwani on 06.03.2021 and taken to Base Hospital, Haldwani, he was declared brought dead. This Court at this stage refrains to make any observation with regard to injuries, its causes, how it could be caused and whether any medical aid was given in the jail hospital, if yes, what was it? Or about the inquiry report which was conducted by CO, Haldwani under the order of SSP, Nainital. Suffice it to say, that CO, who conducted the inquiry under the directions of SSP, Haldwani observed that the statement of Rahul Shrivastav does not find any corroboration after his inquiry and he noted statements of the witnesses who allegedly told him that that the deceased was running here and there and he struck at the gate and fell down. The Court further refrains to observe as to whether the CO had satisfied himself that the injuries could have been sustained by felling down on ground or being hit on some surface? What was the nature of injuries? It was not merely abrasion or contusion alone. It was all over the body. It was on the sole of the feet and when the doctor dissected those injuries he found contused subcutaneous tissues, clotting of blood. Does it suggest that the deceased was hit with much force with brutality on his heels even? It is for the Investigating Officer to unearth.

The truth has to be ascertained by the Investigating Officer.

28. According to the petitioner, she approached everyone in order to lodge the FIR and despite communication having been received from the Secretary, DLSA, the SSP, declined to lodge the FIR. The SSP in her communication informs the Secretary, DLSA that Magisterial inquiry was underway and before this Court she admits that Magisterial enquiry is no bar to lodge an FIR.

29. The directions in the case of Lalita Kumari (supra) commands mandatory lodging of FIR in cases of cognizable offences. In this case the allegations are of custodial death; despite communication having been received from the Secretary, DLSA, SSP Nainital refused to lodge the FIR; instead she ordered for an enquiry by the Circle Officer Police without any authority under law to conduct such an enquiry. So the head of the police in district Nainital did not follow the mandatory provisions of law; did act in violation of the law; did not lodge the FIR. The response which is given to this Court that the communication of the Secretary, DLSA was hazy appears to be unresponsive. The Secretary, DLSA, Nainital had forwarded the application of the petitioner to SSP Nainital and the petitioner while narrating all the facts as to how her husband died in the judicial custody, had sought action in accordance with law. There was no haziness in it, it was crystal clear. FIR was to be lodged.

30. This Court makes these observations to infer that the apprehension in the mind of the petitioner is not baseless. The petitioner has reason to believe that he may not get a fair investigation at the hands of police. Is it "ties of brotherhood" that the matter was not promptly lodged? Is it "ties of brotherhood" that instead of lodging FIR, SSP Nainital ordered for inquiry by CO Haldwani? Is it "ties of brotherhood" that CO Haldwani concluded after enquiry that the statement of eye witness Rahul Srivastava does not find corroboration? Is it "ties of brotherhood" that CO Haldwani while

recording its conclusion, even did not examine the doctor who conducted post mortem and noted the injury?

31. Having considered the manner in which police proceeded in the case, this Court finds that it is a case in which definitely investigation should be transferred to CBI. The Court would also like to observe that it is a case where accountability of the Senior Police Officer may also be required to be fixed administratively. The written words in the Judgments of the Courts and the provisions of right to life, as enshrined in the Indian Constitution, will remain dead letter, if action against erring police officers are not taken by the administration. Hence, this Court also proposes to make recommendation with regard to SSP Nainital, Circle Officer Haldwani and the Guards who are posted at Sub- Jail Haldwani so as to ensure fair investigation. Hence, the following directions:-

(i) Investigation in FIR No.261 of 2021 under Section 302 IPC, Police Station Haldwani, District Nainital be immediately transferred to S.P., Central Bureau of Investigation, Dehradun.

(ii) The Investigating Officer shall ensure that all the documents relating to investigation are handed over to S.P., CBI, Dehradun within a period of three days.

(iii) The named accused Devendra Prasad Yadav - Head Guard, Kriti Nainwal - Guard, Devendra Rawat - Guard, Harish Rawat - Guard, at Sub-Jail Haldwani be immediately transferred from Sub-Jail Haldwani to some place outside the district, so as to ensure fair investigation otherwise within those four walls of Sub-Jail Haldwani perhaps nobody would dare to speak the truth and only witness would be those stone walls which unfortunately cannot speak as to what had happened on 06.03.2021, which resulted in the death of deceased Pravesh Kumar.

(iv) SSP Nainital and CO Police Haldwani be considered for their transfer immediately from district Nainital.

(v) Departmental action, as may be deemed appropriate, be considered to be taken against SSP Nainital who despite under legal obligation to lodge an FIR promptly did not lodge FIR and also without any authority under law directed an enquiry by CO Haldwani in a case of 'custodial death'.

32. Let a copy of this order be immediately forwarded to the Principal Secretary (Home), Government of Uttarakhand and the Director General of Police, Uttarakhand.

33. Let a copy of this order be also forwarded to the State Human Rights Commission, Uttarakhand.

(Ravindra Maithani, J.) 22.07.2021 Sanjay