

have come out in a sting operation done by Tehelka Magazine on two senior police officers who were involved in the investigation of the killing of Sameer Khan at one time or other, by recording their conversations with its journalist on camera. The petition also brought to the notice of this Hon'ble Court that the killing of Sameer Khan by the Gujarat Police in a fake encounter is not an isolated incident. That the same team of the Gujarat police has been found to have carried out the fake encounter of one Sobrabuddin and thereafter raped and killed his wife as well as a witness who could have testified against the police in that case. There are other media reports also of killing innocent persons in fake encounters by the same team of the Gujarat Police. The It appears from all the incidents of fake encounters, a pattern has emerged of killing innocent people, particularly Muslims, on the pretext of they being members of the dreaded terrorist group like Jaish-e-Mohammed and there being a conspiracy to kill the Chief Minister of the State. It is submitted that such encounter killings are cold blooded murders by the police and therefore the most serious offence that can be committed. From the facts disclosed in the Sameer Khan case and the Sohrabuddin case, it also appears that there has been an attempt at the highest level of the Gujarat government not only to cover up but to even abet these cold blooded murders which appear to have been systematically used to glorify the Chief Minister of Gujarat and demonise Muslims as being terrorists. The act of the Gujarat Police in killing people in fake encounters is a serious crime and a gross violation of rule of law and the fundamental rights of citizens under Articles 14 and 21 of the Constitution.

2. The prayers made by the petitioners in the writ petition are as under:

- a) order an independent enquiry by Special Investigation Team into the fake encounter of Sameer Khan and its subsequent cover up; and
- b) direct Respondents to submit before this Hon'ble Court the copy of the inquiry report prepared by Respondent No. 2 into the killing of Sameer Khan;"

This Hon'ble Court has issued notice to the respondents in the writ petition and the same is pending disposal before this Hon'ble Court.

3. By the present application the applicants herein seeks to bring to the notice of this Hon'ble Court another incident of encounter killings by the Gujarat Police of the husband of the applicant no. 1 who has become a victim of fake encounter killing. The applicant no. 2, Citizens for Justice and Peace is a legal rights citizens group struggling for justice against the politics of violence, intimidation and mass crime since 2002. For a decade and a half previously, the individual members of CJP were at the forefront of battling the communal politics of hate during the Bombay pogrom of 1992-1993. The applicant no. 2 has supported the fight of the applicant no. 1 and has been assisting the applicant no. 1 in her search for justice.

4. The brief facts of the incident which the applicant herein begs to bring before this Hon'ble Court is as under:

a) Kasim @ Kalu Zaffer Hussain's, the deceased along with 4 others namely Azam Zaffer Ali Sayaid, Zaffer Ali Asaf Ali Saiyad, Musa Bashirkhan Sayiad, and driver Gulabchandra Yadav left for a pilgrimage to Hussain Tekri, Mehsana, Gujarat on 13 April, 2006. On arrival at Ahmedabad, the deceased and his group checked into Hotel Royal at around 1800 hours, where they met 13 others, who were also taking the same pilgrimage and were from his neighbourhood in Mumbai. At around 2130 hours, the deceased made a telephone call from an STD booth located outside the hotel and spoke to his wife and family informing them of his wellbeing and his return in 4/5 days.

b) On his arrival back to the hotel, the deceased was accosted by PSI J.M. Barwad along with 24 other plainclothes policemen. Since their identity was not disclosed to the deceased, he reacted by roughly shrugging off J.M. Barwad and

asked him for his identity/purpose and a scuffle followed between both in which they grabbed each other collars. Thereafter, J.M. Barwad pulled out his revolver, first pointed it to the deceased's groin then his forehead and said "*seedha khada reh nahi toh ghoda se bata dega mein kya hoon aur kya nahi hoon*". Deceased told him about the pilgrimage and said he was not alone there were 17 others with him. Thereafter all 18 persons (names mentioned below) were taken to the P.S Shahibaug (police commissioner's office) in a police van. All along the journey, the deceased was constantly beaten, slapped and pushed around by the policemen, even as the 17 others begged for forgiveness for the deceased's mistake and defiance.

- (i) Aazam Zaffer Ali, aged 42 years, r/o Ambevali, near Indiranagar railway station, Mahatma Phule police station, near NRC company, Kalyan, Maharashtra;
- (ii) Zaffer Ali Asshif Ali Saiyadaged, aged 24 years, r/o same as above;
- (iii) Musa Bashirkhan Saiyad, aged 30 years, r/o same as above;
- (iv) Gulabchandra Shrinath Yadav (driver of the deceased's group), aged 30 years, r/o same as above;
- (v) Sabbir Husain Pyaru Ali Zaffri, aged 30 years, r/o same as above;
- (vi) Sallu Pyaru Ali Zaffri, aged 34 years, r/o same as above;
- (vii) Majlum Huasain Najir Husain Husaini, aged 27 years, r/o same as above;
- (viii) Mahendi Hasan Maskin Ali Zaffri, aged 21 years, r/o same as above;
- (ix) Khadim Husain Kazim Husain Saiyad, aged 22 years, r/o same as above;
- (x) Hajam Nareman Saiyad, aged 32 years, r/o same as above;

- (xi) Yavar Abbas Kazum Husain Saiyad, aged 21 years, r/o same as above;
- (xii) Yasir Ali Hababa Ali Zaffri, aged 31 years, r/o Powerloom, Bhivandi, Shantinagar, district Thane;
- (xiii) Fajj Mohmad Ali Sheikh, aged 45 years, r/o same as (a) above;
- (xiv) Shabbir Hababa Ali Zaffri, aged 28 years, r/o same as above;
- (xv) Ali Raza Zaffri, aged 25 years, r/o same as above;
- (xvi) Babar Gulam Murtuja Dollari, aged 36 years, r/o Dollari chawl, Ambedkar road, Kalyan;
- (xvii) Mohmad Nadar Ali Shaikh, aged 40 years, r/o Shantinagar's Chappara, Bhivandi;

c) On arrival at P.S Shahibaug, all the 18 persons were illegally detained and kept in the police vehicle within its premises. Thereafter, PSI Barwad singled out the deceased and dragged him out by the hair. Later a 3/4 policemen pulled out rods, ropes and cloth from the same van. 15 minutes later some of the policemen came back, soaked in sweat and shouting "Kalu bhaag gaya, Kasim bhaag gaya". When his fellow pilgrims asked the police how it were possible for a man to escape from such a well fortified police station, the police repeated that the deceased had escaped on the pretext of going to drink water. After about 15 minutes, while the others were still illegally confined in the police vehicle, they saw a maroon coloured four wheeled vehicle drive out off the station compound with 4/5 policemen in it followed by 2 motorcycles and later a white maruti car (whose number plates had been removed) with a few more policemen.

d) At around 1700 hours on 14 April, 2006 the 17 fellow travellers of the deceased were released with a warning to leave Gujarat immediately or else they would be handed over to the Surat police. Before their release, all 17 gave their statements, which were video-filmed followed by taking their finger prints. Except for the remaining members in the deceased's group, each person left. When the deceased's group pleaded with the police and asked for his whereabouts, it was reiterated that he had escaped on the pretext of going to drink water and would return to Mumbai on his own. It may be pointed that no documents pertaining to their detention at P.S Shahibaug were given to the 17 fellow travellers of the deceased, on their release by the police. On their release, the deceased's group members called up his widow, Mariam and narrated the aforesaid events. On 15 April, 2006, the 17 fellow travellers of the deceased reached their locality in Ambewali at 0800 hours and narrated the entire incident again to the deceased's widow and family members.

e) On 16 April, 2006 the deceased's widow, Mariam along with her then three month old daughter, mother and chachi and 2 lawyers reached PS Shahibaug and approached PSI Barwad to inquire about the deceased's whereabouts, to which they were narrated the "escape" version. After the deceased's widow threatened to jump off the building along with her daughter, PSI Barwad got scared and asked them to come back the next day. On 17 April, Miriam was made to meet Joint Commissioner of Police, Shri Ashish Bhatia to whom she narrated the aforesaid incident. Joint Commissioner of Police, Shri Bhatia asked her to submit a written application to him, which she did on the same day at around 1700 hours.

f) On 18 April, 2006 a report of a motor vehicle accident, was carried out in the Gujarati daily "Samajwad". Further, the place of the accident was mentioned

as “underground bridge, Panchal mandir” with full description of the corpse. Since the description matched with that of the deceased, Miriam again approached P.S Shahibaug, where on production of her husband’s photograph the same was confirmed to be the person who died in the motor-vehicle accident. When Miriam was shown the body of the accident victim (which bore a welt on the side of the forehead and a dried up trace of blood on lip) she confirmed it as her husband’s. Thereafter, she was taken to the civil hospital, where her mother identified the corpse as that of the deceased. Present at the hospital were also a few journalists from “Sahara Samay”, who witnessed the above incidents. When the police asked her to take away her husband’s corpse, she refused. On 19 April, 2006 along with a few more relatives and journalists, Miriam returned to claim her husband’s corpse. Since she did not trust the police she insisted that the body be returned with the face uncovered. On seeing the body, she discovered that there were fresh wounds on the entire face and it was covered in blood. Her husband’s body was finally handed over to her at around 1500 hours. Further, a copy of the first crime register dated 19 April, 2006 was handed over to the deceased’s widow where it was stated that vide ICR No. 146/2006, a case was registered under sections 273, 304 of the Indian Penal Code and sections 177, 184, 134 of the Motor Vehicles Act.

g) After repeated requests, a copy of the deceased’s post mortem report dated 14 April, 2006 vide P.M No. 7961/06 at Civil Hospital, Ahmedabad and the same was handed over to the deceased’s relative Fatima Bibi (Miriam’s mother)

h) On 14 December, 2006 vide No. G/Appli/Sector 2/Local/140/06/10 Shri Ashish Bhatia (Joint Commissioner of Police) replied to Miriam’s applications dated 17 and 18 April, 2006, where he reiterated that on conducting a detailed “unbiased enquiry” it was found that the cause of her husband’s was an accident

and that the above enquiry was carried out by a senior police inspector of P.S Shahibaug.

i) On 3 April, 2007, under the Right to Information Act, 2005, Miriam made an application seeking information pertaining to the manner of investigation, police records and records viz. copy of panchnama etc in relation to the death of her husband. Following the aforesaid application, she received around 500 pages comprising of the following:

(i) Joint Commissioner of Police Bhatia's applications requesting P.S Andheri, Mahim, Thane and Kalyan to provide verification of "Irani" persons of the deceased's group including deceased and their crime records;

(ii) Post mortem report of deceased showing that he died as a result of a road accident;

(iii) certificate dated 27.4.2007 from psychiatrist Dr. Hardas certifying the poor mental state of the deceased;

(iv) records of the hotel detailing habitual stay of various members of the deceased's and remaining 17 person's group at Hotel Royal;

(v) FIRs and other documents to show that the deceased and his group were allegedly a part of a crime syndicate that regularly committed minor thefts, cheating and petty crimes in various States.

j) A detailed perusal of the above mentioned 500 page document clearly shows that the police have tried to justify the extra judicial killing of Kasim @ Kalu Zaffer Hussain by producing the above records linking him and several other of the "Irani group" to be members of a petty crime syndicate. It may however be

noted that when the body of Kasim @ Kalu Zaffer Hussain was found, it was shown that he sustained the fatal injuries "after escaping" from the P.S Shahibaug. The applicants submits that it is a case of death during illegal detention since deceased was injured as a result of the multiple injuries inflicted to him while he was illegally detained by the police; and thereafter his tortured body (perhaps still alive) was made to appear as a motor vehicle accident. However, police of P.S Shahibagh placed reliance on the above mentioned documents, and denied any involvement in Kasim @ Kalu Zaffer Hussain's death and consequently their responsibility for the unnatural death of Kasim @ Kalu Zaffer Hussain. Thus, by succeeding in denying death (while being illegally detained by police) the liability of the State for payment of compensation for violation of the fundamental right to life under Article 21 is also being extinguished.

k) Further, Chapter XVI of the Indian Penal Code, 1860 deals with offences affecting the human body. Section 299 defines the offence of culpable homicide; section 300 indicates the circumstances in which culpable homicide will amount to murder unless the case attracts one of the general exceptions (Chapter IV). Exception 3 states that culpable homicide is not murder if the offender, being a "public servant" acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he in good faith, believes to be lawful and necessary for the due discharge of his duty as such "public servant" and without ill-will. It will therefore, be seen that culpable homicide will be murder unless a "public officer" shows:

- (i) that he was acting for the advancement of public justice;
- (ii) had caused death (or bodily injury) while acting in good faith; and
- (iii) that he believed it to be lawful and necessary for the due discharge of his duty and that he was acting without ill-will.

l) Therefore, once a violent act is committed which results in death or bodily hurt of the victim, an offence is committed unless it is shown to fall in one of the general or specific exceptions.

m) The applicant no. 1, through the applicant no. 2 questioned the correctness of the abovementioned departmental enquiry conducted by Joint Commissioner of Police, Shri Ashish Bhatia/ Shri Chaudhari as biased and prejudiced and against principles of natural justice and rule of law. Instead, it is submitted that it is a case of death while being illegally detained by the police of P.S Shahibaug since Kasim @ Kalu Zaffer Hussain died as a result of the multiple injuries inflicted to him by the police on the night of 13 April, 2006; and thereafter his death was shown as a motor accident. Further, there is a glaring gap in the version of the 17 pilgrims and Barward's version (para 5) of "escape of Kasim @ Kalu Zaffer Hussain on the pretext of going to drink water" and the later "motor vehicle accident" version mentioned in the FIR dated 19 April, 2006. Hence, the conduct of the concerned police officers is also a significant circumstance to assess credibility of their "official" and "unofficial versions. It is pertinent to mention that on 16.04.2006, when the deceased's widow threatened to commit suicide in the premises of P.S Shahibaug, PSI Barwad had unofficially accepted that deceased had escaped on the pretext of drinking water, thereby contradicting the later version of her husband's death as a result of a motor vehicle accident.

n) Independently it is also important to note the following:

i) Reporters have seen the marks of attack and assault on the body of the deceased.

ii) It is a well established law that the failure of the State to take all possible steps to protect the life of the citizens while in its custody makes the State vicariously liable for its action/ omission;

iii) A full fledged judicial inquiry needs to be ordered into the blatant attempts by the Gujarat state to subvert the Constitution. If this remains unchecked it becomes **propaganda sanctioned by top leadership**. The state needs to be held accountable to the Constitution and strict action be taken;

iv) In keeping with the guidelines issued by the NHRC, the State Government Authorities have to all deaths in custody, police as well as judicial, natural or otherwise, to the NHRC;

v) While referring to the observations of the Hon'ble Supreme Court of India in the case of Neelbati Behra vs. State of Orissa, 1993 (2) SCC 746, it observed and ordered as under:

(i) This Commission has taken a consistent stand that the obligation of the State to ensure safety of persons while in its custody is strict and absolute and admits of no exception;

(ii) The inalienable right to life of every citizen, including convicts, prisoners or under-trials, cannot be taken away except in accordance with the procedure established by law, while the citizen is in the custody of the State. Violation of that right renders the State vicariously liable for its acts of commission and omission and such liability is not contingent upon determination of the ultimate guilt of the offenders in a criminal court. Besides, death in police custody as a result of torture is perhaps the worst type of crime in civilized society.

5. That the applicants herein addressed letters to authorities about the plight of the applicant no. 1 to no avail. The applicants on January 17, 2008 also addressed a letter to the Hon'ble Chief Justice of Gujarat bringing to the notice of the Hon'ble

Chief Justice the above mentioned facts. The applicants herein in the said letter also sought the payment of compensation to the applicant no. 1 and also order an investigation into the entire incident relating to the death of husband of the applicant no.1. Till date the applicants have received an reply or intimation of any action on the letter addressed to the Hon'ble Chief Justice of Gujarat.

6. That the application is bonafide and made in the interest of justice.

PRAYER:

In the facts and circumstances stated herein above it is Most Respectfully prayed that this Hon'ble Court may be pleased to:

- a) allow the applicant and implead the present applicants as petitioners no. 3 and 4 in the present writ petition;
- b) that this Hon'ble Court consider directing action against officers of the state found responsible for unconstitutional acts;**
- c) that this Hon'ble Court considers directing the State of Gujarat to pay full and final compensation for the life taken and lost;**
- b) pass any such further or other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE APPLICANTS AS IS DUTY BOUND SHALL EVER PRAY

Filed by:

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New Delhi