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**The Law Commission**  
Final Report  
on  
The Evidence Act, 1872  
Relating to Burden of Proof  
In Cases of Torture on Persons  
in Police Custody.

**Genesis of the Problem**

Of late several occurrences of perpetration of torture on persons in police custody and in a few cases even leading to the death of such persons have taken place. Police personnels prosecuted for such occurrences often escape conviction for want of evidence. As an instance, the prosecution of the police personnels in a case which recently occurred in Chittagong, namely, the Sheema murder case, may be cited.

**The Problem**

The reasons behind paucity of evidence in cases of torture and even death of a person while in police custody are obvious. In a criminal case, the burden of proving the guilt of the accused is invariably on the prosecution according to the scheme and various provisions of the Evidence Act, 1872. In cases of torture on a person while in police custody one can rarely expect to get eye-witnesses to such incidents, excepting police personnels some of whom themselves happen to be the perpetrators of torture. Bound by a sense of brotherhood these eye-witnesses often prefer to remain silent in such a situation and even if they speak, they put their own gloss upon the facts often perverting the truth. It is an extremely peculiar situation in which a police personnel alone, and none else, can give evidence regarding the circumstances in which a person in police custody receives injuries. This results in paucity of evidence and probable escape of the culprits.

**The Need for Reform**

It is for the above reason that the Law Commission suo motu took up the subject in order to examine whether there is any need for reform of the law on

the subject, particularly, relating to the burden of proof under the Evidence Act, 1872.

In this connection, we would like to refer to an observation made by the Supreme Court of India in a case in which a farmer named Brij Lal was tortured to death by several policemen for his inability to meet their demand for bribe and for lodging a complaint against them to their superior officer. The court observed :-

“Before we close, we would like to impress upon the Government the need to amend the law appropriately so that policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence. Police officers alone, and none else, can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by the ties of a kind of brotherhood, they often prefer to remain silent in such situation and when they choose to speak, they put their own gloss upon facts and upon the truth. The result is that persons on whom atrocities are perpetrated by the police in the *sanctum sanctorum* of the police station, are left without any evidence to prove who the offenders are. The law as to the burden of proof in such cases may be re-examined by the legislature so that handmaids of law and order do not use their authority and opportunities for oppressing the innocent citizens who look to them for protection.”<sup>1</sup>

The above observations of the Supreme Court of India have direct relevance to the law of evidence whereunder it is for the prosecution to prove beyond all reasonable doubts the essential elements of the offence with which the accused is charged and after proof of those essential elements by the prosecution, it is for the accused to prove that the case falls within any exceptions to criminal liability recognized by law. As the law stands now, the burden of proving as to who has caused the injury on the person in police

<sup>1</sup> State of U.P.V. Ram Sagar Yadab, AIR 1985 S.C. 416.

custody squarely lies on the prosecution and for the reasons already elaborated above the prosecution fails to prove those elements.

### Is a New Law Necessary ?

The question, therefore, is as to whether it will be desirable to enact a special rule of evidence to meet a situation in which a police personnel is charged with perpetration of torture on a person in his custody. It appears to us that there is a need for such a special provision in view of the incidents of torture on persons in police custody that surface to public view from time to time. Many more possibly go unreported.

In order to address the problem in its proper context, it appears to us that the best course would be to give power to the court to draw a presumption where bodily injuries are caused to a person while he is in police custody. The court may, in such cases, be given a discretion to presume that the injuries were caused by the police personnel having custody of the person during the relevant period. The vesting of such a power in the court will be justified, because, as regards a person in police custody, it is unlikely that any one else would have the opportunity of inflicting injuries on him. We have seriously considered whether the presumption should be discretionary or mandatory and after careful consideration, it appears to us that the presumption being purely a presumption of fact and not of law, it should be discretionary and rebuttable. As such, the formula "may presume" and not "shall presume" will be appropriate for the purpose. At the same time, we also like to give some guidelines to be followed by the court in administering the proposed provision, because, the proposed provision will be a qualification to the general rule of burden of proof.

A working paper to the above effect embodying the proposed amendment in the form of a proposal was, accordingly, prepared by the Commission and circulated among various bar associations, lawyers, judges, magistrates, law enforcing agencies including police, etc. for eliciting their views. Response was encouraging and the Commission received views from the following :- 1) Mr. Md. Ismail Hussain, Inspector- General of Police, Dr.

Rafiqur Rahman, Bar-at-Law, Senior Advocate, Supreme Court of Bangladesh, Mr. Md. Abdur Ruzzak-3, Advocate, General Secretary, Bogra District Advocates' Bar Association, Dr. M. Enamul Huq, Ex- Inspector-General of Police, Mr. Sheikh Rezwana Ali, District and Sessions Judge, Tangail, Mr. Md. Arayesuddin, District and Sessions Judge, Barisal, Mr. A.K.M Mainul Islam, Chief Metropolitan Magistrate, Chittagong and Mr. N.C. Biswas, Chief Metropolitan Magistrate, Rajshahi.

Mr. Islam Hussain, Inspector- General of Police has opposed the proposal on the ground that it may have an adverse effect on the morals of the police force. Messrs Sheikh Rezwana Ali, District and Sessions Judge, Tangail, Md. Arayesuddin, District and Sessions Judge, Barisal, N.C Biswas, Chief Metropolitan Magistrate, Rajshahi and A.K.M. Manirul Islam, Chief Metropolitan Magistrate, Chittagong supported the proposal of the Commission without any reservation.

Dr. Rafiqur Rahman, Bar-at-Law, Senior Advocate, Supreme Court of Bangladesh, while supporting the proposal in principle, has been of opinion that the existing section 114 of the Evidence Act, 1872, will serve the purpose if a simple illustration is added to it.

Mr. Abdur Razzak, Advocate, General Secretary, Bogra District Advocates' Bar Association, while supporting the proposal, has suggested that the other "law enforcing agencies" apart from the police, should also be brought within the proposed amendment. He has also suggested some amendments in the Code of Criminal Procedure, 1898.

Dr. Enamul Haq, ex Inspector- General of Police has pointed out that some other agencies, such as, the military, sometimes take persons in custody.

It appears that there is a general consensus among legal experts on the proposal of the Commission.

There is no cause for the apprehension expressed by Mr. Ismail Hussain, Inspector-General of Police, as there is nothing in the proposed enactment

which may deter the police from acting according to law and from enforcing the law. The proposed amendment is aimed at securing justice in cases of illegal bodily torture on persons in custody of police. Moreover, the "may presume" formula itself is a guarantee against such apprehension as has been expressed by the Inspector-General of Police.

Dr. Rafiqur Rhaman's suggestion that incorporation of an illustration in section 114 of the Evidence Act, 1872, as follows, (j) A person in the custody of the police suffering from any bodily injury during that period of custody, the bodily injury was caused by the police personnel," (sic) will serve the purpose, overlooks the intent of the proposed amendment. The Commission has proposed to confine the formula only to the case of "a prosecution of a police personal for an offence constituted by an act alleged to have caused bodily injury to a person" and not to any other case but the presumption contemplated in section 114 of the Evidence Act, 1872, extends to all cases, even civil litigations.

After considering all aspects, the Commission makes the following recommendations.

### Recommendation

A new section being section 114A may be inserted after section 114 of the Evidence Act, 1872, as follows:-

"114A. (1) In a prosecution of any police personnel for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the Court may presume that the injury was caused by the police personnel having custody of that person during that period.

(2) The Court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard to all the relevant circumstances, including in particular -

(a) the period of custody,

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- (b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence,
- (c) if the victim was examined by any medical practitioner, the evidence of such medical practitioner,
- (d) if the statement of the victim was recorded by any magistrate, the evidence of such magistrate.

X. Ahmed 20/11/98  
(Justice Naimuddin Ahmed)  
Member.

K. Hossain 30/11/98  
(Justice Kemal Uddin Hossain)  
Chairman.

OFFICE OF THE

SECRETARY