G.R.CASE NO. 815/99

(Present: A.K.Baruah)

28.09.2018

The complainant of this case namely Binay Ch. Modok is present. Smti. Nijora Roy, Smti. Prabhaboti Roy, Smti. Parboti Roy, Smti. Ambika Roy and Sri Anirban Roy are present being the relatives of the deceased victim who have objection against the Final Report of this case. The complainant also filed one petition stating that he has objection against the acceptance of the Final Report. The relatives of the deceased victim have prayed for proper punishment of the accused persons.

On perusal of the entire materials on record including the case record, case-diary containing the FIR of the case lodged by a police officer himself, Post Mortem report of the deceased victim named ***Late Ananta Roy @ Dwijen Roy @ Hiranya Deka @ Lambhu***, statements of the witnesses and the Final report submitted by the last I.O. (the then DSP-CID, Assam Md. Suleman Ali, A.P.S.), I find this case to be a very serious case of inhuman custodial torture and custodial death of an alleged ULFA man namely Ananta Rai @ Dwijen Roy @ Hiranya Deka @ Lambu on 25.10.99 at the police lock-up of Kokrajhar P.S. during his police custody. All the three accused namely-

i) The then Addl. S.P., Kokrajhar – Sri Anurag Tankha, IPS, presently serving as IGP (V&AC), Assam(as reported by PSI, Kokrajhar).
ii) AB/LNK 598- Prabin Borah.
iii) UBC/46/Ram Nagina Raut

are all police officials/police persons.

Considering the seriousness of the offence and might be to have a fair investigation, the investigation into the case was handed over to CID, Assam. CID conducted the investigation into the case and ultimately filed Final Report in this case by finding the case to be True but failed to obtain Prosecution Sanction against the above named three accused.

In order to take a decision of either accepting the Final Report or rejecting the Final report of the case, I have thoroughly examined the whole case diary and the case record of the case along with all the connected documents of the case and from the materials on record, one can easily understand the inhuman circumstances under which the alleged ULFA man Lt. Ananta Rai died due to the inhuman torture and inhuman treatment by policeman during the police custody. One of the witness who was allegedly present along with the deceased victim at the place of occurrence being a arrested person stated in his statement u/s 164 CrPC that before the death of the deceased victim he was beaten up in the police lockup/police control room and prior to his death, the deceased victim asked for water and complained of illness, but there was no one to give him water and then he became unconscious and ultimately he died. Thus one can understand the circumstances under which the deceased

victim had to die under police custody without his fundamental right to life guaranteed in the Constitution of India under Article 21 and his legal right of not being tortured under police custody even declared by Hon'ble Supreme Court of India in various judgments being protected by the persons who had the duty to protect the same.

From the materials in the case record and case-diary, I find enough/sufficient materials against all the three accused namely Sri Anurag Tankha, IPS, AB/LNK 598- Prabin Borah and UBC/46/Ram Nagina Raut of the offences u/s. 448/304/34 IPC to proceed in this case.

From the FIR of the case lodged by a Police Officer himself and the Post Mortem report of the deceased victim, the custodial torture and custodial death of the victim is established. Again from the statements of the witnesses Prabin Nath, Ramani Rai, Dhabra Rai, the custodial torture against the deceased victim can be concluded. Ramani Rai (who was present in the police lock-up along with the deceased victim at the night of the incident) stated in his earlier statement that he was also tortured and assaulted by the bodyguards of the then Addl. S.P. when the Addl. S.P. was interrogating him. Pradip Nath (who was present in the police lock-up along with the deceased victim at the night of the incident) also admitted that he was also assaulted by police in the lock-up on the night of the incident.

Again from the (1) FIR of the case lodged by a Police Officer himself, statements of
2) S.I.- Promod Ch. Das
3) S.I. Monmohan Deka
4) C/455 Bimal Debnath
5) S.I. Uma Kanta Ramchiary
6) H.G. Anil Kr. Brahma
7) The then D.S.P. (D.S.B.) Kokrajhar- Hareswar Basumatary
8) A.S.I.- Alakesh Chandra Karmakar, it prima-facie appears that all the three accused are responsible for the custodial death of the deceased victim and all the three accused entered the police control room on the night of the incident on 25.10.99 and with the consent or direction of the main accused Anurag Tankha, the other two accused- Prabin Borah and Ram Nagina Raut who were at that time PSO/ security escort party constable of the main accused Anurag Tankha, tortured/assaulted the deceased victim as a result of which subsequently on the same night the deceased victim died.

The main accused Anurag Tankha, IPS admitted in his statement before the I.O. that he entered the Kokrajhar Police Station/Police Control Room on the night of the incident to interrogate the deceased victim. In other words, the accused Anurag Tankha admitted his entry to the place of occurrence where the deceased victim was allegedly tortured and assaulted although the accused Anurag Tankha categorically denied any kind of torture or assault upon the deceased victim. In his statement, accused Anurag Tankha also stated along with the other two accused who were his the then PSOs that the other 2(two) accused i.e. two PSOs- Prabin Borah and Ram Nagina Raut did not enter the place of occurrence i.e. the Police

Control Room at the night of occurrence although they (i.e. the two accused Prabin Borah and Ram Nagina Raut) went to Kokrajhar P.S. along with accused Anurag Tankha and they were on duty attached to accused Anurag Tankha on the night of occurrence. Again in his statement, the witness LNK Pranballu Mandol who was one of the APBN constable in the escort party of the then Addl.S.P.- accused Anurag Tankha stated that on 25.10.99 at about 8 P.M., the then Addl. S.P. (accused Anurag Tankha) along with other two accused Prabin Borah and Ram Nagina Raut entered the Police Control Room with lathi.

Thus not only from the (a) contents of the FIR (b) statement of SI-Promod Ch. Das (c) statement of S.I. Mon Mohan Deka (d) statement of C/455 Bimal Debnath (e) statement of S.I. Uma Kanta Ramchiary (f) statement of H.G. Anil Kr. Brahma (g) statement of the then DSP (DSB) Hareswar Basumatary (h) ASI- Alakesh Chandra Karmakar, but also from the statement of witness LNK Pranballu Mondol, I find prima-facie material against all the three accused of the offences u/s. 448/304/34 I.P.C..

On perusal of the materials on record, it appears that the statements u/s. 161 Cr.P.C. of Ramani Roy and Pradip Nath (who were allegedly present in the police lock-up along with the deceased victim on the night of the incident) were first recorded on 28.10.99 and 15.11.99, but later on, their statements u/s. 161 of Cr.P.C. were re-recorded on 03.01.2005 and 31.01.2005 respectively. Moreover their statements u/s. 164 Cr.P.C. were also recorded on 02.02.2005. On perusal of all the statements of Pradip Nath and Ramani Roy recorded on 28.10.99, 03.01.2005, 31.01.2005 and 02.02.2005, I find that initially on 15.11.99 Sri Ramani Roy stated before the I/O that on 25.10.99 he was in the lock-up of Kokrajhar P.S. along with deceased Ananta Rai and Pradip Nath**.** On that night, he saw some injuries on the body of Ananta Rai. He further stated that he was also brought to the Control Room where he saw the Addl. S.P. with two bodyguards. The Addl. S.P. thereafter interrogated him and he was assaulted by two PSOs of the Addl. S.P..

Sri Pradip Nath in the course of his statement before the I/O on 04.02.99 stated that the deceased Ananta Rai was taken to the P.S. Control Room for interrogation. At that time, he noticed that the condition of the deceased was serious. However, Ananta Rai stated before him that he was badly assaulted in the Control Room. He further stated that he was also interrogated in the Control Room and was assaulted by two persons wearing Khaki Uniforms.

But Sri Ramani Roy and Sri Pradip Nath in their statements recorded again by the I/O (K.C. Choudhury) u/s. 161 Cr.P.C. on 31.01.2005 and by the ld. Magistrate on 02.02.2005 u/s. 164 Cr.P.C. stated that they were assaulted by S.I. P.C. Das (since expired) at Kokrajhar P.S. lock-up. The deceased Ananta Rai was also assaulted by S.I. Das under the influence of liquor as a result of which he died.

The I/O K.C. Chaudhury wrote one letter to the Deputy Inspector General of Police, CID Assam, dated 19.02.2005, regarding the subject of further verification report into the contents of the prayer of accused Anurag Tankha, IPS, in which the I/O stated that the statements of Ramani Roy and Pradip Nath which were recorded later on by him implicated a dead man the then S/I P.C. Das and the changed statements of the two witnesses namely Ramani Roy and Pradip Nath appeared to be concocted. The I/O also stated that sufficient evidences were still available against the accused Anurag Tankha, Prabin Borah and Ram Nagina Rout.

On perusal of the materials on record, I have found that the statements of Ramani Roy and Pradip Nath were re-recorded after about 5 years i.e. on 31.01.2005 by allowing the prayer of the accused Anurag Tankha, IPS when he filed one confidential letter before the then Addl. Director General of Police (CID) Assam, Guwahati with a prayer for further investigation and withdrawal of proceedings for Prosecution Sanction in this case, in view of new materials found during the investigation by the AHRC.

The delay in investigation gave the opportunity to the accused Anurag Tankha to apply for re-recording of the statements of the two witnesses namely Ramani Roy and Pradip Nath which was allowed by the investigation agency in which the two witnesses implicated a dead Police Officer and thus the accused Anurag Tankha got the benefit in the order of Prosecution Sanction. But there is a doubt which arises regarding why the statements of only two witnesses who later on changed their statements in favour of the accused were recorded u/s. 164 of Cr.P.C.? In other words, there is a doubt why the statements of other witnesses who implicated the three accused of this case were not recorded u/s. 164 of Cr.P.C..? Thus, a reasonable doubt also arises whether to save the accused in the matter of Prosecution Sanction or from this case only the statements of two favorable witnesses of the accused recorded u/s. 164 Cr.P.C. where there were many other witnesses/evidence against the accused available in the C/D or on record?

On perusal of materials on record, I am of the view that the re-recorded/changed statements of the two witnesses namely Ramani Roy and Pradip Nath are not reliable or are suspicious in nature as they had changed their statements by implicating a dead person (S/I P.C. Das). The long gap of about 5 years after which the statements of the above two witnesses were re-recorded also creates doubt about the reliability of the evidentiary value of the above named two witnesses. Hence, only on the basis of the changed/re-recorded statements of two witnesses which were recorded after about 5 years of their earlier statements, the accused persons of this case cannot be held to be innocent as there is sufficient /other materials on record against them. Moreover the re-recording of statements of the above two witnesses were done at the instance of the prayer of the accused Anurag Tankha which also creates doubt if the accused influenced the above named two witnesses to change their statements before the AHRC and the I/O etc.. Therefore, I am not inclined to accept the re-recorded or

changed statements of the witnesses namely Ramani Roy and Pradip Nath recorded u/s. 161 Cr. P.C. and u/s. 164 Cr.P.C. in order to accept the Final Report against the accused persons.

Therefore in the present case, in view of the above discussion, there is no difficulty in concluding that the allegations made in the FIR and the statements of witnesses including the PM report of the deceased victim disclose a prima-facie case u/s. 448/304/34 IPC against all the three accused. **Whether the allegations against the accused in the FIR and the above mentioned statements of witnesses are true or false is a question to be decided on the basis of evidence produced during the trial of the case at a later stage and this is not the stage of accepting the version of the accused that they are falsely implicated in this case.**

In other words, there is sufficient materials on record to take

cognizance of the offences u/s. 448/304/34 IPC against the accused and to issue process against the accused.

Now the only point to be decided is - whether cognizance of the offences in this case can be taken when the Sanctioning Authorities (Hon'ble Governor of Assam/Govt. of Assam and S.P., Kokrajhar) of the accused persons did not accord or rejected the Prosecution Sanction of the accused persons?

In order to decide this point - it is to be understood whether Prosecution Sanction is needed in a case of custodial torture or custodial death by public servant or whether the act of custodial torture or custodial death by public servant is protected u/s 197 of Cr.P.C. regarding the need of Prosecution Sanction?

The Hon'ble Gauhati High Court in the case of Amitaba Singha -vs.- State of Assam and another (Crl. Petition No. 516/2014) dealt with the matter of requirement of Prosecution Sanction u/s. 197 CrPC of public servant in a case of custodial torture/assault by the public servant. In this case , the Hon'ble Gauhati High Court discussed many case laws some of which are as follows which I find very much relevant in this case:-

(i) D.K. Basu –Vs.- State of W.B., reported in (1997) 1 SCC 416,
(ii) Sankara Moitra –Vs.- Smti. Sadhana (2004)1CALLT 34 HC (Calcutta High Court),
(iii) Munshi Singh Gautam (Dead) and Others –Vs.- State of M.P., reported in (2005) 9 SCC 631,

In the case of **Amitaba Singha -vs.- State of Assam and another (Crl. Petition No. 516/2014),** the Hon'ble Gauhati High Court observed and held the following;

*"In the case of **Sankaran Moitra –Vs.- Smt. Sadhna (2004)1CALLT 34 HC**, the allegations brought against the Police Officer (appellant), was that*

the husband of the complainant was beaten death. The appellant took the plea of sanction under section 197 Cr.P.C. and prayed for quashing the

proceeding. The Hon'ble High Court dismissed the quashing petition, observing that it was a case of merciless beating by the Police Officer and causing death of a person and that it could not be said to be an act in the discharge of official duty and held that no sanction under section 197 Cr.P.C. was necessary.

In the case of D.K. Basu Vs.- State of W.B., reported in (1997) 1 SCC 416 , the Hon'ble Supreme Court observed:

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. By torturing a person and using third-degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

Using any form of torture for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Challenge of terrorism must be met with innovative ideas and approach. ***State terrorism is no answer to combat "terrorism".*** *State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law.*

Some punitive provisions are contained in the Indian Penal Code which seek to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Sections 330 and 331 provide for punishment of those who inflict injury or grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustrations (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. The statutory provisions are, however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must

proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legally injury is a compulsion of judicial conscience.

In the case of ***Munshi Singh Gautam (Dead) and Others –Vs.- State of M.P., reported in (2005) 9 SCC 631, the Hon'ble Supreme Court*** *observed*

Torture *in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under trial prisoners or suspects tarnishes the image of any civilized nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilization itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism.* ***The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually loss faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with.***

In view of the above decisions and the observations, made therein, an arrested person i.e. a person in custody can't be subjected to any form of torture causing injury or hurt. The officer doing such act of human right violation is liable for punishment under the penal law.

In the case of ***D.K. Basu****, the Hon'ble Supreme Court, in clear terms, has held, torture in custody not permissible and lawful. As held by the Hon'ble Supreme Court, for such unlawful activity, the guilty Police Officer is liable to penal action. From the above decisions, it is clear that once a person is arrested and taken into custody, no physical or mental hurt or injury can be intentionally caused to the arrested person. The well being and safety of such persons should be the prime concern of the person in charge of such custody. Therefore, under no circumstances such person can be subjected to torture. Such acts are certainly inhuman and barbaric, not permitted by civilized society. Though interrogation of an arrested person for the purpose of investigation is permitted by law, physical assault and any other form of torture is not permitted. Law does not permit any person including the supervising Police Officer or the Investigating Officer to assault and torture the arrested person. Such acts cannot be accepted as the act done in discharge of official duty by a public servant. Torture in custody cannot be linked with official duty.*

As discussed above, in the present case ***(Amitaba Singha -vs.- State of Assam and another)****, it has been clearly alleged, in the complaint, that the petitioner, besides assaulting the complainant in*

custody, poured petrol into his private parts. The above discussed medical reports support the said allegations of torture in custody. Hence, the said alleged acts have nothing to do with official duty. Such inhuman act cannot be remotely connected with official duty. Therefore, the protection under Section 197 Cr.P.C. is not applicable in the present case."

Thus, the Hon'ble Gauhati High Court held in the above case of **Amitaba Singha -vs.- State of Assam and another (Crl. Petition No. 516/2014)** that "the acts of assaulting the accused in police custody have nothing to do with official duty of the public servant who allegedly assaulted the victim in the police custody. Such inhuman act cannot be remotely connected with official duty. Therefore the protection u/s. 197 Cr.P.C. is not applicable in the case." Thus from the above judgment of Hon'ble Gauhati High Court, it is crystal clear that the protection u/s. 197 CrPC is not applicable in this case also of custodial torture and custodial death of the deceased victim where the accused persons took the shelter or protection u/s. 197 CrPC of Prosecution Sanction improperly without having any right of protection u/s. 197 Cr.PC. in this case.

In the case of **Sushil Kumar Barua Vs. Golok Chandra Kalita,2008(1) GLT 714, the** Hon'ble Gauhati High Court observed and held the following:

"*While considering the scope of Section 197 Cr.P.C. it is apposite to recall the law laid down in* ***H.H.B. Gill and Anr. v. The King*** *, wherein* ***the Privy Council*** *held:*

A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such to lie within the scope of his official duty.

This view has been approved by the ***Privy Council*** *in* ***Albert West Meads v. The King****.*

Thus, the protective umbrella of Section 197 Cr.P.C. extends to only such acts, which fall within the scope and range of a public servant's official duty. In other words, for availing protection under Section 197 Cr.P.C. the act of the public servant concerned must not only fall within the scope and range of his official duty, but that the offence must be connected with the official duty and not unconnected therewith. The necessary corollary flowing from this limitation is that when an act is prohibited to be done by a public servant in the discharge of official duty, such act of the public servant, though committed during the discharge of the official duty, will not be protected under Section 197 Cr.P.C. The ***Hon'ble Apex Court observed and held, in P. Arulswami v. State of Madras, t****hus*

It is not therefore every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the

official duty. Where it is unconnected with the official duty there can be no protection.

From what has been laid down in P. Arulswami (supra), it clearly follows that in order to seek and receive protection under Section 197 Cr.P.C. the public servant, if questioned, shall be able to claim that whatever he did was done by him by virtue of his offence and in discharge of his official duties. In short, the act, constituting, the offence must directly or reasonably be connected with the official duty and must have been done in the discharge or purported discharge thereof. Section 197 Cr.P.C. does not extend its protective cover to every act or omission done by a public servant in service, but restricts its scope of operation to only those acts or omissions, which are done by a public servant in the discharge or purported discharge of official duty.

A close analysis of the provisions of Section 161 and 163 Cr.P.C. read with Section 24 of the Evidence Act clearly indicates that a police officer is prohibited from beating or confining any person with a view to, inter alia, induce and threaten such a person to make statement or confession. In fact Section 330 IPC makes the act of causing hurt, aimed at extorting confession, an offence punishable with imprisonment for a term, which may be extended to seven years. In view of such statutory prohibition, it cannot be argued that the acts complained of, in the present case, are acts done 'by the accused-petitioner under the colour of his duty or authority. There is no legitimate and perceptible connection between the acts, which the accused-petitioner has allegedly done, and the duties and obligations cast upon him by law. When the law has prohibited an officer from doing what he has done, he cannot be heard to say that what he had done was in exercise of his duties or even purported exercise of his duties. It is no part of a duty of a Police Officer to beat a person at the Police Station to extort confession from him nor is it a part of the duty of a Police Officer to confine a person at the Police Station without having arrested him.

From a careful reading of what has been observed in ***State of Maharastra Vs. Atma Ram and Others AIR 1966 SC 1786*** *case, it is abundantly clear that though a Police Officer is entitled to interrogate any person, he is prohibited by law from beating or confining any person in order to force him to make statement or with a view to extort confession from him.*

An Officer may be on duty; but what he might have done may be an offence, which will fall outside his duty. For instance, when a Police Officer, on duty, commits offence of rape, he cannot say that since he was on duty, the act done by him is protected by Section 197 Cr.P.C. The test, therefore, is that the act, which an accused has allegedly done, must be shown to form part of his duty, though he may have exceeded his powers, while discharging his duties. In the case at hand, as is clearly seen, it is not the duty of a Police Officer to detain and beat any person in order to extort confession. Far from this, the law prohibits Police Officers from detaining

and/or beating and/or coercing any person in order to induce or force such a person to make any statement, far less confession. What the accused-petitioner has allegedly done, in the present case, is an act prohibited by law and, hence, his said acts, having fallen outside the scope of his duty, cannot be said to have been done by him in the discharge or purported discharge of his duties."

The above discussion in the case of Sushil Kumar Barua Vs. Golok Chandra Kalita,2008(1) GLT 714, by the hon'ble Gauhati High Court is found very much relevant in this case to hold that the act of custodial torture by police officer is prohibited by law and hence, such acts, having fallen outside the scope of his duty, cannot be said to have been done by him in the discharge or purported discharge of his duties and therefore the protection u/s 197CrPC is not available in such cases.

In the case of **Prakash Singh Badal and Another –Vs.- State of Punjab,** the Hon'ble Supreme Court held that a public servant is not entitled to indulge in criminal activities and to that extend the section 197 of Cr.P.C. has to be construed narrowly and in a restricted manner.

From the above discussion of the Judgments/ Case Laws of Hon'ble Supreme Court of India and Hon'ble Gauhati High Court, only one conclusion can be drawn and is that – Prosecution Sanction is not needed in a case of custodial torture or custodial death by public servant or the act of custodial torture or custodial death by public servant is not protected u/s. 197 of Cr.P.C. regarding the need of Prosecution Sanction. Therefore, I am of the considered opinion that cognizance of the offences u/s. 448/304/34 IPC in this case can be taken even when the Sanctioning Authorities of the accused persons did not accord the Prosecution Sanction of the accused persons.

It is pertinent to mention here that the then D.G.P (C.I.D), Assam, S.P. Ram wrote a letter (Memo No. CID-II (A)/53-99/193, dated 30-07-2008) to the Commissioner and Secretary to the Government of Assam, Home Department, Dispur, Guwahati praying for reviewing the Government order declining prosecution sanction of accused Anurag Tankha in this case. In this letter, the **Learned D.G.P, (C.I.D) agreed that it was quite wrong on the part of then concerned authority of C.I.D to have moved the Government for according prosecution sanction** vide this office letter No. CID-II (A)/53-99/266, dated 03.06.2002 followed by a few reminders before completion of investigation of the case which has created all the confusion. The Learned D.G.P also wrote in the letter that considerable evidence was available against all the three accused persons in this case namely Anurag Tankha (IPS), Probin Bora and Ram Nagina Rout. The D.G.P stated in his letter that the refusal of sanction in respect of Anurag Tankha, IPS, main accused of the case would no doubt amount to gross discrimination against the two arrested co-accused persons for the same offence in violation of the pristine principle of equality, equity and

justice. As per the contents of the case diary they are also no way more responsible than Anurag Tankha for the offence committed.

In the letter, the Learned D.G.P stated that *"The concerned case diary contains formidable amount of material evidence against the main accused Anurag Tankha, IPS whereas the contention of the said Government order of refusal of prosecution sanction appears to have basically weighed the grounds in his defence offered by Tankha in his representation, singular version of the facts, which is found purely imaginary and act of after thought, prepared many years after the actual incident taking advantage of the death of one key witness SI P.C. Das of Kokrajhar P.S. which is not definitely borne out by the case diary of the case. Perhaps the court of law is the right forum to resolve the matter.*

Lastly, the said order appears legally untenable in view of the judgement of the Hon'ble Supreme Court in connection with Case No. Appeal (Civil) 5636/2006, dated 06.12.2006, Petitioner: Prakash Singh Badal and Anr., Respondent: State of Punjab and Ors., dated 06.12.2006 and the Judgement arising out of SLP(C) No. 19640 of 2004 with Criminal Appeal No. 1279/06 @ SLP(Crl.) No. 2697/2004, Civil Appeal No. 5637/06 @ SLP(C) No. 20000/2004, Criminal Appeal No. 1281/06 @ SLP(Crl.) No. 1620/2006, Civil Appeal No. 5639/06 @ SLP(C) No. 10071/2006, Civil Appeal No. 5638/06 @ SLP(C) No. 20010/2004 and Criminal Appeal No. 1280/06 @ SLP(Crl) No. 3719/2006, nullifying the necessity of any prosecution sanction in respect of cases of such nature".

Therefore, the Learned D.G.P prayed for reviewing the order of prosecution sanction to allow C.I.D to investigate the case to bring it to its logical conclusion.

In reply to this letter of D.G.P, (C.I.D) dated 30.07.08, the Joint Secretary to the Government of Assam wrote a letter to the Addl. Director General of Police (C.I.D,) Assam stating that the Government regret their inability to review the order issued vide No. HMA. 280/2002/153 dated 17.07.2008 (Order of rejection of prosecution sanction of accused Anurag Tankha, IPS).

The Learned the then D.G.P (C.I.D) Assam wrote a letter to the then Deputy Superintendent of Police (HQ), CID, Assam, Guwahati vide Memo No. CB/CID/192, dated 29th July, 2008 stating the following:

"The perusal of the case diary of Kokrajhar P.S. Case No. 255/99 U/S 448/304/34 IPC reveals that the investigation of the case is completed but kept pending for the arrest of accused Shri Anurag Tankha, IPS, the then Addl. S.P., Kokrajhar. Please effect the arrest of Shri Anurag Tankha, IPS, now Principal, PTC, Dergaon without further delay and submit charge sheet forthwith.

In this respect you may ignore the prosecution sanction sought vide this office memo No. CID-II(A)/53-99/266, dated 03.06.2002 which was declined by the Govt. of Assam vide its

order No. HMA.280/2002/153, dated 17.07.2008 as it is legally untenable in view of the recent judgment of the Hon'ble Supreme Court in respect of Case No. Appeal (Civil) 5636/2006, dated 06.12.2006, PETITIONER: Prakash Singh Badal and Anr., RESPONDENT: State of Punjab and Ors., JUDGMENT (Arising out of SLP(C) No. 19640 of 2004) *WITH Criminal Appeal No. 1279/06 @ SLP(Crl.) No. 2697/2004, Civil Appeal No. 5637/06 @ SLP(C) No. 20000/2004, Criminal Appeal No. 1281/06 @ SLP(Crl.) No. 1620/2006, Civil Appeal No. 5639/06 @ SLP(C) No. 10071/2006, Civil Appeal No. 5638/06 @ SLP(C) No. 20010/2004 and Criminal Appeal No. 1280/06 @ SLP(Crl.) No. 3719/2006 nullifying the necessity of prosecution sanction in respect cases of such nature".*

Thus, the then D.G.P (C.I.D),Assam instructed the D.S.P (HQ), CID to ignore the prosecution sanction declined by the Govt. of Assam for accused Anurag Tankha in view of the judgment of the Hon'ble Supreme Court mentioned above nullifying the necessity of prosecution sanction in respect of such cases.

In my view, the accused persons of this case by taking the shelter of section 197 of Cr.P.C. or provision of Prosecution Sanction cannot violate the fundamental right and legal right of a person in the manner as alleged in this case. No person including the Public servants can violate the fundamental right or legal right of a person and play with the Rule of Law of the land and the Justice Delivery system of the state by illegally protecting himself u/s. 197 of Cr.P.C. regarding Prosecution Sanction. Every police officer irrespective of his rank are bound to follow the judgments/case laws and guidelines of Hon'ble Supreme Court of India and Hon'ble High Court including the judgments/case laws regarding custodial torture and custodial death of arrested persons and they cannot be allowed to disobey or violate those judgments/case laws of Hon'ble Supreme Court of India and Hon'ble High Court by taking undue shelter of section 197 of Cr.P.C. of Prosecution Sanction to commit custodial torture or custodial death. If cognizance of the offences in this case is not taken after finding sufficient incriminating material against the accused persons for want of Prosecution Sanction of the accused, they may continue to commit similar offence of custodial torture/custodial death as alleged in this case by violating the Judgments and case laws of Hon'ble Supreme Court of India and Hon'ble High Court. Therefore, I find it just, proper, legal and necessary to take cognizance of the offences of the case (u/s. 448/304/34 of IPC) after finding sufficient incriminating materials against all the accused and considering the above mentioned Judgments of Hon'ble Supreme Court of India and Hon'ble High Court as per which no Prosecution Sanction is required in cases of custodial torture or custodial death of person.

From the above discussion, I am of the opinion that the sufficient and prima facie materials on record against the accused does not justify accepting the F.R. in this case. Again in view of judgements of Hon'ble Supreme Court and Hon'ble High Court mentioned above as per which

prosecution sanction is not required in case of custodial torture or custodial death, the F.R. cannot be accepted on the ground of want of prosecution sanction.

The statements of all the witnesses were recorded, P.M. report of the victim collected, seizures were made in this case. From the materials collected during investigation, prima facie case is made out against all the accused, hence these prima facie materials do not justify re-investigation into the case.

Hence only one course of action is left out in this case i.e. after finding enough and sufficient material to proceed in this case, cognizance of the offences U/S 448/304/34 IPC to be taken and issue process against the accused. Therefore, after finding sufficient prima facie incriminating materials against all the accused and considering the above mentioned Judgments of Hon'ble Supreme Court of India and Hon'ble High Court as per which no Prosecution Sanction is required in cases of custodial torture or custodial death of person, I take cognizance of the offences of the case (u/s. 448/304/34 of IPC) against all the three accused of this case and process to be issued against the accused immediately.

With respect to the issuance of process to the three accused ,I find and consider the following grounds or points:

1. As per the prima facie materials on record, **accused committed culpable homicide by killing a person by violating his fundamental and legal rights in the most inhuman manner while having the duty to protect such rights**. Hence considering the nature and gravity of the offence, facts and circumstances of the case, I am of the view that the accused are not entitled to bail by issuing summons to them. Again, considering the sufficient prima facie materials against the accused and considering the nature of allegation of inhuman killing of a person, I hold that the accused are not entitled to claim any leniency of issuing summons to them or allowing bail to them. Hence, I find it necessary to issue warrant of arrest against the accused.

2. In my view, if the accused are released on bail by issuing summons, it will **frustrate the fair trial** in this case, hence there is need for issuance of warrant against the accused. The accused may influence the witnesses **by his/their official position** which will in turn influence the fair trial adversely. As discussed above, two witnesses already changed their statements in favour of the accused after about 5 years during investigation creating doubt that those 2 (two) witnesses might have been influenced by the accused to change their statements.

3. This **Court has no jurisdiction to try this case as the case is a Session triable case**, which implies that this Court is unlikely to allow bail to the accused after finding enough implicating material against the accused. Hence **no purpose will be served by issuing summons** to the

accused. In other words, I find it necessary to issue warrant against the accused.

4. The main accused Anurag has been evading his arrest since 1999 on some technical ground of sanction which has caused injustice to the deceased victim side and his relatives. The intention of legislature to enact the provision of prosecution sanction was to protect public servants from the prosecution for doing any act in discharge of his legal official duty and it was not enacted to protect the public servants from doing any illegal or unlawful act not connected with his official duty. If it were so, all the public servants will commit illegal/unlawful acts and they will neither be arrested nor prosecuted and then it will create a state of lawlessness. Hence, I am of the view that warrant of arrest should be issued against the accused.

5.. On perusal of the C.D. and C.R., I have not found any order of any kind of bail allowed to accused Anurag Tankha . Hence as per the materials on record accused **Anurag is not on any kind of bail** in a serious case triable by Hon,ble Sessions Court, hence I am of the opinion that the process of Warrant of Arrest should be issued against accused Anurag Tankha.

6. Prima facie it appears that the accused did not even care for the directions of Hon'ble Supreme Court of not to commit custodial torture and thus **violated the Judgements of Hon'ble Supreme Court** by not only torturing the deceased victim but also committing culpable homicide of the victim under police custody in the most inhuman manner. Hence I am of the view that the accused are not entitled to bail by issuing summons to them and the process of warrant should be issued against the accused.

7. This is a Sessions triable case, hence warrant can be issued against the accused finding enough materials on record against the accused and considering the gravity of the offence. A magistrate can issue warrant of arrest against the accused in a warrant case u/s **204 CrPC** after finding sufficient grounds of proceeding in the case.

8. Even after rejection of prosecution sanction, the then DGP (CID) Assam directed the I/O (J.Kalita, DSP,CID)to arrest Anurag by writing a official letter stating the rejection of sanction order of the accused Anurag as improper in view of Hon'ble Supreme Court's Judgement, but then also Anurag was not arrested and ultimately when DGP(CID) Assam filed petition to review the rejection of sanction order of accused Anurag Tankha, the then Joint Secretary to the Govt. of Assam, Home Department expressed regret by informing that the order cannot be reviewed. Thus accused Anurag was not arrested on unsustainable ground of sanction till date since 1999 or accused Anurag Tankha is **avoiding or evading arrest in a grave case of culpable homicide** and hence I find it to be a appropriate case of issuing the process of warrant against the accused.

9. As **law is equal for all** irrespective of their position hence, if the alleged ULFA man(deceased victim) was arrested on the allegation of crime, the IPS

officer or police officer is also to be arrested for the prima facie evidence of killing the ULFA man in a illegal and inhuman manner, collected during investigation against the IPS officer or police persons. The police man cannot be allowed to take advantage of his official post to evade arrest as it would be against the principle of equality before law. Hence issuance of summons or allowing bail to the accused is not justified in this case and if the same is allowed to the accused, it will certainly carry a adverse message to the common man or the society at large that law is not equal for all.

10. In every case, **justice should not only be done but it should always seem to be done.** Justice should not only be done at the time of pronouncing judgement, but justice should be done in every stage of the case so that a fair trial or fair decision could be arrived at..Considering all the materials on record, I am of the view that at this stage of the case, justice will be done and it will seem to be done if all the accused are arrested by issuing W/A and detained in judicial custody till the completion of evidence so that the accused police man cannot influence the witnesses in the same manner in which they evaded prosecution and arrest till date in the name of sanction which is not required as held by Hon'ble High Court. Here I would like to again mention the decision of Hon'ble Supreme Court in the case of **Munshi Singh Gautam (2005) 9 SCC 631 in which the Hon'ble Supreme Court** observed the following:-

"Torture *in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under trial prisoners or suspects tarnishes the image of any civilized nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law unto themselves.* ***Unless stern measures are taken to check the malady of the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilization itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually loss faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with."***

11. In the case of **Amitava Sinha Vs. State of Assam and another(Crl. Petition No. 516/2014) , the Hon'ble Gauhati High Court** relied upon the judgement of **Hon'ble Calcutta High Court in the case of Sankaran Moitra Vs. Smti Sadhana Das and Another** in which Hon,ble Calcutta High Court upheld the order of issuing Warrant of Arrest against the accused instead of summons by holding that sec 204 CrPC makes it clear that in a warrant case , when a magistrate takes cognizance, of the offence, he may issue warrant of arrest if he thinks fit. The Hon'ble High Court further held that the order of issuing warrant of arrest clearly

indicates that such warrant was issued by the ld. Magistrate considering the gravity of the offence. In view of the Hon'ble High Court the nature of the offence was so grave that the ld. Magistrate was justified in issuing warrant of arrest at the first instance.

In the instant case also, the nature of the offence is so grave and serious that I find it justified in issuing warrant of arrest at the first instance against the accused.

Hence, I issue warrant of arrest against accused Anurag Tankha on the basis of above mentioned 11 grounds.

The other two accused namely Prabin Bora and Ram Nagina Raut are on bail which was allowed for non submission of C.S. after their statutory period of detention, i.e. their bail was not allowed on merit of the case and hence after submission of final form of F.R., as cognizance of the offences u/s 448/304/34 IPC is taken finding sufficient prima facie evidence against them, the bail allowed to them stands cancelled.

Considering the above mentioned 11 grounds regarding the need to issue the process of W/A against the accused, including the ground of serious nature and gravity of the offences of this case which is triable by Hon'ble Sessions Court, I find it necessary and justified to issue warrant against them(Prabin Borah and Ram Nagina Raut) also. Hence, issue warrant of arrest against them (Prabin Borah and Ram Nagina Raut).

Let a copy of this order be sent to S.P., Kokrajhar for strict compliance of the above mentioned judgments/case laws of Hon'ble Supreme Court of India and Hon'ble High Court with respect to custodial torture of arrested person by circulating the above mentioned judgments to the Police Stations under his jurisdiction. Let a copy of the order be also sent to the D.G.P., Assam for information and necessary action.

Fix... 03.10.2018 for appearance.

Seen the explanations of the Bench Asstt. and F.R. Asstt. which were called for as per which they have newly joined service and had no idea about the pendency of the case after submission of F.R. Considering the explanations and hearing them, the explanations are accepted with a direction to put up all the FRs (if any) along with the Case records, where FR(s) was/were submitted for want of prosecution sanction and comply with the order of putting up old pending FR(s) along with case records before the concerned learned Eleka Magistrate(S) immediately.

Chief Judicial Magistrate,
Kokrajhar.