(23) The mother is directed to produce the undertaking from the Consulate in accordance with the terms mentioned in the order and the Registrar of this Court shall accept it on being satisfied that such undertaking is reliable. It is only then that the mother would be entitled to remove the children from the jurisdiction of this Court. And to facilitate such removal, it is directed that the Registrar of the Court would arrange for police escort for the mother and the children to be safely placed in the American Embassy at New Delhi for their onward journey to the United States.

(24) This petition is allowed on the above-said terms. No costs.

(25) Simultaneous with the pronouncement of the aforesaid order and in the presence of the parties and their counsel, an oral request has been made by Mr. Sarwan Singh, learned counsel for respondent No. 3, that he be given leave to appeal to Supreme Court of India against this judgment and order. The prayer is declined.

Further prayer has been made that this order be not put into effect till he obtains appropriate orders from the Supreme Court of India. In the nature of things, there are two undertakings to be supplied by the successful petitioner. They would involve some time before my order can actually be put into action. Taking into consideration the overall picture, I restrain the petitioner from taking the children away to United States of America before 22nd March, 1983.

H.S.B.

Before M. M. Punchhi, J.

RAMESH PAL,—*Petitioner.*

versus

SHRI AJHAR ALAM,—*Respondent.*

Criminal Revision No. 1575 *of* 1982.

April 20, 1983.

Code of Criminal Procedure (II of 1974)*—Section* 197*—Complaint against a Police Officer—Allegations of torture and of causing a grievous hurt to a suspect in the course of investigation of a case—Sanction under section* 197 *for the prosecution of such officer—Whether necessary.*

Held, that the various expressions used and gathered in the category of the cases in which offences affecting or relating to human body were concerned need be culled out for prominence. These are "in virtue of office", "in virtue of his official duty", "in execution of duty", "purported exercise of duty", "directly and reasonably connected with official duty," and "within the scope and range of official duty." All these expressions lead to a common axis which is that the act complained of must be in fulfilment of and in excellence of official duty, an accomplishment which the concerned Government in a welfare State might in public interest condone and extend the immunity to the public servant. There seems to be no other purpose than this for having section 197 of the Code of Criminal Procedure, 1973 which is in the nature of an exception to the general rule of accountability regarding a crime. The idea underlying is that the end would justifyingly condone the means, converse to the principle that means must justify ends. On that touchstone, the infliction of torture by a police officer on a defenceless and unobstructive man can hardly be called an act in the excellence of his office or towards fulfilment of his official duty. Rather, it would be in derogation thereof, a step retrograde. The judicial thought pointedly projected in that regard is only focussed on the innate positives in the act complained of on the touchstone of public interest and not on negatives which tend to erode it. Thus, a police officer inflicting or getting inflicted under his orders, torture on a person during the course of an investigation is not entitled to protection of sanction under section 197 of the Code when prosecuted for the offence.

(Para 7)

Criminal revision for order of the Court of Shri Mukhtar Singh Gill, Additional Sessions Judge Barnala, dated 28th August, 1982 *reversing that of Shri Charan Dass Gupta Judicial Magistrate* 1st *Class, Barnala, dated* 15th *December,* 1981 *allowing this petition and setting aside the order of the trial court and dismissing the complaint against Shri Azhar Alam as premature and discharge him.*

Harbans Singh, Sr. Advocate, M. P. Gupta, Advocate with him, *for the Petitioner.*

Kuldip Singh, Advocate, *for the Respondent.*

JUDGMENT

M. M. Punchhi, J.—

(1) The complainant-petitioner filed a criminal complaint against four police officers under sections 325/323/34 and 109, Indian Penal Code, before a Judicial Magistrate, 1st Class, Barnala.

One of the accused arraigned therein is Ajjhar Alam, the then Assistant Superintendent of Police, Barnala (now Superintendent of Police besides member of Indian Police Service). In the said complaint, all the four accused were summoned. While the matter was pending before the Court, the respondent moved an application that he be discharged,, for under section 197, Criminal Procedure Code, the complaint could not proceed against him as the offence attributed to him had been committed while he was acting in the discharge of his official duties and that sanction of the Central Government was an essential prerequisite. The learned trial Magistrate,—*vide* his order, dated 15th December, 1981, dismissed the application observing as follows :—

> "At this stage, there is no material on the file from which it could be held that accused Ajhar Alam was conducting investigation against the complainant and his brother Parkash Chand in a murder case. The question whether the complaint can proceed without requisite sanction can be considered as and when some material comes on the file..................As there is no evidence on the file at this stage to hold that accused Ajhar Alam was conducting investigation of a murder case against the complainant and his brother, or that the accused had committed the alleged act in the discharge of his official duty, so the question whether sanction for the prosecution of the accused is required in this case cannot be considered at this stage. As and when some material will come on the record to the effect that the accused was acting or purporting to act in the discharge of his official duty, the question of sanction will be considered thereafter."

Aggrieved against the said order, the respondent filed a revision petition before Shri M. S. Gill, Additional Sessions Judge, Barnala. He allowed the petition, set aside the order of the learned Judicial Magistrate, 1st Class, Barnala and dismissed the complaint against Ajhar Alam as premature and discharged him. He took the view that in the context, the learned Magistrate was hardly justified in taking cognizance of the offence without the sanction of the competent authorities under section 197 of the Code of Criminal Procedure. The complainant-petitioner has challenged that view in this Court.

(2) Whether a police officer, inflicting or getting inflicted under his orders, torture on a person during the course of an investigation, is entitled to protection of sanction under section 197, Criminal Procedure Code, when prosecuted for the offence, is the significant question which has been raised in this petition. To answer that question, one has to discuss, analyse and differentiate the different strains of thought which prevail in judicial annals. It seems to me, there is a thin line of division earmarking the sources from which those strains have developed though they conclude at the same point, i.e., to confer immunity on public officers and judges from prosecution for offences committed while acting or purporting to act in the discharge of their official duties. I may broadly note those strains.

(3) There are a set of cases which can broadly be called cases relating to offences against property (inclusive of bribery cases). The first in line is *Dr. Hori Ram Singh* v. *Emperor,* (1). The view taken therein was that section 197, Criminal Procedure Code, was intended to apply to those acts which must have been ostensibly done by an officer in his official capacity in execution of his duty. Then in the case of *Lieutenant Hector Thomas Huntley* v. *Emperor,* (2) (a bribe case). It was ruled that it must be established that the act complained of was an official act but the act of receiving illegal gratification by a public servant could not be regarded as an act done or purporting to be done in execution of duty (this was a case under section 270 of the Government of India Act, 1935). Later, in *H. H. B.Gill and another* v. *The King,* (3), Lord Simonds ruled that a public servant can only be said to act or purport to act in the discharge of his official duty if his act is such as to lie within the scope of his official duty and the test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. (In this case, it was also held that there was no difference between section 197, Criminal Procedure Code, and section 270 of the Government of India Act). "In virtue of his office" principle was adopted by the Supreme Court in *Amrik Singh* v. *State of Pepsu,* (4), and it was held that if the act complained of was directly concerned with the

(1) AIR 1939 Federal Court 43.
(2) AIR (31) 1944 Federal Court 66.
(3) AIR (35) 1948 Privy Council 128.
(4) AIR 1955 S.C. 309.

official duties of the public servant so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. The Supreme Court also in *Shreekantiah Ramayya Munipalli and another* v. *State of Bombay*, (5), ruled that section 197, Criminal Procedure Code, is not to be construed too narrowly, and in the context of section 409, Indian Penal Code, ruled that if the act was innocent, it was an official act; if dishonest, it was the dishonest doing of an official act, but in either event, the act was official because the accused could not dispose of the goods, save by the doing of an official act, namely, officially permitting their disposal. In *Baijnath and another* v. *State of Madhya Pradesh*, (6), the Court ruled that what was important was the quality of the act, and the protection contemplated by section 197 of the Code of Criminal Procedure would be attracted where the act falls within the scope and range of the official duties of the public servant. Lastly, in *S. B. Saha and others* v. *M. S. Kochar*, (7), the Court has ruled :—

> "The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the Section will be rendered altogether sterile, for 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, *directly and reasonably* connected with his official duty will require sanction for prosecution under the said provision."

(5) AIR 1955, S.C. 287.
(6) AIR 1966, S.C. 220.
(7) AIR 1979 S.C. 1841.

(4) The second strain of cases are offences affecting decency and morals as also of defamation. To begin with there is *In re Gulam Muhammad Sharif-ud-Daulah,* (8).In that case, defamatory words used by a Judge in the course of the trial of a suit were taken to have been uttered by him, while acting in his official capacity. Section 197, Criminal Procedure Code, as it then stood providing "is accused *as such* Judge or public servant of any offence" rendered that protection. That view was adopted by the Chief Court of Punjab, Lahore in *Amir Singh* v. *Emperor* (8-A). The words "as such" were highlighted on the strength of the aforesaid Madras case. But the words "as such" were given a go bye by amending Section 197, Criminal Procedure Code, in the year 1923. Since then, the expression now is "is accused of any offence alleged to have been committed by him, while acting or purporting to act in the discharge of his official duties". Thus, the aforesaid two old cases have, to my mind, obviously lost their value in the existing context. In *Bhagwan Prasad Srivastava* v. *N. P. Mishra,* (9) where in an operation theatre, the Civil Surgeon abused the complainant before patients and hospital staff, the Court ruled that there must be a reasonable connection between the act and the discharge of official duty, and the act must fall within the scope and range of official duties of the public servant concerned. In that case, it was held that there was nothing to show that the act complained of was a part of the official duty of the Civil Surgeon, Recently, in *B. S. Sambhu* v. *T. S. Krishnaswamy,* (10), the act of a District Judge describing an Advocate in uncomplimentary terms during comments offered in a transfer application was held by the Court to be having no connection with the discharge of official duty of the District Judge. Section 197, Criminal Procedure Code, was not allowed to be attracted.

(5) The third streak of cases are cases which may broadly be called affecting or relating to human body. In *Sarjoo Prasad* v. *Emperor,* (11), where a Station Master assaulted the complainant and his brother, it was held that the act complained of was not one purporting to have been done by the accused *in the execution of his*

(8) I.L.R. 9 Madras 439.

(8-A) 1905 Cr.L.J. 119.

(9) AIR 1970 S.C. 1661.

(10) AIR 1983 S.C. 64.

(11) AIR (33) 1946 Federal Court 25.

duty. Here, the emphasised phrase was picked up from *Dr. Hori Ram Singh's case* (supra). The Constitution Bench of the Supreme Court in *Matajog Dobey* v. *H. C. Bhari*, (12), had before them a case of an income-tax raiding party which was required to execute a search warrant and which on obstruction had, while removing obstruction, committed the alleged offences of hurt. Their Lordships in that context observed as follows :—

> "Where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonbaly necessary for such execution.
>
> If in the exercise of the power or the performance of the official duty, improper or unlawful obstruction or resistance is encountered, there must be the right to use reasonable means to remove the obstruction or overcome the resistance. This accords with commonsense and does not seem contrary to any principle of law.
>
> The true position is neatly stated thus in Broom's Legal Maxims, 10th Ed. at page 312, 'It is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command'. "

They also restated the principles thus :—

> "………in the matter of grant of sanction under section 197, the offence alleged to have been committed by the accused must have something to do, or must be related in some manner, with the discharge of official duty……there must be a reasonable connection between the act and the discharge of official duty, the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

(12) AIR 1956 S.C. 44.

(6) In *Pukhraj* v. *State of Rajasthan and another,* (13), where the Post Master General gave a kick to a Clerk, it was held that the act of the public servant so alleged could not be said to have been done in purporting exercise of his duty and to such a case, section 197 of the Code of Criminal Procedure *per se* could not be attracted. However, it was reaffirmed that facts subsequently coming to light during the course of the trial may establish the necessity for sanction and whether or not the sanction is necessary will depend from stage to stage.

(7) Now the present case with which I am dealing is the case of grievous hurt in which a man's leg was allegedly broken by Police Officers conducting investigation in the presence and direction of Ajhar Alam accused-respondent. Thus, the various expressions used and gathered in the category of cases in which offences affecting or relating to human body were concerned need be culled out for prominence. These are "in virtue of office", "in virtue of his official duty", "in execution of duty", "purported exercise of duty", "directly and reasonably connected with official duty" and "within the scope and range of official duty". All these expressions lead to a common axis which is that the act complained of must be, and if I may say so, in fulfilment of and in excellence of official duty, an accomplishment which the concerned Government in a Welfare State might in public interest condone and extend the immunity to the public servant. There seems to me no other purpose than this for having Section 197, Criminal Procedure Code, which is in the nature of an exception to the general rule of accountability re, a crime. It seems to me that the idea underlying is that the end would justifyingly condone the means, converse to the principle that means must justify ends. On that touchstone, it seems to me, that the infliction of torture by a police officer on a defenceless and unobstructive man can hardly be called an act in the excellence of his office or towards fulfilment of his official duty. Rather, to my mind, it would be in derogation thereof, a step retrograde. As I have been able to decipher, the judicial thought pointedly projected in that regard is only focussed on the innate positives in the act complained of on the touchstone of public interest and not on negatives which tend to erode it. Thus, I have not the least hesitation in answering the afore-posed question in the negative.

(13) AIR 1973 S.C. 2591.

(8) To be fair to the learned counsel for the respondent, I need notice a few decisions of this Court as well in which hurts inflicted by public servants were involved. In particular, I must make reference to the case of *N. P. Sahni and another* v. *Sumand Singh,* (14), decided by D. S. Tewatia, J., which has extensively been quoted and relied upon by the learned Additional Sessions Judge. In that case, D. S. Tewatia, J., distinguished *Bhagwan Prasad Srivastava's case* (supra) and *Pukhraj's case* (supra) on facts and, on the other hand, drew support from the two old decisions afore-quoted in *Gulam Muhammad Sharif-ud-Daulah's case* (supra) and *Amrik Singh's case* (supra). It is noticeable that these were rendered prior to the amendment of 1923 and could hardly have any persuasive value in the present state of Section 197 of the Code of Criminal Procedure....*Mata Jog Dubey's case* (supra) was taken aid of to come to the view that the accused was on manhandling and confining the complainant entitled to the protection of section 197 of the Code of Criminal Procedure since at that time he was performing his duty. That decision, to my mind, is distinguishable from the facts of the present case for here the act complained of is not in virtue of office but rather in derogation of it. The other decision of *Brijinder Singh Sidhu* v. *Hazura Singh,* (15), in which Kulwant Singh Tiwana, J., detecting material on the record which was supportive of the plea of the accused took the view that section 197 of the Code was attractable. That case too is on its own facts. Here, no such material is available for the present to come to the conclusion that sanction under section 197 of the Code has become attracted.

(9) As observed before, the case is at the pre-charge stage. The observations of the learned Magistrate have been quoted in the beginning of this judgment. It may well be that if there is no material on the file from which it could be held that accused Ajhar Alam had participated in the crime he may well discharge him. But to say at this stage that bar of section 197 of the Code of Criminal Procedure is attracted is to erect one where none, for the present, exists. Thus, I am of the considered view that the learned Additional Sessions Judge committed a grave error in allowing the revision petition. Therefore, upsetting that order, I

(14) 1975 Ch. Law Reports 8.

(15) 1981 Ch. Law Reports 154.

restore that of the Judicial Magistrate, 1st Class, Barnala, dated 15th December, 1981. However, it is made clear that if, at any stage, material comes on the record and it becomes necessary, the bar of section 197 of the Code of Criminal Procedure may successfully be pleaded.

(10) For the foregoing reasons, this petition is allowed. The order of the learned Additional Sessions Judge is set aside restoring that of the Judicial Magistrate, 1st Class, Barnala. It is, however, directed that the learned Magistrate, shall expedite the proceedings time-bound. And since the matter is at the pre-charge stage so far as the accused-respondent is concerned, he may, if so approached, consider granting exemption from appearance to the accused-respondent in view of his office and public duties and permit a lawyer to appear in his stead, till the culmination of pre-charge stage at least. Ordered accordingly.

N. K. S.

Before S. S. Sandhawalia, C.J. and D. S. Tewatia, J.

STATE (UNION TERRITORY), CHANDIGARH,—*Appellant.*

versus

MANJIT SINGH AND OTHERS,—*Respondents.*

Criminal Appeal No. 324/*SB*/1982

April 20, 1983.

Code of Criminal Procedure (II of 1974)—*Sections* 374 *and* 377—*Probation of Offenders Act (XX of* 1958)—*Sections* 4 *and* 11—*Accused convicted under various sections of Penal Code by the trial Magistrate—Such accused subsequently released on probation under section* 4 *of the Act by the said Magistrate—Appeal to the High Court against the order under section* 4—*Whether competent.*

Held, that on a plain reading of sub-section (2) of section 11 of the Probation of Offenders Act, 1958, it would emerge that an appeal against an order passed by any Court trying the offender under section 3 or section 4, would lie to that court to which appeal ordinarily lies from the sentence of the former court. For locating the