

(2004) 12 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : HCP No. 182 of 2003

Abdul Ahad Rather

APPELLANT

Vs

State of Jammu & Kashmir and Another

RESPONDENT

Date of Decision : 24-12-2004

Acts Referred:

Arms Act, 1959 — Section 25, 7
Jammu and Kashmir Public Safety Act, 1978 — Section 13, 2, 8
Ranbir Penal Code, 1989 — Section 120, 149, 302, 307

Citation : (2005) 2 JKJ 306

Hon'ble Judges : Hakim Imtiyaz Hussain, J

Bench : Single Bench

Advocate : M.I. Sofi, for the Appellant; M.A. Beigh, Dy. A.G., for the Respondent

Final Decision : Allowed

Judgement

Hakim Imtiyaz Hussain, J.—This Habeas Corpus Petition has been filed by Abdul Ahad Rather S/o Mohd. Mansoor Rather R/o Tekipora,

Sogam, Kupwara (the detenu) through his father Mohd. Mansoor Rather. It is alleged that the detenu came to be arrested on 3.06.2003. He was

later booked in FIR No. 34/03 under Sections 307, 149, 120 RPC, and 7/25 Arms Act of Police Station Lalpora, Kupwara, FIR No. 58/2002 of

P/S Sogam for offences u/s POTA, 302, 307, 120 BRPC, 7/25 A.A., FIR No. 83/2003 of P/S Kupwara u/s 302, 307 RPC, 7/25 AA, and FIR

N. 85/2002 P/S Sogam, u/s 302 RPC, 7/25 Arms Act. The grounds of detention as issued by respondent No. 2 shows that the detenu was

serving in Police Department of J&K Government as Selection Grade Constable. The main allegation against him is that he was working over

ground worker of J.E.M, the unlawful organisation and that his aim and object was to indulge in such nefarious activities which were highly

prejudicial to the security of the State. The grounds of detention gives various activities in which the detenu has allegedly indulged. Ultimately the

detaining authority has come to the conclusion that ordinary law of the land will not serve as a corrective, hence, his detention under the provisions

of J&K Public Safety Act 1978 (for short the Act) becomes imperative,

2. The impugned order. No. DMK/PSA 68-70 dated 12.09.2003 reads as under:

Whereas, you have been detained vide order No: 07 DMK/PSA of 2003 dated 12.09.2003 made by me u/s 8 of J&K public Safety Act 1978.

Now, therefore, in pursuance of sub Section 2 of Section 13 of the said Act, you are hereby informed that your detention has been ordered on the

ground specified in the annexure hereto.

You may inform the Home Department J&K Govt. Srinagar if you would like to be heard in person by the Advisory Board.

You may make a representation to the Government against the said detention, order, if you so desire.

3. The detention order has been challenged on various grounds. It is alleged that the detention of the detenu has been passed on the ground that

ordinary law of the land is not enough as a corrective measure to prevent the detenu from the activities prejudicial to the security of the State and

that the order is not sustainable in view of the law laid down by this Court in various authorities.

4. Respondents have in their counter affidavit stated that as the activities of the detenu are prejudicial to the security of the state his detention was

found absolutely necessary and, accordingly, he was ordered to be detained by respondent District Magistrate, Kupwara vide order No. 07

DMK/PSA of 2003 dated 12.09.2003 with a view to prevent the detenu from acting in any manner prejudicial to the security of the State.

5. Heard. Considered. Learned counsel for the petitioner has vehemently argued that the only ground taken by the detaining authority to detain the

detenu is that the ordinary law of the law will not serve as a corrective, hence his detention has become imperative. He has referred to the

judgment of this Court delivered in Gh. Nabi Dar v. State of J & K and Ors. 2002 KLJ 637 and has argued that in view of this authority the

ground is no more available to the State to detain the present detenu.

6. This Court has in the above cited authority observed as under:

The compelling reasons spelled out by the detaining authority are, that ordinary criminal law is not enough to prevent detenu from such subversive

activities. Similar proposition of law was also in HCP No. 97/2000 titled Bilal Ahmad Bhat v. State and Ors. Wherein while dealing with it,

satisfaction and the reasons disclosed by the detaining authority while directing the preventive detention of the detenu is that the ordinary law of the

land is not sufficient to deter the detenu from his activities. This cannot be accepted either as a ground or detention.

7. This authority was followed by this Court in Mohd. Rustum Lone v. State HCP NO. 209/2003 decided on 10.8.2004.

8. In view of this authority the ground taken by the detaining authority in the present case cannot stand.

9. The detenue in the present case was, at the time of his detention, already in custody in connection with the criminal cases. In view of he law laid

down by the Apex Court in T.P. Moideen Koya Vs. Government of Kerala and Others, , if a person is in custody and there is no imminent

possibility of his being released from such custody, the power of detention should not ordinarily be exercised. There must be cogent material

before the authority passing the detention order for inferring that the detenue was likely to be released on bail. The court held:-

The very object of passing a detention order being to prevent the person from acting in any manner prejudicial to maintenance of public order or

from smuggling goods or dealing in smuggled goods, etc. normally there would be no requirement or necessity of passing such an order against a

person who is already in custody in respect of a criminal offence where there is no immediate possibility of his being released. But in law there is no

bar in passing a detention order even against such a person if the detaining authority is subjectively satisfied from the material placed before him

that a detention order should be passed.

The court while referring to Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, , observed (at para 21)

The principle is that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not

ordinarily be exercised. There must be cogent material before the authority passing he detention order for inferring that the detenu was likely to be

released on bail.

In the present case there is no subjective satisfaction recorded by the detaining order nor is clear as to whether the detainee has applied for any bail

or that was there any likelihood of his release on bail in the cases against him under the criminal law.

10. The detainee was arrested on 3.6.2003 and his detention has been ordered on 12.9.2003. If there were compelling reasons to take him into

preventive custody, then why it took such a long time for the authority to decide it is also not clear from the record.

11. The detention order was passed in the case on 12.9.2003 and as per the record made available, the order was executed on 27.9.2003. The

detainee was available with the authorities as he had already been placed in custody for the criminal offences. The inordinate delay in executing the

warrant of detention has not been explained.

12. In *Ghulam Nabi Bhat v. State of J&K* 2003 (1) SLJ 218 J&K a division Bench of this court held that unexplained delay in execution of the

detention warrant throws doubt on the genuineness of the satisfaction of the detaining authority and vitiates the detention order and detention under

the Public Safety Act. The court was considering the correctness of the proposition of law propounded in the judgment of the single Bench

rendered in *Showkat Ahmed Bakshi v. State & Ors.* 2000 SLJ 700 and concurring with a Division Bench authority of this court in *Ghulam*

Rasool's case observed: (at para 16)

Thus as per the view of learned Division Bench any delay more so unexplained in execution of the detention warrant tantamounts to manipulation

on the part of the detaining authority as well as the executing agencies, such delay throws doubt on the genuineness of the satisfaction of the

detaining authority and therefore detention is rendered illegal. We concur with the view of Division Bench. That in the facts and circumstances of a

case, unreasonable delay may vitiate detention. We may add here another reason for holding that unexplained delay affects the legality of the

detention. If undue delay of such a nature is allowed to occur in the execution of the detention order from which it can be assumed that the nexus

and proximity between detention and the object of the detention has broken. Such delay will render the detention illegal.

11. Under these circumstances we are of the view that the order of detention cannot be sustained since the 'live and proximate link' between the grounds of detention and the purpose of detention is snapped on account of the undue and unreasonable delay in securing the appellant/detenu and detaining him. As we have now come to the conclusion that the order of detention is liable to be set aside on this ground alone. We are not dealing with other contentions raised in the Memorandum of appeal as well as in the writ petition." For the reasons stated above we answer the reference by saying.

(a) the judgment rendered in the case *Showkat Ahmad Bakshi v. State and others* 2000 SLJ 700 J&K does not lay down the correct position of law;

(b) Inordinate unexplained delay in execution of the detention order upon a person in custody does not contravene the safeguards enshrined in Section 13 of Public Safety Act. However such delay vitiates the detention order and detention under the Public Safety Act.

13. In view of this position of law, the detention order in the present case cannot stand.

14. Another important aspect of the present case is that in the grounds of detention it is alleged that the present detenu came into contact with the militants through one Rustum Lone SPO. In this behalf the detaining authority has observed as under:

You are serving in Police Department of J&K Govt. as Selection Grade Constable and were working as over ground worker of JEM, the

unlawful organisation. Your aim and object was to indulge in such nefarious activities which are highly prejudicial to the security of the state. You

engaged yourself in providing shelter, information and transport to the foreign militants. Your activities are grave danger to the security of the state.

You hatched criminal conspiracy with foreign militants of JEM, LET and HM, the unlawful organizations. In the year 2002, you were posted as PP

Sogam which was upgraded as Police Station Sogam. You alongwith Rustum Lone SPO had a meeting with foreign militants, prominent among

them were accompanied by other 5-6 militants.

15. Said Mohammad Rustum Lone was also kept under detention by the State by means of detention order No. 04/DMK/PSA of 2003 dated

12.09.2003 passed by District Magistrate, Kupwara. His detention was challenged and by means of a decision of this Court in HCP No.

209/2003 decided on 10.08.2004 titled Mohd. Rustum Lone v. State his detention has already been quashed and the Court has directed to

release the detenu forthwith. In view of this fact also the detention order against the present detenu cannot stand.

16. For the aforesaid reasons this petition is allowed. The detention order No. 07 DMK/PSA of 2003 dated 12.09.2003 is set aside. The

respondents - State is directed to release the detenu namely Abdul Ahad Rather S/o Mohd. Mansoor Rather R/o Tekipora, Sogam, District

Kupwara, forthwith from the said preventive detention provided he is not required in any other offence.