

(2021) 04 J&K CK 0055
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 15 Of 2020

Abdul Qadoos Rather

APPELLANT

Vs

Union Territory Of Jk And Ors

RESPONDENT

Date of Decision : 27-04-2021

Acts Referred:

Arms Act, 1959 — Section 7, 25

Jammu And Kashmir Public Safety Act, 1978 — Section 17(1)

Citation : (2021) 04 J&K CK 0055

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Sheikh Manzoor, Sajad Ashraf

Final Decision : Allowed

Judgement

1. Impugned in this petition is order of detention of the petitioner issued by District Magistrate, Kupwara (the detaining authority) vide its order No. 59-

DMK/PSA of 2019 dated 22nd November 2019 whereby the petitioner has been taken into preventive custody with a view to prevent him from acting

in any manner prejudicial to the security of the State.

Impugned order is stated to have been executed on 23rd November 2019.

2. Before advertng to the grounds of challenge taken by the petitioner to assail his detention, it is necessary to briefly state the factual background

leading to the issuance of impugned order of detention.

3. Superintendent of Police Handwara vide his communication No. Pross/Dossier/2019/6573-76 dated 5th November 2019 placed the detail of

activities in respect of petitioner before the detaining authority and recommended his detention under the provisions of Jammu and Kashmir Public

Safety Act. Along-with the dossier, the SP concerned also produced copy of FIR 87/2019 and a statement of witnesses recorded therein. As per the

dossier, the petitioner was stated to be an active member of an unlawful terrorist organization known by the name of Lashkar-e-Toiba (LeT). It is

stated that he associated with the aforesaid organization with an intention to take active part in recruiting youths from different parts of the valley to

commit acts of terrorism and create an atmosphere of terror in the valley especially in the Handwara/Kupwara belt. The petitioner, as claimed, had

worked as Special Police Officer (SPO) in the State Police Department and during his deployment as SPO, he came in contact with Zakir Rashid

Bhat of Kupwara during funeral procession of one local militant namely Liyaqat Ahmad, the relative of terrorist namely Zakir Rashid Bhat. He

became friendly with said Liyaqat Ahmad and managed his contact with one young boy namely Shafat Yousuf Malik whom he persuaded and

motivated to join militant rank. It is further alleged that the new recruit namely Shafat Yousuf Malik was apprehended by the Handwara Police during

checking at Kulangam. During his personal search, some arms and ammunition were recovered from his possession and FIR No. 87/2019 under

Section 7/25 of the Arms Act, 18-B, 38 ULA(P) Act was registered with the Police Station Handwara. During investigation, the said person disclosed

his ordeal and, on the disclosure, made by said Shafat Yousuf Malik, the petitioner was arrested.

4. The detaining authority considered the dossier of activities submitted by the police and arrived at its subjective satisfaction that remaining of the

petitioner at large is detrimental to the interest of security of State and accordingly issued the impugned order of detention.

5. The petitioner has assailed the impugned order of detention inter alia on the following grounds:-

(i) That the detaining authority has not applied its independent mind to derive its subjective satisfaction with regard to the necessity of placing the

petitioner under preventive detention and has only relied upon the dossier placed before it by SSP Handwara.

(ii) That the impugned order is vitiated for non-application of mind of the detaining authority, in that, the detaining authority has not shown any

awareness with regard to the petitioner being in police custody in case FIR No. 87/2019 and his subsequent release on default bail on account of

failure of the police to file challan within the statutory period.

(iii) That the detaining authority in the grounds of detention has clearly mentioned that the detenu was at large and not in police custody and, therefore, has shown its complete ignorance that the detenu was arrested in FIR No. 87/2019 and was in police custody till he was bailed out in default of the investigating officers to file the challan within the statutory period.

(iv) That all the documents particularly the statement of the witnesses and other relevant material relied upon in the grounds of detention was never provided to the petitioner which seriously impacted the right of the petitioner to make an effective representation.

6. On being put on notice, the detaining authority has filed the counter affidavit.

7. The detention of the petitioner has been justified in view of his prejudicial activities narrated in detail in the dossier submitted by SP Handwara. It is submitted that the detaining authority after considering the material placed before it by the Police and applying its independent mind arrived at the satisfaction that the activities, the petitioner had been indulging in, were highly prejudicial to the security of State and, therefore, it was imperative to place him under preventive detention so as to prevent him from continuing with his prejudicial activities. The detaining authority has also explained as to how and in what manner the procedural safeguards provided under Jammu and Kashmir Public Safety Act have been followed in the instant case.

There is, however, no specific reply to the averments made by the petitioner in para 4, 5, and 6 with regard to his arrest in FIR No. 87/2019 and subsequent order of release issued by the competent court of law for default of investigating officer to file the challan within the statutory period.

8. Having heard learned counsel for the parties and perused the record, it is seen that the writ petitioner in para 4, 5, and 6 of his petition has clearly stated that he was arrested by the Police of Police Station Handwara in FIR No. 87/2019 on the basis of some confessional statement made by one Shafat Yousuf Malik. Shafat Yousuf Malik was, however, admitted to bail by the court of Judicial Magistrate 1st Class, Handwara on 27th May 2019, but the similar bail application filed by the petitioner was returned with a direction to present the same before the competent court of jurisdiction.

Accordingly, the petitioner filed a bail application before the Court of TADA/POTA (Srinagar), but the same was rejected on 1st June 2019 by the

learned court. The IO however failed to file the charge sheet within a period of 180 days, as such, the concerned Magistrate in terms of order dated

6th November 2019 declined the grant of remand to the State and apprised the detenu of his right to move default bail application. The petitioner

submitted that the default bail application was also filed, but before the petitioner could be released, the detention order was passed. Interestingly,

there is no specific reply given by the detaining authority in his counter affidavit.

9. From complete reading of the counter affidavit filed by the detaining authority, it clearly transpires that he was not aware with regard to the arrest

of the petitioner in FIR No. 87/2019 and his being in custody on the date the detention order was passed by him. He has not shown awareness about

the arrest and subsequent order of the Magistrate declining to grant further remand to the State. All this clearly shows total non-application of mind by

the detaining authority.

10. The legal position on the point was long back settled in the case of Surya Prakash Sharma vs. State of U.P and Ors. 1994 SCC (Cri) 1691. Para 5,

6 and 7 of the said judgment are noteworthy and are reproduced hereunder:

“5. The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in

custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in Rameshwar Shaw v.

District Magistrate, Burdwan. To eschew prolixity we refrain from detailing all those cases except that of Dharmendra Suganchand Chelawat v.

Union of India, wherein a three Judge Bench, after considering all the earlier relevant decisions including Rameshwar Shaw answered the question in

the following words:

“The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that

purpose it is necessary that the grounds of detention must show that

(i) the detaining authority was aware of the fact that the detenu is already in detention: and (ii) there were LPA(HC) NO.22/2017 6 OF 9 compelling

reasons justifying such detention despite the fact that the detenu is already in detention. The expression “compelling reasons” in the context of making

an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it

may be satisfied that

(a) the detenu is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities of the detenu,

it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from

engaging in such activities.

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be

sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the time

of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of

the averment made in grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail "he may again indulge in serious

offences causing threat to public order". (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might

indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

7. On the conclusions as above, we quash the order of detention.

11. This judgment has been followed by a Division Bench of this Court in the case of Bilal Ahmad Dar vs. State of JK & Anr. 2017 (II) SLJ 650

(HC). Para 12 of the judgment rendered in the said case is relevant and is also reproduced hereunder: -

12. From the above decision, it is evident that for an order of detention to be valid in respect of a person in custody, it is necessary that the

grounds of detention must show that;

(i) the detaining authority was aware of the fact that the detenue is already in custody; and (ii) there were compelling reasons justifying such detention

despite the LPA(HC) NO.22/2017 7 OF 9 fact that the detenue is already in detention. The expression "compelling reasons" has also been

explained by the Supreme Court as signifying that there must be cogent material before the detaining authority on the basis of which it may be

satisfied that (a) the detenue is likely to be released from custody in the near future, and (b) taking into account the nature of the antecedent activities

of the detenue, it is likely that after his release from custody he would indulge in

prejudicial activities and that it was necessary to detain him in order to prevent him from engaging in such activities.â??

12. The issue has been considered at some length by the Supreme Court in the case of Rushikesh Tanaji Bhoite vs. State of Maharashtra & Ors

(2012) 2 SCC 72, wherein the Honâ??ble Supreme Court relying upon Three Judge Bench judgment of the Supreme Court in the case of Rekha v.

State of Tamil Nadu (2011) 5 SCC 244 and Vijay Narain Singh vs. State of Bihar 1984 (3) SCC 14 has concluded that the detention order would be

rendered bad if the detaining authority is unaware of the fact that the detenu was in custody when the order of detention was passed and that he had moved an application for grant of bail.

13. In the instant case, the detenu was admittedly in police custody in FIR No. 87/2019 when the order of detention was passed by the detaining

authority. His bail application had been dismissed by the competent court on merits, but later on because of the failure of the prosecution to produce

the charge sheet, he had been conveyed by the court that he had a right to move default bail application. As is claimed by the petitioner, he had

actually moved such application, but, before he could be released, he was detained in terms of the impugned detention order. All these facts, as is

apparent from the bare reading of the grounds of detention, were not within the knowledge of the detaining authority and requisite material had not

been placed before it by the police authority. This obviously has deprived the detaining authority of the requisite material that was required to be

considered by it for deriving his subjective satisfaction with regard to the necessity of placing the petitioner under preventive detention. This ground

alone is sufficient to quash the impugned order of detention. But from the perusal of the record, I have further found that the brother of the petitioner

had made a detailed representation to the Principal Secretary to the Government, Home Department for release of the detenu and same had been

forwarded by the Department of Home to the ADGP CID J&K. However, vide latter his communication dated 11th May 2020 did not find favour

with the release of the petitioner and accordingly recommended that the petitioner should not be released. There is, however, no order of consideration

passed by the Government on the representation of the brother of the petitioner and the recommendations of the ADGP CID, J&K. Once a

representation is made by or on behalf of the detenu to the Government, same is required to be considered by the Government and decision taken

therein on merits. Having failed to do so, the respondents have infringed the vital right of the petitioner to make representation against his detention

and to have the same considered by the competent authority on merits and in accordance with law.

14. That apart from the further perusal of the detention record produced by the respondents, it transpires that the impugned order was issued by the

detaining authority on 22nd November 2019 and the same was confirmed by the Government under Section 17(1) of the J&K Public Safety Act 1978

for a period of six months in the first instance. The same was extended for a further period of six months in terms of Government Order No.

Home/PB-V/1201 of 2020 dated 19th May 2020. There is, however, no further extension issued by the Government that could be traced in the

records. If that be the position, then the order of detention impugned has expired with the expiry of 12 months from the date of execution of the order

of detention. It may be noted that the order of detention dated 22nd November 2019 is stated to have been executed on 23rd November 2019. The

period of detention has thus expired w.e.f. 23rd December 2020. In the absence of any further extension granted by the Government, the petitioner

cannot be kept under preventive detention after 23rd November 2020. For that reason also, the detenu becomes entitled to be released forthwith.

15. For the foregoing reasons, I find merit in this petition and the same is accordingly allowed. The order of detention impugned in this petition is,

accordingly, quashed and detenu held entitled to be released from preventive custody.

16. Respondents to release the petitioner from the preventive custody immediately and forthwith unless he is required in some other case.