

(1994) 06 J&K CK 0006
In the Jammu And Kashmir High Court
Case No : HC No. 695/1993

Assadullah Sofi

APPELLANT

Vs

State of J&K and Others

RESPONDENT

Date of Decision : 29-06-1994

Acts Referred:

Constitution of India, 1950 — Article 22(5), 226
Ranbir Penal Code, 1989 — Section 302, 307

Citation : (1995) SriLJ 52

Hon'ble Judges : A.Q.Parray, J

Bench : Single Bench

Advocate : Z.A.Qureshi, A.Kotwal, Advocates appearing for the Parties

Judgement

1. By this petition, detention of one Ghulam Qadir Sofi son of Mohammad Sultan Sofi R/o Saloor, Ganderbal is being challenged by the

petitioner, brother of the detenu. It is averred that the detenu is a Government employee working in the police Department as Constable No:

210/S of JKAP and is alleged that on 28.4.1993, he was arrested in Police Control Room by army personnel and in identification parade, he was

found one of the supporters of the Police movement and is alleged that subsequently, he was detained under the provisions of Public Safety Act.

2. It is submitted in the petition that an undated copy of grounds of detention was served to the detenu. The detention order seems to have been

passed by District Magistrate, Srinagar and no order of detention was served on the detenu.

3. The detention of the detenu has been challenged and the petition stands admitted to hearing on 16.8.1993. Notice of the petition was given to

the respondent/State. Mr. Kotwal had appeared on 17.9.1993 before one of the

benches of this court and he was given three weeks time for filing counter. Again the case had come up before Hon'ble Mr. Justice M.L.Koul on 3.12.1993 and on the date also, no counter was filed. Two weeks further time was given to Mr. Kotwal with the permission that in case, respondents fail to file counter, the right to file the same shall stand closed and the case was ordered to be listed for hearing. The case has come up for hearing on 4.3.1994. However, at the time of hearing, no records were made available.

4. From the perusal of the petition, it transpires that the petitioner has taken almost all the available pleas which are taken in such petitions by the detainees detained under the provisions of Public Safety Act.

5. The petitioner has pleaded that the detention of the detainee is illegal and ultra vires to the fundamental rights guaranteed by the Constitution of

India as also by the State Constitution. The detention of the detainee is not in accordance with the statutory provisions of JandK Public Safety Act

of 1978. It is alleged that the grounds of detention were not supplied to the detainee within the time prescribed by the statute. The grounds of

detention were supplied to the detainee after more than a month of his detention. The material on which the grounds of detention

were made viz. FIR etc. referred to and relied upon by the detaining authority have not been provided to the detainee and no police dossier or

other records/documents making basis for detaining the detainee have not been made available to the detainee.

6. It is further averred in the petition that the grounds of detention have not been explained to the detainee in the language, he understands. It is

submitted that the detainee is only a Matriculate and can, as such, understand only Kashmiri or Urdu, but the grounds of detention have not been

explained to him in the said languages. This inaction of the respondents in not explaining the grounds of detention to the detainee in the language, he

understands amounts to noncommunication of grounds of detention and deprived him of making a representation, not to speak of an effective one

to assail the order of detention.

7. It is further submitted that the detainee has also not been informed that he has a right to make a representation and this non communication of his

right of making representation has also deprived the detainee of his valuable

right which is guaranteed to him under the provisions of SubArticle (5) of Article 22 of the Constitution of India, which make it emphatically clear that whenever a person is being detained under the provisions of preventive Detention Act, he is to be apprised that he has a right of making such representation against his detention. This right is not envisaged by the Constitution, but also has been taken care of by the Statute in this behalf.

8. The provisions of Subsection (i) of section 13 of the Public Safety Act make it emphatically clear that the grounds of detention should be given to the detenue within five days and in exceptional cases within ten days from the order of detention and in case there is any delay in serving the grounds of detention within five days, the reasons therefor are to be mentioned by the detaining authority and the grounds of detention must be communicated to the detenue in the language he understands, otherwise the assurances or constitutional guarantees of making a representation become illusory, in case the person of the detenue is not in a position to understand the grounds of detention or material on which the detention has been made. So it is under law ensured that the detenue should be provided with all the material, the supporting documents viz. FIR, Police dossier¹ etc. on which the detaining authority has placed reliance while ordering the detention so that he gets clear picture about his involvements and of his activities, which has justified his detention in the public order or in the security of the State, and is in a position to project his contentions.

This is the purpose of law and in case this is not done, then the very order of detention cannot stand the judicial scrutiny and cannot be justified.

9. It may be noted that liberty of an individual is more sacrosanct and in case liberty of an individual as ensured to him under Article 21 of the Constitution is to be deprived, it can be deprived by following due course of law.

10. Once rule nisi stands issued to the respondents, it is they who have to justify that due course of law has been followed in detaining a person.

11. It has also been submitted by learned counsel for the petitioner that the detention order passed by respondent No.2 (District Magistrate, Srinagar) has not been approved by the Government or the Advisory Board and the detention of the detenue, as such, is not only illegal, but unconstitutional also.

12. It may be noted that any order of detention passed by a District Magistrate

or Divisional Commissioner under the provisions of Section 8 of

the Public Safety Act can be passed, but the same is to be approved by the Government within twelve days of the passing of the such order. There

is nothing on the record to suggest or to show that the order passed by District Magistrate, Srinagar was approved by the Government within

twelve days or that the detainee along with his detention papers on which reliance has been made by the detaining authority has been forwarded to

the Advisory Board constituted under Section 14 of the Public Safety Act within 4 weeks from the date of execution of the order of detention and

the said Statutory Advisory Board had to return its finding within eight weeks from the date of detention after perusal of all the material placed by

the detaining authority before it and some further information, which can be sought by the said statutory Board and after hearing the detainee in

person or through representation, as he may desire. The Advisory Board has to return its finding regarding justification of grounds for continued

detention and when such opinion of the Board is received, it is the discretion of the Government either:

i. to confirm the order of detention; or

ii. to release the detainee as they may please.

13. The order of detention is to be confirmed within three months from the date of detention as envisaged by Subsection (i) of section 17 of the

Public Safety Act. However, no such process seems to have been followed as nor records were made available neither any counter was filed by

the respondent/State. So the order of detention on this count also is not illegal and improper, but also unconstitutional.

14. It is further averred that the detention of the detainee has been ordered without application of mind because the detaining authority apprehends

that the detainee may be enlarged on bail, when it is an admitted fact that the detainee was arrested as per grounds of detention on 2.5.1993 in case

FIR No:79 of 1993 Police Station Shergari under section 3/4 TADA (P) Act, 302/307/ 365/120B RPC, 3/25 Indian Arms Act etc. and was

lodged in the lockup in Harini was. Keeping under consideration the heinousness of the offence of murder and attempt to murder coupled with the

offence under TADA (P) Act, there were remote possibility of letting the accused on bail, when the accused has neither applied for bail nor

any bail was granted to him. So the apprehension of learned District Magistrate in detaining the detenue under the preventive detention inspite of

the fact that the heinous offences were registered against him, which were cognizable/tribe by the Designated Court only, fully knowing that the

Designated court has to grant bail only when it is satisfied that no such offence has been committed by the accused and that in future, he is not

likely to repeat such offences. Thus by colourable exercise of powers, the detenue has been detained on vague and fanciful grounds.

15. So all the averments analysed hereinabove stand unrebutted by the respondent/State. There is no justification shown by the respondents that

the order of detention has been passed by the detaining authority in accordance with law and that due course of law has been followed in detaining

the detenue.

16. For the foregoing reasons, the petition is allowed and by a writ of certiorari, the order of detention of whatever nature passed against the

detenue is quashed and it is directed that he be released forthwith unless, otherwise required in any substantive offense. The petition is disposed of

accordingly.