

**(1949) 01 BOM CK 0007**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 637 of 1948**

|                        |    |            |
|------------------------|----|------------|
| Emperor                | Vs | APPELLANT  |
| Abdul Majid Abdul Aziz |    | RESPONDENT |

**Date of Decision :** 25-01-1949

**Acts Referred:**

Bombay Police Act, 1951 — Section 27  
Bombay Public Security Measures Act, 1947 — Section 2(6)

**Citation :** AIR 1949 Bom 387 : (1949) 51 BOMLR 568

**Hon'ble Judges :** M.C. Chagla, C.J.;Gajendragadkar, J

**Bench :** Division Bench

**Final Decision :** Dismissed

## Judgement

M.C. Chagla, C.J.—This is an appeal against an order of the Presidency Magistrate, 20th Court, acquitting the accused who was charged u/s 2(6) of the Bombay Public Security Measures Act (Bom. VI of 1947).

2. This appeal raises rather an important question of principle. An order was made against the accused on June 24, 1947, by the Commissioner of Police u/s 2(1)(b) of Bombay Act VI of 1947. The accused complied with the order and left the jurisdiction of the City of Bombay. But. he came back to Bombay in November and thereby contravened the order. He was arrested on November 22, 1947, and he was prosecuted under Sub-section (6) of Section 2 for contravening the order made by the Commissioner of Police. The learned Magistrate took the view that the prosecution had failed to establish the conditions laid down, by the Legislature for the making of a valid order u/s 2(1) (b), and, therefore, the accused was entitled to an acquittal. The Advocate General has contended before us that the judgment of the learned Magistrate is wrong and that the prosecution had established all that was incumbent upon it to establish by merely tendering the order passed by the Commissioner of Police and it was the duty of the Court to accept the order ex facie as valid, and, if it was satisfied that the accused had contravened the terms of the order, to

proceed to convict the accused and pass the proper sentence.

3. Now, turning to the Act, it is perfectly true that before an order under Sub-clause (b) can be made, the Provincial Government or an officer to whom the power has been delegated under the Act has to be satisfied that any person was acting, is acting or is likely to act in a manner prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof. The making of a valid order is made conditional by the Legislature upon the satisfaction of the Provincial Government. It is a condition precedent to the making of the order, and, therefore, before the Court can convict an accused person for contravening an order u/s 6 evidence has got to be led in order to establish that the Provincial Government was satisfied in the manner indicated in Sub-section (1) of Section 2. Section 6 speaks of contravening an order made under this section. It is only a valid order made under the section, the contravention of which constitutes an offence. It is not any order made under the section which requires obedience on the part of the person to whom the order is addressed. It must be an order which satisfies the condition laid down in Sub-section (1) of Section 2, and as we have pointed out the condition which the Legislature requires and which it has imposed upon the executive authority is that it should be satisfied in a particular manner. Now, the Advocate General has argued that as soon as an order made by the Commissioner of Police is tendered and the order on the face of it says that the Commissioner of Police was satisfied as required by Sub-section (1), nothing further is to be proved by the prosecution, and the condition laid down under Sub-section (1) has been satisfied. In our opinion that is not the correct position in law. Section 60 inasmuch as it provides for a conviction at the hands of a Court, presupposes a judicial determination by the Court. Although the order to be made is an executive order, the determination that it is a valid order is a judicial determination, and for the purpose of a judicial determination all the principles underlying the Evidence Act and all principles underlying criminal jurisprudence must be complied with. And the most fundamental of these principles is that the burden of proving the guilt of the accused is upon the prosecution and the prosecution must establish by evidence all the ingredients which go to constitute an offence, and when an accused person is charged with the contravention of an order, and he pleads not guilty by challenging the validity of the order, one of the most important ingredients to be proved is that the Provincial Government has been satisfied on materials placed before it that the accused is acting in a manner which is prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof, and that ingredient, in our opinion, cannot be said to have been proved merely by the prosecution flourishing in Court an order made by the Police Commissioner. The Advocate General has given the instance of proceedings u/s 491 where a detained person under the Public Security Measures Act comes to Court complaining of his detention and challenging the order of detention. The position, in proceedings u/s 491 and the position that obtains when a person is charged in a Court of law

for the commission of an offence are by no means identical and no analogs" can be drawn between the two. In the case of habeas corpus proceedings the petitioner comes to Court on a petition and he has got to make out, and he has got to state, that the order under which he is detained is a bad order on any of the grounds on which it is open to him to attack or assail the order. On that if the Court is satisfied that a prima facie case is made out, it calls upon the detaining authority to justify the order and to meet the challenge made to it by the petitioner. In the case of a criminal trial it is the prosecution that initiates the proceedings. It is the prosecution that has got to prove the guilt of the accused, and not merely make out a prima facie case. The accused is under no obligation to open his mouth, and the Court can only convict the accused if it is satisfied that the prosecution has established that an offence was committed by the accused. Therefore, it would not be proper for us to accept the suggestion of the Advocate General and to lay down that as in habeas corpus proceedings the Court must in every case be satisfied by the mere production of the order by treating it as ex facie valid unless it is challenged on some ground by the accused. To accept this contention would tend to undermine the basic principles of a criminal trial and virtually to throw the burden upon the accused, which burden should and must always lie upon the prosecution.

4. The learned Presidency Magistrate in coming to the conclusion that he did relied upon a decision of a Full Bench of this Court reported in *Emperor Vs. Yarmahomed Ahmedkhan*, We must say that the view taken by the learned Magistrate of the ease before him was not wholly unjustified in view of some of the observations made by the Chief Justice, Sir John Beaumont, in delivering the judgment of the Full Bench in that case. What the learned Magistrate overlooked, with respect to him, was rather important distinction between the order which the Full Bench was considering in that case and the order which came up for consideration before him. The Full Bench was considering an order u/s 27 of the City of Bombay Police Act and that section gave a power to the Police Commissioner to extern certain persons, and that section also enabled the Police Commissioner to act if it appeared to him that a person or persons were acting in a manner which was causing or calculated to cause danger or alarm or reasonable suspicion as to the nature of the activity of this particular person or persons. The learned Magistrate seems to have been carried away by the fact that whereas in the Public Security Measures Act it was left to the satisfaction, of the Provincial Government whether the person to be extern ed was acting in a particular manner, similarly u/s 27 of the City of Bombay Police Act it was left also to the satisfaction of the Commissioner whether a person or a body of persons were acting in a particular manner because in substance there is no difference in the language used in Section 2 of the Bombay Public Security Measures Act, viz. if the Provincial Government is satisfied, and the language used in Section 27, viz. it shall appear to the Commissioner of Police. But, and that is the fundamental difference, in the case of Section 27 of the City of Bombay Police Act an objective fact had to be established before the

Commissioner of Police could exercise the power given to him u/s 27 and that objective fact was that the person to be externed had to belong to a gang or body of persons in the City of Bombay. Once that objective fact was established, then it was undoubtedly left to the satisfaction of the Commissioner of Police whether he was causing or calculated to cause danger or alarm etc. But in the case of the Bombay Public Security Measures Act there is no objective fact which has to be determined by the Provincial Government or the Commissioner of Police before he is to be satisfied as to the nature of the activity of the person he wants to extern. Bearing in mind this important difference between Section 2(7) of the Bombay Public Security Measures Act and Section 27 of the City of Bombay Police Act, we might now consider certain observations made by the learned Chief Justice in that case.

5. The learned Chief Justice at p. 491 concedes that the very foundation for an order u/s 27 of the City of Bombay Police Act was the movements or encampment of any gang or body of persons. In other words, unless the objective fact with regard to a gang or body of persons was established, the Police Commissioner had no jurisdiction whatever to act under that section. Then at p. 498 the learned Chief Justice lays down, two important principles :

In our opinion, it is a well established principle that where an Act of Parliament confers upon an authority power to make an order in certain conditions, and it is sought to impose a penalty for breach of an order made by the authority, it is incumbent upon the Court hearing the charge to consider whether the order was properly made and to be satisfied on two points : first, that the authority has acted reasonably and not capriciously or oppressively; and, secondly, that the conditions imposed by the statute have been observed.

With very great respect we entirely agree with these observations and we will indicate presently how these observations have got to be applied to a case which falls under the Bombay Public Security Measures Act. Then at p. 493 the learned Chief Justice says :

It is quite true that it is for the Commissioner to be satisfied, and not for the Court. All that the Court can do is to see that there was material before the Commissioner on which he could properly be satisfied.

Now, with very great respect to the learned Chief Justice, if the satisfaction is of the Commissioner or of the Provincial Government, then it is difficult to understand how the Court can judge whether the Commissioner or the Provincial Government is properly satisfied or not. If you import the idea of being properly satisfied, you are immediately substituting your own judgment for that of the Provincial Government or the Police Commissioner, unless the learned Chief Justice used the expression "properly" to mean that in coming to the conclusion the Commissioner of Police had not been influenced by any consideration which was foreign to the purpose or scope of the Act within which he was acting. And we might also point out that this observation would be, with respect, perfectly

appropriate to the particular facts which the learned Chief Justice was considering in that case; because as we have pointed out, if the Police Commissioner had to prove before a Court of law that the objective fact required by Section 27 existed, then certainly the Court would have the right to consider whether the materials on which the Commissioner of Police came to that conclusion were proper materials or not. But in the case before us there is no question of the determination of any objective fact and therefore there is no question of the Court considering the propriety or the adequacy of the materials before the detaining authority on which the decision of the detaining authority was based.

6. In our opinion therefore it is not sufficient for the prosecution in a case where they are charging an accused person with contravention of an order made under the Public Security Measures Act and where the validity of the order is challenged by the accused merely to tender the order. In the case before the learned Presidency Magistrate a police officer was called and all that he could say was that he knew that an order had been made by the Police Commissioner. He did not know anything more about it. It would be incumbent on the prosecution to call in evidence the authority that made the order, whether he is the Commissioner of Police or any other police officer authorised to make such an order. The Police Commissioner in tendering the order will have to state that materials were placed before him, that he applied his mind to those materials and that on a careful consideration of those materials he was satisfied that the accused was acting in a prejudicial manner, and having been satisfied he made the order which he was producing. If the evidence of the Commissioner of Police is not effectively challenged by the accused, then on this evidence it would be open to the Court to be satisfied that the order was properly made and the condition precedent laid down by the Legislature was complied with. But it would be open to the accused, in cross-examination of the Commissioner of Police, to challenge the order on the ground that it was made arbitrarily, capriciously or mala fide, and the Commissioner of Police would have to repel that charge if such a charge was made in cross-examination. It would also be open to counsel for the accused to suggest to the Commissioner of Police that in making the order he had taken into consideration materials and factors which were foreign or extraneous to the scope and ambit of the Public Security Measures Act, or, in other words, that he had permitted his mind to be influenced by considerations which were outside the scope of the statute. If such a suggestion is made and some reasonable grounds are adduced in support of it, it may be that in order to satisfy the Court that he had not taken anything into consideration which was outside the scope and ambit of the Act, it would be necessary for the Police Commissioner to state the general nature of the grounds on which he based his conclusion that the accused was acting in a prejudicial manner. It is perfectly true that it is not incumbent upon the detaining authority to disclose the materials to the Court or to state the sources of information on which he came to a particular conclusion. But there is no legislative bar against the Police

Commissioner stating the grounds which led him to be satisfied that the accused was acting in a prejudicial manner, and as we have said before it may in a particular case become necessary for the Commissioner of Police under cross-examination to disclose to the Court generally what were the grounds which led him to be satisfied and to make a particular order. It would be necessary to disclose these grounds in order to satisfy the Court that his mind was uninfluenced by any foreign or extraneous matter.

7. Turning now to the appeal before us, though the accused sought to challenge the order on several grounds, the Police Commissioner never entered the witness-box, nor was any other evidence called to satisfy the Court that there were materials before the Police Commissioner which he considered before he was satisfied that the accused was acting in a prejudicial manner and before he made the order of externment. Therefore, without agreeing with the learned Magistrate in all the views that he has expressed in his judgment, we must uphold his decision on the narrow and specific ground that as the detaining authority did not step into the witness-box in order to establish the validity of the order and to refute the objections of the accused against its validity by satisfying the Court that the condition precedent was complied with, the prosecution has failed to prove the offence with which the accused was charged.

8. The result therefore is that the appeal must fail. It is accordingly dismissed.