

(1949) 12 BOM CK 0009
In the Bombay High Court
Case No : Criminal Appeal No. 638 of 1949

Emperor	Vs	APPELLANT
Bhiku Ramchandra Shinde		RESPONDENT

Date of Decision : 06-12-1949

Acts Referred:

Bombay Public Security Measures Act, 1947 — Section 2(1), 2(6)
Evidence Act, 1872 — Section 114

Citation : AIR 1950 Bom 330 : (1950) 52 BOMLR 223

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

Bench : Division Bench

Advocate : C.K. Daphtary, General and B.G. Thakor, Addl. Asst. Govt. Pleader, for the Appellant; R.B. Kotwal, for the Respondent

Final Decision : Dismissed

Judgement

Chagla, C.J.—This is an appeal by Government against an order of the Additional Sessions Judge, Poona, acquitting the accused, who was convicted u/s 2 (6), Bombay Public Security Measures Act of 1947 by the City Magistrate of Poona. The order was served on the accused by the District Magistrate, Poona, on 6th March 1948, u/s 2(1) (b) and he was directed not to remain in the Poona District. The accused obeyed the order and went out of the Poona District, but he came back on 3rd May 1948. Thereupon he was arrested and charged as before. The learned Magistrate acquitted the accused largely because in his opinion the prosecution had failed to establish all the ingredients of the offence with which the accused was charged and in coming to that conclusion he followed a decision of this Courts and indeed of this Bench, in Emperor v. Abdul Majid 51 Bom. L. R. 568: A.I.R 1949 Bom 387 : 51 Cri. L. J. 47. The Advocate General, who appears on behalf of Government, has argued that the Magistrate has taken an erroneous view of that judgment and that the judgment does not go to the length to which it was suggested by the Magistrate it did go.

2. Now, in this particular case the detaining authority did not step into the box

and the detaining authority did not state that it was satisfied that the presence of the accused was prejudicial to the public safety and maintenance of public order in Poona. The only evidence led by the prosecution was of a police-officer who formally proved the order, and in his cross-examination he frankly stated that he did not know anything about the making of the order. The Advocate General's contention is that it is not incumbent upon the detaining authority in every case to step into the box and prove that it was satisfied that materials existed which led him to make the order. According to him it is only when the order is challenged on a particular ground which would make it necessary for such evidence to be led that it would be incumbent upon the prosecution to call the detaining authority, and according to the Advocate-General in this particular case looking to the challenge made by the accused to the order it was not necessary that the detaining authority should have been called. Now, in the cross-examination of the police-officer some suggestion was made as to the validity of the order because he was asked as to the reason why the accused was externed, and his reply was that he did not know the reason why the accused was externed, and in his statement the accused has challenged the order on the ground that it was of an exceedingly vague nature and it was illegal. The Advocate General says that nowhere in his defence has the accused suggested that the detaining authority made the order mala fide or that extraneous considerations weighed with the detaining authority in making the order, and therefore it was unnecessary for the detaining authority to come and repel the charge of the order being vague and illegal. The Advocate General has also contended that a presumption must be drawn ex facie that the order was validly made, and if it was validly made, then the detaining authority was satisfied as required by the law. We cannot accept the contention of the Advocate General. This was the very contention that was urged before us in *Emperor v. Abdul Majid* 51 Bom. L. R. 568: A.I.R 1949 Bom. 387: 51 Cr.L.J. 47 and this was the very contention which we expressly rejected in that case. We have pointed out in that case, that the burden is upon the prosecution to establish every ingredient which goes to constitute the offence, and one of the most important ingredients is that the detaining authority was satisfied as to the matters set out in Section 2 (1) before the order was made. We have also pointed out that it is not sufficient to tender the order which states that the detaining authority is satisfied. The detaining authority must step into the box and make that statement on oath in order to enable the accused to challenge that statement, if he was so advised, in cross-examination.

3. The Advocate General has drawn our attention to the practical difficulties which may result if in every case the detaining authority would have to step into the witness box without there being a proper challenge by the accused as to the validity of the order. While appreciating the practical difficulties, we feel it infinitely more important that we should not permit the liberty of the subject to be undermined in any manner. When a person's liberty is taken away under the Bombay Public Security Measures Act, it is essential that the prosecution must

establish, as the law requires, every ingredient of the offence, and, as I said before, there is no more important ingredient than the satisfaction of the detaining authority. It is not the satisfaction of the Court; the law has left it to the detaining authority to be satisfied; and therefore the least that the prosecution can do is at least to prove that the detaining authority was satisfied. If we were to accept the Advocate-General's contention that this evidence would only become necessary provided the accused challenged the validity of the order in a particular manner, we would really be throwing the burden upon the accused rather than upon the prosecution where the burden always lies in a criminal case. According to the Advocate-General, if the accused were to say nothing excepting pleading not guilty, then it would not be incumbent upon the prosecution to prove that the detaining authority was satisfied. That position we are unable to accept as the correct position in a criminal trial.

4. The Advocate-General has also referred to the presumption that would arise u/s 114, Evidence Act, 1872. The Advocate-General says that once an order is tendered and there is no proper challenge, the Court should presume that the act was properly done. In our opinion, such a presumption could not be raised by a Court in a criminal trial. The result of raising such a presumption would be to throw the burden on the accused to rebut the presumption. Section 114 is not mandatory and it is left to the Court in any particular case to raise a presumption as to the validity of official acts. But, as I said before, where you have a case where the liberty of a subject is either restricted or taken away, the Court should not raise a presumption as to a very essential ingredient which constitutes the offence. When the validity of the order has itself to be established by the prosecution, as it is only the contravention of a valid order which constitutes an offence, the prosecution cannot ask the Court to presume that the order is valid. In *Emperor v. Abdul Majid* 51 Bom. L. R. 568 : A.I.R 1949 Bom. 387 : 51 Cr. L. J. 47 we have carefully laid down the ambit of the inquiry which the Court is entitled to launch upon in the event of the detaining authority stepping into the witness box. But we do not accept the position that there may be cases where the validity of the order can be established without the detaining authority stating on oath that the condition precedent to the making of the order was complied with. Our attention is drawn to the fact that in two places in our judgment we have stated that the accused pleads not guilty by challenging the validity of the order, and it is suggested that our judgment should be confined to a position which would arise when the plea of not guilty is in respect of the validity of the order, which plea makes it necessary for the detaining authority to give evidence. It is unnecessary, in our opinion, to emphasise that particular expression in the judgment, because in our opinion when an accused person pleads not guilty to the charge of having contravened a valid order, the validity of the order is challenged by that plea itself, and in order to convict the accused the prosecution has to establish the validity of the order. It is not necessary for the accused expressly to state that he challenges the validity of the order. It is impossible for us to distinguish the particular case before us from the case which

we decided in Emperor v. Abdul Majid 51 Bom. L.R. 568: A. I. R 1949 Bom. 387 : 51 Cr. L. J. 47. The facts are identical. In that case also the detaining authority did not give evidence and the prosecution contented itself by calling a police-officer who did not know anything about the making of the order.

5. The result, therefore, is that the appeal must fail and the order of acquittal must be confirmed.