
(1938) 02 BOM CK 0001
In the Bombay High Court
Case No : Criminal Appeal No. 492 of 1937

Emperor	Vs	APPELLANT
Yarmahomed Ahmedkhan		RESPONDENT

Date of Decision : 11-02-1938

Acts Referred:

City of Bombay Police Act, 1902 — Section 128, 27

Citation : AIR 1938 Bom 338 : (1938) 40 BOMLR 483

Hon'ble Judges : Wassoodew, J; Rangnehar, J; N.J. Wadia, J; John Beaumont, J

Bench : Full Bench

Judgement

John Beaumont, Kt., C.J.—This is an appeal against the conviction of the appellant u/s 128 of the City of Bombay Police Act, 1902, by the Chief Presidency Magistrate, who imposed a fine of Rs. 201. Section 128 of the City of Bombay Police Act provides :-

Whoever, within two years from the date of his removal under the provisions of Section 27 returns to any place within the City of Bombay, without the permission in writing of the Commissioner of Police, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

2. The appellant admits that on November 2, 1936, an order was made by the Commissioner of Police purporting to act u/s 27 of the City of Bombay Police Act, under which the appellant was removed from Bombay. He further admits that he returned to Bombay within two years from the date of such removal; but he contends that the order which the Commissioner of Police purported to pass u/s 27 of the Act was not justified by the terms of that section, that the appellant's removal was not, therefore, under the provisions of Section 27, and that he is not liable to punishment u/s 128.

3. Section 27(7) of the City of Bombay Police Act is in these terms : -

Whenever it shall appear to the Commissioner of Police that the movements or encampment of any gang or body of persons in the City of Bombay are or is

causing or calculated to cause danger or alarm, or a reasonable suspicion that unlawful designs are entertained by such gang or body or by any member or members thereof, or that an out-break of epidemic disease is likely to result from the continued residence in the City of large numbers of pauper immigrants, the Commissioner of Police may, by beat of drum or otherwise as he thinks fit, direct the members of such gang or body or such immigrants so to conduct themselves as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease, or to disperse and remove themselves to such place or places, by such route or routes, and within such time, as the Commissioner of Police shall prescribe.

The scope of the power vested in the Commissioner under that section was discussed by a division bench of this Court in *Emperor v. Gulbadin Pathan* (1935) Criminal Revision Application No. 504 of 1934, decided by Beaumont C.J. and N. J. Wadia J., on February 8, 1935 (Unrep.) and it was there pointed out that the section is of very limited application. The section is one of a group of sections, extending from Section 23 to Section 29 (both inclusive), which are headed "Special Orders" and which confer upon the Commissioner of Police power to deal with various emergencies so as to secure the public safety, and the orders to be made by the Commissioner under those sections are mainly of a strictly temporary character. Apart from Section 27, the only power of externment which is given to the Commissioner is u/s 28, which has since been repealed and re-enacted in another Act, under which a prostitute may be expelled from Bombay, but any such order of expulsion is subject to the approval of the Governor-in-Council. It is clear from the language of Section 27 that the foundation for any order under the section is the movements or encampment of any gang or body of persons. Before any action can be taken under that section it must appear to the Commissioner that the movements or encampment of a gang or body of persons are or is causing or calculated to cause danger or alarm, or a reasonable suspicion that unlawful designs are entertained by such gang or body or by any member or members thereof; then only can the Commissioner give directions to the members of the gang or body. The Commissioner has no power under the n section to deport anyone whom he regards as a dangerous or undesirable character apart from his actions as a member of a gang or body of persons moving or encamping in the city.

4. The facts established in this case are that the appellant was a resident in Bombay from 1910 to 1920; during which period he worked for the P. & O. Company. From 1920 to 1930 he was a sarang of the Chhachi Pathans, who were employed by the P. & O. Co. and other shippers. In the year 1930, one Khan Saheb Abdul Kudus Khan was appointed by the P. & O. Co. a sarang both of the Chhachi and Peshawari Pathans, and this appointment may well have annoyed the appellant. On July 31, 1930, an order was made by the Commissioner of Police purporting to act u/s 27 expelling the appellant from Bombay for a period of two years. After the expiration of such period the appellant returned to Bombay ; and in the year 1934 a serious assault was committed on Khan Saheb

Abdul Kudus Khan, but no offence in respect thereof was proved against the appellant. On March 8, 1934, a further order was made by the Commissioner of Police against the appellant u/s 27 expelling him from Bombay for a further period of two years. The validity of the orders of 1930 and 1934 was not challenged, and it is irrelevant to consider whether they were validly made. In March, 1936, the appellant again returned to Bombay, and the Commissioner warned him to be of good behaviour, and thereupon he again returned to his native place. In April, 1936, Kudus Khan resigned, and the Chhachi Pathans in Bombay elected the appellant as their leader, and he returned to Bombay and applied to the P. & O. Co. to appoint him sarang of the Chhachi Pathans. However, the P. & O. Co. appointed one Mahroopsha, a Peshawari, to be sarang both of the Peshawari and Chhachi Pathans. On November 2, 1936, a further order was made by the Commissioner u/s 27 expelling the appellant and two others from Bombay, and it is that order which is called in question. The appellant maintains that it is not shown that there was any material before the Commissioner of Police on which it was possible for him to be satisfied that the case fell within Section 27 ; and the main question on this appeal relates to the powers of the Court to deal with an order purporting to have been made u/s 27 of the City of Bombay Police Act.

5. It is argued by the Advocate General in the first place that u/s 27 it is the Commissioner, and the Commissioner alone, who is to be satisfied, and that if the Commissioner affirms that he is satisfied as to the matters referred to in the section and thereupon makes an order under the section, no Court can question such order. It may be conceded that an order made u/s 27 is an order made by an executive officer, and is not subject to appeal or revision in any Court. But it is a very different matter to affirm that when an attempt is made to impose a penalty for breach of an order made under the section, the validity of the order cannot be impeached. The learned Advocate. General admitted that the logical consequence of his argument must be that the Commissioner can banish anyone from Bombay, without a particle of evidence against him, without preferring any charge and without hearing him, merely by affirming that the Commissioner is satisfied that the case falls within Section 27. This is really a *reductio ad absurdum*. The Advocate General maintains that it is in the interests of the public that the Commissioner of Police should have wide powers of expelling persons whose actions are likely to be a danger to the public, and that the safeguard against any abuse of that absolute power lies in the sense of responsibility of the Commissioner. In relation to the latter argument it must be borne in mind that the Commissioner does not inquire into these cases himself; he deposes for such enquiry some subordinate police-officer, whose sense of responsibility may not be as high as his own ; and whose impartiality may not be beyond question. In relation to the former argument the language of Section 27, as we have pointed out, shows that the legislature did not intend to give to the Commissioner of Police any general power to banish dangerous characters ; and it is relevant to the argument of the Advocate General, though not to the construction of the Act,

to point out that in the statement of objects and reasons for the Act published in the Bombay Government Gazette of January 31, 1902, it is stated that in Section 27 the provisions of Section 46 of Bombay Act IV of 1890 have been modified so as to give the Commissioner of Police power to control the influx of famine refugees or other immigrants whose presence may involve risk to health or property. The legislature has provided in Chapter VIII of the Criminal Procedure Code methods by which a dangerous character, who has not committed any actual offence, may be controlled, and it is open to the Commissioner of Police to initiate proceedings under that Chapter. We need hardly point out that power to banish a person who has committed no offence from the city where he has been residing for many years, to break up his home and destroy his business, without any trial and solely at the discretion of an executive officer, is one which no civilised legislature is likely to grant. 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. This principle was acted upon by a division bench of this Court in relation to an order made u/s 27 of the City of Bombay Police Act in *Emperor v. Anna Vithoba* (1935) 33 Bom. L.R. 1164. In all charges before a Magistrate u/s 128 of the City of Bombay Police Act, it is, in our judgment, incumbent upon the Magistrate to be satisfied, first, that the accused was informed by the Commissioner of the charge against him with sufficient particularity to enable him to answer the charge, and that he was given an opportunity of so answering ; and, secondly, that there was material before the Commissioner of Police on which he could properly hold that the conditions of Section 27 had come into- operation. 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. If in any such proceedings the Commissioner claims privilege for any document on which he acted, the Court will have to consider such claims ; but, in any event, we can see no reason why the Commissioner should not give evidence before the Court as to the general character of the material which he had before him.

6. The second argument of the Advocate General was that, assuming that it " was open to the Court to question the order, then as soon as the Commissioner produced an order purporting on the face of it to have been made u/s 27, the burden was on the accused to show that the order was invalid. This is to reach the same result by another route and to make it impossible to challenge the order, because the accused person cannot know what material the Commissioner had before him unless the Commissioner chooses to disclose the nature of such material. In our opinion, the burden is upon the prosecution to satisfy the Court that the order alleged to have been disobeyed was a valid one.

7. The third argument of the Advocate General was that if the burden did rest upon the prosecution to prove that the order was valid, such burden was discharged. It is necessary, therefore, to notice the relevant evidence which was before the learned Chief Presidency Magistrate.

8. The first witness called was Mahomed Hayat Mahomed Aslam, Police Inspector in charge of the Pathan Branch. He is a Peshawari, and it may be noted in passing that the accused questioned his impartiality in relation to any dispute between the Chhachis and the Peshawaris. The evidence of the witness was that after the return of the accused to Bombay in April, 1936, complaints were received against the accused by the Commissioner of Police that he was stirring up trouble among the Chhachi Pathans and that he contemplated an assault on Mahroopsha. The witness was deputed to enquire into the matter, which he did, and he made a report against the accused and three others. The report was placed before the Deputy Commissioner and subsequently before Mr. Rowland, the then acting Commissioner of Police, who heard the accused in the presence of the witness. It is apparent from that evidence that all that the Commissioner of Police had before him was a report of the witness, and that report has not been produced. In the absence of that report it is impossible for the Court to say from the Inspector's evidence that the Commissioner of Police had any material before him on which he could have arrived at the conclusion that the conditions of Section 27 had been brought into play. On the face of it it is difficult to suppose that a man who had lived in Bombay for twenty years was a member of a gang whose movements or encampment were causing alarm.

9. The only other material witness was Mr. Rowland, the acting Commissioner, who was called as a witness by the Court. His evidence was that before passing the order he told the accused the general nature of the charge against him and asked him whether he had anything to say in answer, but he did not read to him the evidence. On the evidence of the Commissioner we think that there is no ground for holding that the procedure was unfair. The Commissioner in our opinion was not bound to disclose the evidence which he had. We think the expression used by the Commissioner " He was told generally what the allegations were " is rather vague. The accused should always be given as many particulars as possible. However, the Commissioner cannot be expected to remember exactly what he said on the occasion in question, and we accept his evidence that the appellant was told the charge and was examined in his defence.

10. There is, however, nothing in the Commissioner's evidence to suggest that the case was brought within Section 27. He did not produce the report on which he acted ; nor did he give any evidence whatever as to the nature of the material which he had before him. His order recites that " the undermentioned persons "- that is, the accused and two others,-" are members of a gang whose movements are calculated to cause danger and alarm, or a reasonable suspicion that unlawful designs are entertained by such gang or body or by a member or members thereof." That recital clearly suggests that the three accused persons

were members of a larger gang, and not that they themselves constituted a gang. But the Commissioner in his evidence says : " This gang was put up before me," referring apparently only to the three accused before him. In our judgment, there was no evidence before the Chief Presidency Magistrate that the accused had been removed under the provisions of Section 27, since the evidence failed to establish that any valid order had been made under that.

11. The appeal, therefore, must be allowed, the conviction of the accused set aside, and the fine, if paid, refunded.