

(2021) 05 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Writ Petition (Crl) No. 23 Of 2020

Gulzar Ahmad Parray

APPELLANT

Vs

Ut Of J&K And Another

RESPONDENT

Date of Decision : 01-05-2021

Acts Referred:

Arms Act, 1959 — Section 7, 25

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 148, 149, 307, 332, 336, 353, 427

Jammu And Kashmir Public Safety Act, 1978 — Section 8

Citation : (2021) 05 J&K CK 0002

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : M. Ashraf Wani, Mir Suhail

Final Decision : Allowed

Judgement

1) Petitioner, through his uncle Ghulam Rasool Parray, has assailed his detention ordered by District Magistrate, Budgam (the detaining authority) vide

its order No.DMB/PSA/03 of 2020 dated 27.01.2020 (the impugned order). In terms of the impugned order aforesaid, the petitioner has been put

under preventive detention with a view to preventing him from acting in any manner prejudicial to the security of the State.

2) Before advertng to the grounds of challenge urged by the learned counsel for the petitioner to assail the impugned order, it is necessary to notice

the material on the basis of which the detaining authority has derived its subjective satisfaction for placing the petitioner under preventive detention.

3) As per the grounds of detention served upon the petitioner, which are framed by the detaining authority on the basis of material supplied by

Superintendent of Police, Budgam, vide his letter dated 27.01.2020, the

petitioner is alleged to be a hardcore, habitual and strong supporter of terrorism unleashed in the Valley by some terrorist organizations. The petitioner, with a view to achieve the object of seceding the Union Territory of Jammu

and Kashmir from Union of India and its consequent merger with Pakistan, has been resorting to activities which have the effect of causing

widespread disturbance and instability. The petitioner, it is claimed, had ex-filtrated to POK in the year 2001 in order to obtain training in handling

illegal arms and ammunitions where he remained for at least four years and returned to Valley in the year 2004. The petitioner was later on arrested

by the police in FIR No.131/2004 under Section 7/25 Arms read with 6 I. W. T Act registered in Police Station, Beerwah. It is further stated that on

18th of April, 2019, P/S Beerwah, received an information from reliable sources that some miscreants had assembled at polling booth Hardulatinah

with a view to disrupt the election process and had resorted to heavy stone pelting upon the security forces causing serious injuries to the security

force personnel. With regard to this incident, FIR No.49/2019 under Section 148, 149, 336, 353, 427, 307, 332 RPC etc. was registered in Police

Station, Beerwah and investigation set in motion. During the course of investigation, involvement of the petitioner in the episode was established.

4) It is on the basis of these allegations, which form part of FIR No.131/2004 and FIR No.49/2019, the Superintendent of Police, Budgam, vide his

communication dated 25th of January, 2020, recommended the preventive detention of the petitioner. The detaining authority, relying strongly on the

aforesaid allegations contained in two FIRs, arrived at subjective satisfaction that in case the petitioner is not detained under J&K Public Safety Act,

the security of the State would be jeopardized and there would be imminent threat to the human life and property. The detaining authority, thus, found

it imperative to detain the petitioner by invoking Section 8 of the J&K Public Safety Act and it is in the aforesaid backdrop, the impugned detention

order has been passed against the petitioner and petitioner has been lodged in Kotbalwal Jail, Jammu.

5) The impugned order of detention has been challenged by the petitioner on several grounds. Learned counsel for the petitioner, however, laid much

emphasis on the following grounds:

(I) That the requisite material relied upon by the detaining authority to derive

subjective satisfaction with regard to necessity of putting the petitioner under preventive detention was never supplied to the petitioner thereby incapacitating him from making an effective representation to the detaining authority/government against his detention;

(II) That the grounds of detention are vague, irrelevant and non-existent and, therefore, on the basis thereof, no prudent and reasonable man can make an effective and purposeful representation;

(III) That the detaining authority has relied upon the allegations contained in FIR No.131 registered in the year 2004 to pass an order of detention in the year 2020. There is, thus, no live and proximate link between the allegations and the order of detention;

(IV) That the order of detention also suffer from total non-application of mind of the detaining authority, in that, the detaining authority has no shown any awareness with regard to the fact that the detainee had been acquitted by the Court of Sessions Judge, Budgam, in FIR No.131/2004 on 21st of February, 2009;

6) Having heard learned counsel for the parties and perused the record, I am of the considered view that the detention of the petitioner is not sustainable in law for more than one reason. From perusal of grounds of detention, it clearly transpires that the petitioner has been put under

preventive detention primarily for his involvement in two FIRs i.e. FIR No.131/2004 and FIR No.49/2019. So far as FIR No.131/2004 is concerned, the petitioner has placed on record judgment of acquittal dated 21st of February, 2009, passed by Sessions Judge, Budgam. Apart from the fact that

the allegations contained in FIR registered in the year 2004 are too stale to establish any proximate link with his detention, the detaining authority has shown complete ignorance that the petitioner stood acquitted in the aforesaid FIR on 21st of February, 2009. I am not sure that had this fact been

brought by the police to the notice of the detaining authority, what impact it would have made on the subjective satisfaction of the detaining authority

but suffice it to say that by not placing this relevant information before the detaining authority, the detaining authority has been deprived of the relevant

material which it ought to have taken into consideration for deriving subjective satisfaction. And if we assumed that it was within the notice of the

detaining authority and the same was ignored, it would speak volume about the

non-application of mind of the detaining authority. For both these reasons, withholding of this relevant information from the detaining authority and its non-consideration vitiates the subjective satisfaction of the detaining authority and, therefore, renders the impugned order of detention unsustainable in law.

7) It is equally important to notice that the detaining authority has strongly relied upon the allegations against the petitioner contained in FIR

No.49/2019 to come to the conclusion that the activities the petitioner had been indulging in were highly prejudicial to the security of the State but

without showing its awareness as to whether the petitioner was arrested in the aforesaid FIR; whether or not he was in the custody of the police or

not and if in custody, whether he had applied for bail or not. In the absence of such awareness and the compelling reasons, the impugned order of

detention cannot be justified.

8) 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."

9) 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 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 detainee is already in custody; and (ii) there were

compelling reasons justifying such detention despite the LPA(HC) NO.22/2017 OF 9 fact that the detainee 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 detainee is likely to be released from custody in the near future, and (b) taking into account the

nature of the antecedent activities of the detainee, 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??

10) 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 Hon?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.

11) For the foregoing reason, I find merit in this petition and the same is, accordingly, allowed. The impugned order of detention is quashed. Direction

is issued to the respondents to release the detenue from the preventive custody forthwith, provided he is not required in connection with any other

case.