

(1996) 07 AHC CK 0005

In the Allahabad High Court

Case No : Habeas Corpus Writ Petition No. 3833 of 1996

Hari Narain Awasthi (In Jail)

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 10-07-1996

Acts Referred:

Constitution of India, 1950 — Article 14
National Security Act, 1980 — Section 12(2), 14(1), 3(2)
Penal Code, 1860 (IPC) — Section 323, 363, 366, 376, 506

Citation : (1996) 20 ACR 712

Hon'ble Judges : N.L. Ganguly, J;B.K. Sharma, J

Bench : Division Bench

Advocate : Virendra Singh, for the Appellant; A.G.A., for the Respondent

Judgement

N.L. Ganguly, J.—The Petitioner Hari Narain Awasthi filed this writ petition for issuing a writ of Habeas Corpus and quashing the impugned order dated 31.10.95, Annexure 1 to the writ petition, passed u/s 3(2) of the National Security Act, 1980 by the District Magistrate, Kanpur Nagar.

2. The brief facts leading to the arrest and detention of the Petitioner are as under:

It is said that on the basis of the F.I.R. dated 25.10.95 at 12.30 a.m. which was registered at Crime No. 425 of 1995 under Sections 363, 366, 376, 323, 506, I.P.C. P.S. Kidwai Nagar, District Kanpur Nagar, the Petitioner was arrested at about 3 a.m. in the intervening nights of 24/25th October, 1995 and was sent to the District Jail. The proposal by the Station Officer, P.S. Kidwai Nagar, Kanpur for taking preventive detention proceedings against the Petitioner-detenu and two others, namely, Raju Yadav and Satish alias Raju Nigam was submitted on 30th October, 1995. Orders thereon was passed by the District Magistrate on 31st October, 1995 which was executed and served on the Petitioner, the same day by the jail authorities in Jail. The matter for action regarding the preventive detention of the Petitioner was referred to the State Government on 2nd

November, 1995. The approval was granted by order dated 8.11.95 by the State. The case was referred to the Advisory Board on 17.11.95 and was heard on 11.12.95 by the Advisory Board. The report of the Advisory Board was received by the State on 18.12.95 and the detention order was confirmed and approved on 26.12.95 by the State. The order of confirmation was communicated to the Petitioner on 28th December, 1995.

3. The Petitioner submitted his representation dated 20.11.95 to the State through the Jail Authorities. The District Magistrate received the same on 22nd November, 1995. The State Government had received the representation on 28.11.95 which was placed before the Advisory Board on 29.11.95. The comments by the District Magistrate on the Petitioner's representation was dated 29.11.95 and received by the State on the same date, i.e., 29.11.95. The comments was placed before the State on 5.12.95. Necessary notes were prepared by the State Government on 12th and 13th December, 1995. The Petitioner's representation was rejected on 13.12.95 by the State. The information was sent to the Petitioner through the District Magistrate on 15.12.95.

4. It is not disputed that before the Board, the accused in the case, referred above, were Raju Yadav and Satish alias Raju Nigam who were accused in the criminal case and against whom also action for prevention detention was taken by the State Government. The order for detention as proposed by the District Magistrate was revoked u/s 12(2) of the National Security Act by order dated 26.12.95 and the order for detention in respect of Satish alias Raju Nigam was also revoked by the Central Government on 18.12.95, as such, the State Government had not passed any order in respect to Satish alias Raju Nigam.

5. The necessary counter-affidavits and the rejoinder affidavits have been exchanged. Sri D.S. Misra, learned Counsel for the Petitioner argued the petition on behalf of the detenu. He submitted that the Petitioner has been discriminated and without application of mind or perusal of necessary records, the Petitioner's representation was not considered by the Respondents and orders for detention, as proposed, have been confirmed. The learned Counsel for the Petitioner further submitted that the case of the Petitioner is similar to that of the cases of Raju Yadav and Satish alias Raju Nigam. He submitted that on the ground of parity also, the Petitioner was entitled to be set at liberty and order for detention was liable to be vacated.

6. The learned Counsel for the Petitioner placed before us Annexure 2 dated 31.10.95 passed by the District Magistrate, Kanpur Nagar submitted u/s 3(2) of the Act. A perusal of the said annexure shows that the allegations against the Petitioner and the two other co-accused persons, referred above, are similar. It would be necessary for us to summarise the allegations against the Petitioner and the two other accused persons of the said case. There is a little variation in respect of the case against the Petitioner and the two other detenues which shall be dealt with at a later stage in detail, as pointed out by the learned A.G.A.

7. It is said that on 25.10.95 at 00.30 a.m., the informant Smt. Maya Devi Prajapati had submitted a written report at the P.S. Kidwai Nagar and it was stated in the said report that on 24.10.95 at about 7.30 a.m. when the informant had gone along with her younger sister Renu Prajapati, aged about 12 years, for purchasing soap and other articles from the bazar and had reached near the temple of Shankerji in the open ground, the Petitioner along with other two accused persons by force had apprehended Renu and dragged in a Maruti car forcefully, kidnapped her and had taken her behind the Baradevi Temple in a house where the Petitioner is said to have committed rape on Renu with the help of other two accused persons and the case was mentioned under Sections 363, 366, 376, 323 and 506 I.P.C. was registered.

8. The circumstances necessitating the preventive detention by the State arose, as pleaded by the District Magistrate are that the Petitioner along with other two co-accused persons in open public in the evening in a thickly populated locality by force kidnapped a minor girl and thereafter committed rape on her. This commission of offence committed by the Petitioner and the two other accused persons was considered to be a very serious act committed by the Petitioner and the two other accused persons which has created terror and apprehension of insecurity in the mind of general public. The movement and traffic of the general public came to a stand still and the citizens preferred to remain inside their houses and asked their wards and children to remain inside the house by bolting the doors of their houses. It is said that the District Magistrate in the ground of detention stated that the act of the Petitioner and the two other accused persons had created such a terror and atmosphere of insecurity that people and citizens stopped going out of their houses for necessary jobs also. They even did not go for outings, go to hospital or go to temples on account of the terror the atmosphere created on account of the dangerous and atrocious act of the Petitioner and the two other accused persons. The people of the locality were so much afraid that the joy of Goverdhan festival had finished and the entire area became calm and dull and the entire law and order situation had come to a disruption. The District Magistrate observed that in order to maintain peace, law and public order, it would be necessary that such persons may be kept in detention inside jail, otherwise if such persons are permitted to come out of Jail, they are likely to commit such offences again and create an atmosphere of terror and panic.

9. The learned Counsel for the Petitioner placed Annexure RA 1, the order of the District Magistrate dated 31.10.95 concerning the co-accused Satish alias Raju Nigam and also to Annexure 2 to the rejoinder affidavit concerning co-accused Satish alias Raju Nigam. The learned Counsel for the Petitioner also placed the order of the Central Government dated 18.12.95 revoking the order passed against Satish alias Raju Nigam u/s 14(1) of the Act. It is also not disputed that the co-accused of the case, namely, Raju Yadav who was also initially proposed to be detained under the Act along with the Petitioner, made a representation to the State Government and the State Government was pleased to revoke the

detention order of Raju Yadav u/s 12(2) of the Act by order dated 26.12.95.

10. The learned Counsel for the Petitioner strenuously submitted that the case of the Petitioner is also similar to the case of other two co-accused persons whose orders for detention have been revoked. He submitted that there was no justification for distinguishing the case of the Petitioner for maintaining the proposal for detention of the Petitioner under the Act. The learned Counsel for the Petitioner placed some more facts which are very important to be mentioned.

11. Sri. D.S. Misra, learned Counsel for the Petitioner submitted that the perusal of the X-ray of Km. Renu shows that her age was about 17 years. The record also shows that the girl was habituated to sexual intercourse. It has also been clear from the record that there was no evidence of injury or rape in the near past. She was medically examined within a few hours of the alleged incident. It is also important to note that the Petitioner was also arrested the same night from his house and was also sent before the Doctor for medical examination. It is remarkable to note that there was no injury on his person. It is also not mentioned in the medical report of the Petitioner that on his glans penis, there was any smagma present. The Petitioner was arrested from his house when he was sleeping in the midnight. The medical examination of the body of the Petitioner shows that there are large number of injuries on his person. Sri Misra submitted that all these records were before the State and the Advisory Board. The Advisory Board and the State had not considered the material evidence on record and passed the order for confirmation of the detention. The learned Counsel submitted that when the case of the Petitioner is similar to that of the two other accused persons, whose orders for detention have been revoked, there was no justification for not giving the parity to the Petitioner. He submitted that it violated the provisions of Article 14 of the Constitution of India as well.

12. Sri Tripathi, learned A.G.A. submitted that the Petitioner has not arrayed the Advisory Board as opposite party in the writ petition and he has not prayed for quashing of the orders of the Advisory Board and the State Government. There is no material on record to show what was the material before the Advisory Board to consider and pass orders for co-accused Satish alias Raju Nigam. He submitted that unless the Advisory Board was made a party and given an opportunity for bringing the relevant record before this Court or the original record of the Advisory Board, be obtained by this Court from the State Government, it would not be advisable and proper for this Court to take into consideration the facts and circumstances for revocation of the order against Satish alias Raju Nigam and Raju Yadav. Sri Tripathi further submitted that the case of the Petitioner cannot be said to be similar to that of those two other persons against whom proceedings were initiated and the order for detention was revoked. He submitted that perusal of the facts, as narrated in the first information report and the grounds of the District Magistrate clearly show that the Petitioner is not only an abductor or kidnapper but he is the person who committed the heinous offence of commission of rape on a minor girl aged about

12 years. He submitted that if in evening at about 7 p.m. in open market thickly populated area of City of Kanpur-the life, property and prestige of the citizens are not secure and anti-social elements, who are terrors in the society, are permitted to move at large, the law and order and tranquility of the public order are likely to be seriously jeopardised and in these circumstances, it was necessary to take preventive detention against the Petitioner and the order impugned has rightly been passed against the Petitioner. Sri Tripathi, learned A.G.A. placed paragraph No. 3 of the counter-affidavit of Sri Banshi Dhar Pandey, who submitted the counter-affidavit on behalf of the State Government. In para 3, it has been stated that the Advisory Board has not found sufficient cause for the detention of Satish Chandra alias Raju Nigam and Raju Yadav under the National Security Act, 1980. Accordingly, the order of detention passed against Raju Yadav was revoked by the State Government on 26.12.95 u/s 12(2) of the Act, but before the State Government could pass orders of revocation in respect of Satish Chandra alias Raju Nigam, the Ministry of Home Affairs, New Delhi vide their telex dated 18.12.96 informed that Central Government has already revoked the detention order u/s 14(1) of the Act passed against Satish Chandra alias Raju Nigam. It has been stated in the counter-affidavit that the Advisory Board found sufficient cause for the detention of the Petitioner. Thus, the State Government once again examined afresh the entire case of the Petitioner in detail and since the Government was of the view that order of detention deserved to be confirmed, it was confirmed and orders for detention of the Petitioner for 12 months was issued on 26.12.95.

13. The learned Counsel for the Petitioner placed paragraphs 20 to 33 of the decision in *Wazir Yadav v. State of U.P. and Ors.* 1992 (2) EFR 637.

14. The learned Counsel for the Petitioner also placed a certified copy of the judgment in Habeas Corpus Petition No. 494 of 1995, *Charan Singh Yadav v. State of U.P. and Ors.* decided by the Division Bench on 3.4.96, relying on and referring to the case of *Wazir Yadav*. We refer to the passage from the judgment of the Division Bench as under:

In *Wazir Yadav v. State of U.P. and Ors.* (supra), a Division Bench of this Court emphasised that the reciprocal action would be necessitated on the part of the State regarding his co-detenué also, if the grounds and facts are same and identical. Any other interpretation is likely to result in gross discrimination between person to person and may lead to the end of Rule of Law". It was further observed:

The question which arises here is that when the grounds of detention are identical: one served on Om Prakash and the other served upon the Petitioner, can it be permitted to be said by the State that the detention order still stands. It is impossible to countenance such an argument as that will permit extreme arbitrariness on the executive. It is reprehensible to permit a citizen to enjoy liberty on the same ground while permit another to languish in jail in detention. This will be in the teeth of the purpose and objective behind Section 12 of the

National Security Act read alongwith "Article 14 of the Constitution of India.

15. The question for consideration before us is whether it is necessary that the case of the person against whom order for detention was passed and revoked in exactly similar and same. If it is not exactly same and similar, whether there was any justification for the Respondents not to have examined and looked to the material evidence on record which prima facie flashed certain circumstances so that the criminal case against the Petitioner may become doubtful, if those facts, as mentioned above, are found to be correct. The learned Counsel for the State has not disputed the correctness of the injury report of the accused, the medical examination report of the girl which indicated that her age was 17 years and she was habituated to sexual intercourse. There was no indication that the girl was subjected to sexual harassment and actually rape was committed on her. The semen of the Petitioner was taken, the clothes and garments of the Petitioner were taken by the police, but no material consideration was ever made to fix up that the semen of the Petitioner on the clothes of the girl was similar to that of the accused-Petitioner. These were very important details of facts and circumstances which were before the State Government and the Advisory Board. It has been baldly stated that all materials on record were examined by the State and considered while passing the order.

16. We consider it that the case of the Petitioner and the case of two accused persons, namely, Satish alias Raju Nigam and Raju Yadav and the case against the Petitioner, as per F.I.R. and the prosecution case, are apparently similar. The public at large had not seen the details of the F.I.R. which may have created a terror in the mind against the Petitioner alone. If the commission of the offence is presumed to have taken place, the effect of the commission of the offence would be the same on the public at large for all the accused persons, named therein. The public at large would not know that who was assigned a particular role in the commission of the offence as that of commission of rape on a minor girl.

17. After considering the arguments of the learned Counsel for the parties, we are of the opinion that the order impugned in the writ petition was not passed after taking into consideration this important material fact involved in the Petitioner's case. The Petitioner's representation was rejected without considering the material facts on record and the order impugned was passed arbitrarily without the application of mind. Such an order, in the eye of law, cannot be sustained. We do not consider it necessary that the Advisory Board would have been arrayed as a party in this petition and before taking the facts and circumstances of release of Satish alias Raju Nigam, this Court was under a legal duty to see the facts from the record itself. The details of the facts have been stated in the writ petition supported by the relevant annexures. It is too much to say after the conclusion of the submissions that since the Advisory Board was not arrayed as a party, this Court may send for the record of the Advisory Board and only thereafter the petition be disposed of. It is a writ of

Habeas Corpus. The liberty of the citizen is at stake. We are not to take these matters lightly and delay the disposal. Had the State been keen to controvert the facts stated in the writ petition, they could have asked the Court at the initial stages or at the beginning of the submission that the record was necessary. We are not inclined to accept the submission of the learned A.G.A. We have, thus, no option but to quash the order impugned. We direct that the impugned confirmation order dated 26th December, 1995 is quashed and the Petitioner be set at liberty forthwith unless wanted in any other case.

The writ petition is allowed.